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April 3, 2002

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Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED

APR 03 2002

Missouri Public
Service Commission

RE: Case No. GC-2001-593

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **MOTION TO ACCEPT LATE FILING OF PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW** and **PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Lera L. Shemwell
Senior Counsel
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LLS:sw
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

APR 03 2002

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

Missouri Public
Service Commission

Complainant,)

v.)

Case No. GC-2001-593

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

Respondent.)

PROPOSED FINDINGS OF FACT

AND CONCLUSION OF LAW

COMES NOW the Staff of the Missouri Public Service Commission and submits its Proposed Findings of Fact and Conclusions of Law.

FACTS

1. Missouri Gas Energy is a natural gas corporation subject to the jurisdiction of the Commission pursuant to Chapter 393, RSMo 2000.

2. Schreiber, the Complainant, is a transportation customer of MGE, and has been since 1999. As a transportation customer, Schreiber has taken on the responsibility of purchasing its own natural gas and arranging for interstate transportation to MGE's local distribution system. Schreiber contracted with TXU to make arrangements to purchase natural gas and have it delivered to its Mt. Vernon, Missouri facility.

3. TXUES is part of a large corporation. TXUES routinely makes nominations for many customers for delivery of natural gas to the customers' local distribution company.

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4. The process by which TXUES made nominations for natural gas to be delivered to MGE for Schreiber's use worked for about a year, until July 2000, when no natural gas nomination was made for the Schreiber location in Mt. Vernon, Mo.

5. Under MGE's Commission-approved tariff, Sheet No. 61.3, unauthorized use charges apply in three instances. The circumstance that applies in this case is when a transportation customer receives natural gas volumes and no nomination has been made for natural gas delivery to MGE for use by the transportation customer.

6. In July 2000, Schreiber took natural gas from MGE's system without authorization because no nomination was made on the Williams system to put gas into the system. Schreiber does not deny that it used natural gas from MGE's system when no nomination had been made on the system.

7. TXUES is responsible for making the nomination. TXUES attempts to place or share the blame for the lack of nomination with Williams, but review of TXUES internal emails indicates that TXUES knew that there was a problem with making the nomination on July 5, 2000, and did not remedy the problem.

8. MGE is not responsible for any part of the nomination process for transportation customers, and has no authority to make nominations for a customer. TXUES as agent for Schreiber Foods does have that authority and responsibility.

9. MGE's tariff concerning the situations under which the unauthorized use charge will apply has been approved by the Commission and thus has the force and effect of law.

11. MGE's tariffed unauthorized use charge applies in this situation.

12. Some tariffs contain conditions that the utility must meet before it can act, for example tariffs generally require a utility to provide notice prior to disconnecting service. There is no such condition in MGE's unauthorized use tariff. The unauthorized use charge automatically applies if a transportation customer engages in the described conduct. The third condition, failure to make a reservation for delivery of natural gas applies in this instance.

13. MGE's tariff does not require MGE to take any action for the charge to apply. The tariff might read differently if the unauthorized use charge were designed to protect the transportation customer, but the policy behind the unauthorized use charge is to protect the residential customer from potential harm when a transportation customer fails to make a reservation for the gas that it uses from the system.

CONCLUSIONS OF LAW

14. The Commission has jurisdiction over complaints against public utilities under Section 386.390 RSMo 2000. Complainants allege that MGE, a public utility as defined in Section 386.020 RSMo 2000, violated its tariff.

15. A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature. Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568, 570 (Mo.App.1997).

16. Since tariffs have the same force and effect as a statute, we analyze a tariff as we do a statute. If a tariff is clear and unambiguous, the Commission does not give it another meaning. In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariff's terms are plain and clear to one of

ordinary intelligence. Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co., 937 S.W.2d 314, 317 (Mo.App. 1996)(citations omitted).

17. The tariff language concerning application of unauthorized use charges is clear and unambiguous, leaving no room for interpretation. The tariff states:

Unauthorized use charges will be assessed to transportation customers for all natural gas volumes taken in excess of customer's authorized gas volumes delivered to a Company's delivery location, for the customer's account, plus any Contract Demand. Unauthorized use charges will be assessed to transportation customers on a daily basis.

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

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

MGE tariff sheet 61.3.

18. The burden of proof rests with the Complainant to establish all facts necessary to support the relief it seeks. Tel-Central of Jefferson City v. United Telephone Co., 29 Mo.P.S.C. (N.S.) 584 (1989).

19. Complainant fails to establish that MGE had a duty to send Schreiber a daily bill and also fails to show that even if MGE were required under tariff to send a daily bill that doing so is a pre-condition to Schreiber's responsibility under the unauthorized use charge tariff language.

20. If the tariff language is clear and unambiguous, the Commission cannot give it a different interpretation. In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariff's terms are plain and clear to one of ordinary intelligence." A.C. Jacobs and Co., Inc. v. Union Elec. Co., 17 S.W.3d 579, 584 (Mo.App. 2000)(citations omitted). In this case, the term "bill" may have different

meanings and the Commission will read MGE's tariff *in pari materia* to determine the meaning of the term in this instance. MGE's tariff states that it will assess the charge on a daily basis. It is a logical and reasonable interpretation that following assessment, MGE will post that assessment to the customer's monthly bill on a daily basis. This conclusion is supported by the use of the term "render" in MGE's tariff when the intent is that MGE will send a bill to a customer. The Commission concludes that a reasonable and logical interpretation that the term "bill" in this tariff means to post the charge to the customer's account.

21. Even if MGE were required to send a daily bill, and as noted above, the Commission does not adopt that interpretation, the tariff does not make this a condition to application of the unauthorized use charge. Since billing of the customer is not a pre-condition to application of the unauthorized use charge, Complainant's excuses are not defenses to its liability under the tariff.

22. Further, this conclusion is supported by the policy underlying the unauthorized use charge. The charge is designed to protect firm, primarily residential customers, from transportation customers who take gas from the system without making arrangements for any gas to be put into the system. The fact that no one was harmed this time does not in any way diminish the important considerations behind the policy or negate Schreiber's responsibility to pay the charge as there is no condition on the tariff provisions that the charge will only apply if harm has actually occurred.

23. In addition, the complaint must be dismissed under the filed rate doctrine.

24. The filed tariff or filed rate doctrine applies in circumstances such as this

where to permit one customer to escape paying the tariffed charge because it took legal action would result in discriminatory application of the charge. The filed tariff policy is designed to prevent discriminatory application of tariffs so that consumers who might take legal action and prevail do not pay less than consumers who do not take legal action.

Bauer v. Southwestern Bell Telephone Co., 958 S.W.2d 568, 570 (Mo.App. 1997).

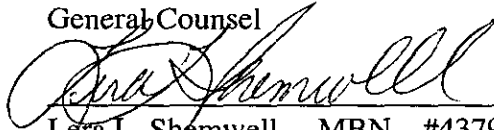
25. The filed rate doctrine applies in this case and under that doctrine the complaint must be dismissed.

26. Schreiber owes this charge, and the complaint is dismissed .

WHEREFORE Staff requests that the Commission adopt its Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,

DANA K. JOYCE
General Counsel

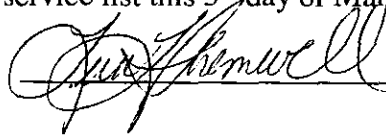


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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 3rd day of March 2002.



Service List for
Case No. GC-2001-593
Revised: April 3, 2002 (SW)

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