

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

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

**MGE'S RESPONSE TO PUBLIC COUNSEL MOTION FOR SUMMARY
DETERMINATION AND STAFF RECOMMENDATION AND MGE'S MOTION FOR
SUMMARY DETERMINATION**

Comes now Southern Union Company d/b/a Missouri Gas Energy ("MGE" or "Company"), and, pursuant to 4 CSR 240-2.117, states as follows to the Missouri Public Service Commission ("Commission") in response to the Office of the Public Counsel's ("Public Counsel") Motion for Summary Determination, Staff's Recommendations, and Staff's Suggestions Regarding Public Counsel's Motion for Summary Determination and as MGE's Motion for Summary Determination:

1. On June 29, 2011, MGE filed its Application for Waiver/Variance requesting that the Commission grant MGE a waiver/variance from the Order in Case No. GM-2003-0238, such that MGE is allowed to calculate its PGA utilizing the actual transportation and storage costs it currently pays to Panhandle Eastern Pipeline Company ("Panhandle Eastern").

2. On July 19, 2011, the Commission issued an Order Directing Filing wherein the Commission directed the Staff of the Commission to file its recommendation by August 25, 2011.

PUBLIC COUNSEL MOTION

3. On August 19, 2011, the Office of the Public Counsel ("Public Counsel") filed its Motion for Summary Determination ("Motion"). Therein, the Public Counsel argues that as a matter of law the MGE's Application should be denied based on three facts:

- MGE entered into a Stipulation and Agreement in Case No. GM-2003-0238;

- The Stipulation and Agreement contained conditions; and,
- One condition of the Stipulation and Agreement requires MGE to maintain the same percentage discount on Panhandle Eastern for purposes of transportation and storage costs passed through the PGA clause. (Motion, p. 7).¹

4. Public Counsel has chosen to not support its Motion with any other factual allegations. In other words, Public Counsel argues that as a matter of law, the conditions found in a Stipulation and Agreement may never be changed.

STAFF RECOMMENDATION AND MOTION

5. On August 25, 2011, the Staff of the Commission (“Staff”) filed its recommendation in this case (“Staff’s Recommendation”). Therein, Staff opposed MGE’s request for waiver/variance for reasons similar to those expressed by Public Counsel. MGE does not agree with Staff’s Recommendation for the reasons stated herein. On August 25, 2011, Staff also filed its Suggestions Regarding Public Counsel’s Motion for Summary Determination (“Staff’s Motion”), using similar arguments to those contained in Public Counsel’s Motion.

MGE MOTION FOR SUMMARY DETERMINATION

6. In addition to responding to the Public Counsel Motion, Staff’s Recommendation, and Staff’s Suggestions, MGE hereby moves the Commission for summary determination in favor of MGE. This Motion is supported by MGE’s verified Application in this matter as well as the affidavit of Kurt Gregson, which is attached hereto as **Appendix 1**. The material facts are described below.

¹ While not necessarily relevant to the issue at hand, Paragraph 11 of the Public Counsel’s Motion provides a list of parties it alleges were “parties to the case that did not sign the Agreement and did not oppose the Agreement.” This list is different from that provided by MGE because certain parties on Public Counsel’s list withdrew from the case prior to its completion. See GM-2003-0238, Order Approving Stipulation and Agreement and Approving Application.

SUMMARY DETERMINATION STANDARD

7. Commission Rule 4 CSR 240-2.117(1)(E) allows the Commission to grant a 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.

8. Thus, the motions for summary determination may be granted only if there is a demonstration that there is no genuine issue as to any material fact. *See Staff v. Laclede Gas Company*, MoPSC Case No. GC-2011-0098, Order Denying Staff's Motion (May 26, 2011).

COMMISSION AUTHORITY

9 A stipulation and agreement has legal significance when the terms are approved and adopted by the Commission. At that point, the stipulation terms become a Commission order. Section 386.490.3 states, in part, that "Every order or decision of the commission . . . shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission. . . ."

10. Section 386.550, RSMo further states, "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." However, the courts have found in regard to Commission orders approving territorial agreements that "[i]f a change in circumstance has occurred since the last order, . . . [a] complaint would not be attacking the previous order and would not be in conflict with section 396.550. It would be an independent proceeding to determine whether the change in circumstances causes the territorial agreement to no longer be in the public interest." *State ex rel. Ozark Border Elec. Coop. v. Public Serv. Comm'n*, 924 S.W.2d 597 (Mo.App. 1996).

11. More recently, in *State of Missouri ex rel. Praxair, Inc., et al. v. Public Service Commission*, 328 S.W.3d 329 (Mo.App 2010), the Court of Appeals upheld the termination of a condition found in a stipulation and agreement, in part, based on the Commission's duty to ensure viability of public utilities to protect the public. *See* FN 10, p. 344 (" . . . the Missouri Supreme Court has long held that the Commission is not bound by contractual terms if they prevent the Commission from ensuring the safety of the ratepayers. *State ex rel. Kansas City Pub. Serv. Co. v. Latshaw*, 325 Mo. 909, 30 S.W.2d 105, 107-108 (Mo.banc 1930). *See also State ex rel. Capital City Water Co. v. Pub. Serv. Comm'n*, 850 S.W.2d 903, 911 (Mo.App. W.D. 1993).").

12. Thus, the mere existence of an approved stipulation and agreement is not determinative of the question. The Commission may issue a different order if there has been a change in circumstances that calls into question whether or not the agreement remains in the public interest. Therefore, the threshold question for the Commission is whether such a change in circumstances has been alleged.

MATERIAL FACTS

13. MGE's Application is verified and, thus, constitutes an affidavit for purposes of the summary determination question. The facts alleged by MGE must be assumed to be true for purposes of the Public Counsel's Motion. Additionally, as described above, MGE has attached hereto as **Appendix 1**, the affidavit of Kurt Gregson, in support of both the MGE Motion and its response to the Public Counsel Motion, Staff's Recommendation, and Staff's Suggestions.

14. The material facts are as follows:

- a. On January 13, 2003, in Case No. GM-2003-0238, Southern Union Company filed an application asking the Commission for authority to acquire, directly or indirectly, up to and including one hundred percent of the equity interests of Panhandle Eastern Pipeline Company, including its subsidiaries.

- b. A Stipulation and Agreement (“Stipulation”) signed by MGE/Southern Union Company, the Commission Staff, and Public Counsel was filed on March 25, 2003.
- c. One of the conditions contained in the Stipulation stated as follows:

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.²
- d. The discounts to be preserved by this provision concerned both transportation and storage discounts.³
- e. The condition was premised upon Staff’s position that “Although the *maximum* transportation rates paid by MGE are regulated by the Federal Energy Regulatory Commission (FERC), it is not uncommon for LDCs like MGE to negotiate discounted rates.” Sommerer Rebuttal, p. 5, Case No. GM-2003-0238 (March 2003).
- f. More than eight years have passed since the subject provision was negotiated by the parties to Case No. GM-2003-0238 and approved by the Commission in March 2003.
- g. The transportation and storage contracts MGE held with Panhandle Eastern in March 2003 expired on March 31, 2005, and thereafter MGE and Panhandle Eastern negotiated and executed two separate five-year transportation agreements (the first commencing April 1, 2005 and expiring March 31, 2010 and the second, currently in effect, commencing April 1, 2010 which will expire March 31, 2015).
- h. MGE and Panhandle Eastern also negotiated two separate storage agreements (the first commencing April 1, 2005 and expiring March 31, 2010 and the second, currently in effect, commencing April 1, 2010 which will expire March 31, 2031).
- i. Since the Commission approved the Stipulation in Case No. GM-2003-0238, market conditions have changed considerably. As a result of changes in market conditions over that time period, no newly negotiated contracts with Panhandle for similar services to those obtained by MGE contain discounts. Thus, MGE’s inability to negotiate a discount is unrelated to its affiliate status. (See Appendix 1).

² See the Stipulation at paragraph 6(A), p. 12.

³ Highly Confidential Appendix A attached to the Application.

- j. As discussed by Kurt Gregson in Appendix 1, as a result of changes in market conditions over that time period, no newly negotiated contracts with Panhandle contain discounts for services similar to those utilized by MGE. Thus, no party – affiliate or non-affiliate – now has transportation or storage discounts on Panhandle Eastern for similar services.
- k. Since 2003, there have been significant changes in FERC regulations that as applied to business negotiations between MGE and Panhandle Eastern provide significant protections to MGE ratepayers. Specifically,
 - i. The FERC issued Order No. 717 on October 16, 2008, which made a number of fundamental changes to its Standards of Conduct rules. Under those rules, MGE is considered a “marketing affiliate” of Panhandle Eastern, so Panhandle Eastern is strictly prohibited from providing preferential treatment or non-public information to MGE that would give it an advantage over its other customers.
 - ii. Some key aspects of FERC’s Standards of Conduct rules are a) non-discrimination (Panhandle Eastern must treat all customers on a non-discriminatory basis and may not preferentially benefit an affiliate such as MGE), b) no conduit of information (no disclosure of non-public transmission function information or transmission customer information to affiliates like MGE), and c) transparency (Panhandle Eastern must post any non-public information inadvertently or otherwise made available to affiliates like MGE). Under these rules, Panhandle Eastern must strictly enforce all tariff provisions and must apply tariff provisions fairly.
 - iii. Panhandle Eastern is prohibited from providing any price advantages to MGE based on its affiliate relationship under these FERC rules. Panhandle Eastern may not give undue preference to any person, particularly marketing affiliates like MGE, in matters relating to the sale or purchase of transportation, storage, and parking and lending services (including but not limited to price, curtailment, scheduling, priority, or balancing).
 - iv. Designated MGE and Panhandle Eastern employees are required to receive annual training on the FERC Standards of Conduct rules. Details on Panhandle Eastern’s Standard of Conduct requirements may be found on its website, www.panhandleenergy.com, by selecting “Informational Postings” and then “Standards of Conduct.”
 - v. Penalties for violating these rules are severe – the Energy Policy Act of 2005 increased the FERC’s maximum civil penalty authority from \$5,000 per day per violation up to \$1,000,000 per day per violation. In addition, the FERC can tailor penalties to include a) disgorgement of unjust profits and b) suspend, condition, or revoke market-based rate authority, certificate authority, or blanket certificate authority. Potential criminal

penalties for willfully and knowingly violating the Natural Gas Act and the Natural Gas Policy Act were increased up to \$1,000,000 and imprisonment up to five years.

- l. In its most recent contract negotiations with Panhandle Eastern (in the context of contracts that were expiring on March 31, 2010), MGE was unable to obtain any discounts with respect to transportation or storage capacity on Panhandle Eastern.
- m. The result is that MGE has been and, unless this application is granted, will continue to be, required to utilize transportation and storage expense in the calculation of its PGA that is far less than the actual expense incurred by MGE.
- n. In compliance with the discount provision approved by the Commission in Case No. GM-2003-0238, MGE has imputed non-existent discounts of approximately \$** ** through ACA adjustments, as shown in Highly Confidential Appendix B to the Application. This figure pertains to the contracts between MGE and Panhandle that were effective from April 1, 2005 through March 31, 2010.
- o. Continued imputation of the non-existent and unavailable Panhandle Eastern discounts will reduce MGE's earnings by approximately \$** ** annually.
- p. With the transportation and storage contracts that became effective April 1, 2010, MGE was able to restructure the Panhandle Eastern contracts such that MGE's actual usage of Panhandle Eastern's services has decreased, resulting in a significant reduction in transportation and storage fees paid by MGE to Panhandle. The total, annual amount paid by MGE for Panhandle Eastern transportation and storage capacity cost (i.e., beginning with the new contract term effective April 1, 2010 which has no discounts) is now approximately \$** ** per year less than the annual amount paid by MGE for Panhandle Eastern transportation and storage capacity when the Commission approved the Stipulation in Case No. GM-2003-0238 (when MGE's Panhandle rates were discounted considerably).
- q. As Mr. Gregson details in Appendix 1, the imputed discounts are a clear disincentive for MGE to use Panhandle Eastern's service and, if continued, they may distort the decision-making process and encourage transportation and/or storage decisions that may not be as beneficial to customers as the use of Panhandle Eastern's non-discounted service. The potential elimination of certain pipeline service to MGE's service territory and resulting requirement to obtain replacement service highlights the immediacy of this concern, as described by Mr. Gregson in Appendix 1.

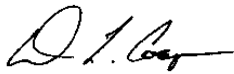
CONCLUSION

15. Public Counsel's Motion for Summary Determination may only be granted if the Commission believes a change of circumstances calling for a reexamination of the subject condition has not been alleged. In this case, a change of circumstances has been alleged that calls into question whether the relevant discount provision remains in the public interest. Consequently, Public Counsel's Motion, as supported by Staff's Suggestions, should be denied.

16. The change in market conditions on Panhandle Eastern is a change of circumstances that necessarily indicates that the subject condition is no longer in the public interest. Accordingly, the Commission should grant MGE's Motion for Summary Determination and order that MGE's gas costs be calculated beginning July 1, 2010 (the start of the 2010/2011 ACA period), based on MGE's actual transportation and storage costs – subject to audit and prudence review during the ACA process.

WHEREFORE, MGE respectfully requests that the Commission consider MGE's objections to the Staff Recommendation and, thereafter, issue its order denying the Public Counsel's Motion for Summary Determination and granting MGE's Motion for Summary Determination.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 19th day of September, 2011, to the following:

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