

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI

The Staff of the Missouri Public Service )  
Commission, )

Complainant, )

v. )

Missouri Gas Energy, a Division of )  
Southern Union Company )

Respondent. )

Case No. GC-2011-0100

**MEMORANDUM OF LAW IN SUPPORT OF MISSOURI GAS ENERGY**  
**MOTION FOR SUMMARY DETERMINATION**

**Introductory Comment**

The purpose of this filing is to support MGE's Motion for Summary Determination and for a dismissal of Staff's Complaint. Staff's Complaint is misconceived and flawed and Staff's Motion for Summary Determination only serves to illustrate why it should not be allowed to go forward. Beyond its several legal deficiencies, the Complaint is not based on facts but, rather, a misreading of the tariff in question that has resulted in abstract concerns about non-existent circumstances. The undisputed material facts point instead to conclusion that the Complaint is fundamentally defective and should be dismissed prior to going to hearing.

### **The Standard of Approval**

The standard for approval of MGE's Motion for Summary Determination requires a showing that (1) there is no genuine issue as to any material fact, (2) that the moving party is entitled to relief as a matter of law as to all or any part of the case, and (3) the Commission determines granting summary relief is in the public interest.<sup>1</sup> As will be shown herein, Respondent's Motion for Summary Determination ("Summary Motion") meets each of these standards and, consequently, the Commission should grant summary determination in favor of MGE and dismiss Staff's Complaint with prejudice.

MGE asserts that Staff's Complaint is legally deficient and should be dismissed. The key material facts are set forth in MGE's Motion for Summary Determination, but include the fact that MGE has a validly approved tariff, with the force and effect of law, which was approved by the Commission after a recommendation by the Staff in MGE's 2006/2007 rate case. Staff's Complaint fails as it has no standing to file this complaint, the Complaint is not ripe for decision, this is a collateral attack on an order of the Commission, on a presumptively reasonable tariff. The Commission need not engage, as Staff asks in its Motion for Summary Determination, in a reasonableness determination of Tariff Sheet R-34 except as appropriate to establish the statutory presumption of reasonableness and Staff's failure to rebut the presumption. The meaning and appropriateness of the tariff is addressed in MGE's separate Memorandum of Law in Support of Response to Staff's Motion for Summary Determination. As discussed more fully in MGE's separate

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<sup>1</sup> See, Commission rule 4 CSR 240-2.117(E).

Memorandum of Law related to Staff's summary determination motion, Staff's hypothetical examples in that motion were inadequate as a matter of law.

**Staff Has No Standing to File or Prosecute the Complaint**

Staff has filed this Complaint pursuant to Commission Rule 4 CSR 240-2.070(1) which provides as follows:

The commission on its own motion, the commission staff through the general counsel, the office of the public counsel or any person or public utility who feels aggrieved by a violation of the statute, rule, order or decision within the commission's jurisdiction may file a complaint. The aggrieved party, or complainant, has the option to file either informal a formal complaint.

The complaint filed by the Chief Staff Counsel is unauthorized by the Commission's complaint rule. That rule only authorizes the filing of complaint to address allegations involving a violation of the statute, a rule or a violation of an order or decision of the Commission. None of those things are implicated in this case.

Staff does not allege a violation of any statute on the part of MGE. Staff does not allege that MGE has engaged in any conduct that represents a violation any rule of the Commission.<sup>2</sup> Finally, Staff does not allege a violation of an order

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<sup>2</sup> Staff alleges that Tariff Sheet R-34 does not comply with particular provisions of the Commission's Natural Gas Safety Rules, but as explained in MGE's Memorandum of Law in Support of Response to Staff's Motion for Summary Determination, there is no conflict between the Commission's gas safety rules and Tariff Sheet R-34. As explained in that filing, the tariff addresses the duty to warn of *potential* hazards whereas the regulations addresses the company's obligation to *actual* hazards that might exist at the time MGE turns on the flow of gas to new fuel line installations under 4 CSR 240-40.030 (10)(J) or when MGE turns on the flow of gas to a customer under 4 CSR 240-40.030 (12)(S). While MGE has an obligation to comply with the terms of subsections (10)(J) and (12)(S) with respect to any actual hazards that exist at the time MGE engages in activities covered by such regulations, the third paragraph of Tariff Sheet R-34 is expressly limited to hazards that are, at the time gas is turned on, only potential hazards, such as equipment or piping that might later fail, malfunction, or fall into disrepair. In any event, no specific conduct on the part of MGE that might constitute a violation of those

or decision of the Commission. It merely points to the Commission's decision in its Case No. GT-2009-0056 as embodying "an authoritative statement of Commission policy". Plainly, Staff has no authority under the rule that it has cited to file a complaint challenging lawfulness or reasonableness of MGE's Tariff Sheet R-34.

### **Staff's Complaint Is Not Ripe For A Decision**

Notable by its absence in the body of the Complaint, the Motion, the supporting Suggestions or any of the attachments is an allegation that a customer of MGE has been, or claims to have been, a victim of an unreasonable application of the terms of Tariff Sheet R-34 in a specific circumstance. Consequently, the Complaint embodies nothing much more than hypotheticals and speculation about how MGE might apply the hold harmless language in Tariff Sheet R-34 to an unspecified factual scenario. This is nothing more than conjecture and, as such, presents no actual controversy for the Commission to resolve.

Such matters are not ripe for decision. There is no case or controversy for the Commission to decide and it should decline to hear the Complaint, not only because the "issues" identified are fuzzy and indistinct, but also because the Commission has no legal authority to issue advisory opinions. *State ex rel. Kansas Power and Light Company*, 770 S.W.2d 740, 743 (Mo. App. 1989).

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rules has been alleged. MGE does not dispute that it is subject to the Natural Gas Safety Rules. Staff has made no assertion, nor any showing that MGE has somehow ignored the Natural Gas Safety Rules since Tariff Sheet R-34 became effective in 2007. Staff has not asserted that MGE has disregarded its obligations under any gas safety regulation or that MGE has stopped warning of actual safety concerns.

Absent a *real* dispute with *real* facts, the Commission should not allow the proceedings in this case to go any further.

**The Commission Has the Authority to Approve or Reject Tariffs Limiting Liability on Regulated Utilities**

The lawfulness of the Commission's April 3, 2007 order approving MGE's Tariff Sheet R-34 is not subject to serious dispute. The Missouri Supreme Court has on two occasions acknowledged that the Commission may approve tariffs limiting liability because it is a term of service that affects rates charged to customers. *State ex rel. Western Union Telegraph v. Public Service Commission*, 224 S.W. 669 (Mo. 1924); *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596 (Mo. 1968). The Commission recently cited these cases approvingly in *Re Laclede*, Case No. GT-2009-0056, Report and Order at pages 7-8.<sup>3</sup>

**MGE's Tariff Sheet R-34 Is Presumptively Reasonable**

The Commission approved MGE's Tariff Sheet R-34 in Case No. GR-2006-0422 in an April 3, 2007, order approving certain compliance tariffs. Accordingly, Tariff Sheet R-34 enjoys a presumption of reasonableness as

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<sup>3</sup> "According to the Missouri Supreme Court the Commission has the authority to approve or reject tariffs limiting liability. The Missouri Supreme Court confirmed this concept in a case concerning telegraph tariffs. In *State ex rel. Western Union Telegraph v. Public Service Commission* [264 S.W. 669 (Mo. 1924)], Western Union's tariffs limited its liability for mistakes, delays and even non-delivery of messages. The Court found that the limitation of liability was one of the terms of telegraph service, along with the rate charged for the service. Since the rates were deemed lawful, the limitations of liability included with the rates were lawful too. The Court stated that "the power to pass on the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates."

embodied in §386.270 RSMo.<sup>4</sup> An order of the Commission is prima facie lawful and reasonable, and the burden of proof to show that it is unlawful or unreasonable is on the person making the allegation. *State ex rel. Shepherd v. Public Service Commission*, 142 S.W.2d 346 (Mo. App. 1940). Staff has offered no evidentiary facts that would rebut the legal presumption of reasonableness. To the contrary, Staff has only offered hypotheticals, speculation and conjecture. This is not sufficient to meet its burden in this case.

**Staff's Complaint Is a Collateral Attack on an Order of the Commission**

Pursuant to §386.550 RSMo, orders and decisions of the Commission which have become final are conclusive in all collateral actions. In this case, there is no actual case or controversy between MGE and a customer concerning the application of a tariff to a particular set of facts. Instead, Staff's allegations solely relate to the reasonableness of MGE's validly approved tariff. Consequently, the Complaint represents a direct challenge to the lawfulness and reasonableness of the tariff sheet and is, therefore, an impermissible collateral attack on the Commission's April 3, 2007 Order Regarding Motion for Expedited Consideration and Approval of Tariff Sheets in Case No. GR-2006-0422. Collateral attacks on orders and decisions are clearly barred by §386.550 RSMo. MGE's rate case GR-2006-0422 is now final and Staff's collateral attack on the Commission's order in that case is barred.

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<sup>4</sup> "All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter."

**The Laclede Decision Does Not Embody A Statement Of Commission Policy With Respect To Hold Harmless Language In Utility Tariffs**

Staff places primary reliance in the Commission's recent Report and Order in Case No. GT-2009-0056<sup>5</sup> which it claims "embodies an authoritative statement of Commission policy" with respect to tariffs that may limit the liability of a public utility. The Laclede Case does not represent a statement of general applicability. That docket was created by the filing of a proposed tariff by Laclede Gas Company ("Laclede"). It was not a rulemaking proceeding initiated by the Commission purporting to affect regulated utilities in some generic fashion. The only parties to the case were Laclede, Staff and the Office of the Public Counsel. MGE was not a party to the case nor was any other investor-owned utility. The decision in the Laclede Case does not purport to make the ordered sections of the decision applicable to any other company other than Laclede. Though binding on Laclede, if final, it is not binding on MGE or any other regulated utility nor can it be.

Additionally, the facts of the two cases differ in significant respects. MGE's Tariff Sheet R-34 has been approved by the Commission and is currently in effect. Laclede's proposed tariff on the other hand, was expressly *disapproved* by the Commission as reflected in the January 13, 2010 Report and Order. It never went into effect. The tariff language as originally proposed by Laclede (and as subsequently jointly proposed by Laclede and Staff) was not identical to the language of MGE's Tariff Sheet R-34. In fact, there were substantial differences.

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<sup>5</sup>*In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment* (The "Laclede Case").

Finally, the Commission in the Laclede Case went to some lengths to point out that Laclede has both regulated and unregulated lines of business and expressed concerns about the advantage that a Commission-approved limitation of liability might confer to the utility *vis-à-vis* its unregulated competitors. MGE, by way of contrast, has no unregulated lines of business. It does furnish, manufacture, assemble, install, maintain, control, or own the equipment that utilizes natural gas on the customer side of the meter. As such, the concern articulated by the Commission is not one that is relevant to MGE.

**Granting the Relief Requested in the Motion is in the Public Interest**

As noted above, there is no actual dispute before the Commission as between MGE and any of its customers concerning the Company's application of the hold harmless provisions of its Tariff Sheet R-34. To wade into the concerns expressed by Staff absent the crystallizing benefit of an actual factual dispute will result in the issuance of little more than an advisory opinion which would be based on nothing more than supposition, speculation and conjecture. This makes for bad decision-making and poor regulation. Liability limitation provisions of the type contained in MGE's Tariff Sheet R-34 are fairly routine clauses. Staff concedes as much.<sup>6</sup> Tariff sheets limiting the liability of Missouri utility in a variety of circumstances such as service or transportation interruptions, curtailments, or inspections of the condition of customer equipment are fairly standard. As recognized by the Missouri Supreme Court in its *Western Union Telegraph* and *Southwestern Bell Telephone* decisions, "the power to pass on

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<sup>6</sup> Staff admits that it is "not uncommon for utilities to include liability-limiting provisions in their tariffs." See, Staff's Suggestions in Support of Its Motion for Summary Determination, p. 3.



the reasonableness and lawfulness of rates necessarily includes the power to determine the reasonableness and lawfulness of such limitations of liability as are integral parts of the rates.” The customers and Missouri ratepayers have been well served by the measured usage of these provisions as a feature to keep rates at reasonable and sustainable levels.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic transmission to all counsel of record on this 11<sup>th</sup> day of April, 2011.

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