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March 18, 2002

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RE: Case No. GC-2001-593

FILED
MAR 18 2002
Missouri Public
Service Commission

Dear Mr. Roberts:

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

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,

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LLS:sw
Enclosure
cc: Counsel of Record

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

FILED

MAR 18 2002

Missouri Public
Service Commission

TXU Energy Services, Inc. and Schreiber)
Foods, Inc.)

Complainant,)

v.)

Missouri Gas Energy, a division of)
Southern Union, Co.,)

Respondent.)

Case No. GC-2001-593

BRIEF OF THE STAFF

COMES NOW the Staff of the Missouri Public Service Commission and submits its brief on the issues in this case:

I. INTRODUCTION

This case involves a complaint by Schreiber Foods (Schreiber), an international food company with locations in Missouri, and TXU, a large Texas-based energy services company, against Missouri Gas Energy (MGE). (Gray Rebuttal, Exh. 3A, p. 3-5).

Schreiber's complaint is that it was charged an unauthorized use charge under MGE's tariff for its use of natural gas in July 2000, when it took gas without making a nomination. Schreiber claims that MGE is required by its tariff to send Schreiber a daily bill, and that MGE did not do so. The issue is whether Schreiber states a defense to paying a tariffed charge.

Staff will demonstrate that Schreiber has no defenses against payment of the charge and that the complaint should be dismissed. Staff supports dismissal on the basis of two applicable and significant policies. The first policy reason that endorses dismissal of the complaint is the very purpose of the unauthorized use charge itself. The charge is designed to protect firm

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customers, who are primarily residential consumers, from unauthorized use of natural gas by large industrial transportation customers. (Noack Rebuttal. Exh. 4, p. 10-11).

The second important policy reason is the filed rate doctrine, the basis of which is the principle that once a rate is approved by a regulatory agency as just and reasonable, it becomes the lawful rate and it is not subject to collateral attack. McBride & Son Builders, Inc. v. Union Elec. Co., 526 S.W.2d 310, 314 (Mo. 1975). It would be discriminatory to allow some ratepayers to escape paying the lawful rate by taking legal action, while those who do not sue pay the lawful rate. Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568 (Mo.App. 1997).

II. FACTS

Schreiber is a transportation customer of MGE. Transportation customers purchase natural gas and arrange for transportation of the natural gas to their facilities. Under MGE's tariff, unauthorized use charges apply if a transportation customer receives natural gas volumes that exceed the volumes that have been nominated for that customer to be delivered on MGE's system. (Gray Rebuttal, Exh. 3A, p. 6).

In July 2000, Schreiber took natural gas from MGE's system without authorization. Schreiber is a transportation customer of MGE, which means that Schreiber has assumed the responsibility of purchasing its own natural gas and arranging for interstate transportation to MGE's local distribution system. (Noack Rebuttal, Exh. 4, p. 5). Schreiber contracted with TXU to make arrangements to purchase natural gas and have it delivered to its Mt. Vernon, Missouri facility. (Gray Rebuttal, Exh. 3A, p. 5). TXU contracted with wholesaler Williams Gas Central, to provide interstate transportation of a certain amount of gas to MGE monthly.

Each month, Williams transports the amount of natural gas that TXU nominates for Schreiber to MGE's city gate in Mount Vernon, Missouri. (Gray Rebuttal, Exh. 3A, p. 5). MGE then provides the intrastate transportation of the natural gas to Schreiber's facility in Mt. Vernon.

The process apparently worked smoothly until July 2000 when TXU failed to make a nomination for natural gas with Williams. TXU attempts to share this blame with Williams (Complainant Br.at 3) but review of TXU internal emails indicates that TXU knew on July 5, 2000, that there was a problem with making the nomination (Noack Rebuttal Exh.4, p. 12, 14) and failed to remedy the problem. TXU had the entire month to resolve the nomination problem and failed to do so. (Noack Rebuttal, Exh. 4, p. 14). Making nominations is the responsibility of the customer. (Gray Rebuttal, Exh. 3A, p. 8). MGE is not responsible for any part of that process and, in fact, has no authority to make nominations for a customer. (Noack Rebuttal, Exh. 4, p. 6). MGE simply provides intrastate transportation.

If no nomination is made, Schreiber is using gas from MGE's system supply when they have not put any gas into the system. (Noack Rebuttal, Exh. 4, p. 10). This happened in July, 2000. MGE's tariffed unauthorized use charge applies in this situation. (Gray Rebuttal, Exh. 3A, p. 6).

MGE became aware of the lack of nomination, (Gray Rebuttal, Exh. 3A, p. 7) and, even though it had no obligation whatsoever to do so, contacted Schreiber more than once and spoke with the plant manager. (Villanueva Rebuttal, Exh. 5, p. 4). MGE also contacted the very person at TXU who was responsible for the nomination and was brushed off. (Villanueva Rebuttal, Exh. 5, p. 5). Despite MGE's efforts, no nomination was ever made for Schreiber's Mt. Vernon plant for July, 2000. The unauthorized use charge applies in this situation.

III. BURDEN OF PROOF

As Complainant, Schreiber has the burden of proof. The Commission has long held a complainant to the burden of proof with its attendant risk of nonpersuasion (*see for example Tel-Central of Jefferson City v. United Telephone Co.*, 29 Mo.P.S.C. (N.S.) 584 (1989) (“Tel-Central has elected to proceed by complaint and by so doing assumes the burden of proof and the risk of nonpersuasion.”)). The burden of proof rests with the complainant in cases, where, such as here, the complainant alleges that a regulated utility has failed to take some action under its tariff and that that failure excuses Complainant from paying a tariffed charge. Schreiber must establish all the facts necessary to support the relief it seeks. Schreiber admits that no nomination was made for natural gas for Schreiber in July 2000. (Complainant Br.at 2). Schreiber has failed to demonstrate that its claim of inadequate notice by MGE defeats its obligation to pay the tariffed rate. The filed rate doctrine provides little relief for a customer from paying a tariffed charge because to do so would result in unjust discrimination. *Bauer*, 958 S.W.2d 568 (Mo.App. E.D. 1997). Additionally, Schreiber has not presented any evidence to challenge the policy behind the unauthorized use charge, to protect firm customers from unauthorized use of natural gas by large transportation customers.

In summary, Schreiber has failed to prove that the language of the tariff requires MGE to send a daily bill to its customers who are using gas without authorization. Schreiber has failed to provide any argument to overcome the stringent requirements of the filed rate doctrine. Finally, Schreiber has not shown that the policy behind the unauthorized use charge should be waived in this situation. Schreiber has not met its burden of proof. The complaint must be dismissed.

IV. DISCUSSION

1. Should Schreiber Foods be required to pay an unauthorized use charge for gas used in July 2000?

Yes. Staff has established three reasons that Schreiber should not escape payment of the unauthorized use charge, and that the complaint should be dismissed. First, Schreiber does not deny that it used natural gas from MGE's system when no nomination had been made on the system. TXU's failure to make the required nomination for delivery of natural gas by Williams to MGE resulted in Schreiber using gas when it had not put any gas into the system. The circumstances under which unauthorized use charges are assessed are described in MGE's tariff:

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. Unauthorized use charges will be assessed to transportation customers on a daily basis.

MGE tariff sheet 61.3. (Gray Rebuttal, Exh. 3A, Schedule 2).

The tariff further explains that there are three ways that a transportation customer can take gas in excess of the authorized amount:

Unauthorized use charges will be assessed to transportation customers on a daily basis:

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

MGE's tariff sheet no. 61.3. (Gray Rebuttal, Exh. 3A, Schedule 2).

In this case, it was the third circumstance that triggered the unauthorized use charge. (Gray Rebuttal, Exh. 3A, p. 6). Schreiber used gas from the MGE system when no nomination had been made on the system.

In its brief, Schreiber claims that the blame may rest with Williams, (Complainant Br. at 2), but TXU internal emails show that TXU failed to make the required nomination of gas on the Williams' system, so Williams had no "order" to deliver any gas for use by Schreiber to MGE's city gate in Mt. Vernon. That is what resulted in unauthorized use charges being assessed to Schreiber Foods. This is a tariffed rate and Schreiber is not permitted to make a collateral attack on an approved, filed tariff. If a statutory review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding. State ex rel. Mid-Missouri Telephone Co. v. Public Service Comm'n., 867 S.W.2d 561, 565(Mo.App. W.D. 1993); §386.550, RSMo 2000, "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." *See also* McBride & Son Builders, Inc. v. Union Elec. Co., 526 S.W.2d 310, 314(Mo. 1975).

Turning from tariff issues to policy issues that govern this case, Staff will show that, not only does Schreiber owe the charge, but also that the complaint must be dismissed because of the policy underlying the unauthorized charge itself. This charge is imposed on transportation customers who use natural gas from the system when they have not put any gas into the system. The policy behind imposing such a charge is that unauthorized use by large transportation customers might endanger MGE's firm customers. Firm customers are typically residential customers and unauthorized natural gas use by large transportation customers might leave inadequate gas for firm customers. That is why transportation customers are required to inform MGE of their expected use by making a nomination for natural gas. If large transportation customers use gas without notification to MGE through nomination, and without adding any gas to the system, there is the potential for harm to other customers.

This is the reason that MGE's firm customers receive all revenues from this charge. MGE does not retain any portion of the unauthorized use charges, but instead the revenues are passed along to the firm natural gas customers through the actual cost adjustment process. (Gray Rebuttal, Exh. 3A, p. 9).

The second policy reason that the Commission should dismiss this complaint in favor of MGE, is the filed rate doctrine. Not only is Schreiber making a prohibited collateral attack on an approved tariff, Schreiber raises what might be considered to be an equitable defense to the filed rate doctrine, which also prohibits collateral attacks. Schreiber asserts that it should not pay this unauthorized use charge, despite not having made a nomination for gas, because MGE should have sent Schreiber a daily bill. Schreiber suggests that because MGE did not physically send Schreiber a bill every day of the month, it should be excused from paying the tariffed charge. That defense is a collateral attack which is prohibited and the defense also fails under the filed rate doctrine.

Under the filed rate doctrine, equitable defenses are impermissible, so to allow Schreiber to escape paying the filed tariff charge would violate the filed rate doctrine. "The filed tariff, or filed rate, doctrine governs a utility's relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action. The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs." Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568 (Mo.App. E.D. 1997). Schreiber is charged with knowledge of the tariff and the unauthorized use charge, and that the charge will apply if they or their agent fail to make a nomination. "Similar to laws, all Missouri citizens are presumed to know the filed

tariffs,' and the fact that MGE's did not send a bill on a daily basis is "not actionable." Uhle v. Sachs Elec., 831 S.W.2d 774, 777 (Mo.App. 1992).

Perhaps the leading case in Missouri on the filed rate doctrine and its prohibition against equitable defenses is Bauer v. Southwestern Bell. In the *Bauer* case, Bauer purchased a tarified service to block 900 calls. When Bauer received bills for similar calls using the 800 area code, Bauer sued based on the equitable defenses of, among other things: fraudulent omission, negligent omission, breach of contract, breach of implied covenant of good faith and fair dealing. The court dismissed the case based on the filed rate doctrine. Bauer argued that this doctrine should not apply because he was alleging fraud. The Court disagreed saying "[n]either the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the terms of the tariff." citing Teleconnect Co. v. U.S. West Communications, Inc., 508 N.W.2d 644, 647 (Iowa 1993). The court went on to explain that "a customer of a utility has no cause of action against a utility for alleged negligent or [even] intentional misquotation of a tarified service." *Teleconnect* at 647. Courts that have considered the fraud issue almost unanimously have rejected the notion that there is a fraud exception to the filed rate doctrine." *Id.*

Schreiber is alleging something much less serious than fraud by claiming that MGE should have notified Schreiber, by sending daily bills, that no nomination for gas had been made. Schreiber is charged with knowledge of the tariff and the effect of the unauthorized use charge and even if MGE were required to send such a bill that would not be a defense. Uhle v. Sachs Elec., 831 S.W.2d 774, 777 (Mo.App. 1992).

The policy reasons that Schreiber's claim is not actionable and must be dismissed are the same policy considerations that underlie the *Bauer* court's decision, the prevention of discriminatory application of filed rates. 958 S.W.2d 568. Schreiber is not alleging fraud, but is

instead alleging that MGE neglected to bill Schreiber daily. Staff strongly disagrees that the tariff requires MGE to do more than post the charge to a customer's bill on a daily basis. Even if the tariff made such a requirement it would not excuse Schreiber from paying the charge. "The rationale behind applying the filed tariff doctrine [even if there] are allegations of fraud is to prevent 'discrimination in rates paid by consumers because victorious plaintiffs would wind up paying less than non-suing ratepayers.'" 958 S.W.2d at 570. The alleged actions of the utility in the *Bauer* case did not excuse Mr. Bauer from paying the filed rate. Similarly, in this case, any alleged breach of the tariff provisions by MGE does not excuse Schreiber from paying the tariffed charge. Schreiber admits that no nomination was made for July 2000. When combined with the fact that the tariff language is clear and unambiguous in defining the circumstances under which the charge will apply, and the policy of nondiscriminatory application of the tariff, it is obvious that Schreiber has no defense against payment of the charge.

The *Bauer* court concluded "that the filed tariff doctrine precluded Bauer's action against SWBT as a matter of law" and the court upheld the trial court's grant of summary judgment in favor of SWBT. *Bauer* at 571. Accordingly, the Commission should dismiss this complaint.

The complaint should be dismissed because Schreiber violated the tariff, has no defense under the filed rate doctrine and its unauthorized use of gas from the system could have created the potential for harm to other customers.

2. Did Missouri Gas Energy (MGE) do what was required by its tariff?

Yes, the answer to this question is that MGE actually did more than was required of it under its tariff.

Schreiber attempts to avoid its responsibility under the tariff by claiming that the tariff requires MGE to send a bill to Schreiber daily for the unauthorized use charge. (Gray Rebuttal,

Exh. 3A, p. 11). This is really a claim that if Schreiber had received such a bill, it would have had notice that no nomination had been made and could have acted on that notice.

(Complainant. Br. at 12).A review of the facts and the law reveals the falsity of that contention.

First, the facts. Schreiber was notified that no nominations had been made. In fact, even though there is no requirement under its tariff to do so, MGE contacted both Schreiber and TXU, and apparently received a brush-off from TXU. Notice was not really necessary, however, because TXU was fully aware, in other words, TXU had actual knowledge, that it had not made any nomination of gas for Schreiber.

Teresa Villanueva contacted Schreiber and spoke with a gentleman who identified himself as the plant manager. (Villanueva Rebuttal, Exh. 5, p. 4). In addition, Schreiber's agent, TXU, was notified. (Villanueva Rebuttal, Exh. 5, p. 4). TXU had the responsibility to make the reservation and by mid-month July 2000, TXU had actual knowledge that it had not made the nomination. (Noack Rebuttal, Exh. 4, p. 12). TXU had actual knowledge of the failure to nominate, but that knowledge made no difference in its actions. Even if MGE were required to send a bill on a daily basis, Schreiber has failed to prove that such additional notice would have made any difference in the outcome.

MGE did all that it was required to do under its tariff. It provided a regular supply of natural gas even though Schreiber had no nomination for the month of July 2000. (Gray Rebuttal, Exh. 3A, p. 12). That is what MGE's tariff requires:

8. Company shall use reasonable diligence to provide a regular supply of natural gas subject to the priority of service provisions and other terms of Company's filed tariffs, but does not guarantee such supply. Company does not assume responsibility for interruption of service, whether caused by inadequacy of supply, equipment, facilities or because of uncontrollable forces, except when such interruption is the result of reckless, willful or wanton acts of Company, its agents or employees.

There is no specific, tariffed requirement for MGE to contact TXU or Schreiber Foods in the event that no nomination is made. MGE's tariff further provides:

Unauthorized use charges will be **assessed** to transportation customers on a **daily basis**:

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 customer(s). (MGE's tariff sheet no. 61.3)

(Gray Rebuttal, Exh. 3A, p. 12-13).

A tariff filed with the Commission and approved "is more than a mere contract; it is the law. Forte Hotels, Inc. v. Kansas City Power & Light Co., 913 S.W.2d 803 (Mo.App. W.D. 1995). (citation omitted). The Court [analyzes] "a tariff as [it does] a statute. If ... a tariff ... is clear and unambiguous, we cannot give it another meaning. 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." A.C. Jacobs and Co., Inc. v. Union Elec. Co., 17 S.W.3d 579, 584 (Mo.App. 2000) (citations omitted).

Staff construes the tariff language to permit MGE to assess unauthorized use charges to Schreiber Foods on a daily basis and allows MGE to enter the unauthorized use charges to Schreiber Foods' monthly bill on a daily basis, but does not require MGE to send a bill to a customer on a daily basis. (Gray Rebuttal, Exh. 3A, p. 12-13). We are all familiar with this process. This is what a hotel does, it posts the daily charges to a customer's bill but does not present the bill to a customer daily, but instead presents the bill upon checkout.

Mr. Gray did use a dictionary to define the term "bill." He testified that it is his expert opinion that the meaning of this term in the tariff "requires MGE to enter the daily unauthorized use charges to Schreiber Food's monthly bill." (Gray Rebuttal, Exh. 3A, p. 13).

Complainant's assertion that Mr. Gray chose the wrong definition because a dictionary gives the ordinary definitions of words in the order they are most commonly used, so Mr. Gray should have used the first definition listed, "to present a statement of costs or charges to an entity" may sound logical at first but is, in fact, absurd. (Complainant Br. at p. 5). Dictionaries do not give definitions in the order they are most commonly used. Some words may have preferred pronunciations but they do not have preferred definitions that are listed first.

In fact dictionaries vary considerably. The Webster's dictionary defines the verb "bill" as 1 to make out a bill of (items); list 2 to present a statement of charges to. WEBSTER'S NEW WORLD DICTIONARY 138(3rd College ed. 1988). Mr. Gray chose the definition that made the most sense when the tariff is read considering practical applications and the purpose of the tariff. (Gray Rebuttal, Exh. 3A, p. 13).

Complainant attempts to prove its point by substituting definitions for the word "bill" in the tariff. (Complainant Br. at 6). In the many cases Staff has reviewed concerning statutory construction, not a single case involved substituting the definition of a word for that word in the statute and then determining whether the sentence was grammatically correct.

When construing statutes, the courts are concerned not with substituting words but with determining the legislative intent by giving words their plain and ordinary meaning. "Absent statutory definition, words used in statute will be given their plain and ordinary meaning as derived from dictionary." Columbia Athletic Club v. Director of Revenue, 961 S.W.2d 806 (Mo. 1998). The courts also attempt to give the statute a reasonable result and read all of the sections in *pari materia*. Russell v. Missouri State Employees' Retirement System, 4 S.W.3d 554, 557 (Mo.App. 1999).

The reason or policy for the tariff has been discussed above. The Southern District recently stated that the purpose of statutory construction is to give weight to the purpose of a statute. "In making such determination we must consider and give weight to the object sought to be accomplished, the manifest purpose of the act; and we avoid, if possible, any construction which will lead to absurd or unreasonable results." State ex rel. Quest Communications Corp. v. Baldridge, 913 S.W.2d 366, 369 (Mo.App. S.D. 1996). The purpose of this statute is to protect MGE's firm customers from the potential injurious effects of unauthorized use of natural gas by transportation customers. (Noack Rebuttal, Exh. 4, p. 10). To define "bill" as requiring MGE to send a daily bill would lead to unreasonable results as described by MGE. (Noack Rebuttal, Exh. 4, p. 19-21).

CONCLUSION

This complaint should be dismissed. Schreiber owes this charge. Schreiber's defense that it should have been notified fails because Schreiber failed to prove that it would have made any difference in the outcome, and such defenses are not permitted under the filed rate doctrine. In addition, the policy reasons noted by Staff, prevention of discrimination under the filed rate doctrine and the policy behind the unauthorized use charge, to protect firm customers, support dismissal.

WHEREFORE, the Staff submits that the complaint must be dismissed.

Respectfully submitted,

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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 18th day of March 2002.



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