

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

Michael E. McKinzy, Sr.,	)	
Complainant,	)	
v.	)	<u>Case No. GC-2003-0579</u>
Missouri Gas Energy,	)	
Respondent.	)	

**Dissenting Opinion of Commissioner Jeff Davis**

In this case, the majority of members on this Commission found that Missouri Gas Energy violated its tariff when the company refused, in April 2003, to either commence service or transfer service from Gerald Lee, the landlord, to Michael E. McKinzy, Sr. The Commission also found that MGE violated its tariff by charging Mr. McKinzy a "connection" fee instead of a "transfer" fee. Further, the Commission found MGE did not violate the provisions of its tariff which address a "discontinuance" of service, a "reconnection" of service or notice thereof. Lastly, the Commission found that MGE's tariff does authorize the company to transfer the debt of Mrs. McKinzy to Mr. McKinzy's account.

This Commissioner respectfully dissents from the findings of the Commission in the following ways: (1) Mr. McKinzy's testimony is neither credible, nor reliable; (2) MGE did not violate Section 3.02 of its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003; and (3) MGE may transfer the past-due debt of Mrs. McKinzy, for service provided to her at a prior address, to the account of Mr. McKinzy, even though Mr. McKinzy did not receive the use and benefit of that service.

**Findings of Fact**

The majority in this case determined that the testimony of Mr. McKinzy was "credible" and, in fairness, Mr. McKinzy did have an answer to every one of MGE's

assertions regarding his wife's address; however, any reasonable person viewing these facts should, in light of common sense and experience, determine that his testimony is not credible.

***General Procedural History and Background:***

In August 2000, Mr. Michael McKinzy, Sr., began living at a residence at 8609 East 87<sup>th</sup> Street, Raytown, Missouri, and had natural gas service in his name from Missouri Gas Energy (MGE).<sup>1</sup> Mr. McKinzy moved out of the East 87<sup>th</sup> Street residence in January 2002, and ceased to be a customer of MGE.<sup>2</sup>

In February 2003, Michael McKinzy, Sr., married Tamara Nance.<sup>3</sup> In March 2003, Mr. McKinzy signed an agreement to lease a home at 8004 Overton, Raytown, Missouri.<sup>4</sup> He moved in later that month.<sup>5</sup> At the time he moved in, the residence had natural gas service through an account in the name of the landlord, Gerald Lee.<sup>6</sup> In March 2003, Ms. Nance updated her records with the Missouri Department of Revenue, Driver and Vehicle Service Bureau, by changing her name to Tamara L. McKinzy and her address to 8004 Overton, Raytown, MO 64138.<sup>7</sup>

On or about April 9, 2003, Mr. McKinzy sought to have the natural gas service at 8004 Overton Street placed in his name.<sup>8</sup> At some point during the application process,

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<sup>1</sup> Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 7; and Exhs. 8 and 9.

<sup>2</sup> Exh. 1 (McKinzy's Direct Testimony), page 1, ¶ 9 through page 2, ¶ 11; and Exhs. 8 and 9.

<sup>3</sup> Transcript, page 77, line 22 through page 78, line 1; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 14; and Exh. 3 (the marriage license of Mr. McKinzy and Ms. Nance).

<sup>4</sup> Transcript, page 101, lines 8–11; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 15.

<sup>5</sup> Transcript, page 101, lines 12–14; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 16.

<sup>6</sup> Transcript, page 113, lines 4–5; and Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17.

<sup>7</sup> Exh. 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau document, printed March 25, 2003).

<sup>8</sup> Transcript, page 113, lines 6–8, and page 167, lines 22–24; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 17; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1–2.

Mr. McKinzy provided the name of his wife, Tamara Nance.<sup>9</sup> MGE denied service to Mr. McKinzy after the company performed a credit check on Ms. Nance and discovered that she had a past-due gas bill with MGE in the amount of \$449.96, for service at a previous residence in 1998-1999.<sup>10</sup> The evidence establishes that at the time of this initial denial of service, MGE believed that Ms. Nance was residing at the Overton Street residence.<sup>11</sup>

On June 18, 2003, MGE terminated the gas service at 8004 Overton Street at the request of Mr. Lee, the landlord.<sup>12</sup> Mr. McKinzy subsequently filed, on June 30, 2003, a complaint with the Missouri Public Service Commission regarding the alleged denial of gas service by MGE at his residence at 8004 Overton.

On or about September 11, 2003, MGE commenced gas service at the Overton Street residence.<sup>13</sup> MGE indicated that it commenced service based on its new understanding that Mr. McKinzy's wife, Ms. Nance, was not living at the residence.<sup>14</sup> MGE did not require Mr. McKinzy to pay any portion of Ms. Nance's bill at this time.<sup>15</sup>

MGE initially charged Mr. McKinzy a connection fee of \$20.00, but the company later, in "a spirit of cooperation and goodwill," gave Mr. McKinzy a credit of \$15.00.<sup>16</sup> Thus,

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<sup>9</sup> Transcript, page 96, lines 5-22.

<sup>10</sup> Transcript, page 96, lines 19-25; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, line 19 through page 4, line 3, page 4, lines 12 through page 5, line 11.

<sup>11</sup> Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 1-6 and lines 17-19, page 4, line 10 through-15 page 5, line 11 and lines 20-26.

<sup>12</sup> Transcript, page 216, line 21 through page 217, line 11; and Exh. 12 (Lambert's Rebuttal Testimony), page 3, lines 7-16 and Sch. KL-3, and page 9, lines 4-8.

<sup>13</sup> Exh. 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4; Exh. 1 (McKinzy's Direct Testimony), page 2, ¶ 20; Transcript, page 88, lines 22-23 and page 112, lines 16-23

<sup>14</sup> Exh. 12 (Lambert's Rebuttal Testimony), page 5, line 20 through page 6, line 4.

<sup>15</sup> Exh. 12 (Lambert's Rebuttal Testimony), page 6, lines 2-7.

<sup>16</sup> Exh. 13 (MGE's billing statement, dated October 9, 2003, for Mr. McKinzy); Exh. 14 (McKinzy's letter, dated October 20, 2003); Exh. 15 (MGE's letter to Mr. McKinzy, dated October 22, 2003); and Transcript page 187, line 20 through page 189, line 18.

the final service fee charged by MGE was \$5.00 (\$20.00 charged - \$15.00 credit applied = \$5.00 charge remaining).

Counsel for the Commission's Staff filed a Staff Report of Investigation and Recommendation on September 8, 2003. Attached to the Memorandum is the Staff Report prepared by James M. Russo and Gay Fred.

MGE and Mr. McKinzy both filed responses to Staff's recommendation. MGE's response suggests that Mr. McKinzy's complaint has been satisfied and that the case should be closed. Mr. McKinzy's response, however, suggested that his complaint might not have been resolved. The Commission therefore held a prehearing conference on December 1, 2003.

On December 4, 2003, MGE filed a Motion for Summary Determination and suggestions in support of that motion. Mr. Berlin filed suggestions in support of that motion on behalf of the Commission's Staff. Mr. McKinzy filed Suggestions in Opposition to Summary Determination or, in the Alternative for Dismissal of Complaint.

Mr. McKinzy and MGE filed testimony; Staff and the Office of the Public Counsel did not. The Commission held an evidentiary hearing on April 14, 2004. Mr. McKinzy, MGE, Staff, and Public Counsel were present. Staff and MGE subsequently filed posthearing briefs; Mr. McKinzy and Public Counsel did not.

***Ms. Nance's Residence:***

There is a question of fact as to whether Ms. Nance was living in at the Overton Street residence in April 2003, when Mr. McKinzy first attempted to get natural gas service at 8004 Overton Street.

MGE's business records indicate that in April 2003, Mr. McKinzy initially stated that his wife was living with him at the Overton Street residence, but that when he was told

that he would have to pay all or a portion of her past-due debt, he then stated that she was not living with him at the Overton address.<sup>17</sup> A printout from the Missouri Department of Revenue, Driver and Vehicle Service Bureau, shows that in March 2003, Ms. Nance listed her name as Tamara L. McKinzy and her address as 8004 Overton, Raytown, MO 64138.<sup>18</sup> Furthermore, an article in the October 16, 2003 edition of the *Kansas City Call* newspaper states that “[f]or about a month, McKinzy and his new bride, Tamara, along with McKinzy’s four children from a previous marriage, were forced to live without gas [service]. . . .”<sup>19</sup>

Mr. McKinzy’s direct and surrebuttal testimony, however, indicates that Mr. McKinzy’s wife was not a member of his household when he applied for service on April 9, 2003.<sup>20</sup> In his surrebuttal testimony, Mr. McKinzy contends that in June 2003, Ms. Nance lived at 6107 East 9th Street, Kansas City, Missouri,<sup>21</sup> and that she did not become a member of his household until December 24, 2003.<sup>22</sup> At the hearing, Mr. McKinzy testified several times that his wife, Ms. Nance, became a member of his household on December 24, 2003.<sup>23</sup>

Although Mr. McKinzy attempted to rebut provided plausible explanations rebutting the evidence that suggests his wife lived at the Overton Street address prior to December 24, 2003, his testimony was not credible. When asked about the driver’s license record listing his wife’s address as 8004 Overton, Mr. McKinzy indicated that he did not

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<sup>17</sup> Transcript page 192, line 16 through page 193, line 7, and page 195, lines 6-19.

<sup>18</sup> Exh. 11 (Missouri Department of Revenue, Driver and Vehicle Service Bureau document, printed March 25, 2003).

<sup>19</sup> Exh. 12 (Lambert’s Rebuttal Testimony), page 6, line 23 through page 7, line 10, and Schedule KL-4.

<sup>20</sup> Exh. 1 (McKinzy’s Direct Testimony), page 3, ¶ 26; and Exh. 2 (McKinzy’s Surrebuttal Testimony), page 2, ¶ 4.

<sup>21</sup> Exh. 2 (McKinzy’s Surrebuttal Testimony), page 2, ¶ 5.

<sup>22</sup> Exh. 2 (McKinzy’s Surrebuttal Testimony), page 3, ¶ 8.

<sup>23</sup> Transcript page 68, lines 8-9 and 13-14, and page 101, lines 15-25.

know why his wife changed her name and address on her driver's license, but suggested that the reason may have been that his wife may have changed her address on her driver's license because she wanted a permanent address for the mailing of important documents or correspondence.<sup>24</sup> By itself, Mr. McKinzy's explanation might be believable; however, combined with the other evidence, it is not.

In response to the newspaper article in the *Kansas City Call*, which suggests that Mrs. McKinzy (Ms. Nance) was living at the Overton Street address during the summer of 2003, Mr. McKinzy stated at the hearing that he never told the reporter that his wife was living at the Overton address.<sup>25</sup> Mr. McKinzy further suggests that the statement was an error on the reporter's part.<sup>26</sup> Mr. McKinzy's testimony on this point was not credible.

Finally, as to the copies of computer screens, or business records, provided by MGE, Mr. McKinzy contends that when he requested service in April 2003, he did not tell any MGE employee that his wife would be living with him at the Overton Street residence.<sup>27</sup> Nonetheless, MGE's records show that Mr. McKinzy did in fact indicate that his wife, Ms. Nance, would be residing at the Overton residence.<sup>28</sup> Mr. McKinzy recanted his statement regarding his wife's living arrangements once he was told that part of her past-due bill must be paid before service would be initiated at the Overton address.<sup>29</sup> In fact, MGE's witness, Ms. Lambert, testified that when a potential customer calls regarding service, MGE typically requests the name of the person calling – the potential customer – and then the spouse's

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<sup>24</sup> Transcript page 110, line 7-15.

<sup>25</sup> Transcript page 102, line 20 through page 103, line 14.

<sup>26</sup> Transcript page 103, lines 11-19 and page 104, lines 3-8.

<sup>27</sup> Transcript page 96, lines 5-18 and page 97, lines 10-1; and Exh. 2 (McKinzy's Surrebuttal Testimony), page 2, ¶ 6 through page 3, ¶ 7.

<sup>28</sup> Exh. 12 (Lambert Rebuttal Testimony), page 6, line 20 through page 7, line 10, and Sch. KL-1.

<sup>29</sup> Exh. 12 (Lambert Rebuttal Testimony), page 6, line 20 through page 7, line 10, and Sch. KL-1.

name.<sup>30</sup> Ms. Lambert indicated that if a person calls and indicates that he or she wants gas service, MGE would typically ask "who's living at the residence and are you married[?]"<sup>31</sup> Ms. Lambert further stated that "unless they indicate that the spouse is not in the home, we assume that they are. I think that's logical and reasonable."<sup>32</sup>

The Commission finds that Mr. McKinzy's explanation or rebuttal of MGE's computer screen records is not credible. Mr. McKinzy is not believable in his assertion that when he attempted to obtain gas service in April 2003, he only provided his wife's name and did not state that she would be living with him at the Overton Street residence.

For these reasons, this Commissioner finds that MGE has established by a preponderance of the evidence that Ms. Nance was living at the Overton Street residence at least as of April 9, 2004, the date Mr. McKinzy first attempted to obtain natural gas service at the Overton Street residence.

### **Conclusions of Law**

I agree with the majority opinion of this Commission with regard to numerous aspects in this case including their jurisdictional statement, their finding that Mr. McKinzy bears the burden of proof in this case and the following findings:

- b. MGE did violate Section 3.03 of its tariff by charging Mr. McKinzy a "connection" fee instead of a "transfer" fee. However, Mr. McKinzy has received all of the relief to which he is entitled.
- c. MGE did not violate Section 3.07(D) of its tariff by "discontinuing" Mr. McKinzy's natural gas service in June 2003;
- d. MGE did not violate Section 3.12 of its tariff by subsequently refusing, until September 2003, to "reconnect" natural gas service to Mr. McKinzy's residence;

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<sup>30</sup> Transcript page 190, lines 5-14.

<sup>31</sup> Transcript page 191, lines 2-5.

<sup>32</sup> Transcript page 191, line 24 through page 192, line 2.

- e. MGE did not violate Section 3.05 of its tariff by failing to use reasonable diligence to furnish continuous gas service to Mr. McKinzy; and

### **Discussion**

As noted in the Findings of Fact above, Mr. McKinzy requested gas service in his name at the Overton Street residence in April 2003. At that time, MGE refused to initiate service at the Overton Street residence in Mr. McKinzy's name because Mr. McKinzy's wife, Ms. Nance, owes a past-due debt to MGE, and Ms. Nance was living at the premises. In June 2003, MGE shut off the gas service to the Overton Street residence at the request of the company's customer, Gerald Lee. Mr. McKinzy was without natural gas service to his Overton Street residence until September 2003, at which time MGE began supplying natural gas service to Mr. McKinzy. MGE charged Mr. McKinzy a "connection fee" of \$20.00 when it initiated gas service, but the company later reduced the charge to \$5.00.

The issues remaining for discussion are: (1) whether MGE violated Section 3.02 of its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003; and (2) whether MGE may transfer to Mr. McKinzy's account the past-due debt owed by his wife, Tamara Nance, for service MGE provided to her at a prior address, when Mr. McKinzy did not receive the use and benefit of that service.

**I. MGE did not violate Section 3.02 of its tariff by refusing to "transfer" or "commence" service to Mr. McKinzy in April 2003.**

It is a well-established fact that a tariff approved by this Commission has the same force and effect of statute. Allstates Transworld Vanlines v. Southwestern Bell Tel. Co., 937 S.W.2d 314 , 317 (Mo.App.E.D. 1996). Therefore, we analyze a tariff as we do a statute. If a statute, or in this case, a tariff, is clear and unambiguous, we cannot give it another meaning. *Id.* In determining whether the language of a tariff is clear and



unambiguous, the standard is whether the tariff's terms are plain and clear to one of ordinary intelligence. *Id.*

Section 3.02 of MGE'S tariff provides in pertinent part:

Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made.

There is no question about the meaning of this tariff and, thus, the question is whether, at the time service was requested, the applicant, or a member of applicant's household (who has received benefit from the previous gas service), was indebted to MGE for gas service previously supplied. If so, MGE's tariff authorized the company to refuse to commence supplying gas service.

As discussed above, Ms. Nance was a member of Mr. McKinzy's household when Mr. McKinzy requested gas service on April 9, 2004.<sup>33</sup> And, the parties do not dispute that at the time service was requested, Ms. Nance owed MGE a past-due debt of \$449.96.<sup>34</sup> Furthermore, this \$449.96 debt was for service that Ms. Nance did benefit from while she lived at a previous residence.<sup>35</sup> Consequently, MGE was authorized by its tariff, Section 3.02, to refuse to commence or transfer service to Mr. McKinzy until payment had been made on the past-due debt.

- II. **MGE may transfer to Mr. McKinzy's account the past-due debt owed by his wife, Tamara Nance, for service MGE provided to her at a prior address, even though Mr. McKinzy did not receive the use and benefit of that service.**

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<sup>33</sup> Exhibit 12 (Lambert's Rebuttal Testimony), page 3, lines 19-23 and Sch. KL-4.

<sup>34</sup> Exhibit 12 (Lambert's Rebuttal Testimony), page 3, lines 19-23 and Sch. KL-4.

<sup>35</sup> See McKinzy's Complaint, filed June 30, 2003.

MGE contends that the answer to this question is "yes." McKinzy and the Commission's Staff argue that the answer is "no." This Commissioner finds that MGE's tariff, specifically Section 3.02, does allow the company to transfer the past-due debt of Ms. Nance to Mr. McKinzy's account at 8004 Overton, now that Ms. Nance is living at the Overton Street residence.

Section 3.02 of MGE's tariff provides that the "[c]ompany reserves the right to transfer any unpaid amount from prior service(s) to a current service account."<sup>36</sup> It is undisputed that Ms. Nance is currently a member of Mr. McKinzy's household at 8004 Overton Street.<sup>37</sup> As Ms. Nance is now a member of Mr. McKinzy's household, her past-due debt may be transferred, pursuant to Section 3.02, to the current service account of Mr. McKinzy.

Nonetheless, MGE acknowledged at the hearing and in its brief that the effect of this conclusion is somewhat limited.<sup>38</sup> Because service to Mr. McKinzy at the subject residence has already started, MGE concedes, and the Commission agrees, that the

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<sup>36</sup> Section 3.02 of MGE's tariff states in part:

PRIOR INDEBTEDNESS OF CUSTOMER: Company shall not be required to commence supplying gas service if at the time of application, the applicant, or any member of applicant's household (who has received benefit from previous gas service), is indebted to Company for such gas service previously supplied at the same premises or any former premises until payment of such indebtedness shall have been made. . . .

In order to expedite service to a customer moving from one location to another, Company may provide service at the new location before all bills and charges are paid for service at the prior location. **Company reserves the right to transfer any unpaid amount from prior service(s) to a current service account.** Such transferred bills are then subject to the provisions of Sections 7.07 and 7.08 herein. [Emphasis added.]

<sup>37</sup> Exh. 2 (McKinzy's Surrebuttal Testimony), page 3, ¶ 8; and Transcript, page 101, lines 15-25..

<sup>38</sup> Transcript, page 65, line 1 through page 66, line 2; MGE's brief, page 4; and MGE's Suggestion in Support of Motion for Summary Determination, or in the Alternative, for Dismissal of Complaint, page 4.

company would not be authorized, under Section 3.12, to discontinue service to Mr. McKinzy for the nonpayment of the transferred amount.<sup>39</sup>

Further, this Commissioner determines that the arguments of Staff and Mr. McKinzy regarding the "benefit and use" of service simply do not apply to the situation at hand. Staff's reliance upon the cases of Bowman v. The Gas Service Company<sup>40</sup> and Winkleman v. Associated Natural Gas Company<sup>41</sup> is misplaced. Neither case is relevant to the situation here, where a tariff provision specifically authorizes a company to "transfer any unpaid amount from prior service(s) to a current service account."<sup>42</sup>

### Conclusion

As discussed above, Mr. McKinzy's testimony is simply not credible. Mrs. McKinzy was living with Mr. McKinzy at the time he sought gas service from MGE. Accordingly, MGE did not violate Section 3.02 of its tariff by refusing to provide service and Mrs. McKinzy's prior debt to MGE was assignable under Section 3.02(d).

The majority was correct in determining that MGE violated Section 3.03 of its tariff and that MGE did not violate Sections 3.05, 3.07, 3.08, 3.09, and 3.12 of its tariff. In fact, the majority applied the law correctly here in most circumstances. It was the law that forced the majority to make the determination that Mr. McKinzy's testimony was, in fact, credible so that this Commission would not be forced to follow the law and order Mrs. McKinzy's past due debt be transferred to the account of Mr. McKinzy for 8004 Overton.

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<sup>39</sup> MGE's brief, page 4. However, if Mr. McKinzy and Ms. Nance later jointly move into a new residence in MGE's service area, and they then attempt to commence service at that new residence, MGE's actions will be governed by its tariff and the Commission's rules in effect at that time.

<sup>40</sup> 27 P.S.C. (N.S.) 44 (1984).

<sup>41</sup> 27 P.S.C. (N.S.) 40 (1984).

<sup>42</sup> Section 3.02 of MGE's tariff. In fact, Staff seems to be confusing the tariff requirements for a discontinuance of service, Section 3.12, with the tariff requirement for transferring the prior indebtedness of a customer to another account, found in Section 3.02.

However, it should be noted that the Commission left open the issue of whether Mrs. McKinzy's debt could be transferred to any household she shares with Mr. McKinzy in the future. Tariffs like the one in question are often the product of negotiated agreements where utilities received the benefit of being able to transfer debts when they gave up some other right. Such agreements should be respected and tariffs having the force and effect of law should not be ignored.

The majority's application of an "ends justifies the means" analysis in determining the outcome of this case is not surprising. The present commission has a tendency to apply the law liberally in favor of individual ratepayers and strictly against corporate defendants. Since there does not appear to be a statute or case law requiring the Missouri Public Service Commission to impartially construe the law, this practice is perfectly legal and will continue until the Missouri General Assembly or a court of higher jurisdiction decides to change that policy.

Respectfully submitted,



Jeff Davis  
Commissioner

Dated at Jefferson City, Missouri,  
on this 17<sup>th</sup> day of August, 2004.