

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED²

MAR 26 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' REPLY BRIEF

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

Overall neither Staff or Respondent in either of their briefs convincingly address the issue of the failure of Respondent to follow the explicit language of the tariff that requires daily billing or the logical reasons for such a requirement. Although many of the arguments overlap, some of the positions taken by Staff and Respondent actually counter each other. For that reason, Complainant will submit just one Reply brief addressing both Staff's and

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Respondent's Briefs. The briefs will be dealt with separately although the key cross-issues will be addressed where appropriate.

A. Staff's Brief

1. Force of Law, The Filed Rate Doctrine and *Bauer*

The overall failure in Staff's analysis is their lack of recognition that the Company is also bound by the terms of its tariff, not just the customer. *See, Bauer v. Southwester Bell Telephone Co.*, 958 S.W.2d 568 (Mo.App. 1997). And that even if it were the case that TXUES may have had some notice of a problem with gas delivery, it is not legal to waive a provision of the tariff. This would be tantamount to allowing customers to avoid late charges for not paying bills on time because the company really didn't need the money that month anyway, and both parties knew it.

Likewise, Staff fails to recognize that Complainants are not challenging the validity of the tariff or making a collateral attack on it. In fact they are relying on the very wording of the tariff itself.

This lack of understanding shows up in Staff's discussion of the *Bauer* and *Teleconnect* cases as well as the "filed rate doctrine" on pages 6 to 9 of its brief. In those cases the utility followed its tariff, even though it may have mislead the customer about what the tariff said. *Telleconnect Co. v. U.S. West Communications, Inc.*, 508 N.W.2d 644 (Iowa 1993). The courts in those cases said the tariff controlled the matter regardless of what the parties did nor did not know or believe. *Id.* at 647. Staff would like to say that the instant case is even less compelling as we are not alleging fraud. But that is not the point. In *Bauer* and *Teleconnect* the companies followed the tariff. Fraud or misunderstanding did not matter, the parties had to follow the tariff.

In the instant case, the allegation is that the tariff was not followed. Complainants rely on *Bauer, Telleconnect* and similar cases. The tariff is the law, the company cannot ignore its provisions even if they are expensive, inconvenient or even, under the circumstances, not needed.

In short on this issue, Complainants are not stating that Respondent merely *should* have sent daily bills, but that the tariff *required* such bills.

2. The definition and application of the term: "Bill."

Staff again misses the point of *Bauer* and *Teleconnect* by incorrectly stating that Complainants' argument in their brief on this issue 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." Although there is substantial and competent evidence that supports that very point, that is not the important issue. If the tariff requires the bill, then the tariff must be followed regardless of the knowledge of any individual customer or how the customer might have acted on that knowledge. Staff's position would make the analysis a subjective one where on a case-by-case basis one determines the "knowledge" of a customer. Complainants' point is that the tariff requires it, end of story.

Staff's discussion of the actual language of the tariff begins on page 9 of its brief. Regardless of where Mr. Gray got his definition of "bill" the fact of the matter is that he listed him in order and he did not use the first one he listed, which did make sense in context of the tariff, but the second one, which did not make sense in context. By using the first and most common the tariff makes sense.

Further, defining bill the way Staff and Respondent does makes the entire sentence superfluous and meaningless. The company, earlier on the tariff sheet required

to 'asses' the use charges on a daily bases. If Staff's and Respondent's definition is accepted than there is no reason for the "billing" language to be in their at all as elsewhere in the tariff standard once a month billing is addressed. A key component of statutory construction is that terms, words and phrases shall not be construed to be meaningless, yet that is what Staff and Respondent mean to do here.

The ultimate Question, then, is: If the tariff language "bill...to the transportation customers on a daily basis" means the same thing as "assessed...on a daily basis." why is "bill" in the tariff in the first place,? Why is the word changed from "assessed" to "bill"? Why is there a separate section apart from the "assessing" paragraph that deals with "bills"? It is submitted that the only logical, grammatical and consistent way to construe the matter is to find that bill means what Mr. Gray first said it means, to send a charge for services to a customer. That is why the word is changed and why it is on a separate part of the tariff sheet.

Also, on this point at page 10, Staff attempts to bring in the actual alleged knowledge of the Complainants of the gas delivery problem. That not only is irrelevant, if flies right in the face of *Bauer* and *Teleconnect*.

Lastly, it is noted that Staff never addresses the fact that, even under their own analysis of the tariff, daily entries of gas usage and the charges for same should be being made by Respondent, but are not being done. (See, Complainants Initial Brief, p

B. Respondent's Brief

1. Tariff Analysis

Respondent does not begin its analysis of the actual wording of the tariff until page 15 of its brief. Respondent apparently feels that the tariff language regarding bill needs to specifically say that the "bill" needs to be sent to the customer every day or that the word "render" in front of it in order to mean a charge must be sent to the customer. That might be an interesting argument if bill were being used as a noun in the tariff section in question. As even staff's witness, Mr. Gray makes clear, however, "bill" in this section is being used as a verb. Indeed Mr. Gray's definition and Respondent's contradict each other on this point. Mr. Gray thinks bill is a verb meaning the action of assessing a charge, Respondent thinks it is a noun, the physical piece of paper that requires another verb such as "send" or "render" in order for it to go anywhere. It is true that the phrase "render" does appear in various rules and in other parts of the tariff. In all of those instances, however, it is clear that "bill" is being used as a noun, not a verb like on this tariff page. For example, 4 CSR 240-13.020(1) cited by Respondent on page 17 of its brief clearly uses bill as a noun. It could be easily rewritten to say "A utility shall normally bill each residential customer..." Sheet 61.3 of Respondent's tariff is clearly using it as a verb, that the utility will "bill...to" its customer. Just like you "walk...to" the store.

Eventually, however, on page 19 of its brief Respondent shifts to Staff's position and now says that "bill" means to calculate the charges. This argument has been dealt with above. It should be pointed out, however, how, if this were true, Respondents own arguments about the need for explicit language would apply to this definition as well especially since it is flying in the face of the ordinary and common meaning of the term when used as it is [a verb] on the tariff sheet.. If the tariff had really only meant

“calculate” when it said “bill”, it should have said so. If the position of respondent was correct than the tariff should have read, by Respondent’s own analysis, “the company will calculate the charges on a daily basis and will then create a bill [note: noun] which it will send to the customer on a monthly basis as it does its other bills.” And, regardless of who wrote the original language of the tariff, it is Respondent’s tariff that they were free to change or clarify at any time.

In summery, to use an analogy suggested by Respondent’s brief: If it looks like a duck and quacks like a duck, it’s a duck. The language “bill...to” in the tariff reads as a verb, functions as a verb and only needs to be there if it is a verb. It’s a verb. A verb that requires that the company send unauthorized use charges to the customer daily.

2. Case of First Impression

As to the argument first raised in Staff’s testimony and brought out on page 19 of its brief, that this issue has never been raised before, the undersigned is more than willing to accept that he was the first person who was insightful, knowledgeable, intelligent and hard working enough to realize that a clear provision of MGE’s tariff was not being followed. That fact, however carries no legal weight. That nobody else either discovered this violation or, possibly, did discover it but did not choose to pursue it, is irrelevant.

3. “Abandoned” Issues

It is quite true that Complainants chose not to brief several issues that turned on the subjective knowledge of employees of the parties. These issues are not so much abandoned as it is recognized there is conflicting evidence. Indeed the fact that there is

conflicting evidence among a number of parties including conversations where the customer is not directly involved, show why, in order to protect the customer, the concept of daily billing is not only not a silly idea as Respondent would contend, but the only way to ensure the customer is protected.

C. POLICY ISSUES

Notwithstanding the fact that the Complainants and the Respondent concur that this event was inadvertent and unintentional, an anomaly within a set of procedures that correctly occurred for 13 months before the event and for 18 months subsequent to the event, and didn't cause any injury or economic harm to any party, both Respondent and Staff claim that "policy" must somehow require that an unauthorized use charge be levied against Complainants.

Interestingly, the response to this from Staff and Respondent has been that the tariff must be enforced even if no harm came to anyone in this instance. Yet in its policy analysis, both Staff and Respondent use the fact that TXUES may have known about the problem as a reason for not requiring a daily bill. Thus both parties endorse a subjective enforcement concept that negates many of the positions they take.

It is submitted that the only policy that matters in the instant case is that the terms of the tariff be enforced on the utility and that no charge be allowed when the proper procedures for assessing and billing the charge were not done.

Even a cursory review of the arguments of Staff and Respondent show the length that they are trying to go to avoid the clear and plain meaning of the Tariff language. Why? The best argument they have is that daily billing is "impractical." or expensive or difficult. Of course it is submitted that, from the case law cited by Staff that

this does not matter, the fact that a tariff provision is difficult or expensive does not change the fact that it is the law. And as the witness for Respondent pointed out, daily billing is not impossible for the company.

Thus Staff and Respondent are left with not much more than, "they couldn't have really meant that, so it must mean something else." Which is why one sees the tortured language analysis instead of the clear and plain meaning of the terms of the tariff.

And although this should make no difference in enforcing the tariff, Complainants once again point out that daily billing serves a vital policy purpose – protecting the customer. As this case showed, arraignments for the delivery of gas for customers such as Schreiber are done without the involvement of the customer by energy providers, pipeline companies, and local utilities. The customer, literally, is not in the loop. By billing daily *to the customer* whenever a nomination has not been made, the customer is protected by getting the information needed to make sure gas deliveries are made correctly. This case shows that inadvertent errors can occur beyond the control of the customer that directly effect it. By daily billing the customer will be informed. This will allow the customer *in general* to avoid a charge by making sure the nomination is made.

The fact that someone at a local Schreiber facility may or may not have received a phone call or not, or the fact that an employee of TXUES may have known of a delivery problem (both issues in dispute here) is irrelevant. Even if Schrieber was fully and totally aware of what was going on (which is denied) the tariff provision must be enforced. So specific knowledge of Schrieber or TXUES is not important. What is

important is that this shows that the requirement in the tariff for daily bills is not ridiculous or a drafting error. It is a requirement that is designed to protect the consumer and that is what the public policy of the Commission in this instance should be, to protect the consumer.

Now it may be that since this tariff sheet was approved the natural gas business has changed. Nominations made retroactively at the end of month for the days preceding it, which are so common now, may not have been a concern when the tariff was written. Perhaps then most, if not all, nominations were made prospectively. But that does not matter either. As the *Bauer* case makes clear, the utility is charged with knowing its tariff and its effect. So if the business of natural gas delivery has changed, then it was incumbent on MGE to alter its tariff to reflect this change. And further, it is submitted, the advent of extensive use of retroactive nominations makes the need for consumer protection even greater as the customer has no way of knowing for sure when it is taking gas it has ordered or when it has not. Daily billing may, indeed, not be the only way to achieve this goal, and MGE might wish to revise its tariff to do some other type of notification. But for now daily billing is what is mandated.

Lastly, throughout this case there has been the underlying implication that if this requirement of daily billing is enforced, ratepayers will somehow be harmed. That gas will not be available or prices will skyrocket. The fact is neither of these is true either in this case or in general. Every day natural gas is taken from the system and used by customers who have not yet made a nomination. Nothing in this case effects that at all. No matter how enforced unauthorized use charges will not stop gas being used without a nomination under the current system since that can go on "legally" as long as a

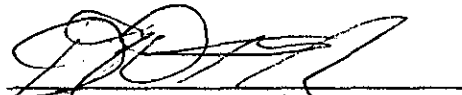
nomination is retroactively made by an arbitrary date. As to price, the same applies the gas is being taken no matter when the nomination is made (or not made) and is not impacting the supply or demand.

As to the use charge going to the ratepayers, this is, at least indirectly correct. But the ratepayers have not been harmed in this case and, unlike what has been implied by Staff, the charge does nothing to prevent a situation like this. In fact no amount of penalty can prevent an unauthorized use as long as retroactive nominations are permitted since no one will know they are not in compliance until after the fact. Moreover the only time the charge is to be levied is when the tariff is complied with and that was not done here. If the Commission wishes to penalize MGE for failing to follow its own tariff and hand that money over to the ratepayers, that is an issue that the Commission might wish to raise on its own.

By contrast, by requiring daily billing, the unauthorized use of natural gas **can** be prevented by putting the customer on notice. If that is the goal, then daily billing meets it and is yet another independent reason to reject the argument that the requirement is ridiculous.

Staff and Respondent want it both ways. They want the wording of the tariff imposing a use charge to be strictly enforced, ignoring the equities of the situation that no harm was done and this was clearly an inadvertent mistake, but try and get around strictly construing the billing requirement because of the alleged "equity" of the situation-- if you accept that TXUES had some knowledge of the problem. In either case they are wrong. The tariff was not followed by MGE and the charge should not be allowed.

Respectfully Submitted



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

ATTORNEY FOR COMPLAINANTS

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of this pleading was served on each and every party, by hand, this 26th Day of March, 2002

