

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

In the Matter of Southern Union Company)	
d/b/a Missouri Gas Energy's Application)	Case No. GE-2011-0282
for Waiver/Variance.)	

**PUBLIC COUNSEL'S MOTION
FOR SUMMARY DETERMINATION**

COMES NOW the Missouri Office of the Public Counsel (OPC) and for its Motion for Summary Determination, OPC states as follows:

1. On June 29, 2011 MGE filed an Application for Waiver/Variance ("Application") asking the Commission to allow MGE to renege on MGE's commitment to continue transportation and storage discounts on gas purchased from Panhandle Eastern Pipeline Company ("Panhandle"), a commitment MGE made to satisfy opposition to MGE's acquisition of Panhandle by other parties, and to gain Commission approval of MGE's purchase of Panhandle. OPC opposes MGE's request and urges the Commission to summarily deny the Application.

2. On March 23, 2003, MGE entered into a Stipulation and Agreement ("Agreement") with OPC and the Staff of the Commission, stating in part, "The parties agree that the Commission should issue its order, subject to the conditions contained herein, authorizing Southern Union to acquire, directly or indirectly, up to and including one hundred percent (100%) of the equity interests of Panhandle, including its subsidiaries."¹

¹ Stipulation and Agreement, Case Number GM-2003-0238, *In the Matter of the Application of Southern Union Company d/b/a Missouri Gas Energy for Authority to Acquire Directly or*

3. A key condition included in the Agreement that allowed the parties to resolve the case in favor of approving MGE's acquisition application is the following:

MGE agrees, for purposes of calculating its purchase gas adjustment ("PGA") and actual cost adjustment ("ACA") rates, to maintain at least the same percentage of discount it is currently receiving on Panhandle and Southern Star Central for purposes of transportation and storage costs passed through the PGA clause to MGE's ratepayers as provided in Highly Confidential Appendix 2 hereto. This provision does not alter MGE's obligation to obtain the best terms for gas transportation that it can... This paragraph 6.A. shall apply for only so long as MGE is an affiliate of SUPC [Southern Union Panhandle Corporation] and Successor Entities."²

This provision, described in the Agreement as a "discount-preservation mechanism," specifically requires MGE to apply the transportation and storage discount through the PGA so long as MGE is affiliated with Panhandle.

4. Appendix 2 to the Agreement made it clear that the discount-preservation mechanism would continue to apply in the event MGE negotiated a new rate with its affiliate Panhandle:

It is also understood that this discount-preservation mechanism is intended to ensure that MGE's current discount percentage on Panhandle (** _____ ** of the FERC maximum tariff rate for transportation and ** _____ ** of the FERC maximum tariff rate for storage) is not exceeded, for purposes of calculating MGE's PGA rates, as a result of subsequent negotiations between MGE and SUPC.³

5. This understanding of the Agreement was confirmed by MGE's counsel, Mr. Robert Hack, and by counsel for OPC and Staff, when questioned by Commissioner Steve Gaw during the March 26, 2003 presentation of the Agreement to the Commission:

Indirectly, Up to and Including One Hundred Percent (100%) of the Equity Interests of Panhandle Eastern Pipeline Company, Including its Subsidiaries, and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction, Filed March 24, 2003, p. 3.

² Stipulation and Agreement, Case Number GM-2003-0238, Filed March 24, 2003, pp. 12-13.

³ *Id.*, Appendix 2, Non-Proprietary.

COMMISSIONER GAW:... I understand that there's an understanding in the stip that the current discounts that are there will stay in place. I'm not clear, I can't recall if there was a - - how long that is intended to go on or is anticipated to go on.

MR. HACK: Well, let me just clarify that. It's intended to go as long - - it's intended to run as long as there is a relationship, an affiliate relationship between MGE and Southern Union Panhandle. What it - - what the provision actually says is that for purposes of calculating MGE's PGA rates, that discount will be used.

Our contracts with Panhandle run - - again, I'm running from the top of my head - - through I'm going to say October or August of '05. So there will be no change in the contract between now and then.

To the extent there is a change in the contract thereafter, it will be whatever we're able to negotiate with the Panhandle. But for purposes of our PGA rates, we will - - we will continue to use that discount percentage.

So Panhandle will be able to comply with its non-discrimination standard at the FERC level by charging us what they're able to negotiate. We will try to protect our interests in those negotiations as best we can, but for purposes of PGA setting, that's what we've agreed to.

COMMISSIONER GAW: I may catch you coming and going here. I apologize for that. I'm just trying to understand both sides of this.

MR. HACK: That's fair.

COMMISSIONER GAW: If you get to that point where the contracts are renegotiated, if it - - if it were feasible or if it were possible to get a lower rate, discount rate - -

MR. HACK: Right.

COMMISSIONER GAW: - - would the PGA then reflect that?

MR. HACK: Absolutely.

COMMISSIONER GAW: But if there is a higher rate, you can't negotiate the same rate, the PGA would still reflect the current, the current discount?

MR. HACK: Correct.

COMMISSIONER GAW: Here's the other side that I want to understand. Is it foreseeable that the FERC could suggest if, for instance, discounts given to other LDCs were not as good, that the FERC could say,

you cut a special deal here and we're not going to allow that discount? Is it possible that that could occur with the rules contemplated on affiliate transactions that are out there?

MR. HACK: Well, I don't think that the affiliate rules would change the result one way or the other.

COMMISSIONER GAW: All right.

MR. HACK: If there's a special deal that can't be justified as, quote, due discrimination, then there is that kind of possibility, but - - and that's why we structured the condition here the way we did, to be in agreement to MGE not to pass on any more than the discount level. Whatever the negotiations are going to be, they're going to be based upon the Panhandle's need to comply with the law.

COMMISSIONER GAW: Yeah. Okay. So if they - - if Panhandle has to raise its rates because of that scenario - - and I realize what may be very farfetched - - but in that event, the PGA would actually reflect the change under this agreement or not?

MR. HACK: It would not. We would pay the rate, but the PGA rate wouldn't reflect it. They would charge whatever they charge.

COMMISSIONER GAW: Okay. Mr. Micheel?

MR. MICHEEL:⁴ The obligation is MGE's obligation. The obligation in the stipulation has nothing to do with Panhandle Eastern.

COMMISSIONER GAW: I understand that concept. I wanted to make sure that I was tracking it, and I - - I appreciate the explanation, because that clears it up for me a lot. The current - - and, again, that's - - that goes on indefinitely as long - - as long as this affiliation exists?

MR. HACK: I can tell you that's not something we were real wild about, but - -

COMMISSIONER GAW: I understand.

MR. FRANSON:⁵ But they did, of course, agree to that.⁶

⁴ Mr. Micheel was counsel for the Office of the Public Counsel.

⁵ Mr. Franson was counsel for the Staff of the Commission.

⁶ Case Number GM-2003-0238, Transcript of Proceedings, Presentation of Stipulation & Agreement, March 26, 2003, Volume 4, pp. 83-88.

6. The above line of questioning demonstrates that all parties to the Agreement understood that if MGE failed to negotiate a discount with Panhandle, the discount would still apply for MGE's customers through the PGA. It is also clear from this line of questioning that this was the understanding of the Commission when it approved the Agreement and ordered the signatories to comply with the terms of the Agreement.⁷

7. In a prior case regarding a public utility company's attempt to renege on a stipulation an agreement, the Commission concluded, "The Stipulation and Agreement was freely negotiated. Consideration was given and received. The Commission approved it and it is binding."⁸ The same analysis applies to MGE's Application as well in that the Agreement was freely negotiated, consideration was given and received, it was approved and ordered by the Commission, and it is now binding on MGE.

8. MGE argues that it was unable to negotiate with its affiliate for the discount, which does not explain how the discount would no longer help protect consumers against harmful implications created by transactions with its pipeline affiliate. Moreover, this scenario was specifically recognized by Appendix 2 to the Agreement, and by MGE, OPC, Staff and the Commission, during the on-the-record presentation of the Agreement.

9. Every party to the Agreement had their individual reasons for agreeing to the terms included in the Agreement, and the testimony received into evidence in Case

⁷ Order Approving Stipulation and Agreement and Approving Application, Case Number GM-2003-0238, March 27, 2003.

⁸ See Order Clarifying Continued Applicability of the Interim Energy Charge, Case Number ER-2006-0315, *In the Matter of the Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company*, May 2, 2006.

Number GM-2003-0238 outlines each party's respective position on the merger request.⁹ OPC asserts that the consumer protections provided by the discount-preservation mechanism did not disappear once MGE negotiated new contracts with its affiliate. The discount-preservation mechanism was included because it recognized that the concerns with the affiliate relationship between MGE and Panhandle would continue after new contracts were negotiated.

10. The Panhandle discount and the discount-preservation mechanism were key conditions recognized by OPC when it agreed to abandon its opposition. Eliminating the discounts and reneging on MGE's agreement ignores the consideration given by OPC to reverse its objection to approving the acquisition application.

11. The Commission should also recognize the number of other parties to the Panhandle acquisition case that did not sign the Agreement and did not object to it, but that may have objected to the acquisition and requested an evidentiary hearing were it not for the Agreement. Parties to the case that did not sign the Agreement and did not oppose the Agreement were: Jeremiah W. (Jay) Nixon, Attorney General, on behalf of the State of Missouri; Enbridge Pipelines; Local 5-348 of Paper, Allied-Industrial, Chemical and Energy International Union; Union Electric Company; Midwest Gas Users Association; Laclede Gas Company; and Kansas City Power & Light Company.¹⁰

12. Commission rule 4 CSR 240-2.117(1) allows a party to seek disposition of any case by summary determination, and requires the moving party to demonstrate that

⁹ Three (3) OPC witnesses (Busch, Burdette, and Robertson), five (5) Staff witnesses (Bernsen, Hyneman, Morrissey, Murray, and Sommerer), two (2) MGE witnesses (Karam and Kvapil), and one (1) Kansas City Power & Light witness (Kramer) filed testimony that was received into evidence. The Agreement provides on p. 20 that "The prefiled testimony and schedules submitted by Southern Union, Staff, Public Counsel and Kansas City Power & Light Company shall be received into evidence without the necessity of the witnesses taking the stand."

there is no issue of material fact. The following material facts are not contested and would allow the Commission to deny the Application on the pleadings:

a. MGE's Application acknowledges that MGE entered into the Stipulation and Agreement in Case Number GM-2003-0238.¹¹

b. MGE's Application acknowledges that the Stipulation and Agreement recommends approval of MGE's application to acquire the equity interests in Panhandle Eastern Pipeline Company subject to conditions;¹²

c. MGE's Application acknowledges that the Stipulation and Agreement in Case Number GM-2003-0238 includes a provision that requires MGE to maintain the same percentage discount on Panhandle for purposes of transportation and storage costs passed through the PGA clause.¹³

These facts form the basis for a Commission order denying MGE's Application because MGE agreed to apply the transportation and storage discounts as long as the affiliate relationship exists between MGE and Panhandle, and in exchange, OPC agreed not pursue its right to oppose the transaction that created the affiliate relationship.

WHEREFORE, the Office of the Public Counsel respectfully moves the Commission to grant this Motion for Summary Determination and deny MGE's Application for Waiver/Variance.

¹⁰ Stipulation and Agreement, Case Number GM-2003-0238, cover letter, March 25, 2003.

¹¹ MGE's Application for Waiver/Variance, Case Number GE-2011-0282, June 29, 2011, p.2.

¹² *Id.*, p.3.

¹³ *Id.*

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 19th day of August 2011.

/s/ Marc Poston

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In the Matter of Southern Union Company)	
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**PUBLIC COUNSEL'S LEGAL MEMORANDUM IN
SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION**

COMES NOW the Missouri Office of the Public Counsel (OPC) and for its Legal Memorandum in Support of its Motion for Summary Determination states as follows:

1. Commission rule 4 CSR 240-2.117(1)(A) authorizes parties to “seek disposition of all or any part of a case by summary determination... at any time after the close of the intervention period.” The intervention period closed on July 18, 2011.¹

2. “[A] motion for summary determination shall not be filed less than sixty (60) days prior to the hearing except by leave of the Commission.” 4 CSR 240-2.117(1)(A). This case has not been set for hearing.

3. “Motions for summary determination shall state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts.” 4 CSR 240-2.117(1)(B). OPC’s Motion for Summary Determination provides specific references to MGE’s Application to demonstrate the lack of a genuine issue of material fact.

¹ Order Consolidating Files, Directing Notice, and Setting Intervention Deadline, Case No. GE-2011-0282, June 30, 2011.

4. “The commission may grant the motion for 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.” 4 CSR 240-2.117(1)(E). OPC’s Motion for Summary Determination explains that the pleadings demonstrate that there is no genuine issue of material fact in that MGE and OPC acknowledge that the parties entered into the Stipulation and Agreement in Case Number GM-2003-0238. OPC is entitled to relief denying MGE’s Application as a matter of law because the Agreement is binding and requires MGE to maintain the natural gas discounts on Panhandle gas, and because the Commission’s March 27, 2003 Order Approving Stipulation and Agreement and Approving Application, Case Number GM-2003-0238, requires MGE to apply the discounts through the Purchased Gas Adjustment (PGA) so long as MGE and Panhandle are affiliated. Denying the Application is in the public interest because it will allow ratepayers to continue paying less for gas than they would pay without the discounts, and because it will hold a public utility to the commitments it made to gain Commission approval of an acquisition application. Holding public utilities to their commitments is in the public interest because it will provide consumers with confidence in their ability to resolve cases through settlement agreements that, when approved and ordered by the Commission, will also be enforced by the Commission.

5. Commission rule 4 CSR 240-2.117(1)(D) authorizes the Commission to “dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.” Denying MGE’s Application on the pleadings is not contrary to any law, and would be consistent with the Commission’s March 27, 2003 Order Approving Stipulation and Agreement and Approving Application, Case Number GM-2003-

0238, *In the Matter of the Application of Southern Union Company d/b/a Missouri Gas Energy for Authority to Acquire Directly or Indirectly, Up to and Including One Hundred Percent (100%) of the Equity Interests of Panhandle Eastern Pipeline Company, Including its Subsidiaries, and to Take All Other Actions Reasonably Necessary to Effectuate Said Transaction.* Denying MGE's Application on the pleadings would be in the public interest in that it will continue the natural gas discounts that have helped ratepayers and should continue helping ratepayers for the duration of MGE's commitment.

WHEREFORE, the Office of the Public Counsel respectfully offers this Legal Memorandum in Support of its Motion for Summary Determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 19th day of August 2011.

/s/ Marc Poston