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March 18, 2002

Executive Secretary  
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**FILED**  
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Missouri Public  
Service Commission

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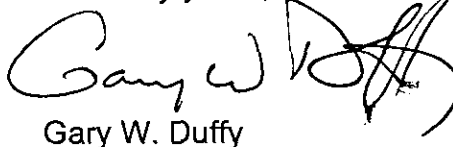
**RE:** TXU Energy Services, Inc. and Schreiber  
Foods, Inc. v. Missouri Gas Energy  
Case No. GC-2001-593

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding, pursuant to the procedural schedule, please find an original and eight copies of the Reply Brief of Missouri Gas Energy.

If you have any questions, please give me a call.

Sincerely yours,

  
Gary W. Duffy

Enclosures

cc w/encl: Office of Public Counsel  
Lera Shemwell, Office of the General Counsel  
Donald C. Otto, Jr.  
Mike Noack

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

TXU Energy Services, Inc., and )  
Schreiber Foods, Inc. )  
 )  
Complainants, )  
 )  
v. )  
 )  
Missouri Gas Energy, a Division of )  
Southern Union Company, )  
 )  
Respondent. )

Case No. GC-2001-593

**FILED**  
MAR 18 2002  
Missouri Public  
Service Commission

**MGE's REPLY BRIEF**

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MISSOURI GAS ENERGY, A DIVISION OF  
SOUTHERN UNION COMPANY

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## **I. SUMMARY**

This complaint should be dismissed because the Complainants (TXUES and Schreiber Foods) have not proven that Missouri Gas Energy violated its tariff. This is a situation where a customer's agent failed to do what was required in order to place a nomination with an interstate pipeline. MGE's tariff is explicit that when no nomination is made for a month, unauthorized use charges will be assessed. MGE followed its tariff and assessed the charge. In an attempt to avoid the charge, the customer's agent makes a semantic argument that creates a ridiculous new duty for MGE to bill a customer every day. That duty does not exist.

It is undisputed that no nomination for Schreiber Foods was registered with the interstate pipeline (Williams) for transportation of natural gas for the month of July 2000, although it was the job of Schreiber's agent, TXUES, to make the nomination. This was either (a) the failure of TXUES to properly make the nomination in the first place, or (b) the failure of Williams somehow to receive the nomination, coupled with the subsequent failure of TXUES to correct the problem in a timely manner. MGE was not a part of that nomination process. In any event, no nomination was made for Schreiber for July 2000. Schreiber went ahead and took natural gas without a nomination in place.

There are clearly stated consequences for the failure of a customer to make a nomination. MGE's tariff says an unauthorized use charge will be assessed "in the event no nomination exists for such customer." (Sheet 61.3) Since there was no nomination, an unauthorized use charge of \$58,851.47 was assessed. The amount of the charge relates directly to the amount of gas used. There is no dispute concerning

the amount of the unauthorized use charge which has been assessed.

The only argument now offered by TXUES and Schreiber in support of the complaint is a strained and erroneous interpretation of the tariff. TXUES and Schreiber argue that MGE should have sent a bill to Schreiber every day of the month in July 2000 until presumably someone got around to making a nomination for Schreiber. This is a ridiculous and erroneous interpretation of the tariff and is contrary to the notion that if transportation customers are sophisticated enough to purchase their own gas, they should be required to manage that supply. The evidence shows MGE complied with the requirements of its tariff after the customer and its agent failed to do what was required of them. The customer and the agent are simply attempting to shift blame for their own failure to MGE. The complaint should be dismissed.

## **II. FACTS**

### **A. Procedural History**

The formal complaint initiating this case was filed on April 20, 2001. The Commission issued a Notice of Complaint to MGE on May 9, 2001, giving MGE thirty days in which to file an answer. MGE timely filed an answer to the complaint on June 7, 2001. On December 21, 2001, MGE filed a Motion for Leave to File Amended Answer and a First Amended Answer. By Order dated January 28, 2002, the Commission granted the motion.

The complainants filed prepared direct testimony from Mr. Wolf and Mr. Mars in October 2001. MGE and the Staff filed prepared rebuttal testimony in December 2001.

An evidentiary hearing was scheduled for February 19 and 20, 2002. Because of the belief of the parties just before the hearing that there were few, if any, facts in dispute, and that there was little to be gained by bringing witnesses from great distances when no cross-examination was anticipated by any party, the parties agreed to submit this case to the Commission on the basis of the pre-filed testimony and waive cross-examination. Thus, this recitation of the facts is developed from those exhibits and the pleadings.

## **B. Factual History**

Schreiber Foods manufactures cheese and frozen food products at a plant in Mt. Vernon, Missouri. (Mars direct, Ex. 1, p. 1) Schreiber is a natural gas customer of MGE at that plant.

Schreiber is a "transportation customer" which means it receives a different type of service than a residential customer of MGE. (Noack rebuttal, Ex. 5, pp. 5-6) Transportation customers have chosen to handle their own gas supply. They make their own arrangements for the natural gas itself from a broker or a producer, and they make their own arrangements to have the natural gas transported to where they need it. That transportation usually involves an interstate natural gas pipeline, for example, Williams Gas Pipelines Central. (Ex. 5, p. 6) After the customer's gas is transported through the interstate pipeline, it is transported by MGE over MGE's distribution system to the customer's location.

Williams, as an interstate pipeline regulated by the Federal Energy Regulatory Commission (FERC), has its own procedures and requirements governing how someone can transport gas over its pipeline. Those procedures are well-defined. (Gray

rebuttal, Ex. 3, p. 6) One of those is a requirement for the customer to make a nomination each month of a certain amount of gas. (Ex. 5, p. 6) In simple terms, a customer is required to tell the pipeline -- prior to the last day of the month -- how much natural gas it is going to be transporting for that month. Williams' tariff allows such a nomination to be made up to the last day of the month. (MGE Answer ¶ 29) In other words, if a nomination had been made for Schreiber prior to the last day of July 2000 in this situation, MGE would not have been required to assess any unauthorized use charge for that month. (Ex. 5, p. 14)

Schreiber contracted with its agent, TXU Energy Services (TXUES), to provide natural gas and perform nominations for Schreiber. (Wolf direct, Ex. 2, p. 1, Complainant's Brief, p. 2) Schreiber has been a customer of TXUES since June of 1999. (Id.) Pursuant to a contract between TXUES and Schreiber, TXUES is supposed to nominate volumes of natural gas to meet Schreiber's needs with Williams via a computer. (Ex. 2, p. 2) Williams, in turn, electronically notifies MGE (and other local distribution companies) of these nominated volumes. (Id.) This is accomplished over the internet with an electronic bulletin board. (Villanueva rebuttal, Ex. 4, p. 3; Ex. 3, p. 7)

TXUES did what it was supposed to do regarding making monthly nominations from June 1999 until July 2000. (Ex. 1, p. 2; Ex. 2, p. 2) TXUES routinely makes nominations for many customers. It is an integral part of its business. (Ex. 3, p. 7) TXUES is a subsidiary of a very large (\$22 billion) corporation. (Ex. 3, p. 3)

TXUES and Schreiber both admit that a "mistake" was made somewhere in the nomination process for July 2000. Whether it was TXUES's failure to make the

nomination with Williams, or somehow a failure of Williams to accept the nomination, coupled with TXUES's failure to attempt to correct that problem, the undisputed fact is that no nomination for Schreiber was ever registered on the Williams website for July 2000. (Ex. 4, p. 6)

According to the FERC tariff of Williams, it is the responsibility of a "Shipper or Point Operator" to change or confirm its nomination. (Ex. 3, p. 8) In this instance, the Shipper or Point Operator is TXUES. (Id.) MGE had neither the obligation nor the ability to make the nomination on Schreiber's behalf. (Ex. 5, p. 24) The Williams website is "secure" and it takes a password to make nominations. MGE does not have passwords to enable it to make nominations for customers who fail to do that on their own. (Ex. 4, p. 5)

Copies of internal correspondence from TXUES demonstrate that TXUES was aware on July 5, 2000 of problems with nominations for that month for two of its customers. (Ex. 5, p. 22 and Schedule MN-4, p. 7 of 10) The documents show Mr. Evan Moore of TXUES was having difficulty making nominations on the Williams electronic bulletin board when he reported: "it (the system) still does not like it." (Id.) Mr. Wolf of TXUES responded on the same day that "We need to get these noms in. So try this, if it doesn't work, calls (sic) WNG. Please keep me posted." (Schedule MN-4, p. 7 of 10) The following month, there is internal correspondence at TXUES in which Mr. Wolf says to Mr. Moore "If you couldn't get the nominations to go through you should have called WNG and asked them what the problem was." "If it is not working you need to be proactive enough to get the problem solved." (Schedule MN-4, p. 6 of 10)



Although it is not a tariff requirement, MGE attempts to look out for the interests of its customers by generating an internal report at approximately the mid-point of each month to identify any customers who have not made a nomination with Williams. (Ex. 4, p. 3) Ms. Villanueva explained that from that internal report, an attempt is made to contact the MGE customer utilizing a contact list provided by the customer. (Id.) She explained that she contacts customers to suggest that the customer make a nomination before month-end "to avoid being billed at the default sales rate and incurring unauthorized use charges." (Id.)

Ms. Villanueva also testified that when she saw there was no nomination for July 2000 for the Schreiber plant, she made "courtesy calls" to the contact people that Schreiber had listed. (Ex. 4, p. 4) On July 24, 2000, she left messages about the lack of nomination, and said during that process she was directed to, and specifically spoke with a Mr. McClury at the Schreiber plant about the lack of nomination. (Id. and MGE's First Amended Answer, ¶ 32) She said she warned him about the unauthorized use charges that would result if the lack of nomination continued. (Id.) She also talked with a representative of Williams about the situation, and with Evan Moore at TXUES. (Id. and MGE's First Amended Answer, ¶ 33-34) She testified that she spoke with Mr. Moore prior to the end of July 2000 about the problem of a lack of nomination, and that he told her he knew what he was doing and that he would take care of it. This is the same Mr. Moore reflected in the internal correspondence shown in Schedule MN-4.

No one at either TXUES or Schreiber "took care of it." The last day of July came and went without a nomination for the month being registered with Williams. (Ex. 5, p. 24)

As a consequence of no nomination being made, MGE applied the terms of its Commission-approved tariff to the situation. The tariff is very specific and requires MGE to assess charges under specific conditions. It also does not give MGE the ability to waive unauthorized use charges. The terms of MGE's tariff explicitly require MGE to assess such a charge when no nomination is made. Unauthorized use charges result when a customer receives natural gas volumes that exceed the authorized volumes. (Ex. 3, Gray rebuttal, p. 6) This can occur if the customer receives (or takes) natural gas during a curtailment ordered by MGE, during times when the interstate pipeline has interrupted service, or if no nomination exists for the customer. (Ex. 3, p. 6)

Sheet 61.3 states that "Unauthorized use charges will be assessed to transportation customers on a daily basis: ... 3. in the event no nomination exists for such customer (zero nomination)." For a copy of the rate schedule, see Schedule MN-2. (Another copy of the same tariff provision appears as Schedule 2 to Exhibit 3).

Complying with that explicit requirement, MGE added an unauthorized use charge of \$58,851.47 to the next bill for Schreiber. The calculation of the amount was described in paragraph 36 of MGE's Answer. That amount is still outstanding. (Ex. 5, p. 3) No one has challenged the accuracy of the calculation. (Ex. 5, p. 15-16)

MGE does not profit from the assessment of unauthorized use charges, so it has no monetary incentive to assess them. MGE's tariff requires any revenues from such charges to be passed on to the firm natural gas customers of MGE. (Ex. 3, p. 9; Ex. 5, p. 16) The charges are in place to assure that transportation customers do not abuse the system. (Ex. 5, p. 16) There has to be a method of keeping track of what gas belongs to what customer when transportation customers and regular customers share

the same distribution system. (Ex. 5, p. 9) Abuse of the system by transportation customers can lead to serious problems. (Ex. 5, pp. 9-11)

### **III. ARGUMENT**

#### **A. Burden of Proof is on Complainant**

The burden of proof at hearing rests with the complainant in cases where, such as here, the complainant alleges that a regulated utility has engaged in unjust, unlawful or unreasonable actions. *Ahlstrom v. The Empire District Electric Company*, 4 Mo.P.S.C.3d 187, 202 (1995); *Margulis v. Union Electric Company*, 30 Mo.P.S.C. (N.S.) 517, 523 (1991). Thus, TXUES and Schreiber Foods must establish all facts necessary to support the relief they seek by a preponderance of the credible evidence. They have failed to show by a preponderance of credible evidence that MGE violated its tariff in this situation.

#### **B. TXUES Knew About the Problem in Time to Fix It**

The root cause of this Complaint is the failure of TXUES to make a nomination for Schreiber for the month of July 2000 with Williams, as it is required to do by the Williams FERC tariff and by its contract with Schreiber. The undisputed evidence shows TXUES knew in early July that it had a problem with the nomination, and that it knew about it in time to be able to correct the problem on its own and avoid any unauthorized use charges.

The internal correspondence in Exhibit 5, Schedule MN-4, clearly shows that TXUES recognized on July 5, 2000, that it had some sort of a problem with its attempt

to nominate for the Schreiber plant involved here. We can reasonably presume from the text of those internal messages that the TXUES employee responsible for making the nomination, Mr. Evan Moore, had already unsuccessfully attempted to make a nomination when he made the following comment on July 5, 2000 regarding the Williams' electronic system: "it (the system) still does not like it." (Ex. 5, p. 22 and Schedule MN-4, p. 7 of 10)

Mr. Moore's supervisor was also aware of the problem and the need to timely make the nomination. This is reflected in the correspondence of Mr. Wolf of TXUES on the same day that "We need to get these noms in. So try this, if it doesn't work, calls (sic) WNG. Please keep me posted." (Schedule MN-4, p. 7 of 10) TXUES acknowledged its problem the following month as reflected in the message in which Mr. Wolf says to Mr. Moore: "If you couldn't get the nominations to go through you should have called WNG and asked them what the problem was." (Schedule MN-4, p. 6 of 10)

Thus, the evidence shows that not only did TXUES know of the problem early in July, Schreiber was told about the potential for unauthorized use charges later in the month through courtesy calls from MGE. Ms. Villaneuva testified that she warned at least one Schreiber employee about the potential problem. (Ex. 4, p. 4) She left messages about the lack of nomination, and said during that process she was directed to, and specifically spoke with a Mr. McClury at the Schreiber plant about the lack of nomination. (Id.) She said she warned him about the unauthorized use charges that would result if the lack of nomination continued. (Id.) She also talked with a representative of Williams about the situation, and with Mr. Evan Moore at TXUES. (Id.) She also testified that she spoke with Mr. Moore prior to the end of July about the

problem of a lack of nomination, and that he told her he knew what he was doing and that he would take care of it. This is the same Mr. Moore reflected in the internal correspondence shown in Schedule MN-4.

Although both Schreiber and TXUES had the opportunity to file surrebuttal testimony to contradict these factual allegations that they were in fact notified of the potential problem, they did not do so. As a result, the Commission can reasonably draw the inference that MGE's allegations about these contacts are true.

The Commission can also conclude from the internal correspondence that TXUES knew it was its obligation to make the nomination for Schreiber and that there would be consequences if the nomination were not timely made. The Williams FERC tariff allowed a nomination to be made for July 2000 at any time during the month of July. TXUES itself knew of the problem on July 5, as reflected in the e-mails. On July 24, MGE contacted Schreiber personnel about the problem, so Schreiber also knew about it. MGE also talked directly with Mr. Moore of TXUES prior to July 31. He said he knew what he was doing and that he would take care of it. MGE is not required by its tariff to make any of those contacts.

### **C. MGE Had Neither the Obligation Nor Ability to Correct TXUES' Problem**

The responsibilities of the various parties are clearly established in this situation by tariff provisions and the mechanical structure of how nominations are made. The FERC tariff of Williams places the responsibility for a nomination on a "Shipper or Point Operator" to change or confirm its nomination. (Ex. 3, p. 8) In this instance, the Shipper or Point Operator is TXUES. (Id.) MGE has no obligation to make nominations for its transportation customers. That is one of the duties a customer assumes when the

customer chooses to acquire and transport its own natural gas. Complainants have admitted this in their brief on page 3 by saying that "Respondent was not involved in, or responsible for, the lack of a nomination appearing in Williams' computer system for July, 2000."

TXUES, who has national experience in this type of work, contracted with Schreiber to supply gas and make nominations. TXUES apparently performed the monthly duties satisfactorily from June 1999 until July of 2000. It also has apparently performed the work satisfactorily for each month after July of 2000. But the evidence clearly shows TXUES failed in its contractual obligations to Schreiber in July of 2000. Instead of admitting that it made a mistake and accepting the financial responsibility for its actions, TXUES is attempting to shift the blame to MGE by creative legal argument.

MGE could not have taken over TXUES's obligation to make a nomination for Schreiber in this situation even if it had wanted to. The evidence shows the Williams website is password protected, so it takes a password to make nominations, and MGE does not have the passwords of its transportation customers. (Ex. 4, p. 5)

**D. MGE Properly Followed Its Tariff Provisions in Assessing the Unauthorized Use Charge**

**1. No Requirement to Notify**

As previously indicated, MGE's obligations regarding a transportation customer's lack of nomination are very limited. There is no tariff requirement calling for MGE to notify a customer who has not made a nomination. TXUES and Schreiber initially tried to argue in the pre-filed testimony that MGE should have tried to notify them that no nomination had been made. (Ex. 2, p. 4) Mr. Wolf argued that the basis for this

alleged “duty” arose from MGE’s requirement to exercise “reasonable diligence” on Sheet 53<sup>1</sup> of its tariff. TXUES and Schreiber also alleged that MGE had not tried to contact either of them in July 2000.

Ms. Villanueva’s rebuttal testimony was then filed in which she contradicted those assertions and gave the names of Schreiber and TXUES people she talked with in July 2000. The Complainants then chose not to file any surrebuttal testimony. The Complainants also did not pursue their argument about the language in Sheet 52 after several problems with that argument were pointed out in the rebuttal testimony of Mr. Noack. (Ex. 5, pp. 16-17) Mr. Noack, quoting the entire sentence in which the term “reasonable diligence” is used, made clear that Mr. Wolf was taking the term out of context. The term refers to MGE’s obligation to provide a regular supply of natural gas. It does not speak to any requirement to notify the transportation customer of its own failure to follow the rules of an interstate pipeline. As noted below, the Complainants have abandoned this argument because they did not pursue it in their brief.

## **2. Obligation to Bill for Unauthorized Use Charges**

Since it is clear MGE had no obligation to notify the customer of the customer’s own dereliction (even though MGE did, in fact, notify them) the inquiry must then turn to what obligations the tariff imposes on MGE as a result of the customer’s failure to nominate for the month. That failure to nominate produced an objective result, i.e., no nomination existed for the customer. Sheet 63.1 clearly sets out MGE’s obligation if

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<sup>1</sup> Mr. Wolf’s testimony refers to “paragraph 8 on Sheet 53” and so does the complaint. We have to presume this is a typographical error since the language appears in paragraph 8 on Sheet 52 rather than 53. See Exhibit 5, Schedule MN-1 and Exhibit 3, Schedule 6.

there is no nomination for a customer. (See Ex. 5, Sched. MN-2 or Ex. 3, Sched. 2) It says that "Unauthorized use charges will be assessed to transportation customers on a daily basis: ... 3. in the event no nomination exists for such customer (zero nomination)." It doesn't say that MGE will have discretion on whether to assess the charge. It doesn't say that MGE will have the ability to waive the charge once it has been assessed. It simply says MGE will assess the charge. Complying with that explicit requirement, MGE added an unauthorized use charge of \$58,851.47 to the next bill for Schreiber. No one has challenged the accuracy of the calculation. (Ex. 5, p. 15-16) The bill has not been paid. (Ex. 5, p. 3)

**E. MGE's Tariff Does Not Require a Bill to Be Issued Every Day**

In the face of the explicit requirement for MGE to assess the unauthorized use charges, and since they do not dispute the calculations, admit no nomination was made, and they have abandoned their other legal arguments, Complainants have resorted to trying to twist the tariff language into a requirement for MGE to send a bill to the customer every day, claiming that this would have alerted them to the lack of nomination. The Commission should reject this unreasonable interpretation for what it is: a desperate attempt to shift the blame to avoid having to pay the bill. It is also a purely speculative argument because the evidence shows that a direct telephone conversation with both an employee of Schreiber and the person at TXUES who was supposed to make the nomination was not sufficient to get their attention. It is therefore pure speculation that a series of bills would have been more instructive. It can be argued that a hypothetical series of daily bills from MGE would make the same impression on the customer as receiving daily credit card solicitation letters in the mail.



The brief of the Complainants contains a semantic discussion of the meaning of the word "bill." MGE agrees that the word can either be a noun or a verb. It can also refer to a part of a duck's mouth. But that misses the point. The point is the context in which the term is used. Significantly, there is no explicit language on Sheet 61.3 which says MGE is required to **send** a bill each day to a customer who might possibly incur unauthorized use charges if the customer doesn't do what is required of the customer on a routine basis every month. The Complainants are trying to create this requirement by implication simply to avoid having to pay an otherwise legitimate bill.

The first hurdle the Complainants must overcome is the ridiculous notion that the Commission would require any utility to send a bill every day to a customer warning the customer that it has a routine monthly obligation which the customer must fulfill. Taken to its logical consequence, this would mean that the Commission wants utilities to send a written reminder to each customer every day each month that they will receive a real bill each month and they need to pay it on time or face disconnection. Mr. Noack discussed at length the nonsensical aspects of daily billing in these circumstances. (Ex. 5, pp. 19-21.)

#### **1. Sheet 61.3 Does Not Contain the Term "Render"**

If it had been the intention of the Commission to require MGE to actually send a bill every day to a customer, as the Complainants argue, the language actually used in the tariff would have been much more explicit and apparent to everyone involved. It would have said that MGE is required to render a bill daily under those conditions. That is because "render" is the term used in the tariff and by the Commission to refer to the act of sending a bill to a customer. There is no language on Sheet 61.3 about

“rendering” a bill daily.

The Commission has traditionally and commonly used special language when it wants to specifically convey the concept of the physical production or delivery of a bill for utility service. That special language typically employs the verb “render.” For example, in 4 CSR 240-13.020(1) of the Commission’s rules, it says that “A utility shall normally **render** a bill for each billing period to every residential customer in accordance with its tariff.” (Emphasis supplied.) The second section of that same rule says that “Each billing statement **rendered** by a utility shall be computed on actual usage... .” (Emphasis supplied.) Then it says “A utility may **render** a bill based on estimated usage ... “ and provides conditions for that. There are numerous other instances where the Commission’s rules speak to a utility **rendering** a bill when it wants to convey that concept. Nothing on Sheet 61.3 explicitly says MGE is required to send or render a bill each day. Instead, the context of the language is that the charges on the bill will be determined or calculated on a daily basis if the charges are incurred.

MGE’s tariff uses the same approach as the Commission’s rules in specifying when MGE will actually send a bill to a customer. As Mr. Noack pointed out in his rebuttal testimony, MGE has a provision on its sheet R-47 in the General Terms and Conditions portion of its tariff which says that it will **render** bills at an interval of approximately one month. See Ex. 5, Sched. MN-3. The language says “... bills based on such readings will be rendered at intervals of approximately one month.” That is the operative language which applies here since there is no language on Sheet 61.3 which actually speaks to when the bill containing the unauthorized use charges will be “rendered” to the customer. Mr. Noack also testified that there is no authorization

anywhere in the MGE tariff which allows MGE to send bills every day to the same customer. (Ex. 5, p. 19)

Complainants on page 9 of their brief try to divert attention from the importance of sheet R-47's statement that MGE's bills are rendered *each month* by saying that the first part of the sheet says "Except as otherwise provided ... ." They argue that sheet 61.3 "provides otherwise." This is another attempt by Complainants to twist words and phrases out of their normal context. Complainants omitted the rest of the sentence when they quoted it in their brief. The full sentence reads:

Except as otherwise provided for in these General Terms and Conditions for Gas Service, the Company will read the customer's meter in accordance with its cycle billing procedure and bills based on such readings will be rendered at intervals of approximately one month.

In the brief, the Complainants intentionally omitted the phrase "in these General Terms and Conditions for Gas Service." As the Commission will note, the heading at the top of Sheet R-47 is "GENERAL TERMS AND CONDITIONS FOR GAS SERVICE." That is a separate set of provisions in the tariff, all with sheet numbers beginning with "R", as in R-47. Therefore, the "Except as provided in..." language by its terms applies only to those sheets bearing the heading "GENERAL TERMS AND CONDITIONS FOR GAS SERVICE." Sheet 61.3, which Complainants want to argue is the exception, is not contained in the "GENERAL TERMS AND CONDITIONS FOR GAS SERVICE." Therefore, the exception language in R-47 cannot apply to Sheet 61.3, and this argument of the Complainants is totally without merit.

The Commission well knows from its regulation of utilities that there is no requirement in any tariff of any utility under its supervision which requires the utility to

send a bill to a customer every day of the month. That is a totally alien concept. The fact that "daily billing" is completely **abnormal** in Missouri utility regulation has to mean that if the Commission *really intended* for MGE to **render** a bill to gas transportation customers every day, the Commission would have stated that quite clearly in the tariff. It is doubtful that if daily billing was the Commission's intent, it would have relied upon a complainant facing an unauthorized use charge to be the first to discover this carefully hidden requirement. Surely this would have arisen in the context of an audit by the Staff somewhere along the way if the Staff thought the language on Sheet 61.3 required daily bills to be mailed.

It is appropriate to *calculate* bills under these circumstances on a daily basis even though the bills are only *rendered* on a monthly basis. As Mr. Noack and Mr. Gray both pointed out, this does not mean actually putting a bill in the mail every day. It means calculating the charges on a daily basis because of the nature of the charges themselves. As the tariff sheet indicates, these type of charges can also arise during a curtailment, i.e., a period when either MGE or Williams has operational or supply problems and has issued an order for all but essential customers to curtail or stop their usage. This can occur for a period of hours or days. Therefore, you would calculate the charges on the basis of how many days were involved in the situation.

## **2. It Doesn't Matter Who Wrote the Tariff Language**

The Complainants argue on page 10 of their brief that the language on Sheet 61.3 should be construed in favor of the customer and against the utility because "MGE wrote the tariff" or "MGE is the one that wrote it and presented it to the Commission for approval." There is no factual basis for this argument because there is no evidence

that MGE was the author of the language on Sheet 61.3. As the Commission is well aware, tariff provisions such as this undergo scrutiny by the Staff before they receive a Staff recommendation for approval. The Staff routinely makes suggestions on how a tariff should be worded. Therefore, the Staff may have been the author of this particular language, and there is no basis for Complainants to contend that MGE wrote the language.

### **3. The Commission Can Look at the Context**

Complainants argue in the brief on page 7 that it is hearsay and speculation for the Staff witness to conclude that other customers did not expect to receive daily bills. That testimony was offered to place a context around the Complainant's argument. Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. **W.A. SCHROEDER, 22A MISSOURI PRACTICE SERIES - EVIDENCE, Sec. 702.1.a** (2000). More frequently, an expert offers an opinion "as to the inferences and conclusion that should be drawn from other evidence." **Id.** This sort of testimony is proper in either "the form of an opinion or otherwise" where it will "assist the trier of fact to understand the evidence or to determine a fact in issue ..." **Section 490.065 RSMo 2000.** This is the sort of testimony offered by Mr. Gray based upon his experience with utilities and tariff provisions.

Even if what Mr. Gray opined is considered hearsay testimony, it was not objected to by Complainants. The parties made no objections to the testimony and waived cross examination. (Tr. Vol. 3, p. 13) No contradictory testimony was presented by Complainants in surrebuttal. Indeed, the Commission is permitted to

consider the context of the entire tariff in determining the meaning of a particular provision. See, *State ex rel. Intercity Beverage Co. Inc. v. Mo.PSC*, 972 S.W.2d 397, 401 (Mo.App.W.D. 1998). It is also permitted to consider evidence concerning the intent, prior interpretations, and the history of a tariff provision in determining its meaning. *Id.* As indicated earlier, the context of the language used on Sheet 61.3 is important. There is no explicit language requiring MGE to actually put a bill in the mail each day on that tariff sheet. Given the Commission's traditional use of the word "render" to convey that concept, its absence from Sheet 61.3, its presence on Sheet R-47 in the context of monthly bills, and the testimony of the witnesses that no other customers are billed on a daily basis or even expect to be billed on a daily basis, it is entirely appropriate for the Commission to reject the semantic argument of Complainants.

#### **F. Complainants Have Abandoned All But One of the Violation Allegations**

It is important for the Commission to recognize that many different allegations of tariff and law violations initially made by Complainants have been abandoned because Complainants have not presented any argument about them in their initial brief.

##### **1. "Reasonable Diligence" Allegation Abandoned**

In paragraphs 8 and 9 of the Complaint, it was alleged that MGE "failed to properly notify either the individual authorized for energy matters at Schreiber Foods or TXUES of this situation [no nomination] or to make the potential financial consequences of this lack of nomination known to anyone at Schreiber Foods." The Complaint then states in paragraph 9 that "As a result [of this lack of proper notification alleged in paragraph 8] Schreiber Foods received a penalty bill ... ."

In paragraph 17a of the Complaint, it was alleged that this lack of adequate notice was a violation of MGE's "duty of reasonable diligence per paragraph 8 of the Sale or Transportation of Natural Gas Contract found at Sheet 53<sup>2</sup> (sic) of MGE's tariff... ."

TXUES and Schreiber did not produce any evidence of any tariff requirement obligating MGE to "properly notify" anyone at Schreiber or TXUES of the lack of nomination. Additionally, the initial brief of Complainants contains no argument regarding Sheet 52 or 53 of MGE's tariff. The evidence shows that Schreiber received what it calls a "penalty bill" not as a "result" of lack of proper notification from MGE but, rather, due to TXUES's failure to make a nomination with Williams. Due to the failure of Complainants to cite or address the reasonable diligence allegations in their brief, the Commission must presume Complainants have abandoned them.

## **2. "Preference" Allegation Abandoned**

In paragraphs 13 and 15 of the Complaint, it was alleged that MGE in the past had forgiven similar unauthorized use charges for other customers. In paragraph 17b of the Complaint, it was alleged that by allegedly forgiving such charges for other customers, but not for Schreiber, MGE was violating subsections 2 and 3 of § 393.130 RSMo 2000 which prohibit discrimination on charges or undue or unreasonable preferences.

TXUES and Schreiber failed to produce any evidence to prove their factual allegation that MGE has in the past forgiven other unauthorized use charges in similar

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<sup>2</sup> See Footnote 1 as to why this reference should be to Sheet 52.

situations. Additionally, due to the failure of Complainants to address these discrimination or undue preference allegations in their brief, or even cite § 393.130 RSMo 2000 in their brief, the Commission must presume Complainants to have abandoned them.

### **3. “Unjust and Unreasonable” Allegation Abandoned**

In paragraph 17d of the Complaint, it was alleged that MGE’s actions in this matter violate subsection 1 of § 393.130 RSMo 2000 which requires safe and adequate facilities and directs that all charges made by a gas corporation for any service shall be just and reasonable and not more than allowed by law or by order or decision of the Commission.

TXUES and Schreiber failed to produce any evidence to prove their allegation that MGE’s actions were unreasonable. Additionally, due to the failure of Complainants to address these allegations in their brief or even cite §393.130.1 RSMo, the Commission must presume Complainants to have abandoned them.

### **4. “Not Supported by Tariffs” Allegation Abandoned**

In paragraph 17e of the Complaint, it was alleged that MGE’s actions and the “penalty charges” in this matter were “not supported by MGE’s tariffs on file with the Commission... .”

TXUES and Schreiber failed to produce any evidence to prove these allegations. The evidence showed that all of the “actions” taken by MGE were consistent with its tariff provisions. The Complainants produced no evidence to contest the right of MGE to assess the unauthorized use charge, and did not contest the computation of the charge. As a result of their failure to address these allegations in their brief, the



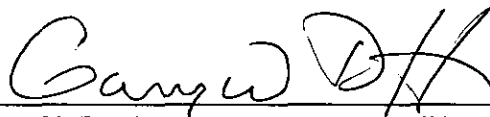
Commission must presume Complainants to have abandoned them.

#### **IV. CONCLUSION**

The Complainants have the burden of proof in this case to demonstrate with credible evidence that MGE violated its tariff. They have not met that burden. The complaint should be dismissed because TXUES and Schreiber Foods failed to prove that MGE violated its tariff when it sent a bill containing unauthorized use charges. There is a clear requirement for the charges to be assessed. There is no dispute about the amount of the charges. There is no dispute that the customer's agent failed in its monthly duty to make a nomination for the customer with the interstate pipeline. The action of the customer's agent triggered the non-discretionary duty of MGE to send the bill with the charges.

MGE did exactly what was required of it under the tariff. In an unabashed attempt to avoid the charge, however, the customer's agent only offers a semantic argument that creates a ridiculous new duty for MGE to bill an otherwise sophisticated transportation customer every day to remind the customer of an ongoing obligation. There has never been a duty for MGE to bill such a customer every day, and one should not be created by the Commission in this case by acceptance of Complainants' argument.

Respectfully submitted,



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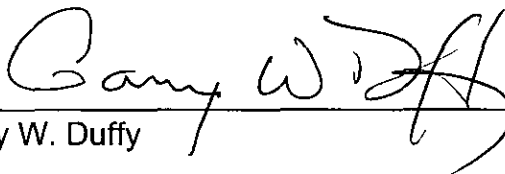
Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed by deposit with the United States Postal Service, first class postage prepaid, or hand delivered this 18<sup>th</sup> day of March, 2002, to:

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