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February 2, 2001

Mr. Dale Hardy Roberts
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³
FEB 02 2001

Missouri Public
Service Commission

RE: **Missouri Gas Energy - Case No. ^{GE}80-2001-393**

Dear Mr. Roberts:

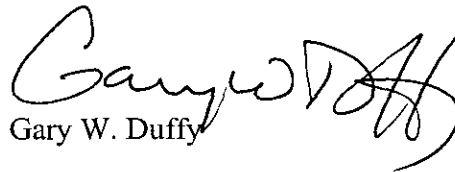
Enclosed for filing in the above-referenced proceeding please find an original and eight copies of Missouri Gas Energy's Response to Agenda Discussion. Please stamp the enclosed extra copy "filed" and return same to me.

If you have any questions concerning this matter, then please do not hesitate to contact me.
Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:


Gary W. Duffy

GWD/rhg
Enclosures

cc: Office of the Public Counsel
Doug Micheel
Tim Schwarz
Stuart Conrad
Jan Marcason

FILED³
FEB 02 2001

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Public
Service Commission

In the matter of Missouri Gas Energy's)
Application for variance from Sheet Nos.)
24.18 and 61.4 to permit the use of certain)
federal refunds and unauthorized use charge)
collections for the benefit of low-income)
customers in the company's service area.)

Case No. ~~00~~-2001-393

GE

MISSOURI GAS ENERGY'S RESPONSE TO AGENDA DISCUSSION

Comes now Missouri Gas Energy ("MGE"), a division of Southern Union Company, by and through counsel, and in response to the discussion of this matter held by the Commission during its agenda session on February 1, 2001, respectfully states the following:

1. It is MGE's understanding, based on the Commission's February 1 agenda discussion, that the Commission has expressed concerns about MGE's application for variance. Specifically, 1) the Commission has no authority to grant MGE's application for variance and 2) the granting of MGE's application for variance would amount to an unconstitutional "taking."

2. Because MGE's application for variance would provide approximately 1,000 households with immediate, substantial and necessary financial assistance in this time of extraordinarily high gas bills, MGE takes the somewhat unusual step of filing this response based on its understanding of the Commission's concerns as expressed during the February 1 agenda discussion. MGE is confident that the Commission would seek MGE's input in this regard prior to denying the application for variance, and files this response now, in the absence of such a Commission request, in the interest of expediting the availability of financial assistance to customers in need.

3. In response to the Commission's concern, as MGE understands it based on the February 1 agenda discussion, that the Commission lacks authority to grant MGE's

application for variance, MGE states that the pleadings filed herein to date are absolutely devoid of any allegation that such authority is lacking. In fact, MGUA states that it "... has no objection to the requested variance insofar as it concerns the distribution of MGE's share of Williams' storage refund." (MGUA pleading, para. 2, p. 4) With respect to unauthorized use charges, MGUA indicates that it has "... no concern ..." with the disposition of such funds so long as such disposition does not impair the right of any large volume customer to contest the validity of such charges.¹ (MGUA pleading, para. 3.C., p. 5) Significantly, MGUA does not allege that the Commission lacks the legal authority to grant MGE's application for variance. Similarly, while both the Staff and Public Counsel argue, on the basis of traditional cost causation principles, that the Commission **should not** grant MGE's application for variance, neither the Staff nor Public Counsel allege that the Commission **cannot**, based on the lack of legal authority, grant MGE's application for variance. As a matter of law, the Commission possesses substantial discretion in setting rates due to complexities inherent in the process. *State ex rel. Associated Natural Gas Co. v. Public Service Commission of Missouri*, 706 S.W.2d 870, 880 and 882 (Mo.App. W.D. 1985). MGE's application for variance simply seeks to implement a temporary deviation from the normal disposition of the Williams refunds and specified unauthorized use charge collections, as provided by tariff, on the basis of the extraordinary conditions we find ourselves in this winter.² Certainly the Commission will recognize the wisdom of exercising its discretion in the manner requested through MGE's application for variance.

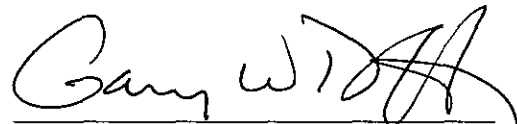
¹ By pleading filed on January 30, 2001, MGE has already indicated that it does not object to the clarification sought by MGUA with respect to the disposition of the unauthorized use charges that are subject to MGE's application for variance.

² Sheet No. 24.18 specifically recognizes the Commission's authority to deviate from the normal disposition of funds when it states "... **unless the Missouri Public Service Commission shall otherwise order** ...".

4. In response to the Commission's concern, as MGE understands it based on the February 1 agenda discussion, that the granting of MGE's application for variance would amount to an unconstitutional "taking" (presumably meaning that the re-allocation of funds to the benefit of lower income customers as proposed in the application for variance, instead of providing the overall body of customers, on average, a reduction in PGA costs of approximately \$2.00 over the course of an entire year [or less than \$0.20 per month] would constitute such a "taking"), MGE states that the pleadings filed herein to date are absolutely devoid of any such allegation. Furthermore, for such a taking to occur, the overall body of customers would need to have a property interest in the funds in question. Missouri courts have been exceedingly reluctant to acknowledge that customers have any property interest whatsoever in the rates charged by a public utility such as MGE. See, *Lightfoot, et al., v. City of Springfield*, 236 S.W.2d 348 (Mo. 1951); and *Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666 (Mo 1950). Particularly under the circumstances presented by this application for variance, there is no compulsion whatsoever for the Commission to deviate from the general direction taken by the courts of Missouri.

Wherefore, MGE respectfully requests that the Commission grant, as expeditiously as possibly and preferably no later than early February 2001, the requested variance.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI
GAS ENERGY

CERTIFICATE OF SERVICE

2nd I hereby certify that copies of the foregoing have been mailed or hand-delivered this day of February, 2001, to:

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