BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant v. Missouri Gas Energy, a Division of Southern Union Company, Respondent.	)	Case No. GC-2011-0100

JOINT APPLICATION FOR REHEARING OF
THE OFFICE OF THE PUBLIC COUNSEL
AND THE CONSUMERS COUNCIL OF MISSOURI

COMES NOW the Office of the Public Counsel and the Consumers Counsel of Missouri ("Joint Applicants") pursuant to §386.500 RSMo, and for their Joint Application for Rehearing, state:

1. On November 9, 2011, the Commission issued its Final Decision and Order to File a New Tariff Sheet (Order). Joint Applicants seek rehearing of the Commission's Order because the conclusions and findings contained in the Order are unjust, unreasonable, and contrary to good public policy.

The Order is Contrary to Good Public Policy

2. The Joint Applicants urge the Commission to set this matter for an evidentiary hearing to give the parties an opportunity to provide evidence on whether granting immunity to Southern Union Company d/b/a Missouri Gas Energy ("MGE" or "Company") from negligence is in the public interest. The Commission should not summarily grant a natural gas distribution company immunity from the negligent acts of

its employees and agents without an evidentiary basis. The Commission found that natural gas "is noxious and highly combustible, necessitating high levels of safety precautions in delivery and use."[1] Due to the combustible nature of natural gas, MGE's negligence could result in serious injury and even the death of MGE's customers or members of the general public. An evidentiary hearing will provide the parties with an opportunity to present evidence on whether immunizing MGE from liability is in the public interest, and it will provide an evidentiary basis to resolve this case.

3. The Order recognizes the reasons why granting MGE immunity from negligence liability is *not* in the public interest:

> The Commission's voluminous gas safety regulations constitute a policy statement that natural gas is a noxious and combustible substance warranting high safety precautions. Such precautions are only in the customer's control to a limited extent. Liability for negligence encourages the Company to take such safety precautions as are in the Company's control, which promotes the public interest.[2]

Here the Commission acknowledges that the customer's control over the provision of gas service is limited, and maintaining liability for MGE encourages MGE to take safety precautions that would not be encouraged if MGE is immune from liability.

4. Despite the above findings, the Order grants summary determination in favor of granting immunity to MGE even in instances where its negligent acts cause serious injury and death to any one of MGE's 500,000 captive customers. The Order includes a section titled "General Immunity for Negligence and Less" which addresses Sheet R-34 Paragraph 5 of the tariff of MGE, which the Commission states "immunizes the Company, from events not within the Company's control, and from the Company's negligence." Sheet R-34 Paragraph 5 states:

[1] Order, p. 5.
[2] Order, p. 23.

> [5] The Company shall not be liable for loss, damage or injury to persons or property, in any manner directly or indirectly connected with or arising out of the delivery of gas through piping or gas utilization equipment on the delivery side of the meter, which shall include…any other act or things due to causes beyond Company's control, or attributable to causes beyond Company's control, or attributable to the negligence of the Company, its employees, contractors or agents. [emphasis added].

5. The above paragraph purports to immunize MGE from "all claims" for injury to persons or damage to property, including work performed by MGE. This language does not encourage MGE to take safety precautions that it would be encouraged to take if it were subject to liability. Furthermore, this language could deter MGE customers harmed by MGE's negligence from filing legitimate claims against MGE.

6. The Order is unreasonable because it predetermines that MGE should not be liable when MGE's negligent actions cause injuries or damages. The Commission has no way of knowing what facts will lead to the next instance where injuries or damages are caused by MGE's negligence. Courts of law are better able to assess the specific facts in question to determine negligence.

The Order Applies an Erroneous Standard

7. The Order establishes the necessary burden of proof that must support summary determination when it states, "Each party must also show that granting its motion is in the public interest."[3] The Order cites to 4 CSR 240-2.117(1)(E):

> (E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law. [emphasis added].

[3] Order, p. 8.

8. The Order applies a different standard than the standard required by 4 CSR 240-2.117(1)(E). Instead of finding that immunizing MGE from liability for ordinary negligence is in the public interest, the Order states that giving MGE immunity from liability for ordinary negligence is "not generally contrary to the public interest": [4]

> In *Warner v. Southwestern Bell Telephone Company*, the Missouri Supreme Court held that a tariff may limit the immunity from ordinary negligence as to failure to correctly edit a telephone book. Under that authority, immunity for negligence is not against public policy for ordinary business activities. Accordingly, immunizing the Company from culpability that is less than ordinary negligence cannot be against public policy for ordinary business activities. The Commission concludes that immunity for negligence is not generally contrary to the public interest.[5]

9. The Order grants summary determination without requiring MGE to prove that immunizing MGE from liability is in the public interest, and without a commission finding that granting immunity to MGE is in the public interest, as required by 4 CSR 240-2.117(1)(E). Commission Rule 4 CSR 240-2.117(1)(E) requires that the Commission issue findings of fact and conclusions of law that support the summary determination. No such findings or conclusions can be found in the Order.

The Opinion in *Warner* is Not Applicable

10. The Order misapplies the opinion in *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596 (Mo. 1968) because *Warner* addressed limitations of liability for errors in connection with classified advertising, which is a matter of private contract, not tort negligence. In *Warner,* Southwestern Bell Telephone Company (SWBT) incorrectly listed Mr. Warner's business phone number in SWBT's telephone directory. Mr. Warner alleged negligence by reason of SWBT's failure to furnish accurate listings. The Order's reliance on this case is misplaced. Immunizing a

[4] Order, p. 22.
[5] *Id.*

telephone company from negligence caused by an error in its telephone directory where the loss of sales to the customer is the only harm caused, is not the same as immunizing a natural gas distribution company from negligence in distributing combustible natural gas and the serious harm that could result from MGE's negligence. *Warner* cannot be relied upon to conclude that Missouri case law establishes the legal principle that a tariff can lawfully immunize the negligent actions of a gas company, especially where the Company is held to a higher standard for practices involving the health and safety of the public. In *Warner*, the damage is limited to a customer's economic interest. In this case, the damage could extend beyond MGE customers to the health and safety of the public in general, and could result in harm that far exceeds any economic harm.

MGE Customers Deserve the Same Protections as Laclede Customers

11. In the only case where the Commission held an evidentiary hearing to determine whether to give a regulated gas company immunity from its negligence, GT-2009-0056, *In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify its Liability for Damages Occurring on Customer Piping and Equipment* (*Laclede*), the Commission reached conclusions that are opposite to the conclusions reached in the Commission's Order in this case, without identifying any evidence to support an opposite conclusion. The Order addresses the opposite conclusion in *Laclede* and states:

> As the Company notes, the Laclede decision only determined the issues in that action on the record in that action. The Commission determines any contested case, including the propriety of any tariff provision, based on the facts of that case. The tariff order did not declare a policy statement about tariff provisions generally.[6]

12. The Order does not explain why the consumer protections provided to Laclede Gas Company's customers should be greater than the consumer protections

[6] Order, pp. 19-20.

provided to MGE's customers. The quote above states that contested cases are to be determined "based on the facts of that case", yet the Order does not identify the facts that support a finding that immunizing MGE from liability is in the public interest, or any finding that would explain what facts and conclusions distinguish this case from *Laclede*. In *Laclede*, the Commission concluded:

> With regard to determining liability for negligent acts, Laclede did not persuade the Commission that the court system is not better able to assess the specific facts in determining negligence. A negligence claim involves many considerations which go to determine whether due care was exercised in the particular instance in which the question arises. Determining whether Laclede was negligent in a particular situation depends on the surrounding circumstances. Actions or omissions which would be clearly negligent in some circumstances might not be negligent in other circumstances. These important fact specific decisions regarding liability, especially with regard to unregulated services, should be left to the judicial system.
>
> Ultimately, even though the Commission has the legal authority to add some liability limits in tariffs, it is choosing not to do so in this case because the limitations in the Amended Tariff are not just and reasonable. The court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities. The state legislature is also an appropriate place to set liability limits on negligence claims or to give more specific authority to the Commission in this area. Laclede has produced no convincing evidence that it would be in the public interest for the Commission to limit liability in the manner it proposes. The Commission, therefore, concludes it is unreasonable to include liability limiting language in Laclede's tariffs as proposed in the Amended Tariff and rejects the tariffs.[7]

13. The judicial system available to Laclede customers in St. Louis is not better able "to determine whether due care was exercised in the particular instance in which the question arises" than the judicial system available to MGE customers in Kansas City, Joplin, or St. Joseph. The Order identifies no findings of fact or conclusions

[7] *Id.* at pp. 12-13.

of law to support a decision that provides significantly greater consumer protections for Laclede's customers than the protections provided for MGE's customers.

The Order Attempts to Expand the Commission's Statutory Authority

14. The Order states that the Commission's jurisdiction to render its Order can be found in § 393.140(11) RSMo 2000, which grants the Commission the "power to require every gas corporation…to file with the commission…schedules showing…all rules and regulations relating to…service used or to be used…by such gas corporation[.]"[8] This is a grant of general authority that gives the Commission the authority to require public utilities to maintain tariffs. The authority granted to the Commission by the Missouri Legislature does not include the authority "to determine damages, award pecuniary relief, declare or enforce any principle of law or equity."[9] The Commission "is an administrative body created by statute and has only such powers as are expressly conferred by statue and reasonably incidental thereto."[10] Limiting a consumer's ability to make legal and equitable claims in a court of law when MGE has acted negligently would be an unlawful declaration of a principle of law and equity, and would go beyond the jurisdiction and authority of the Commission.

15. For all the reasons explained above, the Commission's Order is unjust and unreasonable, unlawful, not in the public interest, and is contrary to good public policy.

MATA Application for Rehearing

16. On November 18, 2011, the Missouri Association of Trial Attorneys (MATA) filed an Application for Rehearing. OPC concurs with the following errors identified in paragraph 6 of MATA's Application.

[8] Order, pp. 8-9.
[9] State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo. App. E.D. 1980).
[10] State ex rel. AG Processing v. Thompson, 100 S.W.3d 915 (Mo. App. W.D. 2003).

(a) The Order purports to immunize MGE from all liability for negligence except negligence for inspection, leakage and repair.

(b) The Order purports to nullify and abrogate Missouri court judgments.

(c) The Order purports to immunize MGE from liability for violations of statutes, Commission regulations and compliance with local codes and standards, including safety laws and regulations.

(d) The Order violates Article 1, Section 14 of the Missouri Constitution by denying certain remedies afforded for injury to person and property.

(e) The Order violates Article 1, Section 22(A) of the Missouri Constitution and the Seventh Amendment to the United States Constitution by eliminating the right to trial by jury for persons injured by MGE's negligence.

(f) The Order deters those injured by MGE's negligent conduct from pursing legitimate claims.

(g) The Commission lacks legal authority to immunize public utilities from liability for acts of negligence.

(h) The Commission lacks legal authority to hold public utilities harmless from court decisions.

(i) The Order is arbitrary, capricious and violates due process because it fails to articulate any rational basis to abrogate the Commission's decision *In the Matter of Laclede Gas Company's Tariff Revision Designed to Clarify Its Liability for Damages Occurring on Customer Piping and Equipment,* Case No. GT-2011-0056, *Report and Order* (January 13, 2010).

(j) The Commission's conclusion that "immunity for negligence is not generally contrary to the public interest" is unlawful, unjust, unreasonable, against Missouri public policy and unsupported by the record in the case.

WHEREFORE, the Joint Applicants respectfully request rehearing of the Commission's November 9, 2011 Final Decision and Order to File a New Tariff Sheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to the following this 18th day of November 2011:

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