

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

Ozarks Medical Center d/b/a Ozarks)
Healthcare,)
)
Complainant,)
)
v.)
)
Summit Natural Gas of Missouri, Inc.,)
)
Respondent.)

Case No. GC-2022-0158

**OZARKS MEDICAL CENTER D/B/A OZARKS HEALTHCARE'S
POST-HEARING REPLY BRIEF**

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I. Introduction

Ozarks Medical Center d/b/a Ozarks Healthcare’s (“Ozarks” or the “Hospital”) initial brief addresses both the legal and public interest basis for both forms of its requested relief. An accounting authority order (“AAO”) is justified because the cashout in controversy originates from multiple extraordinary, nonrecurring events. A Public Service Commission (“Commission”) ordered payment plan is also proper under Summit Natural Gas of Missouri, Inc.’s (“SNGMO”) tariff and the Commission’s inherent regulatory powers. Addressing Ozarks’ cashout in either manner is not unduly discriminatory.

Ozarks’ initial post-hearing brief also addresses several of the legal arguments and positions raised by the other parties. This reply brief is therefore limited to those points requiring further clarification or response. Ozarks asks that the Commission not construe any silence as assent to any point raised by other parties.

II. Reply to Summit Natural Gas of Missouri, Inc.

The Commission should reject SNGMO’s opposition to Ozarks’ requested relief because SNGMO’s arguments misapply the record and law at issue.

A. SNGMO mischaracterizes Ozarks Healthcare’s attempts to balance its nominated gas.

SNGMO makes a point early in its brief of contending that Ozarks did not adequately explain why it failed to balance its nominated gas use after Winter Storm Uri.¹ This attitude reflects a lack of understanding of Ozarks’ situation compared to other transportation customers. According to SNGMO, Ozarks underestimated its natural gas use by 1,225 dekatherms in February, 2021, amounting to a negative imbalance of 33.67 percent.² SNGMO appears to believe

¹ Summit Natural Gas of Missouri, Inc.’s Initial Brief, GC-2022-0158 p. 3 (Jun. 17, 2022).

² Transcript of Proceedings Vol. II, GC-2022-0158, p. 55:1-4 (May 24, 2022).

that Ozarks could have easily reduced its natural gas use by a third in February 2021. However, as Mr. Reeves explained, although Ozarks curtailed gas use at its outpatient facilities, the Hospital must maintain operations at its main campus inpatient and emergency room spaces.³ Its duty to continue serving patients distinguishes it from other transportation customers that can curtail natural gas use relatively easily. Furthermore, Ozarks only found out about this imbalance late into the month.⁴ By that time, reducing natural gas use by a third was infeasible, especially as the COVID-19 pandemic continued to stress Hospital facilities beyond Winter Storm Uri.

B. SNGMO’s opposition to Ozarks’ requested relief is not rooted in the law.

SNGMO raises three legal arguments to oppose Ozarks’ requested AAO. If accepted, these arguments would constrain this Commission’s powers beyond previous understandings. SNGMO first argues that granting an AAO is contrary to the filed rate doctrine.⁵ The filed rate doctrine posits that a utility’s legal rate is the one filed with the Commission, and that rates can only be changed in rate proceedings.⁶ An AAO, by its nature, cannot violate the filed rate doctrine because AAOs do not change rates.⁷ AAOs are not ratemaking and cannot violate discriminatory, retroactivity, or other ratemaking standards by definition. AAOs are instead exceptions to the Commission’s general ratemaking duties, making SNGMO’s first argument a non sequitur.⁸

³ *Id.* at 105:10-17.

⁴ *Id.* at 105:1-8.

⁵ SNGMO’s Initial Brief at 5.

⁶ *Agnew v. Missouri-Am. Water Co.*, 567 S.W.3d 652, 662 (Mo. App. E.D. 2018).

⁷ *Off. of Pub. Counsel v. Every Mo. W., Inc.*, 609 S.W.3d 857, 870 (Mo. App. W.D. 2020); *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm’n*, 210 S.W.3d 330, 335-36 (Mo. App. W.D. 2006).

⁸ *Every Mo. W.*, 609 S.W.3d at 866 (“We have emphasized that, because establishment of an AAO deviates from the Commission’s general ratemaking methodology, the Commission has substantial discretion in determining whether an AAO is appropriate in a particular case”).

SNGMO's second argument is that Ozarks' requested AAO could result in a constitutional taking.⁹ SNGMO's position is that should the Commission grant an AAO, SNGMO could potentially not collect all that it believes it is owed later. Under SNGMO's logic, collecting just one cent less than authorized revenue is impermissible. This logic is wrong. Utilities have never been entitled to their full authorized return, only the opportunity to earn a reasonable return.¹⁰ An AAO does not interfere with SNGMO's opportunity to earn a reasonable return because it does not change rates, and SNGMO's rates will most likely continue earning a reasonable return given that SNGMO's has not initiated a rate case since 2014.¹¹ SNGMO fears that an AAO "could" result in it receiving less than full revenues, but conditional language like "could" and "would" demonstrates that this fear is mere speculation.¹² Speculation alone should not undermine the Commission's confidence of being fully capable of preventing SNGMO's supposed "taking" in the next rate proceeding.

The third legal argument is that the requested payment plan is not available by law because there is no specific statute on point.¹³ Ozarks' initial brief presents the legal justification for a Commission-ordered payment plan under SNGMO's tariff and Section 386.040, RSMo, so Ozarks will not restate those bases here.¹⁴ However, It is worth noting that SNGMO's position should also negate its own purchased gas adjustment clause ("PGA") and yet the surcharge remains. There is

⁹ SNGMO's Initial Brief at 5-6.

¹⁰ *State ex rel. Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 48 (Mo. banc 1979); *Mo. Gas Energy*, 210 S.W.3d at 336 ("Although in the past AAOs may have resulted in recovery of less than the amount lost, this is in line with Missouri law. The Utilities are not automatically entitled to receive all of the costs in the next rate case for several reasons").

¹¹ Ex. 101P, Surrebuttal Testimony of Josh Reeves, GC-2022-0158 p. 8 (Apr. 8, 2022).

¹² SNGMO's Initial Brief at 6.

¹³ *Id.* at 8.

¹⁴ Ozarks Medical Center d/b/a Ozarks Healthcare's Initial Post-Hearing Brief, GC-2020-0158 p. 17-20 (Jun. 17, 2022).

no statutory authority for SNGMO to recover gas costs as a separate line item on customer bills, and no other provision of law explicitly permits natural gas utilities to change the PGA rate outside of a general rate case. Nonetheless, Missouri courts recognize the Commission's inherent power to authorize the PGA mechanism.¹⁵ Just as the Commission may authorize the PGA for cost recovery, it should also recognize its implicit ability to direct cost collections through payment plans.

C. Ozarks' initial brief already addresses SNGMO's objections based on policy.

In addition to its legal arguments, SNGMO's initial brief objects to Ozarks' requested AAO on the bases of fairness and discrimination.¹⁶ Ozarks' initial brief already addresses those points, and the Hospital will not belabor the public interest justification for its requested relief further.¹⁷

D. SNGMO's conclusion overlooks Ozarks' cited authority for its Complaint and Commission practice.

SNGMO's initial brief concludes with the assertion that the Commission should dismiss this case because Ozarks has not shown a violation of law to support its Complaint.¹⁸ The Office of the Public Counsel ("OPC") makes the same claim.¹⁹ Both are wrong for two reasons. First, both SNGMO and OPC appear to ignore Commission Rule 20 CSR 4240-13.050, which prohibits utilities from terminating service for a disputed delinquent charge.²⁰ Ozarks' Complaint plead that it disputed SNGMO's billing and that SNGMO had nonetheless threatened to disconnect the

¹⁵ *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 470, 477-78 (Mo. App. W.D. 1998).

¹⁶ SNGMO's Initial Brief at 7-8.

¹⁷ Ozarks' Initial Brief at 12-16.

¹⁸ SNGMO's Initial Brief at 9.

¹⁹ Initial Brief of the Office of the Public Counsel, GC-2022-0158 p. 2 & 8 (Jun. 17, 2022).

²⁰ 20 CSR 4240-13.050(1)(A).

hospital.²¹ Ozarks' counsel explained the Commission rule underlying the Complaint during the evidentiary hearing,²² and Ozarks' initial brief invokes 20 CSR 4240-13.050.²³ Given these repeated references, the basis for Ozarks' Complaint is clear.

Second, Ozarks filed its request for an AAO as a complaint per this Commission's preferred practice. Customer representatives last sought an AAO three years ago. At that time, the Commission reclassified it as a complaint shortly after filing.²⁴ The Commission later denied the subject utility's motion to dismiss because the Commission concluded that customers may seek AAOs by complaint per Sections 386.390 and 393.140, RSMo.²⁵ The Missouri Court of Appeals later affirmed the Commission's issued AAO.²⁶ Ozarks' Complaint likewise relied on both statutes and therefore complies with this Commission's guidance.²⁷

III. Reply to Staff of the Public Service Commission

The Staff of the Public Service Commission ("Staff") oppose Ozarks' requested relief on similar grounds as SNGMO's legal and public policy positions. The Hospital's reply will therefore be limited to those points that are absolutely necessary.

Staff admits that the Commission has the authority to grant Ozarks' requested AAO but contends that the Commission should not issue an AAO because Ozarks accepted the risk of being

²¹ Complaint, GC-2022-0158 ¶¶ 27, 32-36 & 51 (Dec. 10, 2021).

²² Transcript of Proceedings Vol. II at 28:1-10.

²³ Ozarks' Initial Brief at 1, fn 2.

²⁴ Notice that Petition will be Treated as a Complaint and Assigned a New File Number, *In the Matter of the Pet. For an Order Directing KCP&L Greater Mo. Operations Comp.*, EU-2019-0197 (Jan. 2, 2019).

²⁵ Order Denying Motion to Dismiss, *Office of the Pub. Counsel v. KCP&L Greater Mo. Operations Comp.*, EC-2019-0200 (Mar. 6, 2019) ("Whether their pleading is called a petition or a complaint does not control the determination of whether Public Counsel and MECG have stated a cause of action. Instead, the question is whether that pleading has properly invoked the jurisdiction of the Commission")

²⁶ *Every Mo. W.*, 609 S.W.3d at 866.

²⁷ Complaint, GC-2022-0158 ¶¶ 8 & 39.

a transportation customer.²⁸ This analysis ignores this case’s exigent circumstances making it extraordinary. As Ozarks’ initial brief explains, the disputed cashout debt is the culmination of unprecedented price increases, a freak storm, a failing backup propane system, and the COVID-19 pandemic.²⁹ These are the types of extraordinary circumstances warranting an AAO. The Hospital did not accept such extreme risks nor was it in a position to mitigate them. Staff otherwise objects to Ozarks’ AAO because of its “conceptual” disagreement with the request.³⁰ The public interest portion of the Hospital’s initial brief speaks to this disagreement and no more needs to be said.³¹ Ozarks’ brief also addresses Staff’s conclusion that the Commission cannot order a payment plan.³²

IV. Reply to Office of the Public Counsel

The majority of OPC’s initial brief disputes the legal integrity of Ozarks’ Complaint with little other opposition beyond a passing remark that there is no “reasonable justification” for the requested relief.³³ The Hospital again relies on its previously-stated public interest explanation to respond to OPC’s “reasonable justification” contention.³⁴ As for OPC’s legal arguments, the Commission should reject them for reasons explained below.

A. OPC’s standing analysis is flawed.

OPC’s brief begins by arguing that Ozarks lacks standing³⁵ to raise its claims under Section 386.390, RSMo. According to OPC, a party cannot contest the reasonableness of any rate or charge

²⁸ Initial Brief of Staff, GC-2022-0158 p. 6-7 (Jun. 17, 2022).

²⁹ Ozarks’ Initial Brief at 10-11.

³⁰ Initial Brief of Staff at 5.

³¹ Ozarks’ Initial Brief at 12-16.

³² *Id.* at 17-20.

³³ Initial Brief of OPC at 8.

³⁴ Ozarks’ Initial Brief at 12-16.

³⁵ OPC appears to be conflating “standing” with “jurisdiction” on this point. Standing refers to a litigant’s ability to raise a claim based on a showing of: 1) an injury in-fact, 2) a causal connection

without the consent of OPC and certain governmental representatives.³⁶ The flaw in OPC's reading is that Ozarks is not seeking to change any rate, which would require those consents under Section 386.390, RSMo. Ozarks instead filed a complaint because SNGMO was threatening a service disconnection, contrary to 20 CSR 4240-13.050, and because it was seeking an AAO per Section 393.140, RSMo. The Hospital is using the same complaint format that OPC undertook when it last sought an AAO.³⁷ Just as OPC's Complaint complied with Commission practice then, Ozarks' is proper now.

B. OPC's other opposition to Ozarks' requested AAO ignores past case law and Commission experience.

OPC's remaining legal arguments are contrary to Missouri case law and Commission experience. It maintains that SNGMO's tariff, Section 393.130, RSMo, and Section 393.140, RSMo, prohibit Ozarks' AAO request.³⁸ None of these bar the Commission from granting Ozarks' requested AAO.

OPC claims that SNGMO's tariff prohibits the utility from transferring charges from one customer onto others. The tariff cannot supersede the Commission's authority under a statute or rule, though.³⁹ The Commission's ability to grant AAOs under Section 393.140, RSMo has also

between the injury and the defending party's conduct, and 3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Ozarks clearly has standing to challenge SNGMO's conduct in this circumstance. Subject matter jurisdiction, on the other hand, covers a tribunal's ability to hear a claim based on the satisfaction of threshold matters, such as stating an actionable claim and statutory requirements. *See, e.g.*, Mo. R. Civ. P. 55.27(a)(6). OPC's objection is better understood as arguing that Ozarks has failed to state a claim or satisfy a jurisdictional requirement of Section 386.390, RSMo.

³⁶ Initial Brief of OPC at 3.

³⁷ *See Every Mo. W.*, 609 S.W.3d at 866.

³⁸ Initial Brief of OPC at 3-8.

³⁹ *See Mo. Gas Energy*, 210 at 337 (holding that a Commission rule trumps conflicting tariff language).

been repeatedly affirmed.⁴⁰ SNGMO's tariff is therefore no hurdle to the Hospital's requested AAO.

OPC's arguments under Sections 393.130 and 393.140, RSMo, both contend that the requested AAO is a request for improper preferential treatment. OPC presumably believes that any special rate or adjustment for one customer is impermissible. While Ozarks understands why a ratepayer advocate would make these statutory arguments, they are contrary to the law and Commission experience. As previously noted, an AAO does not change rates and cannot violate the ratemaking provisions of Sections 393.130 or 393.140, RSMo.⁴¹ If the Commission issues an AAO, and then adjusts rates later to account for that deferral, then the Commission is creating "new rates" under Section 393.150, RSMo. The Commission has also granted special rates for individual customers, even outside the context of a rate case⁴² and issued AAOs to account for lost revenue stemming from one customer.⁴³ This latter example meant that other customers could have potentially covered the revenue requirement burden for one user. This is analogous to Ozarks' request for a deferral of its disputed cashout debt, and the Commission should likewise grant the Hospital's request.

Despite examples to the contrary, OPC continues to maintain that any customer cross-subsidization is improper.⁴⁴ This position ignores the frequent subsidization that occurs even amongst rate classes. A utility's rates may be set based on an entire service territory or divided

⁴⁰ *E.g., State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n*, 326 S.W.3d 20, 27-28 (Mo. App. W.D. 2010).

⁴¹ *Id.*

⁴² *E.g., Report and Order, In the Matter of the Appl. of KCP&L Greater Mo. Operations Comp. for Approval of a Special Rate for a Facility Whose Primary Industry is the Prod. or Fabrication of Steel in or Around Sedalia, Mo.*, EO-2019-0244 p. 11 (Nov. 13, 2019).

⁴³ *Report and Order, In the Matter of the App. of Union Elec. Co. d/b/a Ameren Missouri*, EU-2012-0027 p. 2 (Nov. 26, 2013)

⁴⁴ Initial Brief of OPC at 4-5.

amongst districts. Dividing rates into districts isolates the costs to serve individual districts and minimizes the subsidy a larger district may pay to support a smaller district's cost of service. Conversely, a utility may set rates uniformly across a service territory to spread the cost to serve smaller districts to other customers.⁴⁵ This division of rates may be debated and adjusted, but no one can argue that the Commission is arbitrary or unlawful regardless of its ratemaking choice.⁴⁶ Just as the Commission enjoys discretion to set rates, it may also grant Ozarks' requested AAO for future ratemaking consideration.

V. Conclusion

For the reasons stated above, SNGMO, Staff, and OPC's initial briefs misapply the law and do not appreciate the extraordinary context that brings the Hospital to the Commission. Ozarks respectfully renews its request that the Commission grant its requested relief to order and authorize SNGMO to track and defer the approximately \$500,000 in disputed cashout debt as a regulatory asset in an AAO, with carrying costs, for future ratemaking consideration, or order SNGMO to address the disputed imbalance through a separate payment arrangement, and provide such other relief that the Commission deems just and proper.

⁴⁵ See Amended Report and Order, *In the Matter of Spire Missouri, Inc.'s d/b/a Spire Request for Authority to Implement a General Rate Increase for Natural Gas Service Provided in the Company's Missouri Service Areas*, GR-2021-0108 p. 6 & 48 (Nov. 12, 2021) (discussing the potential consolidation of depreciation rates between Spire Missouri, Inc.'s service territories).

⁴⁶ See *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329 (Mo. App. W.D. 2011) (quoting *State ex rel. Off. of the Pub. Counsel v. Pub. Serv. Comm'n*, 938 S.W.2d 339, 344 (Mo. App. W.D. 1997) ("The Commission has considerable discretion in rate setting due to the inherent complexities involved in the rate setting process")); see also Mo. Rev. Stat. § 393.270.4 ("In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein").

Respectively submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically on all counsel of record this 27th day of June, 2022.

/s/ Caleb Hall