

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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| The Staff of the Missouri Public Service Commission,       | ) |
|  | ) |
| Complainant,   | ) |
|  | ) |
| vs.  | ) |
|  | ) |
| Missouri Gas Energy, a Division of Southern Union Company, | ) |
|  | ) |
| Respondent.  | ) |

**Case No. GC-2011-0100**

**STAFF’S REPLY TO MGE’S RESPONSE TO STAFF’S MOTION TO STRIKE INSUFFICIENT AFFIRMATIVE DEFENSE**

**COMES NOW** the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its Reply to Missouri Gas Energy’s *Response to Staff’s Motion to Strike MGE’s Insufficient Affirmative Defense*, states as follows:

***MGE admits its pleading is deficient:***

MGE’s response and opposition to Staff’s motion does not assert that Staff is incorrect in its challenge to MGE’s pleading or that Paragraph 17 of its *Answer* actually does sufficiently plead an estoppel; and Staff notes that MGE thereby admits that its attempted defense is insufficient. What MGE does assert is that the Commission is powerless to strike an insufficient affirmative defense. To quote MGE, “[t]he Commission’s rule governing complaints (4 CSR 240-2.070) does not authorize the striking of an affirmative defense.”<sup>1</sup> MGE goes on to state:

Tellingly, the Motion to Strike contains no reference to any

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<sup>1</sup> MGE’s *Response*, ¶ 2.

Commission decision or rule supportive of the concepts contained in Staff's argument. Staff does not cite any Commission decision striking an affirmative defense from an answer for insufficiency. The remedy sought by Staff is unprecedented.<sup>2</sup>

MGE actually makes this assertion after quoting the relevant portion of the Commission's practice rules, to-wit: "The Respondent shall file an answer to the complaint in the time provided. **All grounds of defense, both of law and of fact, shall be raised in the answer.**"<sup>3</sup> The very provision relied upon by Respondent and quoted verbatim in its response plainly and unmistakably *requires "all grounds of defense, both of law and fact . . . ."* Staff's challenge is simply that, while Respondent possibly invoked a doctrine of law in its Paragraph 17 by stating its name, *it utterly failed to state the facts it necessarily depends upon to show that the doctrine applies.* Contrary to Respondent's assertion, Rule 4 CSR 240-2.070(8) specifically requires facts.

### ***What's an "estoppel," anyway?***

Estoppel is an equitable notion based upon the concept of fairness. As an affirmative defense, estoppel asserts that a party ought not be permitted to benefit from the good-faith reliance of another upon a misleading representation.<sup>4</sup> Equitable estoppel has three elements: "(1) an admission, statement or act inconsistent with the claim afterwards asserted and sued upon; (2) action by another party on the faith of such admission, statement, or act; and (3) injury to such other party, resulting from

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<sup>2</sup> MGE's *Response*, ¶ 7.

<sup>3</sup> MGE's *Response*, ¶ 2 (emphasis supplied by MGE in its *Response*).

<sup>4</sup> *Black's Law Dictionary*, 570 (7<sup>th</sup> ed.).

allowing contradiction of the admission, statement, or act.”<sup>5</sup> It is well-established that estoppel does not lie against governmental entities absent exceptional circumstances.<sup>6</sup> Therefore, when an estoppel is asserted against the government, in addition to the three elements set out above, the party asserting the estoppel must also show that the governmental conduct on which the claim is based constitutes affirmative misconduct.<sup>7</sup>

Estoppel has elements like any legal theory and Respondent, who seeks to raise estoppel here as a defense, has failed to articulate the facts that he believes show that all of those elements exist here. Like any cause of action that is improperly pleaded, Respondent’s attempted defense of estoppel must fail. “In alleging an affirmative defense, care must be exercised to allege all elements of the defense.”<sup>8</sup> MGE has not pleaded *any* of the elements of estoppel and so, the Commission should strike its ineffective attempt to raise estoppel as an affirmative defense.

***Can the PSC strike an improperly pleaded affirmative defense?***

Respondent suggests that the Commission cannot strike its ineffective pleading because its rule does not expressly say that it can. Rule 4 CSR 240-2.070(6) provides:

(6) The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted or failure to comply with any provision of these rules or an order of the commission, **or may strike irrelevant allegations.**

(Emphasis supplied.) Nothing in the language emphasized above indicates that the power to strike irrelevant allegations is limited to complaints. In any event, the power to

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<sup>5</sup> *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 650-651 (Mo. App., E.D. 2010), *citing Fraternal Order of Police Lodge # 2 v. City of St. Joseph*, 8 S.W.3d 257, 263 (Mo. App., W.D. 1999).

<sup>6</sup> *City of Washington v. Warren County*, 899 S.W.2d 863, 867 (Mo. banc 1995).

<sup>7</sup> *JGJ Properties*, *supra*, 303 S.W.3d at 651.

<sup>8</sup> J.R. Devine, *Missouri Civil Pleading and Practice*, § 15-2 (1986).

dismiss or strike defective complaints necessarily extends to and encompasses the power to strike or dismiss defective affirmative defenses. To argue otherwise is absurd.

As a creature of statute, the Commission is vested with those powers expressly granted by the legislature or necessarily implied by those expressly granted.<sup>9</sup> Section 536.063(1), RSMo, provides that “[a]nswering, intervening and amendatory writings and **motions** may be filed in any case and shall be filed where required by rule of the agency . . . .” (emphasis added).<sup>10</sup> Chapter 536 applies to the PSC as necessary to “fill gaps” in the Public Service Commission Law.<sup>11</sup> The cited provision itself, expressly authorizing “motions” and necessarily implying all the features of civil motion practice, is all the authority necessary for the Commission to entertain motions such as Staff’s *Motion to Strike Insufficient Affirmative Defense*.

#### ***Conclusion:***

Contrary to MGE’s position, this Commission is entirely able to strike insufficient affirmative defenses. Moreover, the Commission should do so here because MGE’s attempted affirmative defense of estoppel is utterly insufficient in that it is unsupported by any facts. Like any cause of action, estoppel has elements and MGE has not pleaded them. In view of Staff’s timely and legally accurate challenge, the Commission must strike the deficient affirmative defense.

**WHEREFORE**, Staff prays that the Commission will ignore MGE’s *Response* and

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<sup>9</sup> *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979) (“Since it is purely a creature of statute, the Public Service Commission’s powers are limited to those conferred by the . . . statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted”).

<sup>10</sup> All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (“RSMo”), revision of 2000.

<sup>11</sup> *State ex rel. A & G Commercial Trucking, Inc. v. Director of the Manufactured Housing and Modular Units Program of the Public Service Commission*, 168 S.W.3d 680, 682-83 (Mo. App., W.D. 2005) (“MAPA operates to fill gaps not addressed within the PSC statutes”).

strike Paragraph 17 from MGE's Answer in that it insufficiently asserts the defense of estoppel; and grant such other and further relief as the Commission deems just in the premises.

Respectfully Submitted,

**/s/ Kevin A. Thompson**

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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **1<sup>st</sup> day of December, 2010**, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

**s/ Kevin A. Thompson**