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February 20, 2001

**VIA FEDERAL EXPRESS**

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, #100  
Jefferson City, MO 65101

**FILED<sup>2</sup>**  
FEB 21 2001  
Missouri Public  
Service Commission

Re: 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

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case, please find eight (8) copies of the Mid-America Assistance Coalition, Inc.'s Brief in Support of Missouri Gas Energy Co.'s Application. I am also enclosing one extra copy to be file-stamped and returned to my office in the enclosed stamped, self-addressed envelope.

This filing has been sent on this date by U. S. mail, postage prepaid to all parties of record. Thank you for your assistance with this matter.

Very truly yours,

*Michael G. Donohue*  
Michael G. Donohue

MGD/csk  
Enclosures  
cc: All Counsel of Record

KC-839288-1

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

FEB 21 2001

Missouri Public  
Service Commission

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 ) Case No.: GE-2001-393  
For the Benefit of Low-Income Customers in the )  
Company's Service Area )

**Brief of Mid America Assistance Coalition, Inc.**  
**In Support of Missouri Gas Energy Co.'s Application**

Mid-America Assistance Coalition, Inc. ("MAAC"), a Missouri non-profit corporation and party in this case, respectfully submits this brief in support of Missouri Gas Energy's ("MGE's") application in this docket. On Thursday, February 15, 2001, the Commission held a hearing to address MGE's proposal to transfer certain funds to MAAC, so that MAAC could distribute those funds to certain low income and needy ratepayers, to assist them in paying their natural gas bills.

As MAAC stated both in its motion to intervene and at the hearing, the need for funds to assist the needy with their utility bills has never been greater. The combination of record high natural gas prices and extreme cold this winter has resulted in MAAC receiving more requests for assistance, and in more people needing assistance, than ever before. Indeed, the need for the funds that MGE has proposed to transfer to MAAC has never been greater.

While Public Counsel and Staff Counsel stated at the February 15 hearing that they were opposed to MGE's proposal on *both* legal and policy grounds, the Commission has directed that briefs in this case be limited solely to legal issues, presumably because the strong public policy case in support of MGE's proposal is self-evident. Indeed, the strong public policy argument in favor of MGE's application *is* self-evident and, in any event, is within the control and discretion

of the Commission and not a matter on which Staff or Public Counsel's opinion is entitled to any weight.

Because there is a compelling need for low income and needy ratepayers to receive assistance with their natural gas bills this winter, the only question before the Commission should be whether the Commission in fact has the legal authority to grant MGE's application. The answer, as explained at the February 15 hearing and as will be further explained below, is an emphatic "yes."

In addressing this issue and in ruling on MGE's application, the Commission should, as an initial matter, keep in mind the extremely narrow and unique circumstances presented by MGE's application. As the testimony at the hearing demonstrated and as this Commission is well aware, the price of natural gas has reached unprecedented high levels this winter and this winter has been extremely cold. As Commissioner Drainer and as Mr. Catron noted, these are "extraordinary times." Tr. at 60. It is self-evident that these "extraordinary times have had and will have a disparately large and adverse impact on low income residential ratepayers. Tr. at 61-63. These factors have resulted in low income customers being forced to pay an extremely large percentage of their available financial resources just to keep their homes safely heated this winter.

Moreover, the funds at issue in this case have resulted not from MGE attempting to shift prospective costs from one customer to another. Rather, the majority of the funds result from refunds ordered by the Federal Energy Regulatory Commission for service that the Williams interstate pipeline provided to MGE from 1993 through 2000. The remaining funds result from unauthorized use charges authorized by MGE's tariff that were imposed on certain customers earlier this winter. Staff Counsel and Public Counsel have not and cannot argue that these

unauthorized use charges represent a “cost” imposed on other similarly situated ratepayers – they are funds that directly result from certain customers having violated MGE’s tariff that simply would not exist had those violations not occurred.

So the only legal question before this Commission is whether (a) in these particular circumstances involving record high prices and extremely cold temperatures, and (b) given a pot of money resulting from unauthorized use charges and a FERC-mandated refunds for service provided to MGE over a seven or eight year period, and (c) given the fact that the Commission is given discretion as a result of the applicable MGE tariff sheets currently on file with the Commission, the Commission can approve MGE’s application to use the refund and unauthorized use charge funds at issue to assist low income residential ratepayers with their natural gas bills. The answer is an emphatic “yes.” Indeed, a contrary conclusion would not only be without legal basis, it would be nonsensical in light of the unique circumstances presented to the Commission in this case.

There is no question – and indeed neither Public Counsel nor Staff Counsel disputes – that a utility may have more than one rate for the service it provides. The tariffs of virtually every utility regulated by this Commission are replete with different rates for different services and different customers.

There also can be no question – and again neither Public Counsel nor Staff Counsel appear to dispute – that a utility may have more than one class of service and more than one class of customers. Again, the tariffs of the utilities regulated by this Commission contain many such classifications.

There furthermore is no question that, when there is more than one rate or class of service, the Commission possesses the legal authority and may exercise broad discretion in

determining which customers fall into what classifications. As a result, and even assuming that MGE's proposal at issue in this case results in different rates and different classes of service and customers, the Commission has authority to approve the rates and classifications proposed by MGE. As the Commission is well aware, it has broad discretion within the areas in which it has been delegated authority. See State v. Kraus, 530 S.W.2d 684, 685 (Mo. banc 1975). These principles are further explained below.

First of all, the Commission possesses authority – and often has exercised its authority – to create classifications of service and customers. It possesses wide discretion in establishing what those classes of service and classes of customers shall be. To the extent that MGE's proposal calls for the Commission to create a classification of low income customers that would be entitled to receive the benefit of the grants to MAAC in this case, the law gives the Commission that authority and discretion.

Specifically, Section 393.140(11) of the Revised Statutes of Missouri (1994) gives the Commission power to compel each utility to file with the PSC its schedule of rates to be charged for various services rendered to its customers, and that the rates charged shall be the same for persons or corporations “for doing a *like and contemporaneous service* with respect thereto under *the same or substantially similar circumstances or conditions.*” (emphasis added). This provision provides legal authority for the Commission to approve MGE's proposal either on the basis that it does not concern or address the provision of a “like or contemporaneous service” to similarly situated customers, and/or that the customers who will benefit from MGE's proposal are not in the “same or substantially similar circumstances,” and are not subject to “the same or substantially similar . . . conditions” as ratepayers who will not receive the benefit of MGE's program. The latter basis is particularly applicable in these circumstances, simply because there

can be no question that low income ratepayers (in this case ratepayers who are at the income level of 200% of poverty or below) are not in the “same or substantially similar circumstances or conditions” as those ratepayers with higher incomes. Among other things, such low income ratepayers have suffered a disproportionately large impact from the combination of rate increases and cold weather this winter, a disproportionately large percentage of their income has been taken as a result of this unique combination of circumstances, and they are disproportionately likely to suffer adverse health and safety consequences because they are the most likely to be unable to pay their natural gas bills and thus to eventually lose service as a result.

Similarly, section 393.140 states that rates and charges generally shall be the same for “all persons and corporations under like circumstances.” For the same reasons as already noted, there is more than adequate grounds for the Commission to conclude that the ratepayers who will benefit from the funds at issue in this case are not in “like circumstances” with either commercial or industrial customers, or with residential customers of more substantial means. This is particularly true in light of the truly unique situation presented this winter with respect to the dramatic increase in natural gas rates.

There is nothing in this or any other law that prohibits the Commission from approving MGE’s application and approving customer classes on the basis of income and ability to pay, in the extraordinary and unique circumstances presented by this application and in light of the fact that the funds at issue are FERC-mandated refunds and unauthorized use charges levied on certain MGE customers. Staff Counsel and Public Counsel certainly have not, to date, cited any such law. In fact, the Missouri Supreme Court has recognized that the Commission has wide authority and discretion to regulate and fix rates and charges for public utilities and to determine

the proper classification of the consumers to whom such rates or charges apply. See State ex rel. Laundry, Inc. et al. v. Public Service Comm'n et al., 327 Mo. 93, 34 S.W.2d 37, 43 (1931).

Public Counsel and Staff Counsel repeatedly asserted at the February 15 hearing that the Commission possessed no legal authority to create intra-class rate distinctions, but notably absent in their argument was any assertion that the Commission did not possess authority to create classifications of service and customers themselves. In this unique situation, the Commission possesses authority to approve the classifications and rate treatment proposed by MGE. In doing so, the Commission merely would be carrying out its statutory duty and exercising its discretion in determining the proper classification of certain consumers within the customer base of Missouri Gas Energy and would properly be providing for rates and rate treatment designed to protect the ratepayers who are most vulnerable and who have suffered the most adverse impact from the recent cold weather and price increases.

In 1942, the Missouri Supreme Court considered whether the PSC had statutory authority to determine and classify which of two approved rates apply to a public utility customer. State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (1943). Applying sections 393.130, 393.140, and 386.390, RSMo 1994, respectively, the Court concluded, "The power of the Commission to classify is not limited to the service to be rendered, but it has power to determine the classification of the service rendered. This is true because the two above quoted sections [393.130 and 393.140] say 'any service rendered or to be rendered.'"

The legislature, realizing that technical and policy factors must be taken into account in making proper classifications of customers, services and rates, wisely has left the details of such matters to the Commission. 168 S.W.2d at 1047; see also Friendship Village, 907 S.W.2d at 348-349 (court determined that the PSC's order, which found that electric company charged

retirement communities under proper rate classification, was lawful and reasonable). Thus, the classification of (and discrimination between) customers, services and rates is perfectly permissible, and the Commission has wide authority and discretion in establishing those classifications.

Apparently the only legal limitation on the Commission's ability to establish such classifications is that stated in section 393.140 – that is, the classification must be based on a distinction in the “circumstances or conditions” of the service or customers. In other words, discrimination is perfectly permissible so long as the discrimination is not “undue.” See State of Missouri v. Public Service Comm'n, 701 S.W.2d 745, 752 (W.D. App. 1985). The variance in rates must “be based upon a reasonable and fair difference in conditions which equitably and logically justifies a different rate.” State ex rel. City of St. Louis v. Public Service Commission, 327 Mo. 318, 36 S.W.2d 947, 950 (1931).

Here, there can be no question that there is a “reasonable and fair difference in conditions” between those that will receive the benefit of the grants MGE proposes to make to MAAC, and other gas customers who are more capable of paying their bills and are not at substantial risk of losing service and the ability to heat their homes as a result of the high prices and cold weather this winter. This is particularly true in light of the unique sources of funds at issue in this case – unauthorized use charges and FERC-mandated refunds. If the circumstances presented in this case do not “equitably and logically” justify the provision of certain limited benefits to the low income ratepayers that will be served by MGE's proposed program, then it is difficult to imagine any case in which a different rate or class would be “equitably and logically” justified.<sup>1</sup> See also State ex rel. Associated Natural Gas Co. v. Public Service Comm'n of

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<sup>1</sup> At the February 15 hearing, Staff Counsel and Public Counsel appeared to argue that there was no legal basis for approving MGE's application because it benefited only residential customers and thus unlawfully discriminated

Missouri, 706 S.W.2d 870 (App. 1985); Beauty Built Construction Corp. v. City of Warren, 375 Mich. 229, 134 N.W.2d 214, 218 (1965) (municipality may classify its users for the purpose of fixing rates if the classification is reasonable and there is no discrimination within the class).<sup>2</sup>

MGE's proposal should be approved, and the counter-arguments by Staff Counsel and Public Counsel should be rejected, for other reasons as well. Staff Counsel and Public Counsel appear to make the argument – with no factual or evidentiary support – that approval of MGE's proposal would effectively deny to all other ratepayers the benefit of the refunds and unauthorized use charges at issue. That clearly is not true. As Commissioner Schemenauer and Mr. Catron noted at the February 15 hearing, MGE is entitled to recover in rates from all customers a certain amount for MGE's bad debt expense. Tr. at 82-83. It is virtually certain that at least some of the funds at issue in this case, which MGE proposes to benefit low income ratepayers, will result in bills being paid that otherwise would not be paid, and thus will result in a reduction in MGE's bad debt expense. This, in turn, will result in lower expenses and lower

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against commercial customers. Even assuming there is such a thing as a "low income" commercial customer that might in certain limited respects be similarly situated to the residential customers MGE's proposal seeks to benefit – a fact that the Staff Counsel and Public Counsel have offered no evidence to prove – their argument fails. Even to the extent that it can be argued that this winter's high prices and low temperatures have had an adverse impact on "low income" commercial customers, the Commission long has exercised its discretion to create separate classifications for residential and commercial customers. There is ample reason for the Commission to again do so again here, if the Commission finds such a determination to be necessary in order to approve MGE's application, because among other things: (a) there is substantial historical and judicial precedent for differentiating between residential and commercial customers; (b) MGE's proposal only addresses residential customers; (c) Staff Counsel and Public Counsel offered no evidence to demonstrate that any commercial or industrial customers are "similarly situated" to the residential customers MGE's proposal would benefit; and (d) it is self-evident that residential customers would be impacted in more (and more adverse) ways if they were not to receive the assistance at issue here than if a company did not receive that assistance. Residential customers' use of gas largely is for the purpose of heating their homes; loss of that service would imperil the health and safety of those individuals; the same cannot be said for the loss of service to most if not all commercial and industrial customers.

<sup>2</sup> The cases cited by Public Counsel at the February 15 hearing (Tr. at 15-18) in support of its argument that MGE's proposal was illegal, are either inapplicable or do not support a conclusion any different than the one advanced by MGE and MAAC in this proceeding. For example, The Laclede Gas Company case (Tr. at 15-16) concerned the distinction between refunds and rebates and in what circumstances the Commission could order them. Those issues are not presented here. Similarly, the Union Electric Company case (Tr. at 16) concerned the manner in which refunds ordered by the Commission could be made, but nowhere did that case say that refunds should be treated in any different manner than rates, customers, and classifications generally and, as noted in the text of this brief, the Commission has authority to make the classifications urged by MGE and MAAC in this proceeding.

rates for all customers. In effect, to the extent that the funds at issue result in a reduction in bad debt expense, the funds will benefit MGE's customers twice – they first will benefit the low income customers who directly receive the assistance, and they will benefit all customers as a result in a reduction of MGE's cost of service.

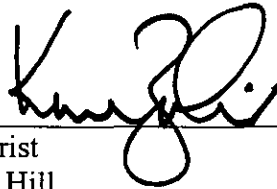
As a result, the argument made by Staff Counsel and Public Counsel that MGE's proposal will result in a dollar for dollar transfer away from all ratepayers and in favor of certain low income ratepayers simply is not true. Therefore, it also is not true that MGE's proposal in this proceeding will be of no benefit to all ratepayers. Indeed, whatever funds are used to pay bills that would otherwise go unpaid will be to the direct rate benefit of all ratepayers.

Finally, and as the Commission no doubt is well aware, it has broad discretion within the statutory scheme in general to safeguard the public interest. V.A.M.S. Sec. 393.140 states that “[t]he commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise.” In State ex rel. Chicago, Rock Island and Pac. R.R. Co., the court, speaking as to matters of the Commission's reasonableness, analyzed whether the Commission abused its discretion. 312 S.W.2d at 794. The court commented that in doing this analysis a large area of discretion is delegated to the Commission by law, and many of its decisions necessarily rest largely in the exercise of sound judgment.

While to MAAC's knowledge there has been no final and definitive determination as to exactly what decisions are “wise” and which ones are not, MAAC strongly urges that the “wise” decision in this case is to grant MGE's application. In doing so, the Commission would not be establishing any universally applicable principle or rule that it will be stuck with in all future ratemaking. Rather, all that it will be saying is that in the truly unique circumstances presented

at this time and in this application, it is reasonable and permissible to allow certain funds obtained through unauthorized use charges and FERC-order refunds to be used to benefit low income ratepayers when they are in dire need. MAAC respectfully submits that it would be "wise" for the Commission to do just that.

WHEREFORE, the Mid-America Assistance Coalition, Inc. respectfully requests that the Commission approve MGE's application in this proceeding.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. Mail, postage prepaid, this 20<sup>th</sup> day of February, 2001, to:

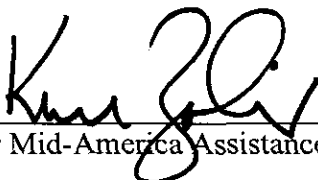
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