

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In re: FERC Docket No. CP07-450,)
MoGas Request for Authorization) Case No. GO-2009-0094
under Blanket Certificate)

MOTION FOR DETERMINATION ON THE PLEADINGS

COMES NOW MoGas Pipeline LLC (“MoGas”), pursuant to 4 CSR 240-2.117(2), and states as follows.

1. Four months ago, on September 9, 2008, Applicant initiated this action by filing a pleading styled “Application to Terminate,” in which Applicant prayed this Commission terminate its involvement in Applicant’s then-pending FERC case (FERC Docket No. CP07-450). In the Application to Terminate, Applicant contended, inter alia:

A. That the Commission has no express or clearly implied statutory authority to intervene in a FERC case;

B. That because FERC cases are matters of interstate commerce, the Commission is explicitly forbidden to intervene in FERC cases by § 386.030, RSMo.

C. That the Commission's enabling legislation does not contemplate the expenditure of state funds to retain a private law firm to represent the Commission in a FERC case and therefore such expenditure is illegal.

2. On September 15, 2008, the Commission was scheduled to take up a Motion to Dismiss the present action for lack of jurisdiction. Rather than dismiss the action, the Commission, on September 16, 2008, ordered Staff to respond to the merits of the Application to Terminate.

3. In its order of September 16, 2008, the Commission recognized the general importance of the issues raised by the Application to Terminate:

. . . the application raises a number of potential issues affecting not only this case but other instances in which the Commission intervenes in matters at the FERC, files comments in FERC dockets and retains outside counsel to handle certain matters.

4. In its order of September 16, 2008, the Commission indicated an intention to make a "disposition" of the Application to Terminate after receiving and considering Staff's response.

5. On September 23, 2008, Staff filed a responsive pleading to the Application to Terminate, which was entitled "Staff's Response."

6. On September 24, 2008, Applicant filed a Reply to Staff's Response. Among other things, Applicant observed that it did not appear that the Commission had authorized Staff's involvement in Applicant's FERC proceedings. In its pleadings, Staff appears tacitly to concede this point.

7. On October 12, 2008, Applicant filed a pleading supplementing its Application to Terminate and providing the Commission with an Order issued by the FERC on September 25, 2008.

8. On October 20, 2008, Staff responded to Applicant's supplemental pleading and moved for a determination on the pleadings pursuant to 4 CSR 240-2.117(2).

9. On January 5, 2009, outside counsel for the Commission filed a new Intervention and Protest, purportedly on behalf of the Commission, in FERC Docket No. RP09-185-000, a second FERC cases to which Applicant is a party. This new Intervention and Protest demands

that FERC order Applicant to modify Applicant's proposed federal tariff sheets. A copy of said filing is attached as **Exhibit A**.

10. Applicant's federal tariff sheets are a matter of interstate commerce, and all of the issues and arguments raised in this action apply equally to the Commission's intervention in FERC Docket No. RP09-185-000.

11. As the Commission recognized in its order of September 16, 2008, the issues raised by the present action affect not only FERC Docket No. CP07-450 but all "other instances in which the Commission intervenes in matters at the FERC, files comments in FERC dockets and retains outside counsel to handle certain matters."

12. Regardless of the current status of FERC Docket No. CP07-450, the issues presented by the Application to Terminate are ripe for determination in the present action because—as recognized in the Commission's order of September 16, 2008 and as shown by the new intervention in FERC Docket No. RP09-185-000—the issues are of a recurring nature, are of general public interest and importance, and yet could evade judicial review. *See State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. 1979). Because the legal principles at stake in this action have not previously been ruled upon, a declaration can and should be made for future guidance. *Cf. State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882 (Mo.App. W.D. 1981).

13. There are no questions of material fact to be determined by an evidentiary hearing in this action.

14. There are no questions of material fact that require determination by an evidentiary hearing in order for the Commission to make a declaration applicable to FERC Docket No. RP09-185-000.

15. There are no questions of material fact that require determination by an evidentiary hearing in order for the Commission to make a declaration for future guidance.

16. This action does not seek a rate increase and is not subject to an operation of law date.

17. Disposition of this action on the pleadings is not contrary to law and is in the public interest.

18. The Commission can—and should—resolve this matter and the associated issues of general public interest and importance forthwith on the pleadings before it.

WHEREFORE, pursuant to 4 CSR 240-2.117(2), Applicant hereby:

(A) Moves for a determination on the pleadings; and

(B) Prays for the Commission's determination of the questions of general public interest and importance that are presented by the pleadings, and that the Commission determine such questions as follows:

(1) That the Commission has neither express nor implied statutory authority to intervene in a FERC case;

(2) That the Commission is affirmatively prohibited to intervene a FERC case by § 386.030, RSMo.;

(3) That the Commission is not authorized to expend state funds to retain a private law firm to represent the Commission in a FERC case; and

(4) That none of the above may, in any event, occur without the express authorization of, and upon the recorded vote of, the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 15th day of January, 2009, to:

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/s/David Brown

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

MoGas Pipeline LLC

)

Docket No. RP09-185-000

**NOTICE OF INTERVENTION AND PROTEST OF
THE MISSOURI PUBLIC SERVICE COMMISSION**

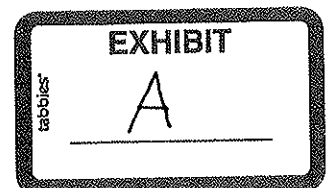
Pursuant to Rules 211 and 214(a)(2) of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure¹ and the Commission's December 30, 2008 Notice of Filing, the Missouri Public Service Commission ("MoPSC") hereby submits its Notice of Intervention and Protest in the above-captioned docket.

I. BACKGROUND

On December 23, 2008, MoGas Pipeline LLC ("MoGas") made a filing proposing to modify certain provisions of its FERC Gas Tariff.² Specifically, MoGas proposes revisions to its tariff in order to: (1) comply with FERC Order No. 712; (2) provide MoGas with "additional flexibility" as to the treatment of new facility costs; (3) modify its tariff provision governing the reservation of capacity for new service; (4) change the provision relating to reservation of capacity for future expansion projects; and (5) make

¹ 18 C.F.R. §§ 385.211 and 385.214(a)(2) (2008).

² MoGas was formed in 2008 through the combination of three affiliated gas pipeline systems. See *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007), *order on reh'g and compliance filing*, 122 FERC ¶ 61,136 (2008). The MoPSC has objected to the Commission's approval of the formation of MoGas, and the MoPSC's request for rehearing of the Commission's February 19, 2008 order in Docket Nos. CP06-407-000, *et al.* remains pending. The instant filing is without prejudice to the MoPSC's request for rehearing and/or the Missouri state court proceedings initiated by the MoPSC seeking to enforce state certificate conditions of MoGas' predecessor pipelines.



minor housekeeping changes.³ MoGas requests an effective date of January 26, 2009 for the proposed tariff sheets.⁴

Notably, certain of the tariff revisions proposed by MoGas in this docket are largely identical to tariff changes that MoGas proposed in a July 5, 2007 compliance filing in Docket Nos. CP06-407-000, *et al.*⁵ The MoPSC and Union Electric Company d/b/a AmerenUE (“AmerenUE”) objected to those tariff changes as outside the permissible scope of MoGas’ compliance filing as well as on the merits.⁶ MoGas filed an answer to the MoPSC and AmerenUE protests in Docket Nos. CP06-407, *et al.* on August 16, 2007.⁷ The Commission ultimately rejected certain of MoGas’ proposed tariff revisions as outside the scope of the compliance filing.⁸

II. NOTICE OF INTERVENTION

The intervenor’s legal name is the Public Service Commission of the State of Missouri. The MoPSC is a governmental agency created under the laws of the State of

³ December 23 Filing, Transmittal Letter at 1.

⁴ *Id.*

⁵ See *Missouri Interstate Gas, LLC*, Docket No. CP06-407-000, *et al.*, Compliance Filing (July 5, 2007). Relevant to the MoPSC’s protest, MoGas’ July 5, 2007 filing proposed tariff revisions to address: (1) waiver of reimbursement for the cost of new facilities; (2) reservation of capacity for new service; and (3) reservation of capacity for future expansions. See *id.*, Transmittal Letter at 13-15.

⁶ See *Missouri Interstate Gas, LLC*, Docket Nos. CP06-407-000, *et al.*, “Motion to Reject, or, in the Alternative, Protest, of the Missouri Public Service Commission” (August 1, 2007) (“MoPSC Protest”); *Missouri Interstate Gas, LLC*, Docket Nos. CP06-407-000, *et al.*, “Protest and Comments of Union Electric Company D/B/A AmerenUE on Compliance Filing” (August 1, 2007) (“AmerenUE Protest”).

⁷ *Missouri Interstate Gas, LLC*, Docket Nos. CP06-407-000, *et al.*, “Opposition to Missouri Public Service Commission’s Motion to Reject Compliance Filing, and Motion for Leave to Answer and Answer Opposing Protests on Compliance Filing of Missouri Interstate Gas, LLC, Missouri Gas Company, LLC and Missouri Pipeline Company, LLC” (August 16, 2007) (“MoGas Answer”).

⁸ *Missouri Interstate Gas, LLC*, 122 FERC ¶ 61,136 at PP 117-18 (2008).

Missouri, § 386.040 MO. REV. STAT. (2002), with jurisdiction to regulate rates and charges for the sale or distribution of natural gas to consumers in the State, § 386.250 MO. REV. STAT. (2002). It is, therefore, a “State Commission” within the meaning of Section 1.101(k) of the Commission’s general regulations. Accordingly, the MoPSC hereby submits its notice of intervention pursuant to Rule 214(a)(2).

The MoPSC requests that all orders, pleadings and other communications be served upon the following persons:

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III. PROTEST⁹

A. MoGas' Tariff Should Provide Additional Details Regarding Waiving Reimbursement For The Cost Of New Facilities

Under proposed section 23.1 of the General Terms and Conditions ("GT&C") of the MoGas tariff, a shipper would be required to reimburse MoGas for the costs of any facilities installed by MoGas with the shipper's consent to receive, measure, transport or deliver natural gas for the shipper's account.¹⁰ Proposed section 23.2 of the GT&C, however, would give MoGas the discretion to waive this reimbursement obligation:

Transporter may waive, at its discretion, all or a portion of the facility cost reimbursement requirement if Shipper provides Transporter adequate assurances of transportation throughput and revenue to make construction of the facilities economical to Transporter. All requests for waiver shall be handled by Transporter in a manner which is not unduly discriminatory.¹¹

These proposed tariff provisions are largely identical to provisions included in MoGas' July 5, 2007 compliance filing in Docket Nos. CP06-407, *et al.* which were protested by the MoPSC and AmerenUE. As the MoPSC argued then, MoGas' proposed tariff provisions fail to specify the circumstances under which MoGas will waive reimbursement of new facilities costs, in contravention of Commission precedent.¹²

⁹ To the best of the MoPSC's knowledge, MoGas did not serve a copy of its December 23 Filing upon the MoPSC as required by 18 C.F.R. § 154.208 (2008). The MoPSC requests that MoGas serve all future tariff filings upon the MoPSC to the attention of Ms. Janis Fischer (see address in section II above). The MoPSC also notes that the version of MoGas' tariff posted on its internet website does not appear to be fully up to date, and, moreover, certain language seems to have been inadvertently omitted from various sections of the online version of MoGas' tariff. These problems made the MoPSC's review of the instant tariff filing more challenging.

¹⁰ The shipper would also be responsible for reimbursing MoGas' FERC filing fees.

¹¹ December 23 Filing, proposed First Revised Sheet No. 82.

¹² See, e.g., *Guardian Pipeline, LLC*, 91 FERC ¶ 61,285 at p. 61,988 (2000).

Indeed, the Texas Eastern tariff provision cited by MoGas¹³ contains a detailed recitation of the factors that will be considered in assessing whether waiver is “economical” to the pipeline.¹⁴ Further, MoGas’ proposed tariff sheets do not contain a requirement that MoGas post on its internet website a detailed description of the circumstances under which any such reimbursement waiver is granted, as the Commission has required.¹⁵

Notably, in its August 16, 2007 Answer in Docket Nos. CP06-407, *et al.*, MoGas agreed to add a sentence to proposed section 23.2 of the GT&C specifying that it “will post the instances under which new facility reimbursement waivers are granted on its website.”¹⁶ MoGas also agreed to add language at the end of proposed section 23.2 of the GT&C consistent with the Commission’s order in *Empire*, and the conforming section 11.2 of Empire’s tariff. Specifically, MoGas proposed the following additional language for section 23.2 of the GT&C:

For purposes of determining whether a project is economical, Transporter will evaluate projects on the basis of various economic criteria, which will include the estimated transportation throughput, cost of the facilities, operating and maintenance as well as administrative and general expenses attributable to the facilities, the revenues Transporter estimates will be generated as a result of such construction, and the availability of capital funds on terms and conditions acceptable to Transporter.¹⁷

¹³ December 23 Filing, Transmittal Letter at 3 n.4.

¹⁴ See Texas Eastern, LP, FERC Gas Tariff, Seventh Revised Volume No. 1, First Rev. Sheet No. 605 (issued October 11, 2005).

¹⁵ See *Empire State Pipeline and Empire Pipeline, Inc.*, 116 FERC ¶ 61,074 at P 188 (2006) (“*Empire*”). Like the Texas Eastern tariff provision cited *supra*, the Empire tariff contained a detailed statement of the factors the pipeline would consider in evaluating waiving reimbursement for new facilities. See section 11.2 of Empire tariff quoted in footnote 12 of AmerenUE’s August 1, 2007 Protest in Docket Nos. CP06-407, *et al.*

¹⁶ MoGas Answer at 21.

¹⁷ *Id.*

MoGas has not included these previously-offered tariff modifications in the proposed tariff sheets included in its December 23, 2008 Filing.

In order to provide transparency and guard against any undue discrimination in granting new facility cost waivers, the Commission should direct MoGas to specify in greater detail the criteria it will apply in determining whether to waive new facility reimbursement costs. The language proposed by MoGas in its August 16, 2007 Answer in Docket No. CP06-407 would be acceptable to the MoPSC in this regard.

Further, consistent with *Empire*, the Commission should direct MoGas to include in its tariff a requirement to post on its internet website a detailed description of the circumstances of any new facility cost waivers. As noted, MoGas' August 16, 2007 Answer in Docket Nos. CP06-407, *et al.* indicated that MoGas would be willing to add a tariff provision requiring it to "post the instances under which new facility reimbursement waivers are granted on its website."¹⁸ It is not clear, however, that merely identifying "the instances" where reimbursement is waived would be sufficient for parties to assess whether waiver is granted on a non-discriminatory basis. The Commission should require MoGas to provide specific details concerning the basis for any waiver, including a description of the economic and/or operational analyses performed by MoGas in determining to waive the reimbursements.

Finally, although proposed GT&C section 23.1 in MoGas' December 23, 2008 Filing is mostly identical to GT&C section 23.1 proposed (and rejected) in MoGas' July 5, 2007 filing in Docket Nos. CP06-407, *et al.*, there is one notable difference. In its 2007 filing, MoGas proposed that if MoGas and a shipper agreed to amortize

¹⁸ MoGas Answer at 21.

reimbursement costs over a mutually agreeable period, carrying charges would be “computed using Commission-established interest rates.”¹⁹ The version of proposed GT&C section 23.1 in the December 23 Filing is silent as to how such carrying charges will be computed.²⁰ The Commission should require MoGas to identify in the tariff how carrying charges on amortized reimbursement costs will be calculated.

B. MoGas Should Be Required To Modify The Proposed Tariff Provisions Relating To Reserving Capacity For New Service

MoGas proposes that, under section 6.4(a) of the GT&C, MoGas would have the authority to reserve capacity for up to 180 days prior to the commencement of service (or longer if mutually agreed). MoGas would, “on a limited term basis up to the in-service date of the new service request, make generally available any capacity reserved under” section 6.4(a).²¹

Proposed section 6.4(a) does not specifically provide that the capacity to be used for new service would first be posted and made available to other shippers as required by Commission policy.²² When this objection was raised in Docket Nos. CP06-407, *et al.*, MoGas stated that it was its “intent that any available capacity will be posted on MoGas’s website,”²³ and that it would “follow the posting requirements set forth in sections 6.7 through 6.9 of its GT&C when capacity becomes available.”²⁴ Further, MoGas indicated a willingness to include a provision in section 6.4(a) “to clarify the tariff to state that

¹⁹ July 5, 2007 Compliance Filing, proposed Original Sheet No. 91.

²⁰ See December 23 Filing, proposed First Revised Sheet No. 82.

²¹ December 23 Filing, proposed First Rev. Sheet No. 58.

²² See *Transcontinental Gas Pipe Line Corp.*, 118 FERC ¶ 61,234 at P 12 (2007).

²³ MoGas Answer at 23-24.

²⁴ *Id.*

section 6.4(a) will be governed by existing sections 6.7 through 6.9 of MoGas's tariff."²⁵ Again, MoGas has not included this proposed language in the version of GT&C section 6.4(a) included in the December 23 Filing. The Commission should direct MoGas to specify in its tariff that the 6.4(a) capacity reservation provisions are subject to the existing capacity posting requirements of the MoGas tariff.

In its August 1, 2007 Protest in Docket Nos. CP06-407, *et al.*, AmerenUE also observed that, contrary to Commission policy, MoGas' proposed tariff sheets did not address how the right of first refusal ("ROFR") would apply to reserved capacity utilized by an interim shipper for a year or more.²⁶ In its August 18, 2007 Answer, MoGas asserted that "the Commission does not require pipelines to offer ROFR rights to interim shippers who will receive service on a temporary basis for more than one year,"²⁷ and that a pipeline is permitted to "provide in its tariff for a waiver of the right of first refusal for such interim shippers, under 'conditions similar in purpose and design to those applied in the capacity reservation context.'"²⁸ Implicitly conceding the validity of AmerenUE's objection concerning the silence of MoGas' tariff in this regard, MoGas proposed "to adopt conforming tariff language, specifying that, for such interim agreements, MoGas reserves the right to limit shipper extension rights, including the ROFR, within the service agreement, as well as that MoGas will indicate, in any open season posting of this capacity, any limitations on such extension rights that will apply to

²⁵ *Id.* at 24.

²⁶ *See* AmerenUE Protest at 7-8.

²⁷ MoGas Answer at 23.

²⁸ *Id.* (quoting *Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141 at P 15 (2004)).

such interim transportation service.”²⁹ The Commission should require MoGas to adopt such tariff language to clarify the operation of the ROFR to interim agreements.³⁰

C. MoGas Should Be Required To Modify The Proposed Provisions Relating To Reserving Capacity For Future Expansions

MoGas proposes a new section 6.4(b) for its GT&C which would allow MoGas to reserve available capacity for future expansion projects.³¹ There are a number of deficiencies in MoGas’ proposal.

First, MoGas should be required to include a provision in section 6.4(b) explicitly stating that it may only reserve capacity that has first been made available to shippers through the open season procedures of its tariff. As the Commission has explained, a “reserved capacity open season ensures that any capacity which [the pipeline] does reserve is capacity which no shipper currently desires.”³² Although MoGas’ proposed tariff states that capacity could only be reserved for a future expansion project for which an open season has been held or will be held, the tariff is not clear regarding whether there must be an open season for the capacity itself prior to any reservation by MoGas.³³

²⁹ *Id.*

³⁰ MoPSC notes that a pipeline may sell interim capacity without a ROFR only if it follows competitive bidding procedures and awards the future capacity using a net present value formula. *See, e.g., El Paso Nat. Gas Co.*, 118 FERC ¶ 61,102 at P 20 (2007). As noted above, MoGas has apparently acknowledged that any proposed reserved capacity must be first subject to the bidding requirements of sections 6.7 through 6.9 of its tariff – provisions that provide for net present value analysis of competing bids.

³¹ *See* December 23 Filing, proposed First Revised Sheet No. 58.

³² *Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072 at P 63 (2007), *reh’g pending*; *see also Iroquois Gas Transmission System, L.P.*, 100 FERC ¶ 61,279 at P 5 (2002).

³³ Further, the posting for such capacity should be no shorter than five business days. *See Ozark Gas Transmission, LLC*, 125 FERC ¶ 61,113 at P 30 (2008).

Second, MoGas should be directed to modify proposed section 6.4(b) to require solicitation of any turn-back capacity before reserving capacity for a future expansion project.³⁴ Such solicitation of unwanted capacity helps to determine the correct size for an expansion project.³⁵

Third, section 6.4(b) should be modified to make clear that, if a capacity reservation under this section expires (for example, because a certificate application is not filed within one year of the reservation), the capacity must be reposted before it can be reserved for another one-year period.³⁶

Finally, MoGas should be required, consistent with Commission policy, to expand section 6.4(b) to provide more information concerning proposed capacity reservations under this section. Specifically, if MoGas proposes to reserve capacity for a future expansion project, it should be required to notify shippers of its intent as part of a reservation posting on its internet website and include at least the following information: (a) a description of the expansion project for which the capacity will be reserved; (b) the total quantity of capacity to be reserved; (c) the location of the proposed reserved capacity on the MoGas system; (d) whether, and if so, when MoGas anticipates that an open season for the capacity will be held or it will otherwise be posted for bids under the expansion; (e) the projected in-service date of the expansion project; and (f) on a rolling basis, how much of the reserved capacity has been sold on a limited term basis.³⁷

³⁴ See *Algonquin*, 120 FERC ¶ 61,072 at P 66; see also *Iroquois*, 100 FERC ¶ 61,279 at P 8.

³⁵ See *id.*

³⁶ *Iroquois*, 100 FERC ¶ 61,279 at P 6.

³⁷ *Id.* at P 7.

IV. CONCLUSION

The MoPSC hereby provides its notice of intervention and asks that the Commission require MoGas to modify its proposed tariff sheets as described herein.

Respectfully submitted,

/s/ John E. McCaffrey

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Dated: January 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

Dated at Washington, D.C., this 5th day of January, 2009.

/s/ John E. McCaffrey

John E. McCaffrey