BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
vs.	)	**Case No. GC-2011-0100**
Missouri Gas Energy, a Division of Southern Union Company,	)	
Respondent.	)	

STAFF'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its Suggestions in Support of its Motion for Summary Determination pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

Introduction

Staff filed its *Complaint* on October 7, 2010, asserting that Sheet R-34 of the tariffs of Missouri Gas Energy ("MGE"), which purports to limit MGE's liability to its customers, (1) is not just and reasonable pursuant to § 393.140(5), RSMo, and (2) is not compliant with the Commission's Gas Safety Rules, 4 CSR 240-40.030(10(J) and 4 CSR 240-40.030(12(S), pursuant to § 386.390.1. For relief, Staff prays that the Commission will make the findings requested by Staff and require MGE to file revised tariff sheets.

Argument

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes summary determination "if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." Filed simultaneously herewith are Staff's motion and affidavits; these *Suggestions* constitute the "separate legal memorandum" that must be "attached" to a motion for summary determination pursuant to Rule 4 CSR 240-2.117(1)(B).[1] Staff suggests that its motion, affidavits and suggestions demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff's complaint be sustained.

Staff urges the Commission to understand that summary determination should be favored, not disfavored. In a proper case, summary determination conserves scarce resources, both fiscal and human, for the Commission and for all the parties. Why hold an evidentiary hearing in a case like the present, which presents issues of law and public policy, but not issues of fact? Evidentiary hearings are lengthy and expensive and the Commission would gain nothing thereby that it cannot get from holding an oral argument on Staff's motion and MGE's anticipated opposition to that motion.

What is this Case about?

This case presents a legal and policy controversy; there are no material facts in

[1] Rule 4 CSR 240-2.117(1) states certain other requirements for summary determination, all of which are met here as detailed in Staff's accompanying motion.

dispute. MGE is a gas distribution utility, an "LDC."[2] MGE's tariffs include a sheet, R-34, which contains provisions limiting MGE's liability to its customers. That sheet was proposed as part of a general rate case, Case No. GR-2006-0422, filed on May 1, 2006, and was ultimately approved by the Commission on April 3, 2007. While it is not uncommon for utilities to include liability-limiting provisions in their tariffs,[3] MGE's Sheet R-34 goes farther than others. In particular, Sheet R-34—

- purports to immunize MGE from all liability, even in cases in which MGE fails to comply with Commission rules and applicable codes and standards;
- purports to limit MGE's liability even when MGE is negligent in the operation of its system, so that, for example, MGE would not be liable for over-pressuring its system and thereby causing damage to a customer's home and appliances;
- purports to limit MGE's liability even when MGE has inspected the customer's equipment; and
- purports to limit MGE's liability even for gross negligence or wanton or willful conduct.

In August 2008, perhaps encouraged by MGE's liability-limiting tariff sheet approved by the Commission in Case No. GR-2006-0422, Laclede Gas Company – another Missouri LDC -- proposed a liability-limiting tariff sheet of its own. Laclede's proposed tariff included provisions not dissimilar to MGE's Sheet R-34, but, in fact,

[2] "LDC" means Local Distribution Company; it is the industry term for a natural gas retail utility.

[3] As MGE points out in its *Motion to Dismiss Staff's Complaint,* filed herein on November 29, 2010 (at ¶ 4: "In fact, tariff sheets limiting the liability of Missouri utilities in a variety of scenarios . . . are fairly commonplace").

actually *less* prejudicial to customers than MGE's. On October 8, 2008, Public Counsel moved to reject the tariff sheet. Staff eventually moved to suspend the tariff, which the Commission did on November 19, 2008. Negotiations followed. Staff eventually agreed to support the sheet, which Laclede modified to meet Staff's concerns.[4] Public Counsel did not and litigation ensued. Following a hearing in October 2009, the Commission issued its *Report and Order* on January 13, 2010, rejecting the sheet. The Commission explained:

> Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so in this case because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. Laclede has produced no convincing evidence that it would be in the public interest for the Commission to limit liability in the manner it proposes. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs.

Laclede filed a timely application for rehearing, which the Commission denied on July 21, 2010, but did not thereafter seek judicial review.

When the Commission's order in Case No. GT-2011-0056 became final and unappealable, Staff faced a conundrum. MGE's Sheet R-34, approved by the Commission, was in force but contained more onerous liability-limiting terms than those that the Commission had just rejected as against public policy. In this circumstance, Staff had no choice but to bring MGE's Sheet R-34 to the Commission for consideration.

[4] It is important to note that Laclede performs HVAC work inside customers' premises, which MGE does not, and Staff did not believe that the proposed liability-limitations were unreasonable in view of Laclede's unusual exposure.

What's Wrong with MGE's Tariff?

MGE's tariff P.S.C. Mo. No. 1 falls naturally into two parts: The first part consists of sheets 1 through 103.3; the second part consists of sheets R-1 through R-92. The title page, Original Sheet 1, advises us that the first part constitutes the "Schedule of Rates and Charges," while the second part constitutes the "General Terms and Conditions for Gas Service." Sheet R-34 is included in the second part and it is headed, as are all of the "R" sheets, with the caption "General Terms and Conditions for Gas Service." The five paragraphs on Sheet R-34 relating to "Company Liability," therefore, apply generally to all gas services provided by MGE.

Paragraph One:

Paragraph One on Sheet R-34, which deals with injury to persons and damage to property, is set out below:

> Customer shall save Company harmless from all claims for trespass, injury to persons, or damage to lawns, trees, shrubs, buildings or other property that may be caused by reason of the installation, operation, or replacement of the service line, yard line and other necessary appurtenances to serve customer unless it shall affirmatively appear that the injury to persons or damage to property complained of has been caused by willful default or gross negligence on the part of Company or its accredited personnel.

Paragraph One requires MGE's customers, as a condition of receiving gas service, to hold MGE harmless with respect to claims for injury to persons or damage to property resulting from "the installation, operation, or replacement" of the pipes and other equipment required to deliver gas service to the customer.[5] The customer is relieved of this obligation only to the extent that he or she can "affirmatively" show that the damage was due to "willful default" or "gross negligence" attributable to MGE.

[5] Trespass is here treated as a species of damage to property.

Simple negligence on the part of MGE is evidently acceptable.

Paragraph One not only effectively bars claims by a customer of MGE for damage to members of the customer's family or to the customer's property caused by MGE's negligence, it converts the customer into MGE's insuror. This is a great deal to require of someone in exchange for gas service, particularly where the service is a necessity of life and is provided by a monopoly. MGE's customers have no realistic alternative but to take the service and hope nothing happens.

It is useful to consider Paragraph One of MGE's Sheet R-34 in the light of the jurisprudence of contracts of adhesion. These are contracts in which the bargaining power of the parties is so disproportionate that the stronger is able to take unfair advantage of the weaker,[6] much like the relationship of a residential ratepayer to a utility company. The technical legal term for the flaw in a contract of adhesion is "unconscionability."[7]

Under Missouri law, a contract is not void for unconscionability unless it is both procedurally and substantively unconscionable.[8] Procedural unconscionability deals with the formalities of making the contract, such as high-pressure sales tactics, unreadable fine print, or actual misrepresentation.[9] "This analysis focuses on whether the parties had a **voluntary** and sufficient meeting of the minds to bind each other to the terms of the writing."[10] Substantive unconscionability deals with the terms of the

[6] ***Black's Law Dictionary*** 318-319 (7th ed., 1999).

[7] ***Brewer v. Missouri Title Loans, Inc.,*** ___ S.W.3d ___, ___, 2010 WL 3430411, 6 (Mo. banc 2010) ("An unconscionable contract is an agreement 'no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other'").

[8] ***Lawrence v. Beverly Manor,*** 273 S.W.3d 525, 531 (Mo. banc 2009).

[9] ***Brewer,*** *supra,* 6-7.

[10] *Id.* (emphasis added).

contract itself, such as whether the terms are unduly harsh to one party. This analysis focuses on whether the terms are so one-sided that they are unenforceable as a matter of public policy.[11] The Missouri Supreme Court stated, "[c]ourts are rightly hesitant to substitute their judgment for that of freely acting parties. That is why a showing of procedural unconscionability is necessary -- it flags circumstances in which one of the parties may not have freely consented to the bargain."[12] It goes without saying that, in the case of a utility customer, there is no bargain and there is no free consent. There is merely a take-it-or-leave-it contract of adhesion.

Applying these principles here, both procedural unconscionability and substantive unconscionability are undeniably present. Paragraph One is procedurally unconscionable because MGE is the monopoly purveyor of one of life's necessities. The inequality of the parties' bargaining strength could not be more extreme. Paragraph One is substantively unconscionable because it effectively bars redress for injuries or damage caused by MGE's negligence. Of course, this analysis is merely illustrative; a tariff approved by the PSC is the law of the land and so is not subject to analysis under contract law. But it is undeniable that the Commission ought not to allow utilities to put provisions in their tariffs that they could not enforce in a contract.

Paragraph Two:

Paragraph Two on Sheet R-34, which concerns gas leaks, is set out below:

> Company may refuse or discontinue service if an inspection or test reveals leakage, escape or loss of gas on customer's premises. Company will not be liable for any loss, damage or injury whatsoever caused by such leakage, escape or loss of gas from customer's service line, yard

[11] *Id.;* ***State ex rel. Vincent v. Schneider,*** 194 S.W.3d 853, 858 (Mo. banc 2006) (citing ***Bracey v. Monsanto Co. Inc.,*** 823 S.W.2d 946, 950 (Mo. banc 1992)).

[12] ***Brewer,*** *supra.*

line, ancillary lines, house piping, appliances or other equipment.

This paragraph excuses MGE from liability for "any loss, damage or injury whatsoever" resulting from gas leaking on a customer's premises or from a "customer's service line, yard line, ancillary lines, house piping, appliances or other equipment." To understand this provision, the reader must be aware that natural gas is delivered via mains that run under the streets, from which at intervals emerge service lines that run under sidewalks, yards, parking lots, and driveways to the meters serving individual homes, businesses and other structures. MGE's tariff contains definitions of these various components:

> ANCILLARY LINE: Exterior piping installed by customer and connected to the yard line to supply fuel to any exterior appliance or apparatus.[13]
>
> HOUSE PIPING OR FUEL LINE: All piping, fixtures, valves, appliances and apparatus of any kind installed downstream from the outlet of Company's meter or Company owned piping, whichever is farther downstream.[14]
>
> MAIN: A gas pipe owned, operated and maintained by Company as distribution line that serves as a common source of supply for more than one service line.[15]
>
> METER OR METER INSTALLATION: The meter or meters, together with auxiliary devices, if any, constituting the complete installation needed to measure the quantity of gas delivered to customer at a single point of delivery.[16]
>
> POINT OF DELIVERY: The point of delivery shall be Company's meter outlet or the connection of Company's piping to customer's piping, whichever is farther downstream.[17]
>
> SERVICE LINE: The pipe installed from Company's main to the inlet of Company's meter or to the connection to customer's piping, whichever is

[13] Sheet R-6.

[14] Sheet R-8.

[15] Sheet R-8.

[16] Sheet R-8.

[17] Sheet R-8.

farther downstream.[18]

SERVICE LINE – CUSTOMER OWNED: That portion of service line, which is owned by customer, extending from customer's property line or customer's side of the drainage ditch or curb line to the inlet of Company's meter.[19]

YARD LINE: The term yard line is used in conjunction with outside meter settings to designate the underground piping installed from the outlet of Company's meter to the building wall. In the event multiple buildings are being served, building shall mean that building nearest to the connection to the service line.[20]

With these definitions in mind, the reader can readily understand the effect of Paragraph Two of Sheet R-34 is to disclaim all responsibility for leaks and damage resulting from leaks in customer-owned piping and appliances. Note that liability is denied even where the gas leak and subsequent damage is due to MGE's negligence, such as delivering gas at too high a pressure.

Paragraph Three:

Paragraph Three of MGE's Sheet R-34 deals with the maintenance and repair of customer-owned piping:

> The Company does not own, nor is it responsible for the repair or maintenance of any piping, vents, or gas utilization equipment on the delivery side of the gas meter, its related appurtenances and piping. All piping, vents or gas utilization equipment furnished by the owner/customer of the premises being served shall be suitable for the purposes hereof and the owner/customer of the premises shall be responsible for the repair and maintenance of such at all times in accordance with accepted practice and in conformity with requirements of public health and safety, as set forth by the properly constituted authorities and by the Company. As with any fixture or appurtenance within premises, piping, vents or gas utilization equipment can fail, malfunction or fall into disrepair at any time and as such the owner/customer of the premises being served shall be aware of this fact, **and Company shall owe customer no duty to warn of**

[18] Sheet R-10.

[19] Sheet R-10.

[20] Sheet R-10.

potential hazards that may exist with such facilities on the delivery side of the gas meter, its related appurtenances and piping.

(Emphasis added).

Paragraph Three, as written, conflicts with a duty to warn that is imposed on gas utilities, including MGE, by the Commission's Gas Safety Rules at 4 CSR 240-40.030(10)(J) and (12)(S), which provide:

4 CSR 240-40.030(10)(J):

(J) Test Requirements for Customer-Owned Fuel Lines.

1. At the initial time an operator physically turns on the flow of gas to new fuel line installations—

A. Each segment of fuel line must be tested for leakage to at least the delivery pressure;

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met; and

C. The requirements of any applicable local (city, county, etc.) codes must be met.

2. The temperature of thermoplastic material must not be more than one hundred degrees Fahrenheit (100°F) during the test.

3. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

4 CSR 240-40.030(12)(S):

(S) Providing Service to Customers.

1. At the time an operator physically turns on the flow of gas to a customer (see requirements in subsection (10)(J) for new fuel line installations)—

A. Each segment of fuel line must be tested for leakage to at least

the delivery pressure; and

B. A visual inspection of the exposed, accessible customer gas piping, interior and exterior, and all connected equipment shall be conducted to determine that the requirements of any applicable industry codes, standards or procedures adopted by the operator to assure safe service are met. This visual inspection need not be met for emergency outages or curtailments. In the event a large commercial or industrial customer denies an operator access to the customer's premises, the operator does not need to comply with the above requirement if the operator obtains a signed statement from the customer stating that the customer will be responsible for inspecting its exposed, accessible gas piping and all connected equipment, to determine that the piping and equipment meets any applicable codes, standards, or procedures adopted by the operator to assure safe service. In the event the customer denies an operator access to its premises and refuses to sign a statement as described above, the operator may file with the commission an application for waiver of compliance with this provision.

2. When providing gas service to a new customer or a customer relocated from a different operating district, the operator must provide the customer with the following as soon as possible, but within seven (7) calendar days, unless the operator can demonstrate that the information would be the same:

A. Information on how to contact the operator in the event of an emergency or to report a gas odor;

B. Information on how and when to contact the operator when excavation work is to be performed; and

C. Information concerning the customer's responsibility for maintaining his/her gas piping and utilization equipment. In addition, the operator should determine if a customer notification is required by subsection 3. The operator shall discontinue service to any customer whose fuel lines or gas utilization equipment are determined to be unsafe. The operator, however, may continue providing service to the customer if the unsafe conditions are removed or effectively eliminated.

4. A record of the test and inspection performed in accordance with this subsection shall be maintained by the operator for a period of not less than two (2) years.

These rules impose a limited duty to inspect and warn upon MGE that Paragraph

Three simply ignores.

Paragraph Four:

Paragraph Four of Sheet R-34 relates to the safeguarding of MGE's property on the customer's premises:

> The owner/customer shall be responsible at all times for the safekeeping of all Company property installed on the premises being served, and to that end shall give no one, except the Company's authorized employees, contractors or agents, access to such property. The owner/customer of the premises being served shall be liable for and shall indemnify, hold harmless and defend the Company for the cost of repairs for damage done to Company's property due to negligence or misuse of it by the owner/customer or persons on the premises affected thereby.

Paragraph Four makes MGE's customers the guardians and insurors of MGE's property. This sort of provision is not unusual. The following is comparable language from the tariff of Ameren Missouri:

> Customer will be responsible for the following:
>
> * * *
>
> 2. The prevention of any damage, alteration or interference with Company metering, service and all other gas facilities on customer's premises by customer or any other party on customer premises.
>
> Customer will pay to Company the cost of repair or replacement of any Company facilities damaged as a result of customer's failure to properly exercise the above obligations.

Paragraph Four is unreasonable because it does not release the customer from liability in cases in which the damage resulted from circumstances beyond the customer's control.

Paragraph Five:

Paragraph Five is similar to Paragraph One:

> The Company shall not be liable for loss, damage or Injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter, which shall include but not be limited to any and all such loss, damage or injury involving piping, vents or gas utilization equipment, whether inspected or not by the Company, or occasioned by interruption, failure to commence delivery, or failure of service or delay in commencing service due to accident or breakdown of plant, lines, or equipment, strike, riot, act of God, order of any court or judge granted in any bona fide adverse legal proceedings or action or any order of any commission or tribunal having jurisdiction; or, without limitation by the preceding enumeration, any other act or things due to causes beyond Company's control, or attributable to the negligence of the Company, its employees, contractors or agents.

The "delivery side of the meter" is the upstream or company side. So, in addition to disclaiming any responsibility for damage resulting from leaks on customer-owned piping, Paragraph Five does the same for company-owned piping. Note particularly that liability for damage resulting from company negligence is disclaimed. All of the points raised with respect to Paragraph One are equally applicable to Paragraph Five.

Conclusion:

A detailed review of MGE's Sheet R-34 reveals that one or more of the five paragraphs thereon are not just and reasonable, and thus violative of § 393.140(5), RSMo, because they:

(a) Purport to immunize MGE from all liability, even in cases in which MGE fails to comply with Commission rules and applicable codes and standards;

(b) Purport to limit MGE's liability even when MGE is negligent in the operation of its system, so that, for example, MGE would not be liable for over-pressuring its system and thereby causing damage to a customer's home and appliances;

(c) Purport to limit MGE's liability even when MGE has inspected the customer's

equipment; and

(d) Purport to limit MGE's liability even for gross negligence or wanton or willful conduct.

Additionally, it is further revealed that one or more of the provisions included on MGE's Sheet R-34 violates the Commission's Natural Gas Safety Rules at 4 CSR 240-40.030(10)(J) and 4 CSR 240-40.030(12)(S), because they:

(a) Purport to eliminate MGE's duty to test for leakage in a competent way, ensure compliance with industry standards and local codes, and warn of potential hazards;

(b) Purport to eliminate MGE's duty to test for leakage in a competent way, ensure compliance with industry standards and local codes, and to discontinue service to a customer when equipment is unsafe.

Given the Commission's obligation under the law to protect captive ratepayers from the monopoly power of the utility, the Commission has no choice but to find that MGE's Sheet R-34 is not just and reasonable, and violates the Commission's Natural Gas Safety Rules at 4 CSR 240-40.030(10)(J) and 4 CSR 240-40.030(12)(S), and order MGE to propose a new tariff sheet, modified so as to be acceptable to the Commission.

WHEREFORE, Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order (1) finding that MGE's Tariff Sheet R-34 is unjust, unreasonable, unlawful, violates public policy, and is void and unenforceable, (2) finding that MGE's Tariff Sheet R-34 does not comply with the Commission's Natural Gas Safety Rules 4 CSR-240-40.030(10)(J) and 4 CSR 240-40.030(12)(S); and (3) pursuant to § 393.140(5), requiring MGE to file revised tariff

sheets that are just and reasonable and in compliance with the Commission's rules and the law; and granting such other and further relief as the Commission deems just.

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