

LAW OFFICE OF  
**DONALD C. OTTO, JR.**  
901 MISSOURI BLVD #163  
JEFFERSON CITY, MO 65101  
PH: (573) 690-2849  
FAX: (573) 632-6711

MARCH 3, 2002

Secretary  
Missouri Public Service Commission  
Governors Office Building  
Jefferson City, Missouri

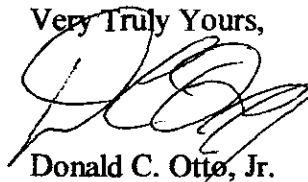
**FILED<sup>3</sup>**  
MAR 05 2002

Re: TXUES v. MGE Case No. GC-2001-593

Missouri Public  
Service Commission

Enclosed please find and original and 8 copies of the Initial Brief of Complainants that I asked to be filed in the above referenced case.

Very Truly Yours,



Donald C. Otto, Jr.

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED<sup>3</sup>

MAR 05 2002

Missouri Public  
Service Commission

In Re:

TXU ENERGY SERVICES, INC., and  
SCHREIBER FOODS, INC

Complainants

vs.

MISSOURI GAS ENERGY, A DIVISION OF  
SOUTHERN UNION COMPANY,

Respondent

Case No. GC-2001-593

COMPLAINANTS' BRIEF

Comes now Complainants, by and through counsel and for their initial brief in the above-styled matter states as follows:

**I. INTRODUCTION**

The instant matter involves a dispute over an "Unauthorized Use Charge" billed to Complainant Schreiber Foods by Respondent. The charge, in the amount of \$58,851.47, was sent to Schreiber in August of 2000 as a result of the lack of nomination of natural gas volumes on behalf of Schreiber during the month of July, 2000 (Rebuttal Testimony of Michael Noack, p. 3). This brief will show that this Charge should not be allowed to stand as Respondent failed to follow its tariff in regards to how such

34

Unauthorized Use Charges are to be billed to the customer; specifically, that no daily bill was sent to Schreiber Foods for these charges.

## II. UNDISPUTED ISSUES.

Many of the facts surrounding this matter are not in dispute. The important items that all parties agree to are as follows:

1. Schreiber Foods is a "transportation customer" of Respondent meaning that Schreiber Foods purchases natural gas from a third party, said gas being transported -- in part by Respondent -- to Schreiber's facility in Missouri. The process whereby Respondent knows how much gas is to be delivered is known as "nomination." Respondent, however, never received any notification of natural gas nomination for Schreiber Foods for July 2000 and, as a result, assessed an Unauthorized Use Charge of \$58,851.47 against Schreiber Foods. (Direct Testimony of Mark Wolf, Edward Mars, Rebuttal Testimony of Michael Noack and Teresa Villanueva)

2. This lack of nomination was a departure from the procedure that had been taking place since June of 1999 (and, indeed, a departure from the procedure that has taken place since July 2000), whereby Complainant TXU Energy Services, Inc. ("TXUES"), with which Schreiber Foods has contracted for natural gas supply, places a nomination on Williams Gas Pipelines computer system for natural gas volumes which are then carried on Williams' pipeline system and would then be passed along to Respondent for Transportation to Schreiber Foods. *Id.*<sup>1</sup>

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<sup>1</sup> TXUES admits that this lack of a nomination is, vis-à-vis Schreiber, TXUES' responsibility, regardless how it took place. However, Complainants do not feel that any party should be penalized for this unintentional, one-time error, especially as MGE has not followed the very tariff it seeks to enforce against Complainants.

3. Although it is submitted that the evidence on this matter is inconclusive, there are only two possibilities for this failure to nominate gas volumes. Either TXUES failed to make the nomination on Williams' computer system as it should have done or Williams' system failed to properly record a nomination that had been properly made. In either event, Respondent was not involved in, or responsible for, the lack of a nomination appearing in Williams' computer system for July, 2000.

4. The Unauthorized Use Charged assessed by Respondent for the entire month of July 2000 was billed to Schrieber foods on a single bill generated in August 2000.

5. Respondent is relying on Sheet 61.3 of its Tariff for the authority to asses such an a Unauthorized Use Charge.

6. Sheet 61.3 of Respondent's Tariff (a copy of which is attached hereto as reference) reads, in pertinent part, as follows:

**UNAUTHORIZED USE CHARGES**

Unauthorized use charges will be assessed to transportation customers for all natural gas volumes taken in excess of customer's authorized gas volumes delivered to a Company's delivery location, for the customer's account, plus any Contract Demand level. Unauthorized use charges will be assessed to transportation customers on a daily basis:

1. during times of and MGE curtailment, and/or
2. during times of an interstate pipeline interruption or curtailment and/or
3. in the event no nomination exists for such customer (zero nomination).

**The Company will bill unauthorized use charges to transportation customers on a daily basis** pursuant to this rate schedule, in addition to any upstream penalties assessed directly to the customer by the delivering pipeline, and/or penalties assessed to the Company by the delivering pipeline, which can be directly attributed to unauthorized use by such customers(s)

(See Noack Schedule MN-2, emphasis added)

### III. THE KEY ISSUE – NO DAILY BILLING VIOLATES TARIFF

#### A. Complainants' Position – A Daily Bill to Schreiber was Required.

Complainants' position on this issue is simple. MGE's tariffs require it to bill a customer on a daily basis for unauthorized use charges. This did not take place. There was, rather than a daily bill, one single bill for the entire month of July 2000 sent to Schreiber Foods which was generated by Respondent in August of 2000.

The tariff is quite unambiguous on this point as it says flatly that "The Company will bill unauthorized use charges to transportation customers on a daily basis...." This is separate from the language earlier that says the Company will "assess" the charges on a daily basis. The tariff is clear. Respondent, in order for the charge to be a valid one, must both calculate and bill the charge on a daily basis. As the charges were not billed to the customer on a daily basis as required by the tariff, the charge should be disallowed.

#### B. "Assess" vs. "Bill"

Unfortunately, as pointed out by the Staff in its testimony, no definitions for the key words on this tariff sheet exists. In general, however, the Courts have held that:

"[W]e analyze a tariff as we do a statute. If...a tariff...is clear and unambiguous, we cannot give it another meaning." *Allstates Transworld Vanlines, Inc v. Southwestern Bell Telephone Company*, 937 S.W.2d 317 (Mo.App 1996). "In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariff's terms are plain and clear to one of ordinary intelligence." *Id.*

*A.C. Jacobs and Company, Inc., et al v. Union Electric Company*, 17 S.W.3d 579, 884 (Mo.App 2000)

It is important to note that (as will be seen again below) the tariff uses both the words "assess" and "bill." In order to be plain and clear to one of ordinary intelligence, there must be a difference in the meaning behind these two words. "Assess" is defined by Webster's New World Dictionary as "to set an amount of (i.e. a tax, fine, etc.)." This makes perfect sense where the word "assess" is used in the tariff: the company must set the amount of the charge on a daily basis, based on the formula set out later on the tariff sheet. But the tariff then switches to the word "bill." By switching terms, a different meaning must be intended. It is submitted that this meaning is clear, unambiguous and obvious: after "setting the amount of" the charge on a daily basis, the customer must be then be billed on a daily basis. And since billing must mean something more than just setting the amount, the word's meaning must be the plain and clear definition to one of ordinary intelligence; that the daily assessed charge as calculated by the company must be sent to the customer. *The customer must be billed daily.*

### C. Staffs Position

#### 1. Staff's Position Does Not Use the Plain Meaning of "Bill"

Staff addresses this issue of what is meant by the word "Bill" on page 13 of the Rebuttal Testimony of James Gray. According to Mr. Gray (line 23) "It ['bill'] can be a verb with two meanings: (1) to present a statement of costs or charges to an entity and (2) to enter on a statement of costs on a particularized list."

Mr. Gray does not give the source of his definition, presumably he used some dictionary that gives the ordinary definitions of words in the order they are most commonly used, since that is the format of his answer. But Mr. Gray then goes on to *not* use the first and most common definition that he himself gives. Instead he uses the

second definition which goes against the plain meaning of the tariff and, as he then interprets it, is no different than the “assessing” requirement earlier on the tariff sheet.

Mr. Gray also neglects the object of the sentence to which the verb is being applied, “transportation customers.” The sentence on the tariff sheet reads, “The Company will *bill* unauthorized use charges *to* transportation customers on a daily basis.... To see that Mr. Gray has used the wrong definition one needs only to insert his two definitions into the sentence instead of the word bill. Using this method one gets”

(1) “The Company will *present a statement of costs or charges* to transportation customers,” or

(2) “The Company will *enter on a statement of costs or on a particularized list* to transportation customers.

The second version clearly makes no sense and goes against the plain meaning of the language of the tariff. The key is that the “bill...to” language eliminates any doubt what the clear and unambiguous interpretation, but was ignored by Staff in its analysis.”

## 2. Staff's Position that Daily Billing is Impractical is Incorrect and Irrelevant

Mr. Gray next (Gray Rebuttal pp 13-14) states that that it would not be practical for Respondent to bill a transportation customer daily since it is possible for the nomination that covers an entire month to be made on the last day of the month. First, this is simply not true. There is nothing to prevent a company from sending a bill to a customer each day that it is supplying gas to it for which no nomination has yet been received that specifically states that no nomination has yet been received for the current month and that if no such nomination is received by the end of the month these are the

charges the customer will be responsible for. Indeed, as will be discussed below, such a system could have great benefits to the customer.

More importantly, it is irrelevant whether or not Staff believes the tariff language to be "practical" or not. "As we have previously stated, a tariff that has been approved by the Commission becomes Missouri law. *Carter's Custom Tile*, 834 S.W.2d at 893" *Allstates Transworld b. Southwestern Bell*, 937 S.W.2d 314, 317 (Mo.App 1996). The Commission approved this tariff with its clear and plain language requiring a daily bill. Such tariffs are applied strictly against both customers and their utilities like any other Missouri statute. (See generally, *Bauer v. Southwestern Bell Telephone Co.*, 958 S.W.2d 568, 570 (Mo.App. 1997) and *A.C. Jacobs*, 17 S.W.3d at 584). As pointed out by the Court in *Jacobs*, A utility company's "proper adherence to its approved rate tariffs" is "a duty imposed by law." *Id.* As will be pointed out again several times below, since Respondent is deemed to know its tariff, if its application is in anyway impractical, then it is incumbent upon it to change the offending language pursuant to 4 CSR 240.010(5).

Thus, even if the application of the tariff language would cause Respondent some practical difficulties (which allegation Complainants do not concede) it does not matter as the tariff must be followed as would any other statute.

**3. The Fact that MGE has had no Problems with this Provision in the Past is Also Irrelevant.**

Staff's final position on this point (Gray Rebuttal p. 14) is that "past business practices seem to indicate that MGE has not had any major difficulty administering that provision in the tariff, indicating that other customers did not expect to receive daily bills" First, of course such a statement is without any support, hearsay and pure speculation. It is just as likely that none of these customers has either realized that a daily



bill is required under the tariff or, if they had read the tariff language, has not deemed the matter worth litigating under their own circumstances.

More importantly, again, the tariff is as binding as a Missouri statute and must have its clear and plain language strictly conformed with. It is totally irrelevant if Respondent has never been “caught” before not following the provisions of its very own tariff. Complainants should not and cannot be penalized for being the first ones to bring this violation to the Commission’s attention.

#### D. Respondent’s Position.

##### 1. The Tariff Language

For the most part, Respondent’s testimony does not give this issue much analysis. Mr. Noack simply asserts that the tariff language does not require that a daily bill be sent to the customer (Noack Rebuttal pp 18-19). Mr. Noack relies, without giving any definitions, on the term daily basis for saying a daily bill is not to be sent. Mr. Noack is correct in stating that the “daily basis” language when talking about “assessing” means the bill is to be calculated daily, but, that is just how the daily bill is to be calculated, not what is to be done with the charges. As does staff, Respondent ignores that the tariff says the company will “bill ...to” the customer the charges on a daily basis (that, indeed, are also to be calculated on a daily basis) .

Mr. Noack simply does not analyze the “bill...to” language of the tariff and even if one tries to read in some sort of definitional or grammatical argument into his testimony, his sentence at line 6 of page 19 shows the clear and plain meaning of the phrase when he states “There are no MGE customers billed on a daily basis that I am aware of.” Here MR. Noack uses the phrase “billed” in its ordinary and plain meaning, in

other words, he is using the *first* definition of "bill" as given by Staff's witness and the same way it is used in the tariff.

Mr. Noack also asserts that since sheet R-47 says that the Company shall render bills at an interval of approximately once a month that that, somehow, obviates the specific requirement of daily billing found on sheet 61.3. (Noack Rebuttal p 19). The very first phrase of Sheet R-47, however, takes care of this argument when it states "*Except as otherwise provided....*" (Noack Rebuttal Schedule MN-3). Sheet 61.3, simply put, "provides otherwise."

## 2. The Difficulty in MGE's Meeting of the Requirement is Irrelevant

Next on pages 20 and 21 of his Rebuttal testimony, Mr. Noack goes on to state how sending a daily bill would, somehow, be confusing and irritating to customers<sup>2</sup> and that to do so would be difficult and expensive to MGE.

First, it is important to note that on line 22-23 of page 20 and continuing on to page 21, Mr. Noack states that such a daily bill *could* be produced. Thus, there is no argument that meeting the requirements of the tariff is impossible. He states thereafter that sending daily bills that might wind-up not needing to be paid (because a nomination is eventually made) would be irritating and confusing to the customer. It is submitted that if the bill is worded properly this would not be the case. The bill simply needs to state that, as of such-and-such date, no nomination has been received and that these are the charges that will be incurred if no such nomination is made by the end of the month. This could be in nice big bold letters so it would not be misunderstood. The bill could, theoretically, even state that the customer should be sure to contact its gas supplier to

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<sup>2</sup> It should not go without note that the only customer whose testimony is before the Commission, Schreiber Foods, wants the daily bills.

ensure that nominations are made on time because it is the customer who is responsible for this bill if the nomination is not made. Bills are sent out every day by companies that include such information such as "disregard if already paid" etc. And ,as Mr. Noack to his credit honestly admits, such could be done in this case.

Mr. Noack does state on page 21 (lines5-6) of his testimony that reprogramming MGE's computers for this task would take "considerable time, effort and expense." Complainants have no way to dispute this, however, it is irrelevant. Complying with the requirements of the tariff is complying with Missouri Law. It does not matter how expensive it is for the company or how much effort is involved. Daily Billing to the customer is required by law and that is what must be done.

Moreover, it should be remembered that *this is MGE's* tariff. MGE is the one that wrote it and presented it to the Commission for approval. If they think the terms are onerous, all they have to do is follow the procedure outlined a 4 CSR 240-40.010 and submit a substitute page to the Commission which will give the Commission at least 30 days notice of the change. If MGE is correct in how time consuming or difficult this process is, then they should have no trouble in having the Commission approve the change. In short, MGE wrote the tariff, MGE sought approval of the tariff, MGE can change the tariff, and they should abide by the tariff until it is changed.

Lastly it should be noted that even under the interpretation given by Staff and Respondent to Sheet 61.3, at least part of the hypothetical procedure proposed my Mr. Noack (utilizing the electronic gas measurement equipment to take a special electronic meter reading each day of no nomination, Noack Rebuttal page 20, lines17-21), *is something that MGE should already be doing.* Staff and respondent agree that the

charges are to be calculated on a daily basis per the formula. Thus, MGE, by its own and Staff's interpretation of 61.3 should be already monitoring daily gas consumption of any entity that does not have a nomination in place since all agree that the charge must be calculated and assessed on a "daily basis" and the key component of the charge is the volume of gas used. If MGE is not currently doing this, which is the clear implication of Mr. Noack's testimony, then this is yet another violation of the approved tariff. If MGE is already monitoring daily usage levels as they should, then, it is submitted, the time and expense in meeting the tariff requirements would be minimal and a one-time additional expense.<sup>3</sup>

#### **IV. WHY DAILY BILLING IS IMPORTANT FOR THE CUSTOMER.**

##### **A. In General**

As all of the parties have shown through their pleadings and testimony, the provision of natural gas is a much more complicated business than it was just several years ago, with customers having a number of options regarding from whom and how to receive the product. In many cases, such as the instant one, the ultimate customer has delegated the responsibility to make the necessary arraignments for the provision of the natural gas to a third-party. Yet it is the customer that will bare the brunt of any penalties, charges, shortages of product, or cut-offs that result because nominations where not made or not made in the right manner or not made for the correct amount of product. Of course,

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<sup>3</sup> It should be noted that this is not just a rhetorical argument, but one which could have serious implications. Unauthorized usage charges are also incurred under periods of curtailment or interruption as well as zero nomination and are calculated, in part, at "2. 125% of the currently effective Purchased Gas Adjustment rate, excluding the refund factor, if any, plus 3. all interstate pipeline penalties and other charges...." As there is nothing that prevents the Purchased Gas Adjustment rate or the refund factor from changing during any given month, or that the penalties from interstate pipeline companies might vary during the month, it is important to know how much product was used on which day.

since we are generally dealing with businesses, such situations could cause shutdowns, layoffs, increased expenses and lost business that could be very detrimental to the public.

Thus, a requirement that the ultimate customer be given clear and explicit notice of the fact that it is using gas even though no nomination has yet been made and one that also notifies the customer of the charges he will incur if the nomination is not made in time, is vital. As in the instant case, the ultimate customer is relying on others to get the nominations made properly. If something goes wrong "upstream" of the customer, he has no guarantee of knowing what the situation is unless he receives clear information in writing that notifies him of the lack of nomination and the consequences. As the testimony of Schrieber Foods showed, had Schreiber received daily bills such as those required by the tariff, it would have known both that something was not right in the process, would have right in front of the responsible persons the consequences if the situation were not corrected (via the bill) and would have made sure the nomination took place so that no charge would have been levied (Mars Direct, pp 4-5)

With daily billing then, the customer has the ability to protect itself and to monitor the situation. For example, in Mr. Noack's hypothetical (Noack Rebuttal pp20-21) perhaps the customer would not be too concerned with the first several bills it received for daily gas usage. But once it got to the end of the month and the bills kept coming in and the charges kept adding up, you can rest assured that someone would place a call or two to the third-party supplier to see what was going on and to make sure the nomination was made in time. When looked at it from this light, it becomes obvious that the switch in the language from "assess" to "bill...to" was not an accident, but an intentional attempt to protect the customer from getting harmed.

B. Importance in the Instant Case – What IS in Dispute.

At the start of this brief, a number of items that were not in dispute in this matter were set out. A review of the testimony of Mr. Wolf, Mr. Mars and Ms. Villanueva, however, shows that there is quite a dispute on a number of issues, specifically regarding who was or was not contacted by MGE regarding the lack of a nomination on behalf of Schreiber Foods. The undersigned notes that the testimony on this point is at times conflicting and, to some extent, comes down to a "swearing contest" between the parties as to what was told to whom and when.

This, of course, is not unusual when one is dealing with phone conversations, real and alleged. Without voice recordings, recollections will always vary and it is almost impossible to prove who said what to whom or when and even more impossible to prove that something wasn't said. This shows the importance of the daily bills in protecting the customer. By providing a written notification to the customer that no nomination was made and what the charges will be if the nomination is not made in time, there can be no dispute as to what the customer knows and when it knows it.

In this manner, the daily billing requirement protects the utility as well by providing a written record of its notice to the customer which is not only required specifically by 61.3, but is also implied by the duty to show reasonable diligence as found in the gas transportation contract included in MGE's tariff. Since, as pointed out by Staff, unauthorized usage can also (in some circumstances but, it is noted, not in this case) have a negative impact upon other customers and ratepayers, the daily billing requirement protects the public as well by making it less likely that unauthorized usage will occur.

Respondent might attempt to argue, on this point, that the requirement of daily billing in order to notify the customer of the problem was not needed in this case because, if one accepts MGE's version of events, attempts to contact various persons about the nomination were made. Such an argument, if made, also is irrelevant. The tariff requires the daily bill. By following the tariff and providing the daily bill, not only does the customer know that no nomination has been made, but also sees the consequences of that fact by the dollar amount on the bill. It is one thing to leave a message to someone who may not understand the natural gas business that no nomination was made, and quite another to have a bill sent that shows how the charges are piling up.

Of course, short of a recording no party can "prove" beyond recollections what was or was not said in a phone call, or even if phone calls were successfully made. That is one of the key reasons why specific written notice and billing requirements are in tariffs so one does not have to rely on what may or may not have been done or said outside the four corners of the tariff requirements. Furthermore, it is respectfully submitted that, no customer would be allowed to ignore the wording of a tariff, like paying their bill on time, even if was shown that they "meant well." or "tried hard."

## **V. CONCLUSION**

The requirement to bill the unauthorized use charges to the transportation customer on a daily basis is explicit and unambiguous. Respondent did not bill Schrieber Foods on a daily basis and, apparently, did not "assess" the charges to Schrieber on a daily basis either. The definitional, grammatical and practical implication arguments all

fall to the Complainants. That in and of itself closes the matter. The tariff was not followed, so the charge should be disallowed.

All that leaves is the very dangerous position that, since this provision is "really not needed" or "difficult to implement" or "might be confusing" or "the company may have tried to notify the parties of the problem in ways other than what the tariff requires" that the tariff language should be ignored. Not only does this fly directly in the face of the Court rulings cited above but, if accepted, puts in question any tariff language that a company, at some point, finds inconvenient or no longer needed. Such a result is not only improper, it would destroy the entire concept of tariffs on file with rules and procedures and rates that must be followed by both companies and customers. One wonders how far a ratepayer would get by not paying a bill based on the grounds that the filed tariff provisions are just too difficult to abide by. Indeed Complainants themselves should be able to take advantage of such arguments by showing that they "intended" or "tried to" meet the requirements of the tariff.

If following the terms of its own tariff is a major problem for MGE, which the Complainants' deny, then all they have to do is file a revised tariff page and correct the problem. Perhaps they can prove that the costs do outweigh the benefits or, perhaps, they can come up with a better way to meet the same goal. Until then, however, they must be held to the same standard that its customers are held to and the terms of the tariff must be met.

In short, MGE wants to strictly hold Complainants to the terms of the tariff, even though it is clear to all that the lack of nomination was a one-time, unfortunate, but

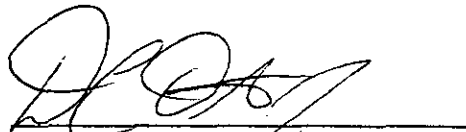


unintentional mistake that harmed no one, while at the same time not be held strictly to the terms of the tariff that apply to it.

As this cannot be allowed to happen and as MGE must be held to the clear and plain terms of its own tariff, the outstanding Unauthorized Use Charge eventually billed to Schrieber Foods should be disallowed.

WHEREFORE, Complainants respectfully pray for a Report and Order in this matter in their favor which disallows the Unauthorized Use Charge in question and for whatever further relief the Commission deems appropriate and lawful.

Respectfully Submitted



Donald C. Otto, Jr. #33844  
901 Missouri #163  
Jefferson City, MO 65101  
(573) 690-2849 phone  
(573) 632-6711 fax  
donottojr@yahoo.com

ATTORNEY FOR COMPLAINANTS

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above pleading was hand-delivered to counsel for all parties of record the 5th day of March, 2002

