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April 2, 2002

Mr. Dale Hardy Roberts
Executive Secretary
Public Service Commission
P. O. Box 360
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FILED²
APR 02 2002
Missouri Public
Service Commission

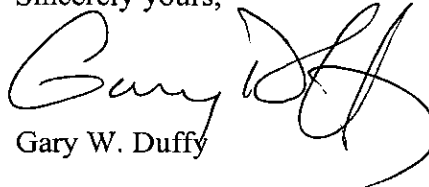
RE: Case No. GC-2001-593
TXU Energy Services v. MGE

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of MGE's proposed Report and Order.

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.

THIS IS MGE's PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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

FILED²
APR 02 2002
Missouri Public
Service Commission

APPEARANCES

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39

Missouri Public Service Commission

Regulatory Law Judge: Kevin A. Thompson

REPORT AND ORDER

SUMMARY

This Report and Order dismisses the complaint filed by the Complainants regarding alleged violations of MGE's tariff in connection with a bill received by Complainant Schreiber Foods, Inc. for unauthorized use charges. The Commission finds that MGE did not violate its tariff and there is no factual or legal basis for the complaint.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following finds of fact. The Commission in making this decision has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

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 June 27, 2001, the Commission issued an order setting a prehearing conference and requiring the filing of a procedural schedule. The prehearing conference was held on July 9, 2001 and the parties filed their Joint Recommendation for Procedural Schedule on July

12. On July 11, 2001, Complainants filed their motion seeking a protective order. On July 31, 2001, the Commission issued an Order Adopting Protective Order and Adopting Procedural Schedule.

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. 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.

An evidentiary hearing was scheduled for February 19 and 20, 2002. The hearing was convened on February 19, but at that hearing counsel for the parties agreed to waive hearing, waive cross examination, and submit the case on the pre-filed testimony.

Background of the Dispute:

Complainant Schreiber Foods, Inc. manufactures cheese and frozen food products at a plant in Mount Vernon, Missouri. 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. 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, which was the one involved here. 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. One of those is a requirement for the customer to make a nomination each month of a certain amount of gas. 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. 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.

Schreiber contracted with its agent, Complainant TXU Energy Services (TXUES), to provide natural gas and perform nominations for Schreiber. Schreiber has been a customer of TXUES since June of 1999. 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. Williams, in turn, electronically notifies MGE (and other local distribution companies) of these nominated volumes. This is accomplished over the internet with an electronic bulletin board.

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

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.

According to the FERC tariff of Williams, it is the responsibility of a "Shipper or Point Operator" to change or confirm its nomination. In this instance, the Shipper or Point Operator is TXUES. MGE had neither the obligation nor the ability to make the nomination on Schreiber's behalf. 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.

Copies of internal correspondence from TXUES which were admitted into evidence demonstrate that TXUES was aware on July 5, 2000, of problems with nominations for that month for two of its customers. 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." Mr. Wolf of TXUES responded on the same day that "We need to get these noms [nominations] in. So try this, if it doesn't work, calls (sic) WNG. Please keep me posted." The following month, there is additional 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."

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 who have not made a nomination with Williams. MGE witness Ms. Villanueva explained that an attempt is made to contact the MGE customer utilizing a contact list provided by the customer. 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.”

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. According to her testimony, 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. She said she warned him about the unauthorized use charges that would result if the lack of nomination continued. She also talked with a representative of Williams about the situation, and with Evan Moore at TXUES. 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.

The evidentiary record indicates that 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.

MGE’s witness Mr. Noack testified that as a consequence of no nomination being made, MGE applied the terms of its Commission-approved tariff to the situation. The tariff requires MGE to assess charges under specific conditions. There is no provision in the tariff to allow MGE to waive unauthorized use charges.

The evidence shows that the terms of MGE’s tariff explicitly require MGE to assess an unauthorized use charge when no nomination is made on behalf of a customer for a month. Sheet 61.3 of MGE’s tariff 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)." Unauthorized use charges result when a customer receives natural gas volumes that exceed the authorized volumes. 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.

Complying with that explicit requirement, since there was no nomination made for Schreiber at the relevant plant for the month, MGE added an unauthorized use charge of \$58,851.47 to the next monthly bill for Schreiber. That amount is still outstanding. No one has challenged the accuracy of the calculation.

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. The charges are in place to assure that transportation customers do not abuse the distribution system. 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. Abuse of the system by transportation customers can lead to serious problems.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

Jurisdiction:

The Commission has jurisdiction regarding complaints against public utilities pursuant to Section 386.390 RSMo 2000. The Complainants alleged violations of law by

MGE and violations of its tariff by MGE.

Respondent MGE is a division of Southern Union Company which is an investor-owned public utility engaged in the provision of natural gas service in the state of Missouri and, therefore, is a "gas corporation" as defined under section 386.020(18), RSMo 2000, and therefore subject to the jurisdiction of the Commission under Chapters 386 and 393, RSMo 2000.

Orders of the Commission must be based upon competent and substantial evidence on the record. Section 536.140, RSMo 2000. Any decision of the Commission must be both lawful and reasonable. ***City of Oak Grove v. Pub. Serv. Com'n.***, 769 S.W.2d 139, 141 (Mo.App.W.D. 1989). The lawfulness of a decision is determined from the statutory authority of the Commission. ***State ex rel. Intercon Gas v. Pub. Serv. Com'n.***, 848 S.W.2d 593, 597 (Mo.App. W.D. 1995). For a decision of the Commission to be reasonable, it must be supported by competent and substantial evidence on the whole record. ***State ex rel. Associated Natural Gas Co. v. Pub. Serv. Com'n.***, 954 S.W.2d 520, 528 (Mo.App.W.D. 1997).

Burden of Proof:

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.

The Alleged Requirement for a "Daily Bill"

Although the Complainants raised several alleged violations of statutes and tariff provisions, their briefs discuss only the claim that MGE's tariff requires MGE to send bills to a customer each day in a situation such as this as some sort of reminder or warning. Since the Complainants have abandoned these other claims, the Commission will focus only on the "daily bill" claim.

The evidence shows that the root cause of the Complaint was the failure of TXUES to make a nomination for Schreiber for the month of July 2000 with Williams. TXUES is required to do that 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 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. This evidence shows without doubt that both Schreiber and TXUES were either actually aware of the problem or should have been aware due to warnings.

The Commission concludes 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.

Although MGE made the courtesy calls, the Commission concludes that MGE did not have any obligation under its tariff to make them. The Complainants have failed to cite to any provision in MGE's tariff which clearly establishes a requirement for such conduct by MGE. The FERC tariff of Williams places the responsibility for a nomination on a "Shipper or Point Operator" to change or confirm its nomination. In this instance, the Shipper or Point Operator is TXUES. 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 initial brief by saying that "Respondent was not involved in, or responsible for, the lack of a nomination appearing in Williams' computer system for July, 2000."

The evidence clearly shows TXUES failed in its contractual obligations to Schreiber in July of 2000 by not making a nomination for Schreiber at the Mt. Vernon plant.

Sheet 63.1 clearly sets out MGE's obligation if there is no nomination for a customer. 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)." Complying with that explicit requirement, MGE added an unauthorized use charge of \$58,851.47 to the next bill for Schreiber. The accuracy of the calculation is not in dispute.

Complainants instead claim the tariff language in Sheet 63.1 requires MGE to send a bill to the customer every day, contending this would have alerted them to the lack of nomination. The Commission finds 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 it had been the intention of the Commission to require MGE to actually send a bill every day to a customer, the language used in the tariff would have been much more explicit and apparent. 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 notes that it has not approved daily bills for any utility company under its jurisdiction, so the Complainants bear a heavy burden to persuade the Commission that this unique requirement exists in the tariff of MGE. The Commission has commonly used special language when it wants to convey the concept of the physical production or delivery of a bill for utility service. That special language typically employs the verb "render." See 4 CSR 240-13.020(1) of the Commission's rules where 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 of MGE pointed out, MGE has a provision on its tariff sheet R-47 in the General Terms and Conditions portion of its tariff which says "... bills based on such readings will be rendered at intervals of approximately one month." That is the operative language which applies since there is no language on Sheet 61.3 which actually speaks to when the bill containing the unauthorized use charges will be "rendered" or "sent" to the customer. The Commission agrees with Mr. Noack that there is no authorization anywhere in the MGE tariff which allows MGE to send bills every day to the same customer.

The Commission concludes that 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.

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.

Decision

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions:

1. The Complainants have failed to meet their burden of proof to convince the Commission by a preponderance of the credible evidence that MGE violated its tariff in this situation.

2. Schreiber Foods undertook certain obligations when it chose to be a transportation customer. One of those obligations is to make a monthly nomination with the affected interstate pipeline. In this one instance, no nomination was made. The lack of a nomination caused MGE to assess an unauthorized use charge to Schreiber pursuant to MGE's tariff. MGE is required by its tariff to assess the charge in such a situation. There is no requirement in MGE's tariff for it to send a bill to Schreiber or any other transportation customer when that customer fails to make a nomination.

3. MGE calculated the unauthorized use charge of \$58,851.47 appropriately. That amount is still unpaid and is overdue. If Schreiber Foods does not pay that bill by the effective date of this Report and Order, MGE may pursue the remedies its tariff allows for the non-payment of a bill not in dispute.

4. Due to the failure of Complainants to meet their burden of proof, this Complaint is dismissed.

IT IS THEREFORE ORDERED:

1. That the Complaint filed by Complainants on April 20, 2001 is hereby dismissed.

2. That all pending motions not specifically ruled on herein are denied.
3. That this Report and Order shall become effective on _____.