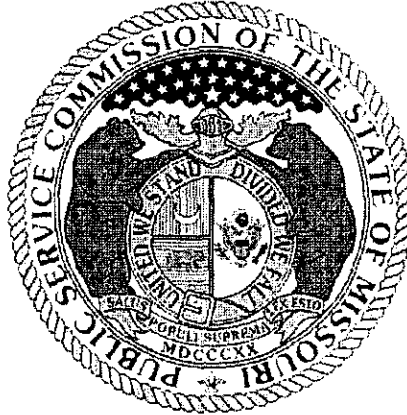


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of Missouri Gas Energy's )  
Application for Variance from Sheet Nos. 24.18 )  
and 61.4 to Permit the Use of Certain Federal )  
Refunds and Unauthorized Use Charge Collections )  
for the Benefit of Low-Income Customers in the )  
Company's Service Area. )

Case No. GE-2001-393

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**REPORT AND ORDER**

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**Issue Date:** March 6, 2001

**Effective Date:** March 16, 2001

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF MISSOURI**

In the Matter of Missouri Gas Energy's )  
Application for Variance from Sheet Nos. 24.18 )  
and 61.4 to Permit the Use of Certain Federal ) Case No. GE-2001-393  
Refunds and Unauthorized Use Charge Collections )  
for the Benefit of Low-Income Customers in the )  
Company's Service Area. )

**APPEARANCES**

**Robert J. Hack**, Senior Attorney, Missouri Gas Energy, 3420 Broadway, Kansas City, Missouri 64111, for Missouri Gas Energy, a division of Southern Union Company.

**Stuart W. Conrad**, Finnegan, Conrad & Peterson, 1209 Penntower Office Center, 3100 Broadway, Kansas City, Missouri 64111, for Midwest Gas Users' Association.

**David R. Hill**, Blackwell, Sanders, Peper, Martin, 2300 Main Street, Suite 1000, Kansas City, Missouri 64108, for Mid-America Assistance Coalition, Inc.

**Douglas E. Micheel**, Senior Public Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

**Thomas R. Schwarz, Jr.**, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:** Vicky Ruth.

**REPORT AND ORDER**

**Procedural History**

On January 18, 2001, Missouri Gas Energy (MGE), a division of Southern Union Company, filed an Application for Variance and Motion for Expedited Treatment. MGE requested that the Commission grant, as expeditiously as possible, a variance to Sheet Nos. 24.18 and 61.4 of its

approved tariff regarding the treatment within the Purchased Gas Adjustment (PGA) of certain federal refunds and unauthorized use charge collections. MGE seeks instead to assign these moneys to the Mid-America Assistance Coalition, Inc. (MAAC), to assist low-income customers in MGE's service territory who are having difficulty paying their gas bills.

On January 22, 2001, the Commission issued a Notice and Order Directing Filing, directing all interested persons to file an application to intervene no later than January 26, 2001. The order also provided that responses to MGE's application for variance were to be filed no later than January 29, 2001.

On January 25, 2001, Midwest Gas Users' Association (Midwest) filed an application requesting intervention and providing its statement of position. Midwest's application to intervene was granted February 1, 2001.

The Staff of the Missouri Public Service Commission (Staff) filed Suggestions in Opposition to Application for Waiver on January 29, 2001. On the same date, the Office of the Public Counsel (Public Counsel) filed its response opposing the application for variance.

MGE filed a response to Midwest's statement of position and to the responses of Staff and Public Council on January 30, 2001.

On February 2, 2001, MGE filed a response to the Commission's February 1, 2001, agenda session discussion regarding this matter.

On February 5, 2001, Midwest filed a response to MGE's February 2, 2001, pleading.

MAAC filed a motion for leave to intervene out of time and statement of position on February 6, 2001. The Commission granted MAAC's request to intervene by order issued February 8, 2001.

On February 8, 2001, the Commission issued an order scheduling a hearing for February 15, 2001. The Commission specifically directed the parties to provide any evidence that is necessary for the Commission to

make its determination, and to present arguments as to whether the Commission has the legal authority to grant the application for variance.

All parties appeared for the hearing on February 15, 2001. The Commission directed the parties to file briefs on or before February 21, 2001, at 4:00 p.m. By order issued February 16, 2001, the Commission directed that the briefs be filed no later than 12:00 p.m. on February 21, 2001. On February 21, 2001, MGE, Staff, Public Counsel and MAAC filed their briefs.

### Discussion

MGE requests a variance from provisions of its tariff contained in Sheets 24.18 and 61.4. Sheet 24.18 provides, among other things, that unless otherwise ordered by the Commission, refunds in excess of \$75,000 received by MGE from charges paid and recovered through the PGA applicable to Residential, Small General, Large General and Unmetered Gaslight customers, shall be refunded to such customers as a reduction in PGA rates. MGE anticipates collecting from Williams Gas Pipelines Central (Williams) a refund of approximately \$620,000 by order of the Federal Energy Regulatory Commission (FERC). This refund represents a compromise of competing claims regarding Williams' conduct of certain storage-related matters following a 1989 FERC order. Costs for storage service on the Williams system are included in MGE's PGA.

Tariff Sheet 61.4 provides that revenues received from unauthorized use charges recovered pursuant to Sheet 61.3 of MGE's tariff will be considered gas cost recovery, and used as such in the development of future gas cost recovery during the ACA process. MGE anticipates collecting approximately \$356,715 in unauthorized use charges from its transportation customers pursuant to bills it issued in January 2001, for unauthorized usage by transportation customers in December 2000.

In its application, MGE indicated that if its application was approved, it would contribute \$250,000 of its own funds to MAAC. In fact, MGE noted during the hearing that it has already contributed the \$250,000 to MAAC.

MGE seeks a waiver of these provisions so that it may divert these specified refunds and unauthorized use charges from the customers entitled to the moneys pursuant to MGE's tariff. MGE indicates that although these funds total approximately \$976,715, returning these moneys to all customers through a reduction in PGA rates would have a *de minimis* impact on the prospective rate of all sales customers.<sup>1</sup> MGE proposes to transfer the specified funds to MAAC, a not-for-profit agency which specializes in coordinating and administering a variety of community-based social assistance programs.

MAAC supports the request for variance. MAAC points out that these are extraordinary times, and that the combination of record high natural gas prices and extreme cold this winter has increased the need for funds to assist the needy with their utility bills. MAAC argues that the Commission has broad discretion within the statutory scheme to safeguard the public interest, and is not statutorily prohibited from granting the variance.

Midwest indicates that it is taking no position regarding the Commission's legal authority or lack thereof to grant the requested variance. Nonetheless, Midwest does have concerns with the proposal regarding unauthorized transportation usage charges. Midwest wants to ensure that the Commission does not take a position which legitimizes otherwise improper unauthorized use charges. Midwest requests that if the Commission grants the variance, that it include in its order a statement to

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<sup>1</sup> MGE indicates that if the request for waiver is denied, the moneys in question would result in a reduction in PGA cost of less than \$2.00, on average, per customer for the year.

the effect that such approval does not affect the rights of any customer to dispute incorrect charges.

Staff argues that the Commission does not have the statutory authority to grant the requested waiver. In addition, Staff suggests that, in spite of the popularity of the cause, the Commission should not require ratepayers to fund utility contributions to charitable causes. Staff notes that the requested variance proposes to take funds from customers who are not eligible for other assistance with this winter's high gas bills, and who have had the opportunity to voluntarily make such transfers, and contribute those funds to a select few customers.

Public Counsel also opposes the request for variance, stating that it believes that the Commission lacks the statutory authority to grant the variance. In addition to the legal prohibition, Public Counsel argues that there are strong policy reasons for not granting the requested variance.

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. 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.

MGE is a gas corporation and public utility engaged in the distribution of natural gas at retail to approximately 485,000 customers in the state of Missouri, subject to the jurisdiction of the Commission. MGE's principal place of business is located at 3420 Broadway, Kansas City, Missouri 64111.

It is undisputed that the weather this year has been extremely cold. This November-December period was the coldest in recorded history for Missouri. Likewise, natural gas prices this winter reached unprecedented high levels. It is undisputed that the extremely cold weather, combined with the record high price of natural gas, has resulted in record high gas bills. These record high gas bills have caused financial hardships for many of MGE's customers.

The funds which MGE proposes to divert come from two sources. The first source of funds is certain specified refunds. MGE anticipates receiving approximately \$620,000 in refunds from Williams Gas Pipelines Central by order of the FERC. This refund represents a compromise of competing claims regarding Williams' conduct of certain storage-related matters.

The second source of funds is unauthorized use charges received from MGE's transportation customers. MGE anticipates collecting approximately \$356,715 in unauthorized use charges from its transportation customers pursuant to bills it issued in January for unauthorized usage by transportation customers in December 2000. The funds from these two sources total approximately \$976,715.

MGE has contributed \$250,000 of shareholders' funds to MAAC for the purpose of assisting low-income ratepayers in paying gas bills. MGE proposes to also provide the contested moneys to MAAC for the same purpose. MAAC is a not-for-profit corporation based in Kansas City, Missouri, which specializes in coordinating and administering a variety of social assistance programs, including providing financial assistance to low-income persons for the payment of energy bills.

## Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

The Missouri Public Service Commission has jurisdiction over MGE's services, activities, and rates pursuant to Section 386.250 and Chapter 393, RSMo.

This case revolves around two issues. First, does the Commission have the authority under the statutes to grant the requested variance? Second, if the Commission does have such authority, do policy considerations support granting the waiver?

Several statutes are applicable to the first question. Section 393.130.2, RSMo 2000, provides, in relevant part, that:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Section 393.140(11) provides, in pertinent part:

Unless the commission otherwise orders, no change shall be made in any rate or charge . . . or any rule or regulation relating to any rate, charge or service . . . which shall have been filed and published by a gas corporation . . . in compliance with an order or decision of the commission, except after thirty days' notice to the commission. . . . No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . . or any rule or regulation . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances. . . .

Read individually or together, these two sections prohibit the requested variance. Section 393.130.2 forbids MGE from directly or indirectly rebating to customers any part of collected rates when such a rebate results in a lesser compensation by one person for the same service than is paid by another person for a like and contemporaneous service under the same or substantially similar circumstances. MGE's proposal seeks to give a certain group of residential customers an indirect rebate by transferring the funds at issue to MAAC.

MGE's proposed variance is also prohibited by Section 393.140(11). This section prohibits a refund to fewer than all utility customers who are similarly situated. MGE's proposal would provide refunds to only a subgroup (low-income customers) of the Residential class, which clearly violates the plain meaning of the statute. In fact, MGE's proposal creates a subgroup (low-income customers receiving funds from MAAC) within a subgroup (low-income customers) of the Residential class. Thus, MGE's proposal does not even treat all members of the subgroup of low-income customers in a like manner.

Although the Commission does have considerable discretionary authority in setting rates pursuant to Section 393.140, this discretion is limited by the applicable statutes. Where, as here, a procedure before the Commission is prescribed by statute, the statute must be followed. *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791, 796 (Mo. banc 1996). The General Assembly has clearly set out, in Sections 393.130.2 and 393.140(11), the Commission's authority to grant refunds and the procedure the Commission must use, stating that those refunds are only lawful when regularly and uniformly extended to all customers under like circumstances. Although MGE and MAAC point to general provisions in Section 393.140(11) to support the position that the Commission has the discretionary authority to grant the variance, this

general statutory provision does not alter the explicit provisions contained in Sections 393.140(11) and 393.130 regarding the treatment of rebates and refunds..

Granting the requested variance would also result in undue and unreasonable discrimination contrary to Section 393.130.3, which provides that:

No gas corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Approving this variance would result in intraclass rate level differences, creating a new class of customers: the disadvantaged or low-income customer class. To date, the Commission has not created a disadvantaged or low-income customer class.<sup>2</sup> Furthermore, the proper venue to discuss the appropriateness of creating a new customer class is not a variance case.

In *State ex rel. Laundry, Inc. v. Public Service Commission*, 34 S.W.2d 37, 44-45 (Mo. 1931), the Missouri Supreme Court held that "it is not admissible for a public service company to demand a different rate, charge or hire from various persons for an identical kind of service under identical conditions." In *State ex rel. McKittrick v. Public Service Commission*, 175 S.W.2d 857, 866 (Mo. banc 1943), the Court stated that "[h]aving two or more rates for the same service is the thing forbidden by the non-discrimination statute, Sec. 5645 [now § 393.130]." Case law makes it clear that the classification of utility service is to be based upon the characteristics of the utility service provided, not on a circumstance of

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<sup>2</sup> In its Report and Order in EM-2000-292 and EM-2000-369, the Commission noted that "[l]ow-income customers have not previously been accorded status as a separate class of consumer when utility rates are designed." EM-2000-292 Report and Order, pp. 29-30 (December 24, 2000), and EM-2000-369 Report and Order, pp. 26-27 (January 7, 2001).

the customer. The statutes forbid charging one residential customer one rate, and charging another residential customer a different rate.

The Commission finds that granting MGE's application for variance would result in the body of ratepayers being forced to make a charitable contribution to MAAC. The Commission has previously held that ratepayers should not be required to fund utility contributions to charitable causes. *Laclede Gas Company*, 9 Mo.P.S.C. (N.S.) 97, 115 (1960); *Joplin Waterworks Company*, 14 Mo.P.S.C. (N.S.) 280, 286 (1969). The worthiness of the cause or of the charitable organization contributed to is not at issue here; instead, the problem lies with the fact that ratepayer dollars are flowed through to a charitable organization without regard for whether the individual ratepayer would have chosen to make the contribution or not. *In Re St. Louis County Water Co*, 94 PUR 4<sup>th</sup> 96 (Mo.P.S.C. 1988).

In these times of record cold temperatures and unprecedented high gas costs, many are suffering from extremely high gas bills. The Commission is sympathetic to the plight of all ratepayers, and is particularly concerned for low-income ratepayers who are having difficulty paying their gas bills. Nonetheless, the Commission finds that it is prohibited by Missouri statutes and case law from granting the requested variance. The Commission determines that in addition to the legal prohibition, approval of the waiver is not consistent with sound public policy. Although sympathetic to the plight of MGE's low-income ratepayers, the Commission notes that all ratepayers are facing hardships due to the increased cost of gas. MGE's proposal would take funds from customers who are not eligible for other assistance with this winter's high gas bills and would contribute those funds to a select few customers. The proposal would result in MGE ratepayers being forced to contribute to a charitable organization, a practice the Commission finds inappropriate, even though

well-intentioned. Although the Commission commends MGE for its ingenuity and generosity in making its proposal, the application for variance must be denied.<sup>3</sup>

**IS THEREFORE ORDERED:**

1. That the Application for Variance filed by Missouri Gas Energy, a division of Southern Union Company, on January 18, 2001, is denied.
2. That this Report and Order shall become effective on March 16, 2001.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

( S E A L )

Lumpe, Ch., Drainer, and Murray, CC.,  
concur;  
Simmons, C., dissents, with dissenting  
opinion attached;  
certify compliance with the provisions  
of Section 536.080, RSMo 2000.  
Schemenauer, C., not participating.

Dated at Jefferson City, Missouri,  
on this 6th day of March, 2001.

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<sup>3</sup> The Commission would like to commend MGE for its recent efforts to alleviate some of the suffering of its ratepayers. As previously noted, MGE has given \$250,000 to MAAC to be used to assist low-income ratepayers who are having difficulty paying their natural gas bills. MGE has also provided \$15,000 to the Division of Family Services (DFS) so that temporary workers can be hired for Jackson and Clay Counties to assist DFS in processing LIHEAP paperwork that has a backlog of approximately six weeks. In addition, MGE indicated that it has restored service to approximately 700 households which were without heat, receiving little more than a promise to pay from those households.

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**DISSENTING OPINION OF COMMISSIONER KELVIN L. SIMMONS**

On Today, the Missouri Public Service Commission determines whether Missouri Gas Energy (MGE) can use certain federal refunds and unauthorized use charge collections for the benefit of low-income customers in the company's service area. It is my belief that the Commission can and should grant MGE's request, however, today the Commission declines that request and I respectfully dissent.

In the Bible, at Psalms 41:1, it says, "Blessed is he that considereth the poor: The Lord will deliver him in time of trouble." There is no argument that throughout the service territory of MGE, the state of Missouri and this nation, the poor, low income and senior citizens are being hit especially hard with the burden of paying unusually high heating bills. It goes without question that in extraordinary times such as these, numerous governmental bodies have sought to protect the poor from circumstances beyond their control. I believe the Commission also has the discretion to seek to protect the poor by granting MGE's request and thereby to offer relief to low

income customers who are paying an extremely large percentage of their available financial resources just to keep their homes safely heated this winter. I believe it to be in the public interest to grant the request and I believe it is sound public policy.

At the urging of the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel), the Commission has concluded that it cannot lawfully grant the requested variance. I disagree.

Section 393.130.2, RSMo 2000, provides, in relevant part, that:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

Section 393.140(11) provides, in pertinent part:

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . . or any rule or regulation . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances. . . .

The Commission concludes that, read individually or together, these two sections prohibit the requested variance. However, the fact is, were the variance granted, MGE would continue to charge and

receive its tariffed rate for gas service. MGE's proposal does not include any special or reduced rate; there would be no collection or receipt of a different or less compensation, no refund or remittance of any portion of a bill. Rather, MGE proposes to donate certain funds to a third party, a not-for-profit social assistance agency, the Mid-America Assistance Coalition, Inc. (MAAC), which will in turn distribute the funds to eligible ratepayers to assist them in paying their bills to MGE. MGE's proposal does not include any of the actions forbidden by the cited statutes.

The Commission concludes that MGE's proposed variance is also prohibited by Section 393.140(11), which provides: "nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . . except such as are regularly and uniformly extended to all persons and corporations under like circumstances[.]" Similarly, Section 393.130.2 prohibits both indirect and direct rebates not extended to all similarly situated customers. But, MGE's proposal does not include any rebate or refund, either direct or indirect. A "rebate" is "[a] deduction from an amount to be paid or a return of part of an amount given in payment." *American Heritage Dictionary* (2<sup>nd</sup> College ed. 1985) at 1031. A "refund" is "[a] repayment of funds"; "an amount repaid." *Id.*, at 1040. The money in question was never collected from the ratepayers as rates and cannot, consequently, be repaid, rebated or refunded to them. The money in question came, for the most part, from Williams Pipeline Co. pursuant to an order of the Federal Energy Regulatory Commission (FERC); the rest came from unauthorized use penalties.

This money is MGE's money and it is not subject to the provisions on which the Commission relies. MGE should be permitted to donate this money to MAAC for the purpose of assisting the poor during this difficult heating season.

The Commission also relies on Section 393.130.3, RSMo 2000, which prohibits a utility from granting "any undue or unreasonable preference or advantage to any person[.]" First, MGE's proposal is neither undue nor unreasonable; rather, it is a sensible solution to a very real problem. Second, MGE's proposal involves a charitable donation to a not-for-profit agency; the proposal does not involve MGE granting an advantage, or imposing a disadvantage, on anyone. This section, too, simply does not apply to MGE's proposal.

It has also been suggested that, were the Commission to grant the variance, there would be an unconstitutional taking of private funds, or that the ratepayers would thereby be forced to underwrite the charitable purposes of the utility. Both positions are wrong. The money in question does not now belong to the ratepayers and it never did. Consequently, a takings analysis under the Due Process Clause of the Fourteenth Amendment, United States Constitution, is inapplicable here.<sup>1</sup> The money is MGE's and the PGA tariff exacts it from MGE as a *quid pro quo*, the price of admission to the PGA/ACA program. Likewise, as it is not the ratepayers' money, it follows that

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<sup>1</sup> This analysis applies equally to the Due Process Clause in the Missouri Constitution.

its donation to MAAC cannot be an involuntary donation by the ratepayers.

Because the Commission can grant the requested variance, the Commission *should* grant it. The Staff and the Public Counsel take the position that to do so would be poor public policy. They are wrong. MGE's proposal is an extraordinary, one-time mechanism directed at the suffering caused by this extraordinary, unusual winter. Public policy is flexible enough to encompass unusual solutions for unusual problems. How can compassion be poor public policy? How can it be a mistake to provide for those who cannot provide for themselves? The United States Congress, the Missouri General Assembly, and many Missouri municipalities have taken steps to assist the poor this winter with their energy needs. It would appear that the general concensus is that what is proposed here is good public policy. It is particularly troubling to me that the Public Counsel takes this position.

For these reasons, I respectfully dissent.

Respectfully submitted,

  
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Kelvin L. Simmons  
Commissioner

Dated at Jefferson City, Missouri,  
on this [DATE] day of March, 2001.