BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. GC-2006-0491
Missouri Pipeline Company, LLC; Missouri Gas Company, LLC;	)	
Respondents.	)	

RESPONDENTS' MOTION FOR STAY
AND SUGGESTIONS IN SUPPORT

COME NOW Respondents and state as follows:

1. This Commission issued its revised Report and Order in this action on October 11, 2007; the Report and Order is, by its own terms, effective October 21, 2007.

2. This Commission may stay the effect of its Report and Order. *See, e.g., In re Primary Toll Carrier Plan*, 1998 WL 412447, May 07, 1998; NO. TO-97-217.

3. Respondents have preserved numerous legal issues for judicial review, and it is likely that the Respondents will prevail on the merits of such action.

4. If this Commission fails to stay the effect of its Report and Order, it is likely that the Respondents will be irreparably harmed.

5. If this Commission grants a stay of the effect of its Report and Order, it is unlikely that others will be harmed.

6. It is in the public's interest that this Commission grants a stay of the effect of its Report and Order.

SUGGESTIONS IN SUPPORT

The determination of whether a stay of an agency's order is warranted must be based on a balancing of four factors: (1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.[1]

I. Respondents have a high likelihood of prevailing on the merits.

Because the four-prong *Gabbert* test is a balancing test, Respondents need not conclusively prove that they will prevail on the merits; Respondents need only "show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued.[2] Accordingly, to the extent that the potential harm to the other party or to the public interest is minimal or nonexistent, then the burden on Respondents is low, as Respondents have little or nothing to outweigh.

The balancing of the *Gabbert* factors "should not be rigid or 'wooden' and cannot be accomplished with 'mathematical precision.'"[3] Because the *Gabbert* balancing is equitable in nature, the tribunal's approach must "be flexible enough to encompass the particular circumstances of each case."[4]

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[1] *State ex rel. Director of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839-40 (Mo. 1996).

[2] *Gabbert* 840, citing *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm.*, 812 F.2d 288, 290 (6th Cir. 1987).

[3] *Id*, citing *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc).

[4] *Id*, citing *Dataphase*, 640 F.2d at 113.

Respondents are filing an Application for Rehearing concurrently with the present motion; Respondents incorporate that pleading, attached hereto as **Exhibit A**, into the present argument by reference.

In their Application for Rehearing, Respondents preserve substantial legal arguments for review in circuit court, including the following:

- The Commission's rulings on Counts I, III, and IV are based upon speculation, unwarranted inferences, and a disregard of substantial evidence contained in the record, causing one of the Commissioners to write in dissent, "it certainly gives the appearance that the Commission is more interested in obtaining a desired result than in being an impartial administrative tribunal."
- The Commission's findings of fact, which are at critical points unsupported by reference or citation to the record, will not enable the circuit court to review the Commission's decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.
- The Commission erroneously asserts jurisdiction over Omega in its role as an unregulated agent and gas marketing company without offering any legal basis for such jurisdiction.
- The Commission ignores the following critical facts: in its role as a gas marketer for the City of Cuba, Omega did not own the capacity that it was managing; at no point in the transactions at issue was Omega acting in the legal capacity of a "shipper"; and at no point in the transactions at issue was Omega subject to the jurisdiction of the Commission.
- The Commission intentionally—and without support in the record—confuses the background facts concerning the legal relationships among MPC, MGC, Omega, the City of Cuba, and the entities that obtained natural gas from the City of Cuba's capacity.
- The Commission fails to distinguish the transactions at issue in the present case from essentially identical transactions by the City of Richland, which have the full blessing of the Commission, rendering its action against Respondents arbitrary and capricious.
- Without concluding that Respondents intentionally destroyed evidence, the Commission nonsensically invokes the spoliation doctrine to "infer" transportation rates charged to shippers on Respondents' pipelines, not based on any existing principle of the law of evidence but simply because it determined that Complainant "needed" this evidence.

- The Commission's conclusions of law on Count I are at variance with the charge in that the charge alleges that Omega used customer information "in a discriminatory manner," but the Order concludes only that MPC and MGC gave Omega "access" to information about natural gas nominations and gas usage, without any finding that Omega ever made use of this alleged "access" in a discriminatory manner. Furthermore, the Commission's finding of "access" to confidential information ignores the legal presumption that officers holding positions with affiliated entities can and do change roles to represent each entity separately.
- The Commission's nonsensical conclusion that Omega was "allowed" to sell lost and unaccounted for gas is beyond the scope of Count I and entirely unsupported in the record, which describes no mechanism by which Omega—or any other party—could have sold lost and unaccounted for gas that was supposedly "accumulated" on a system with no storage capacity.
- The Commission does not cite any evidence to support its conclusion that Omega profited from its role in balancing nominations on Respondents' pipeline system, which conclusion is against the weight of the evidence, which showed that upon the sale of Omega to Tortoise Capital Resources Corporation, an independent third party, this new owner refused to continue to perform the balancing role without compensation because the balancing role provided it no benefit and carried too much risk.
- The Commission found that Omega began receiving a discount on July 1, 2003 without any evidentiary support for this conclusion.The Commission made conclusions regarding Omega's "possible" increased profit without any evidence regarding Omega's profits or the sources of Omega's assumed or possible profits.
- With regard to clear and conclusive evidence (in Respondents' favor) that Respondents gave a discounted commodity rate to the City of Cuba prior to July 1, 2003, the Commission arbitrarily determines that this conclusive evidence was fraudulently created after the discount was given and thereafter disregards this conclusive evidence. Facts support that effective 7-1-2003 the rate being charged to Cuba went up (the discount was reduced).
- The Commission arbitrarily ignores evidence proving Omega's agency relationship with the City of Cuba, including Omega's agency agreement with the City.
- Because the evidence shows that Omega served in an agency role managing Cuba's capacity, with Cuba receiving a discounted rate as a non-affiliated shipper, the Commission's application of Section 3.2(b) and 12(c) of the General Terms and Conditions of the Pipelines' tariffs to Omega is erroneous.

- The Commission, which does not contest that Cuba and other third-parties were non-affiliates, nevertheless applies tariff provisions to these entities that are only applicable to affiliates of the Pipelines.
- The Commission violates the clear and explicit "notice" terms of the applicable tariff by ordering implementation of new transportation rates for non-affiliated shippers before the requisite notice was filed on June 21, 2006.
- The Commission attempts to impose a reparation, refund, or adjusted rate by an illegal, retroactive application of Respondents' tariffs.
- The Commission, without proof that Omega entered into a discounted transportation agreement concludes that Omega failed to disclose this nonexistent discount.
- The Commission's conclusions of law on Count IV are at variance with the charge in that the charge references only an alleged discount to Omega, whereas the Commission's Order finds "discounts offered to shippers" and not discounts to Omega.
- Respondents' due process rights were violated in this case in that Respondents were denied an impartial decision-maker, as noted by one of the Commissioners in dissent, who found that the Commission engaged in unusual procedures that amounted to "nothing more than an opportunity for Staff to bolster a weak case."
- Respondents' due process rights were violated during the course of a procedurally unauthorized on-the-record presentation in that—as described by a dissenting Commissioner—"the attorneys for Staff and intervenors made numerous assertions and basically testified, all of which was not subject to cross examination." As noted by the dissenting Commissioner, the un-cross-examined testimony, which was also unsworn, "swayed a majority of the Commission."

Of particular significance is the likelihood that Respondents will prevail on a challenge to retroactive and forward-looking rate adjustments ordered by the Commission. The filed rate doctrine prohibits retroactive rate alteration and, in particular, the ordering of reparations.[5] In addition, even a forward-looking rate adjustment must result in a rate that is "just and reasonable" and must be made through the "exercise of a

[5] *State ex rel. Associated Natural Gas Co. v. Public Service Com'n*, 954 S.W.2d 520, 531 (Mo.App. 1997) (citations omitted).

fair and enlightened judgment, having regard to all relevant facts."[6] More specifically, in determining the price to be charged for gas, the Commission must give "due regard" to a "reasonable average rate upon capital actually expended" and to "the necessity of making reservations out of income for surplus and contingencies."[7] In the present case, the Commission orders a retroactive rate adjustment that is explicitly prohibited by the filed rate doctrine, and the Commission orders a forward-looking rate adjustment without any regard, analysis, or even mention of Respondents' return on capital or the necessity for Respondents to make reservations for surplus and contingencies. The resulting rates are not economically viable[8] and cannot be said to be either just or reasonable. The only accurate description for these rates is that they are punitive, and they are clearly the result of what one Commissioner candidly described as a "Commission more interested in obtaining a desired result than in being an impartial administrative tribunal." There is no appreciable chance that these arbitrary and punitive rate adjustments, made without regard for the economics of the delivery of natural gas, will stand upon judicial review.

II. Respondents will be irreparably harmed if the stay is not granted.

If the Commission's Report and Order is allowed to become effective, Respondents will suffer immediate, irreparable harm. Among other forms of relief, the Commission orders a rate adjustment for Respondents' customers, which has already caused several shippers to refuse to pay their current bills in full, paying instead approximately 4% of their current invoices.

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[6] *See State ex rel. Missouri Gas Energy v. Public Service Com'n*, 186 S.W.3d 376, 384 (Mo.App. W.D. 2005), *citing Hope and Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923).

[7] *State ex rel. Midwest Gas Users' Ass'n v. Public Service Commission*, 976 S.W.2d 470, 478 (Mo.App. W.D. 1998).

[8] Exhibit B, Ries Affidavit at ¶ 3.

As discussed above, ordinarily a rate adjustment is made based upon the exercise of fair and enlightened judgment, having regard to all relevant facts and with due regard to a reasonable average rate upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. The adjusted rates imposed by the Commission in its Report and Order provide a negative return on capital[9] and, rather than allow for reservations out of income for surplus and contingencies, will, to the contrary, deplete and immediately exhaust Respondents' reserves.[10] The immediate effect of the adjusted rates will, in fact, be to render Respondents insolvent—if Respondents continue to operate under the adjusted rates.[11] This will force Respondents to terminate service to its customers and sink into financial ruin.[12] The ultimate result will be that Respondents' business operations will be interrupted;[13] that Respondents' credit will be seriously impaired;[14] and that Respondent will be forced to discontinue operations.[15]

The factors to be weighed in considering a stay are the same in evaluating the granting of a preliminary injunction.[16] An injunction should not be granted if its effect would be to interrupt a party's operations, perhaps seriously impair its credit, and injuriously affect the employment of numerous persons.[17] In the present case, it is

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[9] Exhibit B, Ries Affidavit at ¶ 4.

[10] Exhibit B, Ries Affidavit at ¶¶ 5 & 6.

[11] Exhibit B, Ries Affidavit at ¶ 11.

[12] Exhibit B, Ries Affidavit at ¶¶ 3-11.

[13] Exhibit B, Ries Affidavit at ¶¶ 3-11.

[14] Exhibit B, Ries Affidavit at ¶¶ 7 & 8 .

[15] Exhibit B, Ries Affidavit at ¶ 10.

[16] *Gabbert*, 925 S.W.2d at 840.

[17] *Washington Capitols Basketball Club Inc. v. Barry*, 304 F. Supp. 1193 (N.D. Cal. 1969), judgment aff'd, 419 F.2d 472 (9th Cir. 1969).

beyond dispute that the adjusted rates imposed by the Commission will do irreparable harm to Respondents if the Commission's Report and Order is not stayed.

III. No other party will be harmed if a stay is granted.

This Commission will suffer no harm if its order is stayed pending judicial review. The only arguable harm would be to the intervenors in the case, which include customers of Respondents who would benefit from the lower, adjusted rates imposed by the Report and Order, and who might argue that they will be harmed if the lower rates are not imposed immediately. This argument lacks merit because the Report and Order authorizes the customers to file civil actions to recover, retroactive to the year 2003, the difference between the new, adjusted rates and the rates that were previously established by Respondents' tariffs. If Respondents do not prevail upon judicial review, it will be a simple matter for the customers to extend the period for which they seek relief to include the period of the stay in addition to the period between 2003 and the present date. In other words, there will be no irreparable harm to the customers.

Furthermore, if the stay is granted, the customers will continue to pay rates that were properly established pursuant to a ratemaking procedure previously conducted before this Commission after due consideration of all relevant factors. None of the customers have ever formally complained that such rates were unfair or unreasonable. Continuing to pay fair and reasonable rates during the pendency of the review process will not harm the customers. To the extent that the customers will lose anything at all, it will be the loss of a windfall, which the customers can recover if Respondents do not prevail upon judicial review.

IV. It is in the public's interest that the stay be granted.

The Commission must consider the requested stay's effect upon all parties in interest and should issue a stay when it is necessary to serve the public's interest.[18] In the present case, the public, which includes end users of the natural gas transported by Respondents, will suffer great harm if the stay is not granted because Respondents will be forced to discontinue natural gas transportation service to its customers, depriving the end users of natural gas service.[19] Given that the winter heating season is beginning, the continued transportation of natural gas is essential to the public welfare. Grating the stay will allow Respondents to continue to transport natural gas to their shippers; denying the stay will irreparably harm the public by interrupting the supply of natural gas during the critical winter heating season.

V. Conclusion

All four prongs of the *Gabbert* balancing test weigh in favor of a stay: (1) Respondents have preserved substantial legal arguments for review in circuit court that create a significant likelihood that Respondents will prevail there on a Petition for Review; (2) Respondents have demonstrated that absent a stay, they will suffer irreparable financial harm; (3) A stay does no harm to the Public Service Commission whatsoever, and the only arguable harm to the intervenors is slight delay in their ability to file damage actions in circuit court against Respondents for damages alleged to have begun in 2003, which delay will not in any way hinder or limit the potential recovery of the intervenors; and (4) A stay will preserve the status quo and thereby prevent the public from being harmed by a termination of natural gas service at precisely the time of year when natural gas service is essential to the public welfare.

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[18] *See Higday v. Nickolaus*, 469 S.W.2d 859, 871 (Mo.App.1971).

[19] Exhibit B, Ries Affidavit.

For the foregoing reasons, in the present case it is clear that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party if a stay is issued, and the public interest also weighs in favor of a stay. Consequently, a stay should be granted, both to prevent irreparable harm to Respondents and to serve the public interest of uninterrupted natural gas service during the winter heating season.

WHEREFORE, Respondents respectfully request that this Commission stay the effect of its Report and Order until this action is finally resolved by judicial review.

Dated: October 19, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Respondents' Initial Post Hearing Brief has been transmitted by e-mail or mailed, First Class, postage prepaid, this 19th day of October, 2007, to:

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