

as an “inappropriate and unauthorized pleading.”¹ The gravamen of MGE’s motion is that Rule 4 CSR 240-2.070, relating to complaints, authorizes a formal complaint and an answer but not a reply.

6. Staff directs the Commission’s attention to Rule 4 CSR 240-2.080(15), relating to pleadings, service and filing, which provides that “[p]arties shall be allowed not more than ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission.” MGE’s *Answer* is a pleading, 4 CSR 240-2.010(13); Staff is a party, 4 CSR 240-2.010(11); Staff filed its *Reply* on November 17, 2010, well-within the ten day interval set by the rule; nothing in Chapter 2, Title 4 CSR 240, prohibits filing a reply; and Rule 4 CSR 240-2.080(15) expressly authorizes a response – however denominated – to “**any** pleading” (emphasis added).

7. An affirmative defense, as Staff had occasion to point out in its *Reply*, “is one that wholly or partly avoids the cause of action asserted by the preceding pleading by new allegations that admit part or all of the cause of action, but avoids liability because of a legally sufficient excuse, justification or other matter negating the cause of action.”² Professor Devine goes on to note that “an affirmative defense raises new matter, not pleaded in the preceding pleadings[.]”³ Consequently, well-established notions of fair play and procedural due process require that the complainant be allowed an opportunity to respond to this new matter.

8. MGE also asserts, mistakenly, that Staff’s *Reply* “requests no relief with

¹ MGE’s *Motion to Strike*, ¶ 3.

² J.R. Devine, *Missouri Civil Pleading and Practice*, § 15-2 (1986).

³ *Id.*

respect to the affirmative defenses that are addressed therein[.]”⁴ The careful reader will note that Staff’s *Reply* ends with the following *ad damnum* clause requesting specific relief:

WHEREFORE, having fully replied to Respondent’s Answer and Affirmative Defenses, Staff prays the Commission will grant the relief sought in Staff’s Complaint; and grant such other and further relief as the Commission deems just in the premises.

Certainly, the Commission could not grant Staff the relief sought in its *Complaint* if it found any of MGE’s purported affirmative defenses to have merit.

9. MGE also erroneously brands Staff’s *Reply* as “nothing more than a prehearing brief[.]”⁵ The Commission will note that, in the commencement to its *Reply*, Staff stated, “and for its Reply to Missouri Gas Energy’s denominated Affirmative Defenses, **denies the same** and in further reply, states as follows” (emphasis added). Staff thereby pleaded a denial or general demurrer to MGE’s purported affirmative defenses and, helpfully, went on to explain why each was unavailing, defective or generally lacking in merit.

WHEREFORE, having shown that its *Reply* was permitted under the Commission’s practice rules, Staff prays that the Commission will deny MGE’s *Motion to Strike Staff’s Reply*; and grant such other and further relief as the Commission deems just in the premises.

⁴ MGE’s *Motion to Strike*, ¶ 4.

⁵ *Id.*

Respectfully Submitted,

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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 **1st 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