BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

STAFF'S SUGGESTIONS IN OPPOSITION TO MGE'S MOTION FOR SUMMARY DETERMINATION AND STAFF'S REPLY TO MGE'S RESPONSE TO STAFF'S MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its Suggestions in Opposition to MGE's Motion for Summary Determination, and for its Reply to MGE's Memorandum of Law in Support of Response to Staff's Motion for Summary Determination, states as follows:

Introduction

Staff filed its *Complaint* on October 7, 2010, asserting that Sheet R-34 of the tariffs of Missouri Gas Energy ("MGE"), which purports to limit MGE's liability to its customers, (1) is not just and reasonable pursuant to § 393.140(5), RSMo, and (2) is not compliant with the Commission's Gas Safety Rules, 4 CSR 240-40.030(10(J) and 4 CSR 240-40.030(12(S), pursuant to § 386.390.1 and § 393.140(5), RSMo.[1] For relief,

[1] All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri ("RSMo."), revision of 2000.

Staff prays that the Commission will make the findings requested by Staff and require MGE to file revised tariff sheets.

Staff filed its *Motion for Summary Determination,* with supporting *Suggestions,* on December 1, 2010. The Commission granted MGE an extension of time within which to respond to Staff's motion and invited MGE to file a cross-motion for summary determination.[2] MGE filed both its response to Staff's motion, with supporting memorandum, and its cross-motion for summary determination, also with supporting memorandum, on April 11, 2011. Staff now answers all of these filings.[3]

Argument

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes 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." MGE has filed a cross-motion for summary determination, with the result that the parties agree that no material fact remains for hearing. The parties do not agree, of course, as to which of them is entitled to relief as a matter of law.

MGE's Arguments:

In its *Response to Staff's Motion for Summary Determination* and the associated

[2] A cross-motion is unnecessary because the Commission may grant summary determination for any party once such a motion is filed and its authority under the rule is invoked.

[3] MGE's ***Motion for Summary Determination,*** with supporting exhibits and its ***Memorandum of Law in Support of MGE's Motion for Summary Determination,*** are found under EFIS item 25. MGE's ***Response to Staff's Motion for Summary Determination*** and its ***Memorandum of Law in Support of Response to Staff's Motion for Summary Determination*** are found under EFIS item 26. "EFIS" is the Commission's electronic filing and information system.

Memorandum,[4] MGE raises these arguments: (1) the tariff is presumptively valid and Staff has failed to rebut the presumption; (2) Staff's *Complaint* is barred by § 386.550 as a collateral attack on a Commission decision; (3) Staff lacks standing to bring its *Complaint;* (4) the decision of the Commission in Case No. GT-2009-0056 relied on by Staff is not an authoritative statement of Commission policy because it is not a rule; (5) Staff's *Complaint* is not ripe because "[t]here is no pending dispute between an MGE customer and MGE before the Commission as to the application of any aspect of this language"; (6) Sheet R-34 is not incompatible with the Commission's Natural Gas Safety Rules; (7) Sheet R-34 is neither unjust nor unreasonable; and (8) the public interest does not favor granting Staff the relief requested in its *Complaint.* In its *Motion for Summary Determination* and its supporting *Memorandum,*[5] MGE raises these arguments: (1) Staff does not have standing to bring its complaint; (2) the issues asserted in Staff's *Complaint* are not ripe; (3) Staff's *Complaint* is an impermissible collateral attack on a Commission decision; and (4) the tariff in question is presumptively valid and Staff has not overcome the presumption. The arguments raised in all of these pleadings are much the same and Staff will address them together.

Presumptive Validity

MGE argues that its tariff is presumptively valid and asserts that Staff has failed

[4] ***Staff of the Missouri Public Service Commission v. Missouri Gas Energy, a Division of Southern Union Company,*** Case No. GC-2011-0100 (***MGE's Response to Staff's Motion for Summary Determination*** and ***Memorandum of Law in Support of Response to Staff's Motion for Summary Determination*****,** filed April 11, 2011) (hereinafter respectively ***"MGE's Response"*** and ***"MGE's Response Memo"***).

[5] ***Staff of the Missouri Public Service Commission v. Missouri Gas Energy, a Division of Southern Union Company,*** Case No. GC-2011-0100 (***Missouri Gas Energy's Motion for Summary Determination*** and ***Memorandum of Law in Support of Missouri Gas Energy Motion for Summary Determination*****,** filed April 11, 2011) (hereinafter respectively ***"MGE's Motion"*** and ***"MGE's Motion Memo"***).

to rebut that presumption.[6] MGE relies upon § 386.270, which provides:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Section 386.270 does not help MGE here. This case, in fact, ***is*** a "lawsuit challenging the lawfulness of [the] tariffs."[7] This case, therefore, is permissible under § 386.270. That statute does not mean what MGE seems to think it means. The cases discussing the effect of § 386.270 make it clear that Commission-approved and effective tariffs are presumptively valid ***except in cases, like this one, brought for the express purpose of challenging a tariff.*** The statute protects tariffs from collateral attack. For example, the Western District of the Missouri Court of Appeals recently reasoned as follows:

> Unlike the tariffs in ***Utility Consumers*** [*i.e.,* ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,*** 585 S.W.2d 41 (Mo. banc 1979)], the lawfulness of the tariffs in this case has not been challenged. "A tariff is a document which lists a public utility['s] services and the rates for those services. A tariff has the same force and effect as a statute, and it becomes state law." ***State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n,*** 210 S.W.3d 330, 337 (Mo. App., W.D. 2006) (internal citation omitted). We are required to deem a tariff lawful unless a lawsuit has been filed whose purpose is to challenge the tariff.
>
> > All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and *shall be prima facie lawful,* and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable *until found otherwise in a suit brought for that purpose* pursuant to the provisions of

[6] ***MGE's Motion Memo,*** pp. 5-6; ***MGE's Response Memo,*** pp. 2, 6.

[7] ***State ex rel. Missouri Pipeline Co. v. Missouri Public Service Commission,*** 307 S.W.3d 162, 178 (Mo. App., W.D. 2009).

this chapter.

§ 386.270 (emphasis added). Where no lawsuit has been filed challenging a tariff, "[t]he General Assembly ... has mandated that we deem the rates, tolls, charges, schedules and joint rates fixed by the commission to be lawful and reasonable." ***A.C. Jacobs & Co. v. Union Elec. Co.,*** 17 S.W.3d 579, 583 (Mo. App., W.D. 2000) (internal quotations omitted).

The Transporters did not bring a lawsuit challenging the lawfulness of their tariffs. [FN 12: The instant case was brought by the Staff seeking to enforce the tariffs. *See* § 386.390.1.] Indeed, the Transporters themselves explicitly state in their reply brief that the tariffs were lawful, reasonable, and established pursuant to a lawful ratemaking process. Because no lawsuit challenging the lawfulness of section 3.2(b)(1) of the tariffs has been filed, that issue is not properly before us, and we must deem the tariff to be lawful and reasonable. § 386.270; ***A.C. Jacobs & Co.,*** 17 S.W.3d at 583.

Accordingly, we hold that the Commission acted lawfully in enforcing the tariffs and in declaring which rate scheme applied to the Transporters' non-affiliate customers. Moreover, the lawfulness of the tariffs is not properly before us, and therefore we reject without deciding the Transporters' argument that the tariffs contain an unlawful automatic rate adjustment clause.[8]

Tariffs cannot be attacked collaterally; they must be attacked directly, in a case brought for that purpose before the Commission. This is just such a case and MGE's reliance on § 386.270 is therefore misplaced.

Collateral Attack

MGE also contends that Staff's *Complaint* is barred as a collateral attack upon a Commission order by § 386.550, which provides that "[i]n all collateral actions or

[8] *Id. Accord,* ***A.C. Jacobs and Co., Inc. v. Union Electric Co.,*** 17 S.W.3d 579, 583 (Mo. App., W.D. 2000). A more detailed consideration of the statute, undertaken nearly twenty years ago, held that: "Considering the intent of the legislature to enact a statutory design which promotes orderly setting of rates and review of the rates as set, the most reasonable construction of § 386.270 requires the finding that the legislature intended the orders of the Commission to remain in force and be *prima facie* lawful until found otherwise by the ultimate ruling of a court at the conclusion of the appeal process." ***State ex rel. GTE North, Inc. v. Missouri Public Service Commission,*** 835 S.W.2d 356, 367-368 (Mo. App., W.D. 1992). Under that interpretation, this case is the first step on the path leading to that ultimate court ruling.

proceedings the orders and decisions of the commission which have become final shall be conclusive."[9] This argument is contrary to the plain language of the Public Service Commission Law and must fail.

MGE has quoted § 386.550 accurately but has misapplied it. This case is ***not*** a collateral attack on the Commission order that approved MGE's Sheet R-34. It is, instead, a ***direct attack*** on that tariff sheet. As already explained in the preceding section, direct attacks on tariffs in front of the Commission are permitted, as § 386.270 makes unmistakably clear:

> All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable **until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.**

Likewise, § 393.140(5) – under which Staff's *Complaint* is brought – unmistakably authorizes the Commission to hear and determine an action brought to challenge a previously approved rate or other tariff provision:

> Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed.

Section 386.550 does not exist in a vacuum. It is part of a comprehensive scheme for the regulation of public utilities in order to serve the public interest. When construing a statutory provision, such as § 386.550, "the purpose of the whole act must be

[9] ***MGE's Response Memo,*** p. 3; ***MGE's Motion Memo,*** p. 6.

considered."[10] In "determining the intent and meaning of statutory language, 'the words must be considered in context and sections of the statutes in *pari materia,* as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words.'"[11] Statutory provisions are *in pari materia* when they relate to the same subject.[12] All of the provisions of the Public Service Commission Law must be considered together and harmonized.

The Commission cannot effectively regulate Missouri's public utilities if a tariff, once approved, cannot be changed except with the consent of the company. Times change, and the Commission necessarily must be able to require regulated entities to adapt to meet new challenges and changing conditions as the public interest may require. Tariffs are "living documents,"[13] intended for modification as the need arises. MGE's collateral attack theory is demonstrably contrary to the plain language of the Public Service Commission Law.

Standing

MGE asserts that Staff lacks standing to bring its complaint, arguing that Rule 4 CSR 240-2.070(1) authorizes Staff to bring a complaint only where the violation of a

[10] ***State ex rel. Office of Public Counsel and Missouri Industrial Energy Consumers v. Missouri Public Service Commission,*** 331 S.W.3d 677, 683-684 (Mo. App., W.D. 2011), *citing* ***State ex rel. Evans v. Brown Builders Elec. Co.,*** 254 S.W.3d 31, 35 (Mo. banc 2008), *citing* ***Neske v. City of St. Louis,*** 218 S.W.3d 417, 424 (Mo. banc 2007).

[11] *Id., citing* ***State ex rel. Evans v. Brown Builders Elec. Co.,*** 254 S.W.3d 31, 35 (Mo. banc 2008).

[12] ***Black's Law Dictionary*** p. 794 (7th ed., 1999).

[13] "Living documents" are those whose periodic revision is expected. *See, e.g.,* ***Massachusetts Manufacturing Extension Partnership v. Locke,*** 723 F.Supp.2d 27 (D.D.C. 2010) ("The Guidelines describe themselves as 'a 'living document'' that 'can (and probably will) be revised to reflect Center needs."); ***Bartlett v. Mutual Pharmaceutical Co., Inc.,*** 2009 WL 3614987 (D.N.H. 2009) ("The ANDA, it says, is a living document that ordinarily would include all annual and periodic reports filed with the FDA to date."); ***Sanders v. Southwestern Bell Telephone, L.P.,*** 676 F.Supp.2d 1271 (N.D. Ok., 2009) ("The performance evaluation was a living document that was to be updated throughout the year."); ***O'Neil v. Crane Co.,*** 99 Cal.Rptr.3d 533 (Cal. App. 2 Dist., 2009) ("These manuals were living documents which could be changed during subsequent years.").

statute or of a Commission rule, order, or decision is alleged.[14] According to MGE, Staff has made no such allegations. Oddly, MGE acknowledges on the very same page of its *Memorandum* that Staff's *Complaint* alleges that "Tariff Sheet R-34 does not comply with particular provisions of the Commission's Natural Gas Safety Rules," thereby giving the lie to its own argument.[15] MGE's contention that its tariff sheet does not violate the cited rules is, of course, merely a defense and is a matter for Commission determination.

Staff's *Complaint,* although not organized into counts, asserts that MGE's Tariff Sheet R-34 is not just and reasonable for two reasons: first, because it is contrary to the position announced by the Commission in its *Report & Order* in Case No. GT-2009-0056; second, because it does not comply with the Commission's Natural Gas Safety Rules. The first cause of action is brought under § 393.140(5) and the second is brought under that statute as well as § 386.390.1. Staff has standing to bring the two causes of action set out in its *Complaint* pursuant to the specific authority of Rule 4 CSR 240-2.070(1), which MGE conveniently sets out in its *Memorandum:*[16]

> The commission on its own motion, the commission staff through the general counsel, the office of the public counsel or any person or public utility who feels aggrieved by a violation of the statute, rule, order or decision within the commission's jurisdiction may file a complaint. The aggrieved party, or complainant, has the option to file either informal a formal complaint.

MGE misconstrues this rule. MGE asserts that it only authorizes Staff complaints that allege a violation of a statute, rule, Commission order, or Commission decision.[17]

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[14] ***MGE's Response Memo,*** pp. 3-4; ***MGE's Motion Memo,*** pp. 3-4.

[15] ***MGE's Motion Memo*****,** p. 3 n. 2.

[16] *Id.*

[17] *Id.;* ***MGE's Response Memo,*** p. 3.

MGE incorrectly applies this subordinate clause, "who feels aggrieved by a violation of the statute, rule, order or decision within the commission's jurisdiction," to all of the antecedents listed in the sentence: the Commission, the Staff, the Office of the Public Counsel, any person, and any utility. However, under the Last Antecedent Rule, "relative and qualitative words are to be applied only to the words or phrases preceding them" and "are not to be construed as extending to or including others more remote."[18]

It is true that the Last Antecedent Rule is not always mandatory in statutory interpretation; It is "merely an aid to construction and will not be adhered to where extension to a more remote antecedent is clearly required by consideration of the entire act."[19] In particular, "[w]here several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all."[20] In the present case, it is clear that the limiting subordinate clause has no application at all to the first antecedent, the Commission itself, whose authority is a matter of statute that may neither be limited nor expanded by a rule of the Commission. In the same way, the limiting subordinate clause does not apply to the next antecedent, the Commission Staff, or to that next following, the Office of the Public Counsel.

The other statute that Staff brings its *Complaint* under, § 393.140(5), provides:

> [The Commission shall:] (5) * * * Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished,

[18] ***Spradling v. SSM Health Care St. Louis,*** 313 S.W.3d 683, 688 (Mo. banc 2010), *citing* ***Norberg v. Montgomery,*** 351 Mo. 180, 187, 173 S.W.2d 387, 390 (banc 1943).

[19] *Id.*

[20] *Id.*

> notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed . . . .

This section states no standing requirements whatsoever; presumably, anyone at all can bring such a complaint. Certainly, there is no language that can be construed to exclude Staff as a complainant. Even if there were, the Commission is explicitly authorized to take up a complaint under either of the cited statutes ***on its own motion***. A complaint by Staff can be construed as a suggestion that the Commission so act.

MGE's standing argument is therefore absolutely without merit.

Not A Rule

MGE also argues that the Commission's decision in Case No. GT-2009-0056 does not constitute an authoritative statement of Commission policy because it is not an administrative rule.[21] This argument is perplexing. Staff concedes that the cited adjudicative decision is not an administrative rule, but so what? That does not prevent the Commission from taking the same position in this adjudication involving MGE's liability-limiting tariff as it took in the prior case.

Staff brought its *Complaint* because it considers MGE's Sheet R-34 to be even more offensive to the principles that guided the Commission's decision in GT-2009-0056 than the proposed tariff of Laclede's that was disallowed in that case. Staff supported Laclede in GT-2009-0056 and expected that tariff to be approved. The Commission's contrary action was something of a revelation to Staff – the Commission seemed to be taking a new tack with respect to liability limitations in tariffs. After all, as MGE points out in its pleadings, the Commission had approved Sheet R-34 without

[21] ***MGE's Response Memo,*** pp. 4-6; ***MGE's Motion Memo,*** pp. 7-8.

discussion not so very long before. It was only natural for Staff, in response, to bring this *Complaint* ***for the very purpose of eliciting Commission review of the most extreme liability-limiting tariff of all.*** Staff may well propose a rulemaking as a result of this case.

More to the point, the fact that the Commission's decision in GT-2009-0056 is not an administrative rule states neither a defense nor an avoidance of Staff's *Complaint* and should therefore be ignored as irrelevant.

Ripeness

MGE asserts repeatedly that the Commission should dismiss Staff's *Complaint* because it is not ripe for decision in that there is no actual case or controversy pending in which MGE's Sheet R-34 is implicated.[22] MGE is incorrect. Pending in the Circuit Court of Jackson County, Missouri, is ***Trigen-Kansas City Energy Corporation v. Missouri Gas Energy, a division of Southern Union Company,*** Case No. 1016-CV24880, a lawsuit brought by one regulated utility against another, in which Defendant MGE – Respondent herein -- has asserted that "the overarching issue of MGE's liability is governed by MGE's tariffs, which state that MGE shall not be liable for loss, damage, or injury 'attributable to the negligence of the Company, its employees, contractors or agents.' See MGE Tariff Sheet No. R-34 §3.19 'Company Liability' at Hack Affidavit Ex. 9."[23]

More importantly, § 393.140(5), RSMo, does not include a "ripeness" or "case or controversy" requirement. The tariffs of a public utility regulated by the Commission

[22] ***MGE's Response Memo,*** pp. 7-8, 11-21; ***MGE's Motion Memo,*** pp. 4-5, 8.

[23] ***Defendant Missouri Gas Energy's Motion to Dismiss and Suggestions in Support,*** p. 8, filed 17 September, 2010, in Case 1016-CV24880, Circuit Court of Jackson County, Missouri, a copy of which pleading is attached hereto as Exhibit A.

are, as that provision makes clear, *always* before the Commission and may be changed as the public interest requires. This principle is also illustrated by the following provision:

> Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, **and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission,** unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.[24]

MGE relies particularly upon a decision of the Western District of the Missouri Court of Appeals concerning ***Kansas City Power & Light Company*** that notes that the Commission may not issue advisory opinions.[25] That decision is inapposite. It concerned an investigation by the Commission of retail sales by interstate pipelines.[26] Importantly, the Commission held no hearings and did not develop a factual record.[27] Thereafter, the Court of Appeals reversed the Commission's *Report & Order,* stating:

> There is nothing in the record to indicate that any interstate pipe line company had undertaken to make direct retail sale of natural gas to any local customer. Nor, is there anything in the record to indicate any controversy over the question of whether or not the Commission has jurisdiction over interstate transportation of natural gas by pipe lines to local users.[28]

The Court held that "the Commission may not promulgate declarations of law in the abstract because the Commission 'has no power to expound authoritatively any

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[24] Section 386.490.3, RSMo; emphasis supplied.

[25] ***State ex rel. Kansas City Power & Light Co. v. Public Service Commission,*** 770 S.W.2d 740 (Mo. App., W.D. 1989).

[26] "In June of 1985 the Commission established a docket for the purpose of investigating developments in the natural gas transportation industry and the relevance of such developments to the regulation of natural gas companies in Missouri." *Id.,* at 741. These are referred to as "farm taps."

[27] *Id.*

[28] *Id.,* 741-42.

principle of law or equity[.]'"[29]

The present case may readily be distinguished from ***Kansas City Power & Light Company*** because it *does* affect the rights of a party; it *does* impose an obligation upon a party; it *does* it require a party to act or refrain from acting at the peril of some penalty; and there will be a direct and immediate effect on the interest of a party as a result of an order in Staff's favor in this case.[30] That party, of course, is MGE.

Not Incompatible

MGE also asserts that its Sheet R-34 is not incompatible with the Commission's Gas Safety Rules.[31] Staff has argued that incompatibility extensively in the *Suggestions* supporting its own *Motion for Summary Determination* and will not repeat its argument here.

Neither Unjust Nor Unreasonable

MGE also asserts that its Sheet R-34 is neither unjust nor unreasonable.[32] Staff has also argued this point extensively in the *Suggestions* supporting its own *Motion for Summary Determination* and will not repeat that argument here, either.

What Staff will do is point to a lawsuit mentioned previously, ***Trigen-Kansas City Energy Corporation v. Missouri Gas Energy, a division of Southern Union Company,*** Case No. 1016-CV24880, now pending in the Circuit Court of Jackson County, Missouri. In this case, a regulated steam heat utility, Trigen – now Veolia,

[29] *Id.,* at 743.

[30] *Compare* to ***Kansas City Power & Light Co.,*** *supra,* 770 S.W.2d at 742, where the Court pointed out that none of those statements were true.

[31] ***MGE's Response Memo,*** p. 17.

[32] ***MGE's Response Memo,*** pp. 4, 8-11, 11-17, 18-20; ***MGE's Motion Memo,*** p. 5.

brought a lawsuit against MGE for negligence, seeking millions of dollars in damages.[33] MGE had tendered incorrect bills for gas service to Trigen for an extended period of time, discovered its error, and billed Trigen for millions of dollars of additional payment due. Trigen responded, reasonably enough, by seeking damages for negligence from MGE. In its defense, MGE has asserted the liability limiting provisions of Tariff Sheet R-34, the very sheet that Staff here challenges as unjust and unreasonable.

The Commission stated in GT-2009-0056 that "[t]he court system is qualified to determine whether negligence has occurred even in matters involving regulated utilities."[34] Here, Trigen is seeking exactly such a determination from the courts and MGE is using its Commission-approved tariff to prevent that determination from occurring. This is directly contrary to the principles stated by the Commission in GT-2009-0056, where the Commission stated, "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 . . . are not just and reasonable."[35] By the standard stated in GT-2009-0056, MGE's Sheet R-34 is also not just and reasonable, which is exactly why Staff has brought this *Complaint* to the Commission. Frankly, if the Commission will not allow Laclede to have such a tariff, then logically it will not allow MGE to have one, either.[36]

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[33] *See generally* ***Defendant Missouri Gas Energy's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss,*** filed 29 October, 2010, in Case 1016-CV24880, Circuit Court of Jackson County, Missouri, a copy of which pleading is attached hereto as Exhibit B.

[34] ***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 & Order,*** issued January 13, 2010) at p. 13.

[35] *Id.*

[36] Staff will not waste any effort on MGE's argument that "everybody's doing it," *see* ***MGE's Response Memo,*** pp. 4, 8-9, 11, 12 n. 48, and 18; ***MGE's Motion Memo,*** pp. 8-9. Not all liability limiting tariff provisions are unreasonable and none of the others are before the Commission in this case.

The Public Interest

MGE also argues that Staff's position is contrary to the public interest.[37] Echoing its ripeness argument, MGE urges the Commission "not to accept Staff's invitation to issue what would amount to nothing more than an advisory opinion[.]"[38] Similarly, MGE advises the Commission to refuse to "wade into the concerns expressed by Staff absent the crystallizing benefit of an actual factual dispute[.]"[39] Staff has demonstrated that *there is at least one actual dispute,* that between MGE and Trigen, which Trigen, at least, considers sufficiently "crystallized." Staff has also demonstrated that § 393.140(5) does not include a "ripeness" or "case or controversy" requirement and that the central principle of the Public Service Commission Law is that the tariffs of regulated entities are always before the Commission. Finally, this Commission has already determined, in another case, that the public interest favors the review of liability-limiting tariffs and the disallowance of those that are unreasonable:

> 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.[40]

Therefore, MGE's public interest argument should be denied.

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[37] ***MGE's Response Memo,*** pp. 20-21; ***MGE's Motion Memo,*** pp. 8-9.

[38] ***MGE's Response Memo,*** p. 20.

[39] ***MGE's Motion Memo,*** p. 8.

[40] ***Laclede Gas,*** *supra,* Case No. GT-2011-0056, ***Report & Order*** p. 13.

WHEREFORE, Staff prays that the Commission will grant summary determination of its *Complaint* filed herein and enter its order (1) finding that MGE's Tariff Sheet R-34 is unjust, unreasonable, unlawful, violates public policy, and is void and unenforceable, (2) finding that MGE's Tariff Sheet R-34 does not comply with the Commission's Natural Gas Safety Rules 4 CSR-240-40.030(10)(J) and 4 CSR 240-40.030(12)(S); and (3) pursuant to § 393.140(5), requiring MGE to file revised tariff sheets that are just and reasonable and in compliance with the Commission's rules and the law; and granting such other and further relief as the Commission deems just.

Respectfully Submitted,

/s/ Kevin A. Thompson
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **18th day of May, 2011,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson