



MISSOURI GAS ENERGY

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ROBERT J. HACK
Vice President, Pricing & Regulatory Affairs

March 12, 2001

FILED

MAR 15 2001

**Missouri Public
Service Commission**

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102-0360

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

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter, please find an original and eight (8) conformed copies of **Motion for Reconsideration and Application for Rehearing of Missouri Gas Energy and the Mid America Assistance Coalition**.

A copy of this filing has been mailed or hand-delivered this date to counsel of record.

Thank you for bringing this matter to the attention of the Commission. Please call me if you have any questions regarding this matter.

Sincerely,

C: F. Jay Cummings
Thomas R. Schwarz, Jr.
Douglas E. Micheel
Stuart W. Conrad
Jan Marcason
Karl Zobrist
David Hill

Enclosures

FILED

MAR 15 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. GE-2001-393

MOTION FOR RECONSIDERATION AND APPLICATION FOR REHEARING
OF MISSOURI GAS ENERGY AND THE MID AMERICA ASSISTANCE
COALITION

Come now Missouri Gas Energy ("MGE"), a division of Southern Union Company, and the Mid America Assistance Coalition, Inc., ("MAAC") by and through counsel, and pursuant to 4 CSR 240-2.160 and section 386.500 RSMo 2000¹ respectfully submit their motion for reconsideration and application for rehearing.

1. On March 6, 2001, the Commission issued its Report and Order in this matter, which bears an effective date of March 16, 2001. In its Report and Order the Commission denied—by a 3-1 vote—the Application for Variance filed by MGE on January 18, 2001. The Commission majority took this action on the basis of the stated findings that 1) it lacked the legal authority to approve the application (Report and Order, p. 8) and 2) approval of the application was inconsistent with sound public policy (Report and Order, p. 10).

2. The Commission majority is simply wrong in concluding that approval of the application would result in unlawful discrimination. As a consequence, the decision is unreasonable, unlawful, unjust, arbitrary and capricious. Specifically, in the Report

¹ Unless specifically indicated otherwise, all statutory references herein are to RSMo 2000.

and Order the Commission majority either ignores or misconstrues the following provisions of the law:

- A. Section 393.130.2 requires similarity of treatment only for customers “. . . under the same or substantially similar circumstances or conditions.” In this particular case, MGE sought to treat customers in a disparate manner based on differences in income and need. Basing such disparate treatment on differences in income is justified and reasonable due to the significantly greater impact this season’s high gas bills has on lower-income customers than on the balance of MGE’s customer base. Lower-income customers have a correspondingly greater need for assistance with their gas bills this winter than the balance of MGE’s customer base.
- B. Similarly, section 393.140(11) provides for the like treatment of customers only “. . . under like circumstances.” In this particular case, MGE sought to treat customers in a disparate manner based on differences in income and need. Basing such disparate treatment on differences in income is justified and reasonable due to the significantly greater impact this season’s high gas bills has on lower-income customers than on the balance of MGE’s customer base. Lower-income customers have a correspondingly greater need for assistance with their gas bills this winter than the balance of MGE’s customer base.
- C. Regulation and the fixing of rates for public utilities is largely a legislative function. *State ex rel. Laundry v. Pub. Serv. Comm’n*, 34 S.W.2d 37, 43 (Mo. Supreme Court 1931). Consequently, in order to be valid,

Commission action classifying those users or consumers to whom such rates or charges will apply must meet the principle of sound legislative classification, and "[T]he basis of sound legislative classification is similarity of situations or condition with respect to the feature which renders the law appropriate and applicable." *Id.* In *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 36 S.W.2d 947, 950 (1931), the Missouri Supreme Court cited the following quotation with approval: "Arbitrary discriminations alone are unjust; if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination." Recent case law follows similar logic. In construing section 393.130.3, which contains anti-discrimination provisions consistent with those found in section 393.130.2, the Western District Court of Appeals concluded that the statute and the cases discussing it do not prohibit **all** discrimination. "If discrimination is reasonable because of the particular circumstances in the case, rates are not struck down merely because of the dissimilarity." *State ex rel. Office of the Public Counsel v. Pub. Serv. Comm'n*, 782 S.W.2d 822, 825 (Mo.App. W.D. 1990).

The discrimination MGE proposed through the application was not arbitrary; it was based on the extraordinary winter, the extreme difficulty it posed to lower-income customers and the correspondingly greater need of lower-income customers for assistance with their gas bills. The disparate treatment of customers was based on income level differences, and corresponding differences in need. Under the circumstances presented by this winter,

income level and need differences represent “ . . . a reasonable and fair difference in conditions which equitably and logically justify a different rate . . .” such that “ . . . it is not an unjust discrimination.” *State ex rel. City of St. Louis v. Pub. Serv. Comm’n*, 36 S.W.2d 947, 950 (1931). Because the disparate treatment proposed by MGE was based on differing income and need levels, and because such differing income and need levels equitably and logically justify such different treatment under this winter’s extraordinary conditions, it was not an unjust discrimination and was therefore not violative of sections 393.130.2 and 393.140(11).

3. In finding that approval of MGE’s application would be inconsistent with sound public policy, the Report and Order reads as though the Commission majority believes that differentiation among customers can lawfully and reasonably occur only on the basis of differences in the characteristics of the utility service being provided and can never lawfully or reasonably occur on the basis of differences in the characteristics of the customer. This belief is wrong, and demonstrably so by the Commission’s own past actions. For example:

A. MGE’s tariff contains an experimental weatherization program that is available only to lower income customers in Kansas City. (See Sheet No. 96 of MGE’s tariff) If income-based differentiation among customers was absolutely unlawful and unreasonable, as the Commission majority appears to believe, then this weatherization program, which has been in effect for a number of years, would never have been approved.

B. Sheet No. 25 of MGE’s tariff defines residential service as “ . . . gas service supplied at one point of delivery to residential customers for domestic use by the

customer or by members of customer's household . . .". (emphasis supplied)

The same service supplied to the same premise by the very same equipment is transformed to commercial service, charged at the Small General Service rate, if the premise is not occupied by the customer or members of the customer's household (e.g., where the landlord pays the gas bill). Are there truly significant differences in the characteristics of the utility service being provided in these circumstances?

- C. What are the differences between residential and business telecommunications service, other than the identity of the customer, which justify the assessment of a higher rate for business local service than residential local service?

Other examples of differentiation among customers on the basis of the characteristics of the customer rather than on the basis of the characteristics of the service being provided certainly exist. To ignore these past actions, as the Commission majority has done in the Report and Order, is unreasonable, unlawful, unjust, arbitrary, capricious and warrants rehearing or reconsideration.

4. Whether or not the Commission majority, or any portion thereof, decides to change the initial decision and grant the Application for Variance, the Commission would be well advised to grant reconsideration or rehearing for the sole purpose of moderating the language used throughout the Report and Order. MGE made it very clear that the filing of the Application for Variance was based on this winter's extraordinary conditions. (Application for Variance, p. 2, para. 5) MGE also made it clear that it was not seeking to establish precedent to be used at all times on a going forward basis. (Tr. 75-76) Nevertheless, the Commission majority has issued a Report and Order that seems

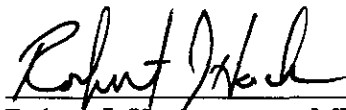
to permanently shut the door on income-based differentiation (and possibly even differentiation based on other customer characteristics) among customers in needlessly strong and unambiguous language. The statutory language which the Commission majority so strongly asserts to prohibit approval of the Application for Variance is in actuality much more subtle and flexible and provides the Commission with substantial bounds within which discretion can be exercised.² The Commission majority in this case should not take it upon itself—as the Report and Order seems to do—to restrict the ability of a future Commission which may actually want to exercise such discretion.

Wherefore, MGE and MAAC respectfully request that the Commission grant

² In fact, this Commission itself just recently voted out another MGE order which acknowledged the substantial discretion granted under the Public Service Commission law. (See, Report and Order [on remand], Case No. GR-96-285, pp. 46-52, dated February 1, 2001). In a similar vein, the Commission majority ought to reconsider the “taking” analysis used in the Report and Order. (Report and Order, p. 10). Before any unconstitutional “taking” can be found, the overall body of customers must be shown to have a property interest in the funds in question. No such showing has been made in this case and 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).

reconsideration or rehearing and approve the Application for Variance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered this 12th day of March, 2001, to:

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