



Commissioners

SHEILA LUMPE
Chair

M. DIANNE DRAINER
Vice Chair

CONNIE MURRAY

ROBERT G. SCHEMENAUER

KELVIN L. SIMMONS

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
<http://www.psc.state.mo.us>

February 21, 2001

BRIAN D. KINKADE
Executive Director

GORDON L. PERSINGER
Director, Research and Public Affairs

WESS A. HENDERSON
Director, Utility Operations

ROBERT SCHALLENBERG
Director, Utility Services

DONNA M. KOLILIS
Director, Administration

DALE HARDY ROBERTS
Secretary/Chief Regulatory Law Judge

DANA K. JOYCE
General Counsel

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

RE: Case No. GE-2001-393

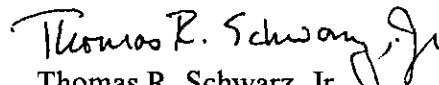
Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **STAFF'S BRIEF**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,


Thomas R. Schwarz, Jr.
Deputy General Counsel
(573) 751-5239
(573) 751-9285 (Fax)

TRS:sw
Enclosure
cc: Counsel of Record

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

FILED²

FEB 21 2001

**Missouri Public
Service Commission**

In the Matter of Missouri Gas Energy's)
Application for a 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.)

Docket No. GE-2001-393

STAFF'S BRIEF

I. Background

On January 18, MGE filed an application for variance from provisions of its tariff contained in Sheets 24.18 and 61.4. Sheet 24.18 provides, among other things, that unless ordered otherwise by the Commission, MGE refunds in excess of \$75,000 received from charges paid and recovered through the PGA applicable to Residential, Small General, Large General and Unmetered Gaslight customers, shall be refunded to such customers as a reduction in PGA rates. Sheet 61.4 provides that revenues received from unauthorized use charges recovered pursuant to Sheet 61.3 of MGE's tariff will be considered gas cost recovery, and used as such in the development of future gas cost recovery during the ACA process.

MGE seeks a waiver of these provisions in two respects. First, MGE proposes to divert specified refunds and unauthorized use charges from the customers entitled to the moneys pursuant to its tariff. MGE proposes that the moneys thus diverted be devoted to providing energy assistance to its low-income residential customers. Second, MGE proposes to return the funds to the selected customers in an accelerated timeframe.

The funds at issue are not insignificant. MGE anticipates collecting from Williams Gas Pipelines Central some \$620,000 of refunds by order of the Federal Energy Regulatory Commission. MGE also anticipates collecting \$356,715 in unauthorized use charges from its transportation customers pursuant to bills it has issued in January for unauthorized usage by transportation customers in December, 2000.¹ MGE thus proposes to divert some \$976,715 from its customers entitled to the funds to its low-income customers.²

MGE proposes to effectuate the diversion by transferring the funds to the Mid America Assistance Coalition ("MAAC"), a not for profit agency which specializes in coordinating and administering a broad spectrum of community based social assistance programs. MAAC has in the past supervised the distribution of funds pursuant to Commission-approved settlements. MAAC proposes to execute MGE's proposed program for a fee of four percent of the amounts distributed. No party challenged MAAC's effectiveness or efficiency.

Midwest Gas Users' Association ("MGUA") and MAAC applied to intervene in this case, and the Commission granted intervention to each. The Commission held a hearing in the case on February 15, 2001, at which all parties appeared.

¹ Midwest Gas Users' Association has filed a motion to intervene in this case, and notes that action taken in this docket should not prejudice the right of transportation customers to verify the accuracy of unauthorized use charges, and to challenge any such charges the customers deem imposed in error.

² MGE also proposes to contribute \$250,000 of its own funds to the hotchpot, bringing the total to well over one million dollars.

II. Argument

This case poses two issues. First, does the Commission have the authority under the statutes to grant the waiver that MGE seeks. Second, if the Commission has such authority, do policy considerations support granting the waiver. The Staff respectfully suggests that the answer to each question is “no”.

A. The statutes do not authorize the waiver.

Because the Commission is a creature of statute, its powers are limited to those conferred by the statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted. *State ex rel. Utility Consumers' Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo banc 1958); *State ex rel. Springfield Warehouse & Transfer Co v. Public Service Commission*, 225 S.W.2d 792, 794 (Mo. App. 1949); *State ex rel. Kansas City v. Public Service Commission*, 257 S.W. 462, 462-463 (Mo. banc 1923).

Further, “[N]either convenience, expediency, or necessity are proper matters for consideration in the determination of the issue here submitted. Either or all of these can only be urged in support of an act of the Commission clearly authorized by the statute.” *Kansas City, supra*, 257 S.W. at 462. The Staff contends that the language of §393.130.2, and §393.140(11) RSMo 2000³ preclude the Commission from granting the waiver sought by MGE.

The starting point for an analysis of the Commission’s authority is the language of the statutes themselves. Section 393.130.2 provides, in pertinent part:

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

³ All statutory references are to RSMo 2000, unless otherwise noted.

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. (Emphasis supplied.)

Section 393.140(11) provides, in pertinent part:

* * * * *

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, . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances. (Emphasis supplied.)

The words of the two sections, read individually or together, prohibit the waiver that MGE seeks. Section 393.130.2 clearly expresses the General Assembly's intent that a public utility shall charge the same rate to all customers for doing a like and contemporaneous service under the same or substantially similar circumstances. There is no suggestion in the record whatsoever that low-income residential customers receive a different service than other residential customers. That being the case, the proposed diversion of credits to the subset of the residential class falls within the prohibited "other device or method" for charging disparate rates.

Similarly, what MGE proposes runs afoul of the provision of §393.140(11). The cited portion of that section clearly prohibits a refund to fewer than all utility customers who are similarly situated. By proposing to provide refunds to only a subgroup of the residential class, MGE's waiver seeks to violate the plain terms of the statute.

The Missouri courts have long held the language of the cited sections to prohibit the preferment of one customer or set of customers to another set of customers taking service under

the same or similar circumstances. In *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 44-45 (Mo. 1931), the Missouri Supreme Court held:

* * * * *

... laws designed to enforce equality of service and charges and prevent unjust discrimination, such as the Missouri act, require the same charge for doing a like and contemporaneous service (e.g. supplying water) under the same or substantially similar circumstances or conditions.

* * * * *

Accordingly, even at common law, it is not admissible for a public service company to demand a different rate, charge, or hire from various persons for an identical kind of service under identical conditions.

* * * * *

But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.

The Court observed in another case "Having two or more rates for the *same* service is the thing forbidden by the non-discrimination statute, Sec. 5645 [now §393.130]." *State ex rel. McKittrick v. Public Service Commission*, 175 S.W.2d 857, 866 (Mo. banc 1943). The purpose of providing public utility regulation was to secure equality in service and in rates for all who needed or desired these services and who were similarly situated. *May Department Stores Co. v. Union Electric Light & Power Co.*, 107 S.W.2d 41, 49 (Mo. 1937); *Reinhold v. Fee Fee Trunk Sewer, Inc.*, 664 S.W.2d 599, 604 (Mo. App. 1984). The Commission has also long held the same opinion. See, e.g., *Civic League of St. Louis v. City of St. Louis*, 4 Mo.P.S.C. 412, 448-453 (1916).

The cases cited above make clear that the classification of utility service is to be based upon the characteristics of the utility service provided, not on a circumstance of the customer.

The proposed waiver flies in the face of judicial construction of the Public Service Commission Law from its very inception more than eighty years ago. The statutes expressly forbid charging one residential customer one rate, and another residential customer another rate. To do otherwise would be to frustrate the very purpose of the law, which is to secure equal treatment for all public utility customers.

The Commission does not have authority under the Public Service Commission Law to grant the waiver sought by MGE.

B. Approval of the waiver is not consonant with sound public policy.

The Commission sets rates and refunds based on principles of cost causation. While the Commission can and does consider factors other than cost in setting rates, MGE does not suggest any standards by which to gauge when a departure from those principles is justified, nor how great the departure can be. If some customers can be deprived of their property, can shareholder property likewise be taken in "proper" circumstances? Precedent declares no, and MGE confirmed as much at hearing. (Tr. p. 45, lines 9-10).

The Commission has long held that ratepayers should not be required to fund utility contributions to charitable causes. *Laclede Gas Company*, 9 Mo.P.S.C. (N.S.) 97, 115 (1960); *Joplin Waterworks Company*, 14 Mo.P.S.C. (N.S.) 280, 286 (1969). That practice is particularly appropriate in the present circumstances. MGE systematically and regularly solicits its customers, through its Neighbors Helping Neighbors Program, to assist low-income residential customers. (Tr. pp. 42-43). Residential customers also are eligible for assistance under the Low Income Home Energy Assistance Program and the Emergency Crisis Intervention Program. (Tr. pp. 121-122). The record also establishes that MGE's Small General Service customers are not

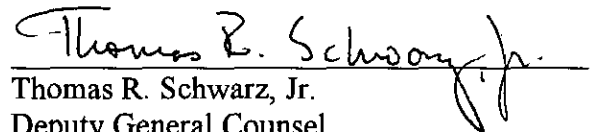
eligible for assistance under Neighbors Helping Neighbors. (Tr. p. 46). Thus, the waiver proposes to take funds from customers who are not eligible for other assistance with this winter's high gas bills, and who have had the opportunity to voluntarily make such transfers, and contribute those funds to a select few customers. The Commission should adhere to its sound past practices, and deny the request for waiver.

III. Conclusion

WHEREFORE, the Staff suggests that the Commission reject MGE's request for a waiver to divert customer refunds, but authorize a waiver of the provisions of MGE's tariff to permit prompt distribution of refunds and unauthorized usage charges pursuant to its PGA tariff.

Respectfully submitted,

DANA K. JOYCE
General Counsel


Thomas R. Schwarz, Jr.
Deputy General Counsel
Missouri Bar No. 29645

Attorney for the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-5239 (Telephone)
(573) 751-9285 (Fax)
e-mail: tschwarz@mail.state.mo.us

Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 21st day of February, 2001.

Thomas R. Schwanz Jr.

Service List for
Case No. GE-2001-393
Revised: February 21, 2001 (SW)

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Gary W. Duffy
Brydon, Swearingen & England P.C.
P.O. Box 456
Jefferson City, MO 65102-0456

Karl Zobrist
Blackwell, Sanders, Peper & Martin LLP
2300 Main Street, Suite 1100
Kansas City, MO 64108

Stuart W. Conrad
Finnegan, Conrad & Peterson
1209 Penntower Office
3100 Broadway
Kansas City, MO 64111

Robert J. Hack
Missouri Gas Energy
3420 Broadway
Kansas City, MO 64111