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Missouri Public
Service Commission

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

Complainants

VS.

Case No. GC-2001-593

MISSOURI GAS ENERGY, A DIVISION OF
SOUTHERN UNION COMPANY,

Respondent

Comes now Complainants and for their proposed Report and Order in the above-styled case, state as follows:

This is a case of first impression for the Commission which is being asked to interpret certain tariff language found at Sheet 61.3 of Respondent's (MGE) tariff effective September 2, 1998 which deals with the manner and procedure for assessing and billing unauthorized use charges to natural gas transportation customers.



The basic facts of this case are not in dispute. Complainant Schreiber Foods, Inc (Schreiber) is a natural gas transportation customer of Respondent. It has contracted with Complainant TXU Energy Services (TXU) for the provision of natural gas which is carried interstate from its source eventually to Schreiber's facility in Missouri. As part of this procedure, TXU notifies Williams Pipeline Company of the volume of natural gas to be used by Schreiber in any given month. This information is then passed on to MGE which is the final link in the transportation chain from source to Schreiber.

This process of notifying Williams and MGE of the volumes to be used by a customer is known as "nomination." MGE's tariff provides, in part, at Sheet 61.3 that "Unauthorized Use Charges" will be assessed to any transportation customer who uses natural gas without having a nomination in place. All of the parties in this case agree that the practice is for these nominations to be made on a monthly basis and that a nomination can take place anytime during the month when the gas is used. This, in effect, allows "retroactive" nominations of gas volumes where the customer has been using gas without any nomination being in place, but a valid nomination is made sometime before the end of the month.

The process of nomination of gas volumes for Schreiber's facility by TXU in Missouri had gone without incident for 13 months until July, 2000 when, for reasons which are in dispute, no nomination for July was ever made, although certain volumes of natural gas were used by Schreiber during that month.

In August of 2000, Schreiber received a statement for unauthorized use charges for the month of July. This was Schreiber's first billing for these charges and the first

written notice of any kind to Schreiber that a nomination for July had not been made and that unauthorized use charges were being applied.

Despite a number of allegations in the original Complaint, the issue in this matter has boiled down to a single question: "Does MGE's tariff require it to send to its transportation customers a bill for unauthorized use charges for each day that natural gas is being used for which no nomination is in place?"

The key language of Sheet 61.3 of MGE's tariff, states as follows:

UNAUTHORIZED USE CHARGES

Unauthorized use charges will be assessed to transportation customers for all natural 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 and 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)

It is Complainants' contention that the language of the second full paragraph, specifically the phrase that "The Company will bill unauthorized use charges to transportation customers on a daily basis..." requires that a statement of charges be sent from MGE to its customer each day during which natural gas is being used for which unauthorized use charges apply. No definitions appear in the tariff for the words, "assess" or "bill" or for the phrase "daily basis," so the Commission will have to interpret these words and phrases.

It is also noted that, although the instant case involves charges for item #3 in the tariff (zero nomination), the language in dispute applies to all three events that trigger such charges including temporary pipeline interruptions.

Respondent and Staff take the position, although for slightly different reasons, that the language of the tariff does not require that a daily statement of charges be sent to the customer for each day that an unauthorized use charge is to be applied. These arguments essentially state that it is MGE's obligation to only keep track of the charges on a daily basis and that the ultimate statement of the charges can be sent to the customer on a monthly basis as are normal monthly statements of charges. We disagree.

The language of Tariff Sheet 61.3 set out above clearly shifts from "assessed...on a daily basis" in the first paragraph, to "bill...to transportation customers on a daily basis" in the last paragraph. To accept Respondent's and Staff's position would render this change in language meaningless by defining "bill" to be the same as "assess." The Commission will not construe any portion of a tariff or any change in language meaningless or without purpose. Furthermore, "bill" in this instance is undoubtedly being used as a verb (unlike for, example, in other sections of the tariff where "bill" is used purely as a noun – a piece of paper – that requires a word like "send" or "render" to create action) and paired with the phrase "to the transportation customer" indicates a requirement that a statement of charges be sent to the customer.

Thus the Commission adopts as the plain and ordinary meaning of the phrase "bill" the first definition given by the witness for Staff, Mr. Gray, at page 13 of his Corrected Rebuttal Testimony where he defined "bill" as: **"(1) to present a statement of the costs or charges to an entity."** This definition meets the requirements set out below

of being the plain and ordinary meaning of the term, but also is the definition which best fits the grammar and context of the paragraph in question. No other definition proposed makes logical, grammatical or contextual sense when placed in the paragraph in question on Sheet 61.3

This is supported by the fact that there is a paragraph on billing on this tariff sheet in the first place. As noted by MGE, there are other sections of MGE's tariff that deal with billing procedures. Had the billing procedure for unauthorized use charges been intended to be the same as "normal" charges, as Respondent and Staff claim, then this section would have been left out in its entirety and only language dealing with "assessing" the charges would have been needed. Clearly, something more is being required of the company when unauthorized use charges are involved than just the normal billing procedure. Again, Mr. Grey's first definition is the only one presented which solves this issue.

Staff and Respondent attempt to negate this definition by implying that this is not what the Tariff was intended to mean since a daily bill serves no real purpose and is inconvenient to the company. The clear implication is that such a tariff requirement is ridiculous and, therefore, the words and phrases must mean something else. First, of course, as noted below, the language of the tariff is the law of Missouri and the fact that a provision of it inconvenient or unpopular cannot change that fact. Even if the tariff/law arguably no longer made "sense" in light of current practices, the tariff/law remains. MGE concedes that complying with a daily billing requirement is not impossible, so there is no basis to alter the meaning of the words and phrases or to find some excuse for failing to meet them on those grounds. MGE is free at any time to propose changes to this

tariff sheet and present to the Commission why this provision should be changed or eliminated.

Moreover, such a requirement of daily billing, although it might create a burden on the company, is certainly not ridiculous or nonsensical. Such a billing would give a prompt and unequivocal written notice to the customer that it is using gas for which no nomination has yet been made. The only evidence on this point in the record is that if Schreiber had received such a billing, it would have made sure the nomination would have been made by the end of the month. Daily billing, then, protects both the customer, the company and the public by avoiding situations such as the instant one and, even if a nomination fails to be timely made in spite of daily bills, leaves no doubt that the customer had every notice and opportunity to correct the situation before the charge is applied

Although not included in the original complaint, the testimony showed that, in addition to not billing the customer on a daily basis as required by the tariff, MGE is also not properly assessing the charges on a daily basis, as it is not monitoring gas usage on a daily basis, even though it has the capability to do so. Such a failure to monitor on a daily basis is also important since unauthorized use charges are also assessed for pipeline shutdowns which may last only a few days and because the total charge to be assessed is based on prices and other penalties which might, especially in emergency situations, fluctuate on an other than monthly schedule.

As to the public policy arguments raised by Staff and Respondent and the allegation that there was adequate notice of the failure to nominate apart from a daily billing, these issues are irrelevant in light of the tariff language which is mandatory. In

any case, however, the Commission believes there is a very strong public policy argument in favor of mandatory procedures that give notice to the natural gas transportation customers. It is these Missouri customers that are required to pay the charges and who face economic hardship, disruption and, theoretically, the shutdown of operations and the termination of employees, if the charges are significant ones or if gas supplies are shut-off as a result. A daily billing would clearly notify in writing the customer of the situation that gas is being used for which no nomination has been made and would give the customer the exact charge being assessed in ample time for it to have the situation corrected. Perhaps this policy could be met in ways other than daily billing, however, at the present daily billing to the customer supports this policy. Lastly on this point, it is noted that, even if they were relevant, Staff's and Respondents policy arguments are for the most part negated by the current reality of retroactive nomination.

The daily billing requirement is also important in a pipeline interruption or curtailment situation. The underlying customer may not have any knowledge of an interruption or curtailment, and would be incurring significant charges by continuing to use natural gas during this period. This is especially true of a multi-state company, where energy arraignments and bill-paying may take place at a location outside Missouri. By giving notice through daily bills of the charges, the customer has the ability to quickly reduce natural gas usage and/or shift to alternate sources in order to avoid or reduce the charges. Without daily billing the customer is at risk of a potentially enormous bill, through no fault of its own, that it had no notice of, with no opportunity to protect itself.

The clear and plain meaning of the tariff language, then, requires MGE "to present a statement of the costs or charges" to its transportation customers on a daily

basis for each day that unauthorized use charges may apply. This will protect the customer by giving it notice of the situation and its economic consequences in time to correct the lack of nomination, if that is the problem, or to reduce its consumption or shift to alternate sources if faced with pipeline interruption or curtailment.

CONCLUSIONS OF LAW

This case involves a Complaint which seeks the Commission to disallow an "Unauthorized Use Charge" levied against Schreiber Foods, Inc. Respondent. As noted above, the key matter in dispute is the interpretation of language in the tariff for which no definitions are supplied. So while the burden of proof normally falls upon the Complainant in a Complaint case, we note that it is the Commission's responsibility to interpret this tariff regardless of the positions taken by the parties, the evidence submitted or any supposed burden or proof or persuasion¹. As noted by the Missouri Court of Appeals:

This case involves the interpretation of language in Respondent's tariff for which no definitions are supplied in the tariff itself. As such, **the Commission is bound** to follow the "[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) [emphasis added]

¹ We note that, in this instance for the reasons set out herein, Complainants *have* made both a prima facie case for Commission review and have met the standard burden of proof and persuasion normally required of Complainants. Even if no evidence had been presented by Complainants, however, the Commission is still bound to interpret the tariff language per *A.C. Jacobs*. and reach its decision accordingly.

In determining the plain and clear meaning, the actual phrases and words in question must also be analyzed in light of the surrounding language of the tariff in order to give consistent treatment to all provisions of the tariff and so as not to invalidate or render meaningless any provision of the tariff. *See generally, Russell v. Missouri State Employees Retirement System*, 4. S.W.3d 554 (Mo. App. 1999)

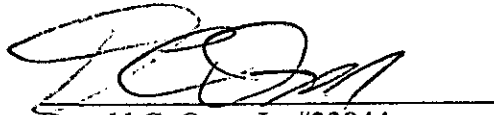
Careful review of such language is important for "As we have previously stated, a tariff that has been approved by the Commission becomes Missouri law. *Carter's Custom Tile*, 834 S.W.2d at 893" *Allstates Transworld v. Southwestern Bell*, 937 S.W.2d 314, 317 (Mo.App 1996).

Further, 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 is deemed to know the content and effect of its tariff language and company's "proper adherence to its approved rate tariffs" is "a duty imposed by law." *Id.*

In this instance, given the specific findings of fact set out above, this duty was met.

It is therefore **ORDERED** that the Complaint of Schrieber and TXU is upheld and that the unauthorized use charge billed to Schrieber at issue is disallowed. Respondent will make such changes in its accounts so that the unauthorized use charge is no longer assessed against any entity for any lack of nomination of natural gas volumes for Schrieber for the month of July, 2000.

Respectfully Submitted



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ATTORNEY FOR COMPLAINANTS

CERTIFICATE OF SERVICE

The undersigned hereby states that a true and accurate copy of the foregoing document was hand-delivered to each and every party of record this 2nd day of April, 2002.

