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

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| Beverly A. Johnson, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | Case No. GC-2008-0295 |
| | ) | |
| Missouri Gas Energy, | ) | |
| | ) | |
| Respondent. | | |

## ***AMICUS CURIAE*** **BRIEF OF THE MISSOURI ENERGY DEVELOPMENT ASSOCIATION**

COMES NOW The Missouri Energy Development Association ("MEDA") pursuant to Commission rule 4 CSR 240-2.075(6) and submits this brief for the consideration of the Missouri Public Service Commission ("Commission") in the captioned proceeding.

## INTRODUCTION

MEDA is an incorporated trade association whose member companies consist of Union Electric Company, d/b/a AmerenUE; The Empire District Electric Company; Empire District Gas Company; Kansas City Power & Light Company; Laclede Gas Company; Missouri Gas Energy; Atmos Energy Corporation, and Missouri-American Water Company, all of whom are regulated by the Commission as provided by law. MEDA submits this brief to address an issue of importance to all regulated utilities in the State of Missouri because all of the member companies are subject to the Commission's "Denial of Service" rule and the Commission's acceptance of Staff's argument, as described herein, could have the practical effect of nullifying the Commission's rule, tariffs filed with and

approved by the Commission in furtherance of the rule and will overturn long-standing practice and custom in the utility industry.

## ARGUMENT

MEDA limits its argument in this case to the issue of Staff's novel and incorrect application of the statute of limitations in civil cases to a denial of service tariff which allows a utility to refuse service to a customer with an outstanding debt.[1] MEDA concurs in MGE's arguments with respect to this topic.[2] The salient point to note is that the Commission has adopted a rule which expressly permits utilities to deny service to a customer with an outstanding debt. That rule can be found at 4 CSR 240-13.035(1) and all utilities must conform their practices to its requirements.

The problem with Staff's argument in this case, that is, asserting that MGE's application of its denial of service tariff with respect to a customer's request to initiate service at a new address can be time-barred under the five-year civil action statute of limitations, is manifold.

First, the argument, as pointed out by MGE, is just wrong as a matter of law. The statute of limitations in civil actions merely provides an affirmative defense to a cause of action in a civil lawsuit after a specified period of time has run. The limitation on civil action does not mean that the person against whom a

[1] MEDA will not address the alternative argument of which limitation period (5 versus 10) is applicable under the facts established.
[2] For purposes of this brief, MEDA adopts the statement of facts as presented by MGE.

suit might otherwise be filed no longer owes the debt.[3] Nor does it mean that the company or person to whom the debt is owed must ignore its existence when determining whether and on what terms it will provide additional goods or services to the debtor. In other words, the civil statutes of limitation found in Chapter 516 RSMo do not release the underlying claim; they just deny a particular remedy. This is a distinction previously addressed by the Commission in 1993 when it concluded that a statute of limitation is a matter separate and apart from a billing adjustment. *See, Re United Cities Gas Company*, 2 Mo.P.S.C.3d 280, 287 (1993).

Second, Staff's ill-conceived argument is at odds with the Commission rule 4 CSR 240-13.035 (Denial of Service) which permits utilities to refuse service to those with unpaid accounts. That rule addresses two different scenarios; one that allows the utility to cast back seven years (for applicants who had received the benefit of use of another customer's account) and the other scenario that has no time limitation whatsoever (for customers with unpaid accounts in their own name). Staff's argument in this case that the five-year civil statute of limitations requires MGE to ignore Ms. Johnson's undisputed delinquent debt simply cannot be reconciled with a denial of service rule that does not apply a limitation period for such situations. Additionally, it makes no sense from a policy and equity perspective to have a shorter limitations period for an applicant with a directly owned delinquent debt versus an applicant who has received benefit of use.

[3] A statute of limitation must be pleaded in the answer. If not, the defense is waived. *Dyer v. Brown*, 25 S.W.2d 551, 552 (Mo. App. 1930)

Third, Staff's argument is procedurally problematic because, if it is adopted by the Commission, it would appear to be a *de facto* revocation of the Commission's denial of service rule. MEDA submits that a decision in this case to require a utility to initiate service to a customer with an undisputed delinquent debt would not comply with the terms of the Missouri Administrative Procedure Act which provides strict, detailed procedural requirements for the adoption, modification or revocation of a state agency rule. *See,* § 536.021, RSMo.

Finally, the Staff's argument should be rejected because it represents a fundamental and unwise change of public policy. It is not just a question of protecting the utility. The Commission has expressly recognized that its denial of service rule providing for a seven-year cast back for persons having received the benefit of utility use is "an attempt to balance the needs of individual customers to receive service and the needs of all customers not to have increased bad debt expense".[4] What the Commission recognized is that a utility's paying customers carry those who fail to pay because bad debt expenses traditionally have been a component of cost of service. Staff's limitation of actions argument does not properly take into account the Commission's careful balancing of interests between those customers who pay their bills and those who don't. In fact, Staff is totally silent on this point. It merely offers that there is a limitation of action statute applicable to collecting penalties arising out of a complaint case.[5] This

[4] *Re A Proposed Denial of Service Rule*, Case No. AX-2003-0574, Order of Rulemaking issued March 18, 2004.
[5] *See*, §516.130 RSMo.

observation has absolutely no bearing on whether a utility may deny service to a customer who owes it a debt.

## CONCLUSION

Staff's novel and misguided effort to overlay a civil action statute of limitation standard on denial of service questions should be rejected by the Commission. It is wrong as a matter of law, it is at odds with the express provisions of the Commission's denial of service rule, its presentation is procedurally flawed and it represents an unwise change in public policy where a careful balancing of customer interests is necessary.

Respectfully submitted,

/s/ Paul A. Boudreau
Paul A. Boudreau - MO Bar # 33155
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456
Telephone: (573) 635-7166
Facsimile: (573) 636-6450
Email: paulb@brydonlaw.com
Attorney for Missouri Energy Development Association

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 7th day of October, 2008, to the following:

Kevin Thompson
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102-0360

Lewis R. Mills, Jr.
Office of the Public Counsel
Governor Office Building
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102-2230

Beverly Johnson
4800 S. Hocker Road, Apt. 202
Kansas City, MO 64136

Dean Cooper
Brydon, Swearengen & England
P.O. Box 456
Jefferson City, MO 65102

/s/ Paul A. Boudreau_____
Paul A. Boudreau