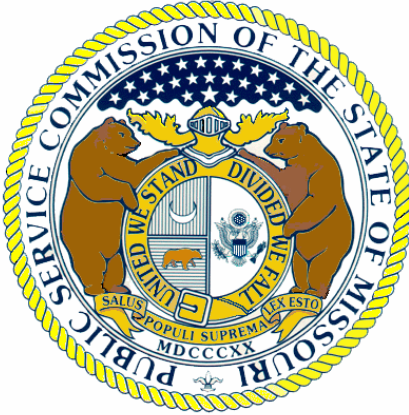


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



Beverly A. Johnson,

Complainant,

v.

Missouri Gas Energy,

Respondent.

Case No. GC-2008-0295

REPORT AND ORDER

Issue Date: November 6, 2008

Effective Date: November 17, 2008

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Beverly A. Johnson,)	
)	
Complainant,)	
)	
v.)	<u>Case No. GC-2008-0295</u>
)	
Missouri Gas Energy,)	
)	
Respondent.)	

REPORT AND ORDER

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APPEARANCES

Beverly Johnson, 4800 South Hocker Road, Apt. 202, Kansas City, Missouri 64136: **on behalf of herself as *pro se* Complainant.**

Dean L. Cooper, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Post Office Box 456, Jefferson City, Missouri 65102, for: **Missouri Gas Energy, a Division of southern Union Company.**

Kevin Thompson, General Counsel, Governor Office Building, 200 Madison Street, P.O. Box 360, Jefferson City, Missouri 65102, for: **The Staff of the Missouri Public Service Commission.**

The Office of the Public Counsel.¹

SENIOR REGULATORY LAW JUDGE: Harold Stearley

¹ Although The Office of the Public Counsel ("Public Counsel") entered an appearance at the prehearing conference held on July 14, 2008, it chose not to participate in the remainder of these proceedings. Public Counsel "*may* represent and protect the interests of the public in any proceeding before or appeal from the public service commission." (Emphasis added). Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "*shall have discretion* to represent or refrain from representing the public in any proceeding." (Emphasis added). Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel "shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding." *Id.*

REPORT AND ORDER

Syllabus: This order concludes that the Complainant, Ms. Beverly A. Johnson failed to meet her burden of proof to demonstrate that the Respondent, Missouri Gas Energy, unlawfully denied her natural gas service.

I. Procedural History

A. Complaint

Beverly Johnson filed a formal complaint against Missouri Gas Energy ("MGE") on March 10, 2008,² in which she alleged that MGE had unlawfully refused to establish natural gas service at her new address. Specifically, Ms. Johnson claimed that: (1) she was evicted from her former residence at 4200 East 56th Street, Kansas City, MO 64130 on February 14, 2001; (2) other tenants staying at that residence after her departure used gas service under her name; (3) she moved into her present residence in November 2007; and, (4) MGE will not establish gas service at the present address unless she pays the outstanding balance on her former account at 4200 E. 56th Street. Ms. Johnson seeks an order from the Commission requiring MGE to zero out the outstanding balance on her account from the 4200 East 56th Street residence and initiate natural gas service at her current residence.

B. Notice and Answer

The Commission issued notice on March 12, and MGE filed its Answer to the Complaint and its Motion to Dismiss on April 11. MGE asserted that; (1) its records indicate that Ms. Johnson has an outstanding debt in the amount of \$957.74 associated with the 4200 East 56th Street address; (2) service at 4200 East 56th Street was initiated in November 1997 and was discontinued for non-payment on May 23, 2001; (3) MGE did not

² All dates throughout this order refer to the year 2008 unless otherwise noted.

receive a request to discontinue service at 4200 East 56th Street; (4) timely disconnection notices were mailed to the address on the account prior to the shut off; (5) the last payment toward Ms. Johnson's account was made by Energy Assistance Funds on March 20, 2001, in the amount of \$600.00; and, (6) MGE asked Ms. Johnson pay fifty percent of the outstanding debt (i.e. \$478.00) before initiating service at the new address. MGE claimed that it was appropriately operating under its tariff and the Commission's rules when it refused to initiate natural gas service to Ms. Johnson at her current residence.

C. Staff's Investigation and Report

The Commission's Staff filed a report of its investigation into this matter on April 25. Staff asserted that: (1) as of February 14, 2001, there was an account balance of \$1,120.06 at the 4200 East 56th Street residence; (2) after applying the energy assistance payment of \$600.00, Ms. Johnson would still have an account balance of \$520.06; (3) the additional \$437.68 added to the balance at the 4200 East 56th Street residence was accrued after February 14, 2001; (4) this additional \$437.68 of the total \$957.74 should be eliminated from the balance because it appears Ms. Johnson did not benefit from any natural gas service provided to the 4200 East 56th Street residence after February 14, 2001; and (5) Staff has not found MGE in violation of any Commission rule or its tariff.

D. Procedural Schedule, Hearing Dates and Issues

The Commission held two prehearing conferences in this matter, one on May 28 and one on July 14. The parties had engaged in settlement negotiations in the interim between these conferences but had deadlocked. Consequently, the Commission directed the parties to file a procedural schedule culminating in an evidentiary hearing. The evidentiary hearing was set for August 22. The Commission directed that it would be a live hearing without prefiled testimony and did not require the parties to submit an issues list.

On August 12, MGE submitted an offer for a consent decree stating that it would consent to a Commission order directing that it remove \$437.68 from the account balance of \$957.74 from the 4200 East 56th Street residence, thus requiring Ms. Johnson to pay the remaining balance of \$520.06 prior to initiating natural gas service at her current address. MGE emphasized that refusing to establish service to Ms. Johnson at her current address in no way violated its tariff or any Commission rule. No party responded to MGE's consent decree offer.

E. Case Submission

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing began and concluded on August 22 at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of two witnesses and received six exhibits into evidence.

During the evidentiary hearing, Staff raised a new and novel legal argument. Staff argued that Section 516.120, the statute of limitations for certain contracts, time-barred MGE from collecting Ms. Johnson's unpaid debt. Staff argued that application of the statute of limitations had the effect of extinguishing the debt, and that MGE should be required to initiate gas service for Ms. Johnson at her current residence.

The Commission entertained closing arguments by the parties, but also instructed the parties to file post-hearing briefs with specific instructions to brief Staff's new legal argument.³ Transcripts were filed on September 12, and post-hearing briefs were filed on September 26. On October 7, the Missouri Energy Development Association ("MEDA")

³ The Commission recognized that Ms. Johnson would probably not be able to prepare a technical legal brief and allowed her to make closing arguments in which she did adopt the statute of limitations issue raised by Staff. However, Ms. Johnson was never precluded from filing a brief, or any other type of response in lieu of a formal brief. Indeed, Ms. Johnson has not been shy about putting forth her position in this matter. Transcript, pp. 86-88. See Transcript generally.

sought leave to late-file a brief *amicus curiae*. The Commission granted leave, accepted the *amicus* brief and set a deadline for responses. The Commission also allowed the parties to file reply briefs to the initial round of post-hearing briefs. No party completed any additional briefing, but the Office of the Public Counsel ("Public Counsel") filed a motion for reconsideration of the Commission's acceptance of the *amicus* brief and requested the Commission to reject MEDA's brief. The Commission issued a separate order on November 6, denying Public Counsel's motion, finding it to be devoid of merit.⁴

The case was deemed submitted for the Commission's decision at the completion of the briefing schedule and response deadlines on October 27.⁵

II. Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.⁶ Section 536.090 provides, in pertinent part:

⁴ EFIS Docket Number 35, Order Denying Public Counsel's Motion for Reconsideration, issued November 6, 2008. EFIS is the Commission's Electronic Information and Filing System.

⁵ "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

⁶ *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. 2003); *State ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App. 2000).

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.⁷ Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.⁸

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."⁹ Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."¹⁰

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's discretion,¹¹ but witness credibility is solely a matter for the fact-finder "which is free to believe none,

⁷ *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

⁸ *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

⁹ *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

¹⁰ *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

¹¹ *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

part, or all of the testimony.”¹² An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.¹³ In fact, the Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.”¹⁴

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.¹⁵ And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.¹⁶ Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.¹⁷

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.¹⁸ When interpreting its own orders, and

¹² *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

¹³ *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com’n of the State of Mo.*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users’ Ass’n. v. Public Service Com’n of the State of Mo.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Com’n*, 703 S.W.2d 577 (Mo. App. 1986).

¹⁴ *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

¹⁵ *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

¹⁶ *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm’n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

¹⁷ *Id.*

¹⁸ *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*,

ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.¹⁹ Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.²⁰

A. The Parties

1. Beverly A. Johnson is a *pro se* consumer complainant currently residing at 4800 South Hocker Road, Apartment Number 202, Kansas City, Missouri 64136.²¹

2. Ms. Johnson took up residence at the 4800 South Hocker Road address on November 3, 2007.²²

3. One of Ms. Johnson's prior residences was located at 4200 East 56th Street, Kansas City, Missouri.²³ Ms. Johnson occupied this residence from approximately November 1997-February 2001.²⁴

4. The 4800 South Hocker Road address and the 4200 East 56th Street address are located within the natural gas service territory of Missouri Gas Energy.²⁵

312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

¹⁹ *Id.*

²⁰ *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

²¹ EFIS Docket No. 1, *Complaint*, filed March 10, 2008; Transcript, p. 44-46, 55.

²² EFIS Docket No. 6, *Staff Report*, filed April 25, 2008; Transcript, p. 44-46, 55.

²³ EFIS Docket No. 1, *Complaint*, filed March 10, 2008; EFIS Docket No. 6, *Staff Report*, filed April 25, 2008; EFIS Docket No. 5, *Answer and Motion to Dismiss*, filed April 11, 2008; Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History; Transcript, p. 39-40.

²⁴ *Id.*

²⁵ EFIS Docket No. 5, *Answer and Motion to Dismiss*, filed April 11, 2008; *Missouri Gas Energy, Schedule of Rates and Charges and General Terms and Conditions for Gas Service*, P.S.C. MO. No. 1, Sheets No. 1-8,

5. Missouri Gas Energy (“MGE”) is a division of Southern Union Company with its principal office located at 3420 Broadway, Kansas City, Missouri 64111.²⁶

6. Southern Union Company is incorporated under the laws of the State of Delaware and is authorized to do business in Missouri as a foreign corporation under its registered fictitious name of MGE.²⁷

7. MGE provides natural gas service to the public pursuant to its Commission-granted Certificate of Convenience and Necessity (“CCN”) and Commission approved tariff.²⁸

8. The General Counsel of the Missouri Public Service Commission “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”²⁹ In this matter the General Counsel represents the position of the Staff of the Missouri Public Service Commission (“Staff”).

Tariff Tracking Number JG-2003-0638; Exh. 2, Billing Statements; Exh. 3 Account Analysis; Exh. 4 Customer Contact Entry; Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History.

²⁶ EFIS Docket No. 5, *Answer and Motion to Dismiss*, filed April 11, 2008; See also Report and Order, Case No. GA-2007-0289, *In the Matter of the Application of Missouri Gas Energy, a Division of Southern Union Company, for a Certificate of Public Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Natural Gas Distribution System to Provide Gas Service in Platte County, Missouri, as an Expansion of its Existing Certified Area*, p. 11. Transcript, p. 21.

²⁷ *Id.*

²⁸ MGE received its initial CCN in Case No. GM-94-40. MGE’s Tariff P.S.C. MO. No. 1, assigned Tariff Tracking Number JG-2003-0638.

²⁹ Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

B. Witness Demeanor, Credibility and Testimony

9. No prefiled testimony was filed with the Commission pursuant to Commission Rules.³⁰ The Commission directed there be only live testimony.³¹

10. The following witnesses provided live testimony, by telephone, and were subject to cross-examination by the parties and the Commission:³²

Beverly A. Johnson (representing herself)

Shirley J. Bolden (for MGE).

11. While testifying, Ms. Johnson and Ms. Bolden were confident, sincere, and unwavering in their testimony.

12. While at times Ms. Johnson was emotional, the testimony provided by Ms. Johnson was credible.

13. The testimony provided by Ms. Bolden was composed, substantial and credible.

14. MGE's witness, Ms. Bolden, provided authenticated documentary support with regard to MGE's positions on the subject matter of her testimony via various accounting analyses and service order activity records.³³

15. Ms. Bolden is employed by MGE in the position of Manager of Customer Solutions. She has held this position for the past three years. She has been employed by MGE for a total of 37 years, most of which has been spent working in the customer service

³⁰ See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

³¹ See EFIS Docket No. 15, *Order Adopting Proposed Procedural Schedule with Conditions and Setting Evidentiary Hearing*, issued July 21, 2008. See also Transcript Volume 3.

³² See Transcript, Volume 3.

³³ Transcript, pp. 59-68. See also Exh. 3 Account Analysis; Exh. 4 Customer Contact Entry; Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History.

department. Ms. Bolden has extensive first-hand experience with MGE's customer record system.³⁴

16. Section 490.065 sets forth standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings.³⁵

17. Section 490.065 states:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

18. The Commission finds that Ms. Bolden is a subject matter expert with regard to having specialized knowledge that will assist the Commission in relation to MGE's customer service and billing records. Ms. Bolden's expertise in this subject matter was not challenged or controverted by any other evidence.

19. Additionally, the Commission finds that regardless of the general credibility findings made in Findings of Facts Numbers 9 through 18, a given witness's qualifications

³⁴ Transcript, p. 58-60.

³⁵ *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003).

and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, as required, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony.³⁶

20. Staff elected not to proffer a witness.³⁷

C. The Unpaid Balance on the Gas Service Account at 4200 East 56th Street, Kansas City, Missouri.

21. Ms. Johnson began receiving natural gas service from MGE, solely in her name, at the residence located at 4200 East 56th Street, Kansas City, Missouri on November 18, 1997.³⁸

22. Ms. Johnson was evicted from, and vacated, the residence located at 4200 East 56th Street, Kansas City, Missouri on or about February 14, 2001.³⁹

23. MGE disconnected service to the residence located at 4200 East 56th Street, Kansas City, Missouri on May 10, 2001 for non-payment.⁴⁰

³⁶ As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

³⁷ Transcript, pp. 85-86.

³⁸ Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History; *Staff Report*, filed April 25, 2008, EFIS Docket No. 6; EFIS Docket No. 5, *Answer and Motion to Dismiss*, filed April 11, 2008; Transcript, pp. 35, 66-67.

³⁹ EFIS Docket No. 1, *Complaint*, filed March 10, 2008; Transcript, p. 69.

⁴⁰ Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History; Transcript, pp. 66-67.

24. Ms. Johnson's billing history, beginning on February 3, 1999 through May 23, 2001, indicates that, between these dates, Ms. Johnson always had an outstanding balance on her account.⁴¹

25. Ms. Johnson's billing history, beginning on February 3, 1999 through May 23, 2001, indicates that Ms. Johnson made partial payments on her natural gas bill at irregular times and in varying amounts.⁴²

26. Ms. Johnson does not pay her utility bills in full when she receives them, but makes partial payments on her utility bills as she is able to budget and gets low-income assistance when possible.⁴³

27. During the billing period of February 3, 1999 through May 23, 2001, Ms. Johnson received assistance with paying her natural gas bill from the "Light/Heat Fund" on December 7, 1999 in the amount of \$178.00, and again on December 8, 2000 in the amount of \$235.00.⁴⁴

28. During the billing period of February 3, 1999 through May 23, 2001, Ms. Johnson received assistance with paying her natural gas bill from Energy Assistance (Energy Crisis Intervention Money) in the amount of \$600.00.⁴⁵

29. Ms. Johnson's account balance at the residence located at 4200 East 56th Street, Kansas City, Missouri was \$957.74 on May 23, 2001 (final bill).⁴⁶

⁴¹ Exh. 3, Account Analysis. Ms. Johnson's complete billing record between the dates of November 19, 1997 and May 10, 2001 has not been offered or admitted into this record.

⁴² Exh. 3, Account Analysis.

⁴³ Transcript, pp. 48-54.

⁴⁴ Exh. 3, Account Analysis; Transcript, pp. 78-79.

⁴⁵ *Id.*

⁴⁶ Exh. 3, Account Analysis; Transcript, pp. 33, 62, 77-78. See also EFIS Docket No. 1, *Complaint*, filed March 10, 2008; Exh. 2, Billing Statements (Account Statements and Disconnection Notices); Transcript, pp. 40-43.

30. The billing statements Ms. Johnson filed with her complaint, and admitted into evidence, corroborate the account balances listed in MGE's Accounting Analysis.⁴⁷

31. When she filed her complaint, Ms. Johnson provided the Commission with copies of "Disconnect Notices", admitted into evidence, that she received from MGE dated February 14, 2001, March 15, 2001, March 20, 2001, April 16, 2001 and April 19, 2001.⁴⁸

32. Each of the "Disconnect Notices" provided Ms. Johnson with at least ten days notice of the pending disconnection and provided instructions on how to avoid disconnection of the gas service.⁴⁹

33. There is no factual dispute among the parties with regard to MGE's billing records and the unpaid debt owed by Ms. Johnson to MGE for gas service received at the residence located at 4200 East 56th Street, Kansas City, Missouri that was occupied by Ms. Johnson from approximately November 1997 to February 2001.⁵⁰

34. The final unpaid debt owed by Ms. Johnson to MGE is \$957.74.⁵¹

D. Establishing New Natural Gas Service at 4800 South Hocker Road, Apartment Number 202, Kansas City, Missouri

35. Currently, the East Central Missouri Community Action Agency has a gas service account for Ms. Johnson's apartment located at 4800 South Hocker Road, and

⁴⁷ Exh. 2, Billing Statements. Although Ms. Johnson filed copies of these documents with the Commission along with her complaint, it was MGE who formally offered these documents into evidence. Transcript, pp. 40-43. See also Exh. 3, Account Analysis.

⁴⁸ *Id.* Transcript, pp. 40-43.

⁴⁹ *Id.*; Exh. 4 Customer Contact Entry; Exh. 5, Premise Service Order Activity; Exh. 6, Service Order Completion History; Transcript, pp. 40-43, 63-65, 80.

⁵⁰ See all pleadings and Transcript generally.

⁵¹ See Findings of Fact Numbers 21-33 and their associated footnotes.

pays \$20.00 per month for a customer charge and Infrastructure Service Replacement Surcharge ("ISRS").⁵²

36. Ms. Johnson is not currently receiving natural gas service in her name at her current residence at 4800 South Hocker Road.⁵³

37. Prior to November 1, 2007, MGE offered to establish natural gas service to Ms. Johnson at 4800 South Hocker Road residence for a 50% payment of her outstanding debt, i.e. \$478.00.⁵⁴

38. After November 1, 2007, MGE offered to establish natural gas service to Ms. Johnson at 4800 South Hocker Road residence for a payment of \$154.36 pursuant to the application of the cold weather rule.⁵⁵

39. Prior to the start of the evidentiary hearing, MGE offered to reduce Ms. Johnson's bill from \$957.74 to \$520.06 and to establish natural gas service based upon this outstanding debt.⁵⁶

40. Ms. Johnson did not accept the offers MGE made to her as are described in Findings of Fact Numbers 40-42.⁵⁷

41. MGE has denied Ms. Johnson natural gas service based upon the Commission's denial of service rule, 4 CSR 240-13.035 and its tariff provision for denial of service, tariff Sheet R-19, Rule 3.02.⁵⁸

⁵² Exh. 1, MGE Bill for Account Number 0297530913, 4800 South Hocker Road, Apartment 202, Kansas City, Missouri 64136-2603, dated May 16, 2008. Transcript, pp. 28-33.

⁵³ Transcript p. 27-32. Ms. Johnson testified that if she does not establish gas service in her name at the 4800 South Hocker Road residence that she will be forced to vacate the premises. *Id.*

⁵⁴ Transcript, pp. 69-70.

⁵⁵ *Id.*

⁵⁶ Transcript, pp. 22-23, 69-70.

⁵⁷ *Id.*

⁵⁸ EFIS Docket No. 5, *Answer and Motion to Dismiss*, filed April 11, 2008; Transcript, pp. 71.

42. Commission Rule 4 CSR 240-13.035 and MGE's Tariff Rule 3.02 and Commission Rules state that MGE may refuse to provide service where there is a failure to pay a delinquent charge.⁵⁹

III. Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

A. Jurisdiction, Authority Pursuant to the Complaint Statute, and Burden of Proof

1. Commission Jurisdiction

Ms. Johnson is a "person" as defined in Section 386.020(39) and Commission Rule 4 CSR 240-2.010(12). Ms. Johnson, by the act of filing her complaint with the Commission pursuant to Section 386.390 and Commission Rule 4 CSR 240-2-070, and by the act of entering her appearance before the Commission, submitted to the personal jurisdiction of the Commission. Ms. Johnson, a natural person representing herself on her own behalf, may practice before the Commission pursuant to Commission Rule 4 CSR 240-2.040(6).

Section 386.020(18) defines a "gas corporation" as including "every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof." Section 386.020(42) defines "public utility" as including "every . . . gas corporation . . . as [this term is] defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of

⁵⁹ Commission Rule 4 CSR 240-13.035; Tariff Tracking Number JG-2003-0638, Tariff Sheet R-19, Rule 3.02, issued March 15, 2005, effective April 15, 2005.

the commission and to the provisions of this chapter.”⁶⁰ MGE is an “gas corporation” and a “public utility,” as defined in Sections 386.020(18) and (42), and is subject to the jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.⁶¹

2. Commission Authority Pursuant to the Complaint Statute

Section 386.390.1, 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 has already concluded MGE is a public utility and subject to the jurisdiction, supervision, and control of the Commission, and pursuant to Section 386.390, the Commission has the authority to hear complaints against MGE.

3. Burden of Proof – Preponderance of the Evidence Standard

“In cases where a complainant alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the complainant has

⁶⁰ The Commission's regulatory authority encompasses all public utilities; including the manufacture, sale and distribution of natural gas. See Sections 386.250.1 and 386.250.5.

⁶¹ See Findings Of Fact Numbers 5-7. See also EFIS Docket No. 5, *Answer and Motion to Dismiss*, paragraph 1, filed April 11, 2008.

the burden of proof.”⁶² As the complaining party, Ms. Johnson bears the burden of proving the allegations in her complaint.

In order to carry her burden of proof, Ms. Johnson must meet the preponderance of the evidence standard.⁶³ And in order to meet this standard, Ms. Johnson must convince the Commission it is “more likely than not” that MGE acted unlawfully when denying her nature gas service.⁶⁴

The burden of proof has two parts: the burden of production and the burden of persuasion. The burden of production requires the Ms. Johnson to introduce enough evidence on the material issue or issues to have that issue or those issues decided by the Commission, rather than the Commission deciding against Ms. Johnson in a peremptory ruling such as a summary determination or a determination on the pleadings.⁶⁵ The burden of persuasion requires Ms. Johnson to convince the Commission to favor her position,⁶⁶ and this burden always remains with Ms. Johnson.⁶⁷

⁶² *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968).

⁶³ *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996), *citing to*, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979). The function of the standard of proof is to “allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Id.*

⁶⁴ *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 109 -111 (Mo. banc 1996); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992). Preponderance is the minimum standard in civil disputes. *Rodriguez*, 936 S.W.2d at 109-111, *citing to*, *Santosky v. Kramer*, 455 U.S. 745, 755, 102 S.Ct. 1388, 1395, 71 L.Ed.2d 599 (1982).

⁶⁵ *Byous v. Missouri Local Government Employees Retirement System Bd. of Trustees*, 157 S.W.3d 740, 745 (Mo. App. 2005); *Kinzenbaw v. Dir. of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001); *State v. Ramires*, 152 S.W.3d 385, 395 (Mo. App. 2004).

⁶⁶ *Id.*

⁶⁷ *Middlemas v. Director of Revenue, State of Missouri*, 159 S.W.3d 515, 517 (Mo. App. 2005); *R.T. French Co. v. Springfield Mayor's Com'n on Human Rights and Community Relations*, 650 S.W.2d 717, 722 (Mo. App. 1983).

Nor can it be said that the burden of production would ever shift to MGE. In fact, MGE is not required to produce any evidence. It is not that the two parts of the burden of proof ever shift from Ms. Johnson, she always bears those burdens, but if Ms. Johnson offers sufficient evidence to prove MGE more likely than not unlawfully denied her gas service, and MGE fails to produce sufficient evidence to rebut Ms. Johnson's evidence, then Ms. Johnson will have met her burden of proof.

Some litigators confuse these concepts and cry burden-shifting has occurred when the Commission notes they offered no evidence in controversy, but the Commission can only base its decision on the record evidence, and it must have competent and substantial evidence of a party meeting its burden of proof. If there is no evidence to weigh against one party's position, that party may carry their burdens of production and persuasion. A party without evidence, or with insufficient evidence, may fail, not because the burden of proof has shifted, but because not enough evidence exists to tip the scales weighing the evidence to "less likely than not."

4. Final Conclusions Regarding Jurisdiction, Authority and Burden of Proof

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) Ms. Johnson has submitted to the personal jurisdiction of the Commission; (2) MGE, by virtue of being a public utility, is subject to the jurisdiction, control, and regulation of the Commission; (3) the Commission has subject matter jurisdiction to hear Ms. Johnson's complaint pursuant to Section 386.390; (4) Ms. Johnson bears the burden of proving the allegations of her complaint, and (5) the standard for meeting the burden of proof is the preponderance of the evidence standard.

B. The Unpaid Balance on the Gas Service Account at 4200 East 56th Street, Kansas City, Missouri

1. The Unpaid Debt is Uncontroverted

It is uncontroverted that the unpaid debt for gas service on Ms. Johnson's former residence (4200 East 56th Street) is \$957.74. It is uncontroverted that Ms. Johnson was the account holder for this unpaid debt. It is also uncontroverted that Ms. Johnson was evicted from this residence on February 14, 2001, prior to the May 10, 2001 shut-off of the gas service, and that \$437.68 of the \$957.74 debt accrued during a time period in which she did not actually receive the benefit of the gas service. Because of this disparity, Staff originally advocated for a reduction in Ms. Johnson's gas bill to reflect an account balance of \$520.06.

Regardless of the disparity between the gas that was delivered and used at 4200 East 56th Street during the months at issue versus the gas actually used by Ms. Johnson, Ms. Johnson was the account holder and there must be some legal mechanism or applicable legal authority in order for the Commission to reduce a debt owed by an account holder. It is well-settled law that the Commission cannot grant monetary relief for damages, order a pecuniary reparation or refund, and that it lacks the authority to do equity or grant equitable relief.⁶⁸ Neither Ms. Johnson nor Staff offers a legal theory that would support a

⁶⁸ *GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680, 696 (Mo. App. 2003); *Wilshire Constr. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971); *Am. Petroleum Exch. V. Pub Serv. Comm'n*, 172 S.W.2d 952, 955 (Mo. 1943); *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937). Although the Commission has exclusive jurisdiction to establish rates to be charged from and after the time of their promulgation, it does not have authority to hear an action by a public utility customer for an accounting for past overcharges in excess of rates established by it for the purpose of recovering such excess from the public utility. The Commission is not a court and cannot enter a money judgment for one party against another. *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 107 S.W.2d 41, 57-58 (Mo. 1937).

Commission decision to reduce the unpaid balance on Ms. Johnson's account to \$520.06.⁶⁹ However, in a last minute argument at the evidentiary hearing, Staff offered, and Ms. Johnson adopted, the position that a statute of limitations applying to contracts extinguishes Ms. Johnson's debt completely.

2. The Effect of a Statute of Limitations on Ms. Johnson's Debt

Staff argues that: (1) Section 393.130.1 restricts MGE's charges to no more than those allowed by law;⁷⁰ (2) the business relation between MGE and Ms. Johnson is based in contract;⁷¹ (3) Section 516.120(1) sets a limitations period of five years to enforce any obligations and liabilities on contracts;⁷² and, (4) any action by MGE against Ms. Johnson's unpaid debt is time-barred by Section 516.120(1). Staff extends its argument to a position that because MGE cannot collect the debt, the debt becomes a charge that is more than that allowed by law, and as such, the debt must necessarily be totally extinguished. Once extinguished, according to Staff, there is no unpaid debt that would serve as a basis, under the Commission's rules or MGE's tariff to deny Ms. Johnson gas service at her current address.⁷³

⁶⁹ It is true that before the evidentiary hearing MGE offered to consent to this reduction; however, this offer was in the nature of a settlement offer and Ms. Johnson declined to accept MGE's offer. The Commission has no authority to order MGE to renew its offer to Ms. Johnson.

⁷⁰ Section 393.130.1 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."

⁷¹ *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579 (Mo. App. 2000); *National Food Stores, Inc. v. Union Electric Company*, 494 S.W.2d 379, 381 (Mo. App. 1973).

⁷² Section 516.120(1) provides that "all actions upon contracts, obligations or liabilities, express or implied" must be brought within five years.

⁷³ The Commission notes that this position is contrary to Staff's original position that MGE had not, in any way, acted contrary to the Commission's denial of service rule or MGE's tariffs. See EFIS Docket No. 6, *Staff Report*, filed April 25, 2008.

MGE counters Staff's argument by arguing that: (1) if any statute of limitations is applicable, it is Section 516.110(1), the ten-year statute for actions upon any writing;⁷⁴ (2) regardless of which statute of limitations might apply, statutes of limitation are procedural and not substantive, and a statute of limitations in this context only eliminates a collection procedure in an appropriate court against Ms. Johnson and has no effect on the underlying debt;⁷⁵ and (3) imposition of a five-year statute of limitations directly conflicts with the Commission's denial of service rule.⁷⁶

As MGE correctly observes, the Court of Appeals addressed a similar issue in *Messner v. American Union Insurance Company*.⁷⁷ The question for the court in *Messner* was whether the plaintiff could establish that he was "legally entitled to recover" as to an underlying claim, even though the statute of limitations on that underlying claim had run. The Court of Appeals found that the statute of limitations in these types of situations was a procedural matter and did not affect the substantive nature of the underlying claim.⁷⁸

Regardless of how a given statute of limitation may apply, the Commission cannot enforce, construe or annul contracts, nor can it award a money judgment.⁷⁹ The Commission has no authority to award money in a contract enforcement action or extinguish a debt owed on a contract. Consequently, the Commission concludes that

⁷⁴ Section 516.110(1) provides, in pertinent part, that a ten year statute of limitations applies to any action upon any writing for the payment of money or property.

⁷⁵ *Messner v. American Union Insurance Company*, 119 S.W.3d 642, 647 (Mo. App. 2003).

⁷⁶ Commission Rule 4 CSR 240-13.035 – Denial of Service – provides no limitations period for unpaid debts by account holders and provides a limitations period of seven years for occupants that benefited from the gas service not paid for but who were not account holders. MGE's tariff provision concerning denial of service mirrors the Commission's rule.

⁷⁷ 119 S.W.3d 642 (Mo. App. 2003).

⁷⁸ *Messner*, 119 S.W.3d at 647.

⁷⁹ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Com'n of State of Mo.*, 116 S.W.3d 680, 696 (Mo. App. 2003); *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 49 (Mo. 1937).

regardless of which statute of limitation might apply, if either do apply, the statute can only serve as an affirmative defense to curtail a collection procedure available to MGE in circuit court. The proper statute of limitation has no effect on the existence of Ms. Johnson's unpaid debt unless Ms. Johnson had the debt declared extinguished by a court of competent jurisdiction. As such, the Commission need not decide which, if any, statutes of limitations may apply in circuit court. Ms. Johnson has not had her debt legally extinguished making the potential exercise of an affirmative defense to its collection in another venue irrelevant and immaterial to Ms. Johnson's complaint.

3. Final Conclusions Concerning Ms. Johnson's Unpaid Debt

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) Ms. Johnson owes an unpaid debt of \$957.74 to MGE for natural gas service; (2) the Commission has no legal authority to order a reduction in that debt; and (3) even if a statute of limitations is applicable with regard to Ms. Johnson's debt, that debt has not been legally extinguished and currently is still owed to MGE.

C. Establishing New Natural Gas Service at 4800 South Hocker Road, Apartment Number 202, Kansas City, Missouri

1. MGE's Basis for Denial of New Service to Ms. Johnson - Applicable Commission Rules and Tariffs

MGE has denied Ms. Johnson's request to establish new service at her current residence, because Ms. Johnson has not paid an undisputed charge on her prior account with MGE. The Commission has already concluded that Ms. Johnson's debt is \$957.74 and that this debt is not subject to reduction or elimination by order of the Commission. The Commission must now determine if MGE properly denied her service pursuant to its application of the Commission's denial of service rules and MGE's tariff provisions.

Commission Rule 4 CSR 240-13.035 (1)(A) 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. Similarly, MGE's Tariff Sheet R-19, Rule 3.02(1)(A) provides that MGE may refuse to commence service to an applicant for non-payment of an undisputed delinquent charge.

The debt owed by Ms. Johnson to MGE is both delinquent and undisputed. Consequently, MGE acted within its authority to deny Ms. Johnson service at her current address, so long as Commission Rule 4 CSR 240-13.035 (1)(A) and , MGE's Tariff Sheet R-19, Rule 3.02(1)(A) are legal and enforceable.

2. Legal Effect of Commission Rules and Tariffs

It is well-established law that regulations may be promulgated only to the extent of and within the delegated authority of the statute involved.⁸⁰ Once properly promulgated by an administrative agency with properly delegated authority, a rule has the force and effect of law.⁸¹ Commission Rule 4 CSR 240-13.035 was properly promulgated pursuant to Sections 386.250(6), 393.140(11) and 393.130(1), becoming effective originally on May 30, 2004.

"A tariff is a document which lists a public utility services and the rates for those services."⁸² The Commission has the power to approve gas company tariffs, and once the

⁸⁰ *Psychare Management, Inc. v. Department of Social Services Division of Medical Services*, 980 S.W.2d 311, 313 (Mo. banc 1998); *Bartlett and Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. banc 1983).

⁸¹ *Psychare Management*, 980 S.W.2d at 313-314; *United Pharmacal Co. of Missouri Inc. v. Missouri Bd. of Pharmacy*, 159 S.W.3d 361, 365 (Mo. banc 2005).

⁸² *State ex rel. Missouri Gas Energy v. Public Service Com'n*, 210 S.W.3d 330, 337 (Mo. App. 2006); *Bauer v. SW. Bell Tele. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997).

Commission approves a tariff, it becomes Missouri law.⁸³ MGE's tariffs have "the same force and effect as a statute directly prescribed from the legislature."⁸⁴

Pursuant to Section 386.270 RSMo, all Commission orders are prima facie lawful and reasonable.⁸⁵ Section 386.270 provides:

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.

Consequently, once a tariff is approved and has become effective, it is valid until found otherwise invalid in a lawsuit litigating that issue; either by an appeal of the Commission's decision in a court of competent jurisdiction pursuant to Section 386.510, or in a complaint action before the Commission pursuant to Section 386.390.⁸⁶ In both of these litigation choices, the burden of proof lies with the petitioner challenging the lawfulness of the order approving the tariff.⁸⁷ MGE's Tariff Sheet R-29 became effective on April 15, 2005.⁸⁸

⁸³ Sections 393.130, 393.140(11), and 393.150; *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. App. 2005); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *Southwestern Bell Yellow Pages, Inc. v. Wilkins*, 920 S.W.2d 544, 548 (Mo. App. 1996). *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86, (Mo. 1926); *Wheelock v. Walsh Fire Clay Products Co.*, 60 F.2d 415 (8th Circuit 1932); *Updike Grain Co. v. Chicago & N.W. Ry. Co.*, 35 F.2d 486 (8th Circuit 1929); *Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. . . .*, 267 F.Supp. 175 (D.C. Mo. 1967).

⁸⁴ *Id.*; *Laclede Gas Co.*, 156 S.W.3d at 521; *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996); *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). *State ex rel. Maryland Heights Fire Prot. Dist. v. Campbell*, 736 S.W.2d 383, 387 (Mo. banc 1987).

⁸⁵ Section 386.270, RSMo 2000; *Missouri Gas Energy*, 210 S.W.3d at 337; Section 386.270. RSMo 2000.

⁸⁶ Sections 386.510 and 386.390, RSMo 2000; *State ex rel. Public Counsel v. Public Service Com'n*, 210 S.W.3d 344, 360 (Mo. App. 2006); *A.C. Jacobs and Co., Inc. v. Union Elec. Co.*, 17 S.W.3d 579, 583 (Mo. App. 2000); *State ex rel. GTE North, Inc. v. Public Service Commission*, 835 S.W.2d 356, 367 (Mo. App. 1992); *State ex rel. Union Elec. Co. v. Public Service Com'n of State of Mo.*, 765 S.W.2d 618, 621 (Mo. App. 1988); Transcript p. 261, lines 16-25, p. 262, lines 1-25, p. 263, lines 1-25, p. 264, lines 1-2 (Testimony of Staff Witness, Michael Straub). See also *In the Matter of the Filing of Proposed Tariffs by The Empire District Electric Company to Comply with the Commission's Report and Order in Case No. ER-2001-299 and to Correct a Recently Discovered Error in the Calculation of the Revenue Requirement*, Case No. ET-2002-210, Tariff No. 200200321, *Order Rejecting Tariff*, issued November 19, 2001, effective date November 24, 2001.

⁸⁷ "In cases where a complainant [brought pursuant to Section 386.390, RSMo 2000] alleges that a regulated utility is violating a law, its own tariff, or is otherwise engaged in unjust or unreasonable actions, the

There is no evidence in the record to suggest that Commission Rule 4 CSR 240-13.035 and MGE Tariff Sheet R-19, Rule 3.02 were in any way unlawfully promulgated or improperly approved. The Commission concludes that its rule and MGE's tariff sheet are lawful and have the same force and effect as statutes directly prescribed from the legislature.

3. Final Conclusions Regarding MGE's Denial of Service

Substantial and competent evidence in the record as a whole supports the conclusion that MGE properly denied natural gas service to Ms. Johnson at her current address pursuant to a valid and lawful Commission Rule and a valid and lawful tariff provision. MGE acted lawfully when denying Ms. Johnson natural gas service.

D. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.⁸⁹ The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.⁹⁰

complainant has the burden of proof." *David A. Turner and Michele R. Turner, Complainants, v. Warren County Water and Sewer Company, Respondent*, 9 Mo. P.S.C. 3d 548 (Mo. PSC 2001), *citing to*, *Margolis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991); *Michaelson v. Wolf*, 261 S.W.2d 918, 924 (Mo. 1953); *Farnham v. Boone*, 431 S.W.2d 154 (Mo. 1968). In cases where a petitioner challenges the lawfulness of a Commission order pursuant to Section 386.510 the party seeking to set aside an order of the Commission shall have the burden of proof "to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be." Section 386.430, RSMo 2000; *Union Elec. Co.*, 765 S.W.2d at 621.

⁸⁸ Tariff Tracking Number JG-2003-0638, Tariff Sheet R-19, Rule 3.02, issued March 15, 2005, effective April 15, 2005.

⁸⁹ *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

⁹⁰ *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.⁹¹ “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”⁹² The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.⁹³ “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”⁹⁴

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that,

⁹¹ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

⁹² *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

⁹³ *Id.*

⁹⁴ *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

IV. Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decision.

Ms. Johnson has failed to sustain her burden of proving, by a preponderance of the evidence, that MGE unlawfully denied her natural gas service at her current address; 4800 South Hocker Road, Apartment Number 202, Kansas City, Missouri 64136. The relief Ms. Johnson requested, i.e. the elimination of her account balance of \$957.74 and the establishment of natural gas service at her current address, shall be denied.

THE COMMISSION ORDERS THAT:

1. Missouri Gas Energy did not unlawfully deny Beverly A. Johnson natural gas service as alleged in the complaint filed on March 10, 2008.
2. The relief requested by Beverly A. Johnson in her March 10, 2008 complaint, is hereby denied.
3. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein, or by separate order, are hereby denied.
4. Any party wishing to file a motion or request to stay this order shall file that motion or request no later than November 10, 2008.

5. Any party wishing to file a motion or request to extend the effective date of this order in any manner shall file that motion or request no later than November 10, 2008.

6. This Report and Order shall become effective on November 17, 2008.

7. This case shall be closed on November 18, 2008.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, and Jarrett, CC., concur.
Clayton and Gunn, CC., dissent, with separate
dissenting opinion to follow.
and certify compliance with the provisions
of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 6th day of November, 2008.