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February 21, 2001

FILED<sup>3</sup>

FEB 21 2001

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

**RE: Missouri Gas Energy,  
Case No. GE-2001-393**

Dear Mr. Roberts:

Enclosed for filing in the above referenced case, please find the original and 8 copies **Post Hearing Brief of the Office of the Public Counsel**. Please "file stamp" the extra enclosed copy and return it to this office. I have on this date mailed, faxed, or hand-delivered the appropriate number of copies to all counsel of record.

Thank you for your attention to this matter.

Sincerely,

Douglas E. Micheel  
Senior Public Counsel

DEM:kh

cc: Counsel of Record

Enclosure

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

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. GE-2001-393

**FILED<sup>3</sup>**  
FEB 21 2001  
Missouri Public  
Service Commission

**POST HEARING BRIEF OF  
THE OFFICE OF THE PUBLIC COUNSEL**

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February 21, 2001

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## **I. INTRODUCTION**

In this proceeding Missouri Gas Energy ("MGE") seeks a variance from the requirements of its currently effective tariffs, Sheet No. 24.18 and Sheet No. 61.4. (A copy of each tariff sheet is attached as Attachment A). By this variance request MGE seeks to turn over to the Mid-American Assistance Coalition ("MAAC") certain pipeline refunds and unauthorized use charges that properly should be flowed through to MGE's residential, small general service, large general service and unmetered gas light customers. The Office of the Public Counsel's ("Public Counsel") opposition to the variance requested by MGE is rooted in Public Counsel's belief that this Commission lacks the statutory authority to grant the variance. Setting aside the legal prohibition that should properly prevent this Commission from granting the requested variance; there are policy reasons for not granting the requested variance.

## **II. ARGUMENT**

### **A. The Public Service Commission Lacks Statutory Authority To Grant The Requested Variance.**

#### **1. The requested variance is contrary to the specific language contained in Section 393.130.2 RSMo. 2000 and Section 393.140(11) RSMo. 2000.<sup>1</sup>**

MGE pursuant to its requested variance seeks to take the pipeline refund monies and the unauthorized use monies and turn them over to MAAC so that MAAC can utilize these monies in assisting a certain group of residential customers in MGE's service territory who have difficulty paying their gas bills. (MGE Variance Application ¶13). Such a request is prohibited by the statutory requirements of Section 393.130.2 and 393.140(11).

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<sup>1</sup> All references to statutes are to RSMo. 2000 unless otherwise noted.

Section 393.130.2 provides in pertinent part that:

2. No gas corporation, shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Section 393.130.2 expressly forbids MGE from directly or indirectly rebating to customers any part of what has been collected in rates when such a rebate results in a lesser compensation by one person for the same service than paid by another for a like and contemporaneous service under the same or substantially similar circumstances. See: Re Laclede Gas Co. 5 Mo.P.S.C. (N.S.) 540, 544 (1954).

In this proceeding, MGE indirectly seeks to give a certain group of residential customers a rebate by providing the monies at issue to MAAC. As a result of this indirect rebate to this discrete group of residential customers, other residential customers and all small general service, large general service and unmetered gas light customers will be required to pay more for their gas service. Such a result is expressly forbid by the clear and unambiguous language of Section 393.130.2.

A similar prohibition against disparate refunds appears in Section 393.140 sub-paragraph (11). Section 393.140(11) provides in pertinent part that:

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; **nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified**, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, **except such as are regularly and uniformly extended to all persons and corporations under like circumstances.** (emphasis added).

This section provides that a refund is lawful only when regularly and uniformly extended to all under like circumstances.

In this case MGE does not seek to regularly and uniformly extend the refunds at issue to all customers under like circumstances as required by Section 393.140(11). MGE seeks to provide refunds to only a certain group of residential customers. Such treatment is expressly forbidden by Section 393.140(11) “. . . nor shall any corporation refund or remit **in any manner** or by any device any portion of the rates or charges so specified . . . except such as are regularly and uniformly extended to **all** persons and corporations under like circumstances.” (emphasis added) This Commission has no statutory authority to provide refunds to certain discrete residential customers and deny other residential, small general service, large general service and unmetered gas light customers refunds.

In Re Laclede Gas Company 5 Mo.P.S.C. (N.S.) 540, 544-45 (1954) the Commission had occasion to analyze Section 393.130.2 and Section 393.140(11). In this decision the Commission expressed the opinion that refunds/rebates could not be ordered unless the refund/rebate is regularly and uniformly extended to all under like circumstances. In discussing Section 393.130.2 and Section 393.140(11) the Commission stated:

Section 393.130 V.A.M.S. uses the word “rebate,” while Section 393.140, subparagraph (11), uses the word “refund.” As those words are used in those statutes they seem to refer to the same thing – to a repayment or payment back to the customer. Webster’s International Dictionary defines “rebate” as, “to deduct from; to make a discount from, as sums due; a deduction; abatement; remission or payment back.” In the same volume “refund” is defined as “to give back; to repay; restore; to reimburse; to make repayment.” (emphasis added)

Id. Such analysis is consistent with the statutory language of 393.130.2 and 393.140(11) and is as valid today as it was in 1954. The Missouri Supreme Court in McBride & Son Builders, Inc. v. Union Electric Company, 526 S.W.2d 310 (Mo.banc 1975) had occasion to comment on the

meaning of subsection 11 of Section 393.140. The Court noted subsection 11 prohibits any corporation to “refund or remit in any manner or by any device any portion of the rates or charges” specified. Id. at 313.

Section 393.130.2 and Section 393.140(11) clearly and unambiguously set out this Commission’s authority to grant refunds – those refunds are only lawful when regularly and uniformly extended to all under like circumstances.<sup>2</sup> In this proceeding MGE requests this Commission provide refunds/rebates to a discrete group of residential customers, but not all residential customers and wholly deny small general service, large general service and unmetered gas light customers refunds. Such treatment is not consistent with the express statutory requirements of Section 393.130.2 and 393.149(11) and should be rejected by this Commission.

**2. The Commission’s discretionary authority does not allow the Commission to ignore the express language of 393.130.2 and 393.140(11).**

MGE and MAAC appear to argue that this Commission can ignore the statutory language contained in 393.130.2 and 393.140(11) because this Commission has broad discretionary authority in determining rates. (Tr. p. 30 l. 17-25; MGE Response to Agenda Discussion ¶3). Although it is correct that this Commission has a considerable amount of discretion in setting rates pursuant to Section 393.140, this discretion can only be used within the circumference of the powers conferred upon it by the legislature; the provision cannot in itself give the Commission the authority to change the ratemaking scheme set up by the legislature. State ex rel. Utility Consumers Council of Missouri v. Public Service Commission, 585 S.W.2d 41, 56 (Mo.banc 1979). (“UCCM”) The

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<sup>2</sup> Section 393.130.2 and 393.140(11) do not speak of undue or unreasonable discrimination. These sections do not allow any refunds or rebates unless the refunds or rebates are extended regularly and uniformly to **all** customers under like circumstances.

Public Service Commission is a creature of statute and can only function in accordance with statutes. Where a procedure before the Commission is prescribed by statute, the procedure must be followed. State ex rel. Monsanto Company v. Public Service Commission, 716 S.W.2d 791, 796 (Mo.banc 1996). The legislature in Section 393.130.2 and Section 393.140(11) has clearly set-out this Commission's authority to grant refunds and the procedure the Commission must use – those refunds are only lawful when regularly and uniformly extended to all under like circumstances.

To accept MGE's and MAAC's claim that this Commission has broad discretion to grant the variance request, would result in this Commission nullifying the express requirements of Section 393.130.2 and Section 393.140(11). At hearing both MGE and MAAC pointed to general provisions contained in Section 393.140(11). (Tr. p. 85 l. 11-25; p. 86 l. 1-12). This general statutory provision can not in any way alter the explicit provisions contained in Section 393.130.2 and Section 393.140(11) regarding the specific requirements the Commission must follow when a gas utility provides a direct or indirect rebate or seeks to refund monies to customers in any manner.

Sections 393.130.2 and 393.140(11) specifically dictate how this Commission is required to treat refunds and rebates whether they are direct or indirect refunds or rebates. It is well-settled law that a specific statute prevails over a general one. State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536 (Mo.banc 1979). Granting MGE's request would result in this Commission ignoring the explicit dictates of the legislature. This Commission has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the legislature. State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission, 225 S.W.2d 792, 794 (Mo. App. 1949). If the Commission grants MGE's variance request it will effectively eliminate the specific language regarding the treatment of rebates and refunds from Section 393.130.2 and Section 393.140(11), thus altering the ratemaking scheme set up by the

legislature. This Commission has no authority to alter the ratemaking schemes established by the legislature. UCCM at 56.

MGE and MAAC argue that due to the extraordinary nature of gas prices this winter the public interest compels this Commission to grant MGE's variance application. (Tr. p. 30 l. 17-20; p. 11 l. 2-10). However, this Commission's powers are limited to those conferred by statute. While the Public Service Commission law is to be liberally construed to further its purposes, State on inf. Barker ex rel. Kansas City v. Kansas City Gas Co., 163 S.W. 854 (Mo. 1914), "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the Commission is authorized by statute. UCCM at 49 citing State ex rel. Kansas City v. Public Service Commission, 257 S.W. 462 (Mo.banc 1923). Simply put, as a matter of law Section 393.130.2 and Section 393.140(11) specifically prevent the Commission from granting the variance requested by MGE.

### **3. Granting MGE's variance request would also be contrary to Section 393.130.3.**

Granting MGE's requested variance also would result in undue and unreasonable discrimination contrary to Section 393.130.3. This section states in pertinent part:

3. No gas corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The fundamental theory of ratemaking for public utilities is that there shall be but one rate for a particular service, and a charge made to one patron or consumer different from that made to another, for the same service under like circumstances, constitutes undue discrimination. State ex rel. School of Nursing v. Public Service Commission, 464 S.W.2d 737 (Mo.App. 1970).

The purpose of the Public Service Commission law is to secure equality in service in rates for all who need or desire these services and who are similarly situated. May Department Store Co. v. Union Electric Company, 107 S.W.2d 41, 49 (Mo. 1937). To allow MGE to place these refunds with MAAC would result in similarly situated residential customers paying different rates for the same service from MGE.<sup>3</sup>

In State ex rel. McKittrick v. Public Service Commission, 175 S.W.2d 857, 866 it was held that a utility may have two or more rates if they be for different character of service, but to have two or more rates for the same service is the thing forbidden by the non-discrimination statute. If this Commission grants the requested variance, certain residential customers will in effect be paying a different rate for service than other similarly situated residential customers.<sup>4</sup> This is exactly the type of discrimination that the Public Service Commission law seeks to eliminate.

Approving such a variance request would result in intraclass rate level differences. As acknowledged by MGE witness Catron, it is not appropriate to charge residential customers different rates for the same service. (Tr. p. 54, l. 5-8). For purposes of setting rates all residential customers should be treated the same. To do otherwise would be unreasonable discrimination.

Granting MGE's variance request would result in another customer class being created within MGE's rate structure. To date this Commission has not created a disadvantaged/low-income customer class. This fact was recently noted by this Commission in its Report and Order in EM-2000-292 and EM-2000-369 where this Commission stated:

Low-income customers have not previously been accorded status as a separate class of consumer when utility rates are designed. Standard rate design treatment attempts to match revenue requirement determination with cost causation by class.

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<sup>3</sup> Currently MGE has the following customer classes for service: residential, small general service, large general service, unmetered gas light and transportation.

<sup>4</sup> MGE has approximately 450,000 residential customers (Tr. p. 47 l. 22-25; p. 48 l. 1-2).

In other words, the class of consumers that causes a cost to a utility should be required to pay those costs through rates. The evidence presented by MDNR suggests that low-income customers have special problems that UtiliCorp should address through additional programs. Those programs of course bear a cost. Thus, if the Commission were to require UtiliCorp to institute costly new programs to better serve its low-income consumers, without subsidization from other classes of consumers, it might be necessary to increase the rates charged to the class of low-income consumers in order to pay for those programs. Obviously, such a result would not be practical or desirable from the standpoint of the low-income consumers. But neither would it be fair and reasonable for the Commission to order UtiliCorp to institute such programs without giving it an opportunity to recover the cost of those programs through rates. As previously indicated, this case is not about establishing rates. It is not about adjusting UtiliCorp's class cost of service.

(Report and Order EM-2000-292 p. 29-30 (Dec. 24, 2000); Report and Order EM-2000-369 p. 26-27 (Jan. 7, 2001)) Although these cases were merger cases, if it was inappropriate to create a new customer class in a merger proceeding, it is equally inappropriate to create a separate low-income customer class in this proceeding that requests a variance from MGE's tariffs. This is not a proceeding about establishing rates. Such a class creation may be desirable, but there currently is no such customer class and the Commission does not have the authority to create such a customer class in this proceeding.

Rate classifications are not based on the economic situation of the customer, but rather on the economics of providing service to the customer. In this case MGE seeks to stand this basic ratemaking principle on its head. MGE requests this Commission ignore the costs of providing service to residential customers and base rates on the specific economic situation of a certain group of residential customers. Such a proposition is contrary to the fundamental theory of ratemaking. It is the economics of providing service to a customer group that determines the rate appropriate for that group of customers, not the economic situation of the customer.

Assuming *arguendo* the Commission believes it has authority to set-up a new class of customers in this proceeding, the proposal by MGE still does not treat all low-income customers

equally. MGE seeks only to help low-income customers at the 200% of the poverty level as the income qualification criteria. (Tr. p. 9 l. 3-11; ¶5 of Attachment 2 appended to Application). According to MGE only 900 households would receive assistance. (Tr. p. 6 l. 17-20). So MGE would not be providing help to all similarly situated low-income customers only to a subgroup of the low-income customer subgroup. Moreover, there is no evidence that all customers of this subgroup would be extended relief that is regularly and uniformly extended to all low-income customers under like circumstances. Such disparate treatment is unlawful.

**4. MGE's tariffs do not grant this Commission authority to order the monies at issue to be paid over to MAAC.**

MGE points out that tariff Sheet No. 24.18 specifically recognizes the Commission's authority to deviate from the normal disposition of the funds when it states "... unless the Missouri Public Service Commission shall otherwise order ..." (Application ¶7). Pursuant to this language the Commission cannot order these refunds be turned over to MAAC unless such action is not contrary to the Commission's statutory authority. As discussed above, the treatment of the monies at issue requested by MGE and MAAC are wholly contrary to Section 393.130.2 and 3 and Section 393.140(11).

Indeed, tariff Sheet No. 24.18 implicitly recognizes the requirements of Section 393.130.2 and Section 393.140(11) that refunds/rebates be regularly and uniformly extended to all customers under like circumstances. Sheet No. 24.18 of MGE's tariff provides among other things, that "... refunds ... in excess of \$75,000 ... received by the Company from charges paid and recovered through the PGA/EGCIM/FCP applicable to its Residential, Small General, Large General and Unmetered Gaslight customers, shall be refunded to such customers as a reduction in PGA

rates . . .” This language requires refunds over \$75,000 to be regularly and uniformly extended to all Residential, Small General, Large General and Unmetered Gaslight customers.

Public Counsel believes the tariff language “. . . unless the Missouri Public Service Commission shall otherwise order . . .” allows the Commission to change the method the refunds are provided to all customers i.e. the Commission could expedite the refunds to all customers or the Commission could require MGE to provide refund checks to all customers.<sup>5</sup> However, pursuant to statute the Commission cannot order the monies be turned over to MAAC.

Tariff Sheet No. 61.4 states “[a]ll revenues received from unauthorized use charges will be considered as gas cost recovery and will be used in the development of the gas cost recovery amount during the ACA audit as set forth in the Purchased Gas Adjustment Schedule (PGA).” This tariff sheet does not contain the “unless otherwise ordered” language appearing in Sheet No. 24.18. Tariff Sheet No. 61.4 is clear and unambiguous. All unauthorized use charges will be used in determining gas cost recovery amount during the ACA audit. This tariff does not give the Commission authority to alter the treatment of unauthorized use charges. It is well-settled law that tariffs approved by the Commission have the same force and effect as a statute directly prescribed by the legislature. Allstates Transworld v. Southwestern Bell, 937 S.W.2d 314, 317 (Mo. App. 1996). Simply put, Sheet No. 61.4 on its face prevents the Commission from authorizing the unauthorized use charges incurred to be turned over to MAAC.

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<sup>5</sup> In its Response to MGE’s Application for Variance Public Counsel requested the Commission order MGE to file tariffs expediting the refunds to all customers.

**B. Sound Policy Reasons Support The Denial Of MGE's Requested Variance.**

Setting aside the legal prohibitions that should properly prevent this Commission from granting the requested variance; there are policy reasons for not granting the requested variance. First, granting MGE's request would result in the body of ratepayers making a charitable contribution to MAAC. Ratepayers should not be made unwitting contributors to charitable concerns preferred by MGE. The issue is not the worthiness of charitable organizations contributed to, but the fact that ratepayer dollars are flowed through to the organization, whether the individual ratepayer would have chosen to make the contribution or not. Re St. Louis County Water Co, 94 PUR 4<sup>th</sup> 96 (Mo.P.S.C. 1988).

The record evidence demonstrates that all MGE customers can voluntarily choose to give to the Neighbors Helping Neighbors program. (Tr. p. 42 l. 6-22). Customers have an avenue to voluntarily contribute to low-income assistance. (Tr. p. 42 l. 4-7). In this proceeding customers would be forced to contribute to MAAC if the variance is granted. From a policy standpoint such forced contribution is wholly inappropriate.

Although MGE is quite generous in allowing this Commission to force ratepayers to provide a forced contribution to MAAC, if the shoe were on the other foot and the Commission were forcing shareholders to contribute money to MAAC, MGE would object. Witness Cattron testified as follows:

Q. You said the Company would advocate for the Commission for the authority to grant this kind of waiver, or rather, this kind of channeling of one ratepayer's refund to another ratepayer.

Would you favor the Commission having the authority to do that with respect to diverting shareholder money to a particular group of ratepayers?

A. No. Management has the capability to make that decision.

(Tr. p. 45 l. 2-10). In this fact setting shareholders and management should be allowed to make the decision whether to contribute to MAAC. Shouldn't the same be true for ratepayers? Are ratepayers any less capable of deciding to give to the Neighbors Helping Neighbors Program? If MGE believes this Commission lacks authority to divert shareholder money to a particular group of ratepayers, why would the Commission have authority to divert ratepayer money to a particular group of ratepayers?

Second, all ratepayers have been facing hardships due to the increased cost of gas. MGE's proposal if excepted by the Commission would wholly prevent small general service customers from getting any sort of refund, because small general service customers cannot seek relief from MAAC. Such treatment of the small general service customers is not fair.

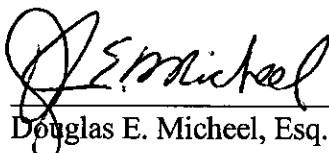
### **III. CONCLUSION**

For the above reasons the Commission should reject the variance requested by Missouri Gas Energy.

Respectfully submitted,

**OFFICE OF THE PUBLIC COUNSEL**

BY:



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AUG 07 2000

Missouri Gas Energy,  
a Division of Southern Union Company  
Name of Issuing Corporation

MISSOURI  
Public Service Commission

For: All Missouri Service Areas  
Community, Town or City

FIXED COMMODITY PRICE PGA  
FCP

Commission in Case No. GO-2000-705, for periods prior to the effectiveness of the FCPC of the PGA, commodity costs shall be subject to audit and prudence review. Also consistent with the provisions of the Stipulation and Agreement approved by the Commission in its Report and Order in Case No. GO-2000-705, for periods during the effectiveness of the FCPC of the PGA, gas commodity costs shall not be subject to audit and prudence review. Pipeline transportation and storage costs shall be subject to audit and prudence review.

V. REFUND PROVISIONS

Residential, Small General, Large General and Unmetered Gaslight Customers:

For the purpose hereof, unless the Missouri Public Service Commission shall otherwise order, refunds or a balance in the refund account in excess of \$75,000 (including interest from suppliers) received by the Company from charges paid and recovered through the PGA/EGCIM/FCP applicable to its Residential, Small General, Large General and Unmetered Gaslight customers, shall be refunded to such customers as a reduction in PGA rates. After receipt of a refund in excess of \$75,000 or the balance reaching \$75,000, the Company shall file with the Commission, at the time of its Winter or Summer or unscheduled Winter FCP filing, and propose to make effective, the appropriate FCP Statement reflecting the decrease and an associated statement showing the computation of the refund adjustment. After receipt of any refund in excess of \$75,000 prior to the effective date of this tariff sheet or the balance reaching \$75,000 prior to the effective date of this tariff sheet, the Company shall file with the Commission, and propose to make effective with the appropriate September, 1997 PGA Statement reflecting the decrease and an associated statement showing the computation of the refund adjustment.

The Company will add interest to the refunds received from its suppliers applicable to (1) the amount of the refund from the date of its receipt by the Company to the beginning date of the refund adjustment period, and (2) the average amount of the total refund estimated to be outstanding during the refund adjustment period. Such interest shall be calculated at the rate of 6 percent per annum compounded annually. For each refund distribution period, the interest to be added by the Company shall be included in determining the refund credits to be applied to bills.

FILED

AUG 31 2000  
00-705MISSOURI  
Public Service Commission

DATE OF ISSUE: August 7, 2000  
month day year

DATE EFFECTIVE: [REDACTED]  
month day year  
AUG 31 2000

ISSUED BY: Robert J. Hack Vice President, Pricing and Regulatory Affairs  
Missouri Gas Energy, Kansas City, Missouri 64111

Attachment A  
Page 1 of 2

Missouri Gas Energy,  
a Division of Southern Union Company

For: All Missouri Service Areas

TRANSPORTATION PROVISIONS  
TRPR

Missouri Public  
Service Commission

REC'D AUG 28 1998

OTHER TERMS AND CONDITIONS

All revenues received from unauthorized use charges will be considered as gas cost recovery and will be used in the development of the gas cost recovery amount during the ACA audit as set forth in the Purchased Gas Adjustment schedule (PGA).

Missouri Public  
Service Commission

98 - 140  
FILED SEP 02 1998

DATE OF ISSUE August 28 1998  
month day year

DATE EFFECTIVE SEP 02 1998  
month day year

ISSUED BY: Charles B. Hernandez

Director, Pricing and Regulatory Affairs  
Missouri Gas Energy, Kansas City, MO. 64111

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been faxed, mailed or hand-delivered to the following counsel of record on this 21st day of February, 2001:

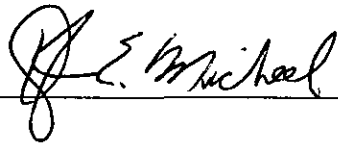
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