

Beverly A. Johnson,
Complainant,
v.
Missouri Gas Energy,
Respondent.

Staff's Brief

Introduction:

This matter comes before the Commission on a formal complaint filed by Beverly A. Johnson against Missouri Gas Energy (“MGE”), a division of Southern Union Company, on March 10, 2008. The Commission duly issued its Notice of Complaint as required by § 386.390.3, RSMo, and directed a Staff investigation on March 12; MGE answered and moved to dismiss on April 11. Staff filed its investigation report on April 25. Pursuant to a Procedural Schedule adopted by the Commission on July 21, an evidentiary hearing was convened on August 22. MGE and Staff appeared by counsel, Ms. Johnson appeared *pro se*, and the Office of the Public Counsel did not participate. Complainant and Ms. Shirley Bolden, an employee of MGE, testified and six exhibits were offered and

received. Pursuant to orders of September 12 and September 15, post-hearing briefs are due by September 26.

Jurisdiction:

Section 386.390.1, RSMo, authorizes the Commission to hear and determine complaints:

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service.

The Commission's regulatory authority encompasses all public utilities, § 386.250.5, RSMo, and the manufacture, sale and distribution of natural gas, § 386.250.1, RSMo. MGE admits that it is a public utility and thus subject to the regulation of the Commission.¹

The Facts:

Ms. Johnson seeks natural gas service at 4800 Hocker Road, Apartment

¹ Answer, ¶ 1.

202, Kansas City, Missouri, but has been denied service due to an outstanding balance of \$957.74 for service previously rendered at 4200 East 56th Street in Kansas City.² That service was terminated due to non-payment on May 23, 2001.³ Ms. Johnson explains that she was evicted from 4200 East 56th Street on February 14, 2001, and that she must have gas service as a condition of her lease at 4800 Hocker Road.⁴ MGE's tariff, at Rule 3.02 (Sheet R-19), provides that MGE "may refuse to commence service to an applicant" for "non-payment of an undisputed delinquent charge."⁵

It is worth noting that MGE offered to initiate service to Ms. Johnson upon payment of half of the unpaid balance, \$478.00, or, if service were initiated during a period covered by the Cold Weather Rule, for a payment of \$154.36.⁶ However, Ms. Johnson did not accept either of these offers.⁷ MGE's witness testified that, if Ms. Johnson were reconnected, "I think the company would expect that Ms. Johnson would make every effort to pay her bill in its entirety as it comes due."⁸

The Issues:

Ms. Johnson prays that the Commission will direct MGE to initiate natural gas service to her at her present residence and to set her account balance to

² Answer, ¶¶ 3, 4; Tr. 3:62; Ex. 3.

³ Answer, ¶ 5.

⁴ Complaint.

⁵ Answer, ¶ 8.

⁶ Answer, ¶ 7; Tr. 3:69-70.

⁷ Tr. 3:70.

⁸ Tr. 3:78.

zero.⁹ MGE, in turn, prays that the Commission will acknowledge that Ms. Johnson owes an unpaid balance of \$520.06 and dismiss the complaint.¹⁰

Analysis:

The Unpaid Balance

MGE contends, and Ms. Johnson admits, that she owes MGE some amount of money for service rendered in 2001 at 4200 East 56th Street in Kansas City. By May 23, 2001, when service was terminated for non-payment, the account balance at 4200 East 56th Street was \$957.74. In its investigation report, Staff suggested that the account balance be reduced to \$520.06 to reflect the undisputed fact that Ms. Johnson was evicted from 4200 East 56th Street on February 14, 2001, and received no benefit from the natural gas service provided by MGE at that location thereafter.¹¹ In its pleading filed herein on August 12, MGE states that “it would consent” to this reduction in the account balance.¹²

MGE’s Tariff

MGE’s tariff allows it to refuse to serve a customer that owes an unpaid, undisputed balance. A tariff is a document which lists a public utility’s services and the terms, conditions and rates applicable to those services. *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo. App., E.D. 1997). A tariff that has been approved by the Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.

⁹ *Complaint*.

¹⁰ *Response to Order Adopting Proposed Procedural Schedule and the Staff Report*, ¶ 6.

¹¹ *Response to Order Adopting Proposed Procedural Schedule and the Staff Report*, ¶ 5.

¹² *Response to Order Adopting Proposed Procedural Schedule and the Staff Report*, ¶ 6. See testimony of Shirley Bolden, Tr. 3:69.

A.C. Jacobs and Co., Inc. v. Union Elec. Co., 17 S.W.3d 579, 582 (Mo. App., W.D. 2000); *Bauer, id.*; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co.*, 937 S.W.2d 314, 317 (Mo. App., E.D. 1996). Under the law, therefore, MGE is authorized to refuse service to Ms. Johnson until the unpaid balance of her previous account is resolved,¹³ unless, of course, some other, intervening law requires a different result. Staff's position herein is that § 516.120.1, RSMo, is just such a law.

Section 536.120.1, RSMo

Section 393.130.1, RSMo, provides in pertinent part that “[a]ll charges made or demanded by any such gas corporation . . . for gas . . . or any service rendered or to be rendered shall be just and reasonable and **not more than allowed by law** or by order or decision of the commission” (emphasis added). Section 516.120(1), RSMo, in turn, provides that “all actions upon contracts, obligations or liabilities, express or implied” must be brought within five years. “The business relationship between a utility and its customers is rooted in contract.” *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579 (Mo. App., W.D. 2000); *National Food Stores, Inc. v. Union Electric Company*, 494 S.W.2d 379, 381 (Mo.App.1973). It follows that MGE cannot assert against Ms. Johnson an unpaid balance that is barred by statute due to the passage of time, because such a charge is “more than allowed by law[.]” Section 393.130.1, RSMo.

¹³ Reference has also been made to Commission Rule 4 CSR 240-13.035, which likewise provides that “a utility may refuse to commence service to an applicant” for “failure to pay an undisputed delinquent utility charge for services provided by that utility or by its regulated affiliate.”

Nothing in the Public Service Commission Law suggests that the several statutes of limitations enacted by the General Assembly do not apply to public utilities and their customers nor that the tariffs of a public utility are excepted from those statutes. Indeed, it is well-established that the appropriate limitation statute does apply to penalty actions brought under the Public Service Commission Law. See *State v. Davis*, 830 S.W.2d 27, 30 (Mo. App., S.D. 1992). Given the silence of the legislature on the issue, it must be presumed that the limitations statutes do apply. Accordingly, MGE must, as requested by Ms. Johnson, initiate gas service to her at 4800 Hocker Road because MGE is barred from asserting the unpaid balance against her.

Remedies

Although the Commission can – and should -- direct MGE to initiate service to Ms. Johnson, the Commission cannot direct MGE to set her account balance to zero, because the Commission cannot grant pecuniary relief. *St. ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696 (Mo. App., W.D. 2003).

Staff's Change of Position:

An inquiry was made at the hearing concerning Staff's apparent change of position in this matter, in that Staff's investigation report made no reference to the statute of limitations issue. The explanation is that Staff conducted additional research when it became apparent that this matter was going to hearing and did not discover the statute of limitation issue until after the investigation report had been filed.

WHEREFORE, Staff prays that the Commission will direct MGE to initiate natural gas service to Ms. Johnson at 4800 Hocker Road, Apartment 202, Kansas City, Missouri.

Respectfully submitted,

/s/ Kevin A. Thompson
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For the Staff of the Missouri Public
Service Commission

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on all of the parties of record or their representatives as set out in the service list maintained for this case by the Commission's Data Center on this **26th day of September, 2008**, either by hand delivery, electronic mail, facsimile transmission, or First Class United States Mail, postage prepaid.

/s/ Kevin A. Thompson