STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
Jefferson City, Missouri
October 19, 1989

CASE GC-89-85, GR-89-136 and GR-90-41

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Jeffrey Dangeau, Attorney, Arkansas Western Gas Company, 1083 Sain Street, Fayetteville, Arkansas 72702-1408

Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,

Harvey G. Hubbs
Secretary

uncertified copy:

Charles Scharlau, Chariman, Arkansas Western Gas Company, 1083 Sair. Street, Fayetteville, Arkansas 72702-1408
Thomas M. Byrne, Attorney, Mississippi River Transmission Corporation, 9900 Clayton Road, St. Louis, Missouri 63124

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

American-National Can Company, et al., Complainants, v. Laclede Gas Company, Respondent.	)	CASE NO. GC-89-85
In the matter of Laclede Gas Company of St. Louis, Missouri, for authority to file a tariff reflecting a change in rates for its customers in accordance with the Purchased Gas Adjustment clause on file for the Company.	)	CASE NO. GR-89-136

REPORT AND ORDER

Date Issued: October 19, 1989

Date Effective: October 31, 1989

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APPEARANCES: George M. Pond and Robert C. Johnson, Attorneys at Law, Peper, Martin, Jensen, Maichel and Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, for American-National Can Company, Anheuser-Busch, Inc., Chrysler Corporation, Ford Motor Company, General Motors Corporation, McDonnell Douglas Corporation, Monsanto Company, Nooter Corporation, and The Procter & Gamble Manufacturing Company.

Gerald T. McNeive, Jr., Associate General Counsel and Donald L. Godiner, Vice President and General Counsel, Laclede Gas Company, 720 Olive Street, Room 1528, St. Louis, Missouri 63101, for Laclede Gas Company.

Stuart W. Conrad, Attorney at Law, Lathrop, Koontz & Norquist, 2345 Grand Avenue, Suite 2600, Kansas City, Missouri 64108, for Midwest Gas Users Association.

Paul W. Phillips, Attorney at Law, Room 6D033, 1000 Independence Avenue, S.W., Washington, D.C. 20585, and W. L. Rowberry, Attorney at Law, P. O. Box 202, Kansas City, Missouri 64141, for the Department of Energy on behalf of the Executive Agencies of the United States.

Martin J. Bregman, Assistant General Counsel, The Kansas Power and Light Company, 818 Kansas Avenue, Topeka, Kansas 66612, for The Kansas Power and Light Company.

Ronald K. Evans, Attorney at Law, Union Electric Company, P. O. Box 149, St. Louis, Missouri 63166, for Union Electric Company.

Rudolph C. Veit, Attorney at Law, Carson, Coil, Riley, McMillin, Levine and Veit, P.C., P. O. Box 235, Jefferson City, Missouri 65101, for United Cities Gas Company.

James C. Swearengen, Attorney at Law, Hawkins, Brydon, Swearengen & England, P.C., 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456 and Jeffrey L. Dangeau, General Counsel, Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, 1083 Sain Street, Fayetteville, Arkansas 72701-1408, for Arkansas Western Gas Company, d/b/a Associated Natural Gas Company.

Lewis R. Mills, Jr., Assistant Public Counsel, Office of the Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102, for Office of the Public Counsel and the public.

Andrew J. Snider and William S. Shansey, Assistant General Counsels, Missouri Public Service Commission, P. O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

Procedural History

On November 10, 1988, American-National Can Company and eight other industrial gas customers (Complainants) filed a complaint against the Laclede Gas Company (Respondent) requesting that the Commission find that Respondent could not lawfully pass take-or-pay (TOP) charges through to its customers pursuant to its Purchased Gas Adjustment (PGA) clause. Specifically, Complainants challenge the legality of a tariff filed by Respondent May 20, 1988, and effective June 1, 1988, using its PGA mechanism to pass through to its customers fixed TOP charges. This complaint was denominated Case No. GC-89-85. Respondent filed its answer to the complaint on December 14, 1988, denying the allegations contained therein.

Laclede filed tariffs with the Commission on January 20, 1989, seeking approval through its PGA clause of a net increase in charges to its firm customers which included TOP charges. This filing was denominated as Case No. GR-89-136 which was consolidated with Case No. GC-89-85. The Commission authorized recovery of these additional TOP charges on an interim basis subject to refund pending the outcome of a hearing on the legality of recovering TOP charges pursuant to the PGA clause.

Additional Laclede PGA filings including an element of TOP charges were filed during the course of these proceedings and approved by the Commission on an interim basis subject to refund pending the outcome of these proceedings.

Timely applications to intervene were granted by the Commission to the Midwest Gas Users Association, the United States Department of Energy on behalf of the Executive Agencies of the United States, the Union Electric Company, the United Cities Gas Company, the Kansas Power and Light Company and the Arkansas Western Gas Company. The Office of the Public Counsel (Public Counsel) and the Commission's Staff (Staff) participated in these proceedings.

By Order issued February 24, 1989, the Commission denied a joint motion for partial summary judgment filed herein by the Complainants and the Public Counsel and

established a procedural schedule for the consolidated cases. An evidentiary hearing was held July 25, 1989, and briefs were filed by the parties pursuant to a schedule established by the Hearing Examiner.

By Order issued August 25, 1989, the Commission denied a petition to reopen these proceedings. There is currently pending before the Commission a Motion to Strike Complainants' Unauthorized Reply Brief filed herein by Respondent. The Commission will deny this Motion to Strike.

Findings of Fact

The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact.

Complainants and Public Counsel challenge the legality of Laclede's flowing through TOP charges to its customers via its PGA clause. The TOP charges in question were flowed through to Laclede from its sole pipeline supplier, Mississippi River Transmission Company (MRTC). This charge to Laclede from MRTC was authorized by the Federal Energy Regulatory Commission (FERC) as a flow-through of TOP charges billed to MRTC by its upstream pipeline suppliers, United Gas Pipe Line Company, Natural Gas Pipeline Company, and Trunkline Gas Company.

Respondent's PGA clause provides for the recovery outside of a general rate case of the costs to purchase gas from Respondent's wholesale supplier, MRTC. Pursuant to this PGA tariff, Respondent's charges to its customers for gas are to increase or decrease as the cost of gas charged to it by MRTC increases or decreases.

TOP charges are the product of take-or-pay clauses included in long term gas purchase contracts concluded between natural gas producers and interstate pipelines during the gas supply shortages of the late 1970s. To assure gas supplies, pipelines decided to sign contracts which provided that certain high payments would be made regardless of whether gas was taken. The fact that oil prices were high at the time reassured the pipelines that demand for gas would remain high.

In the 1980s a confluence of events made these contracts uneconomical. Gas supplies increased due to several factors including changes in regulatory policies. Oil prices decreased, making oil a more attractive alternative fuel and lowering the demand for gas. Regulatory restrictions were eased, making it possible for large customers to purchase gas from producers and transport it through the pipelines to their plants. The new regulatory policies also made it possible for pipelines to purchase gas on the spot market at prices significantly cheaper than those contained in the take-or-pay contracts. In making these spot purchases, the pipelines triggered the take-or-pay provisions when gas available under contract was not taken. The take-or-pay charges are the product of either minimum charges to the pipelines by the producer or related contract reformation costs including agreements to buy out or buy down, that is, extinguish or reduce take-or-pay contract liabilities.

The FERC, in discharging its authority to regulate wholesale natural gas flowing through interstate pipelines pursuant to the Natural Gas Act, regulates the manner in which interstate pipelines may recover these TOP charges from their customers, whether other pipelines or local distribution companies (LDCs). The FERC has no jurisdiction over LDCs which come under the authority of their respective state regulatory commissions. Natural Gas Act of 1938, 15 U.S.C. 717(b) (1984). However, pursuant to the "filed rate doctrine" enunciated in Nantahala and Mississippi Power, the states are preempted from barring the recovery by the LDC of the wholesale rates charged to it by its wholesale supplier pursuant to tariffs approved by the FERC. Nantahala Power and Light Company v. Thornburg, 476 U.S. 953 (1986); Mississippi Power and Light Company v. Mississippi ex. rel. Moore, 108 S. Ct. 2428 (1988).

The states may inquire into the prudence of the LDC in entering into a given contract when less costly alternatives were available. Pike County Light and Power Company v. Pennsylvania Public Utility Commission, 465 A.2d 735 (Pa.Cmwlth.

1983). However, there is no question of imprudence in this case. Once the FERC has approved these charges for pass-through by the pipeline to its customers, Respondent has no control over them. No action by Respondent can diminish their amount or eliminate them. Therefore, the Commission must give effect to these wholesale rates which have been approved by FERC. Of course, this Commission retains the authority to determine the mechanism for recovery of the charges approved by the FERC. Re: Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 40 FERC 61,172, 89 PUR 4th. 312, 331, (August 7, 1987) (Order No. 500).

The fundamental issue raised by Complainants in this case is whether Respondent's TOP charges may legally be recovered pursuant to its PGA clause. Complainants and Public Counsel argue that TOP charges are not a cost of gas as provided for in Respondent's PGA clause and that such recovery constitutes single-issue ratemaking and retroactive ratemaking which have been declared illegal under the case law governing the Commission's enabling statutes.

Complainants and Public Counsel argue that TOP charges cannot be a cost of gas because they are, in actuality, a cost for not buying gas. Complainants and Public Counsel also argue that TOP charges are not a cost of gas because Respondent would owe these charges even if Respondent stopped buying gas from its supplier.

The Commission is not persuaded by these arguments. The Commission determines that TOP charges are a cost of gas for Respondent as provided in its PGA tariff. Respondent's PGA tariff provides that:

> The charges which the Company makes for gas shall be subject to increases or decreases due to increases or decreases in the cost of gas charged by the Company's supplier, Mississippi River Transmission Corporation (MRTC).

Respondent's PGA tariff goes on to describe the components which shall be included in these charges. These are set forth in paragraph E of Respondent's PGA tariff. The components consist of Schedule CD-1 which is MRTC's tariff governing the supplying of gas to Respondent, including the D-1 and D-2 Demand charges, the

Commodity charge and the GRI surcharge. The wording of Respondent's PGA tariff, paragraph A.2, is inclusive rather than exclusive. It provides in pertinent part that:

> The cost of purchased gas applicable to firm sales shall include MRTC's wholesale CD-1 Demand and Commodity charges and GRI charge.... (Emphasis supplied.)

MRTC's Rate Schedule CD-1 specifies that it is governed by MRTC's tariff setting forth general terms and conditions. Paragraph 20.0(a) of MRTC's tariff setting forth general terms and conditions provides for the recovery of TOP charges from MRTC's customers taking gas under Rate Schedule CD-1.

It is accurate to state in the abstract that TOP charges are a payment made in lieu of taking gas. This statement does not accurately describe Respondent's situation, however. In the matter at issue herein it is accurate to say that pipelines which supply Respondent's supplier, MRTC, have made payments in lieu of taking gas. The recovery of these payments has been passed to MRTC which has passed that cost through to Respondent. For Respondent, there is no option of taking gas in place of paying the TOP charges. In order to obtain gas from its supplier, Respondent must pay the TOP charges. If Respondent fails to pay the TOP charges apportioned to it, MRTC can withhold delivery of the gas.

It is true that Respondent would owe TOP charges to MRTC even if it discontinued the purchase of gas from MRTC. However, this is true also of Respondent's Demand charges. Even though Respondent can seek to change its contract with MRTC as to the demand level, subject to the approval of the FERC, it is clear that the difference between the Demand charges and the TOP charges in this regard is one of degree rather than one of kind. In short, no practical difference exists between TOP charges and the costs that Respondent has traditionally recovered through its PGA clause since its inception. Therefore, the Commission determines that Respondent's PGA clause provides for the recovery of TOP charges.

The Commission further determines that the pass-through of Respondent's TOP charges via its PGA mechanism does not constitute retroactive ratemaking. The court in UCCM describes retroactive ratemaking as setting rates so as to recover past losses or refund past excess profits because the previous rate did not perfectly match expenses plus rate of return. State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission, 585 S.W.2d 41 (En banc. 1979). The court goes on to describe the permissible method of ratemaking wherein past expenses are used as a basis for determining what rate is reasonable to be charged in the future in order to avoid further excess profits or future losses. In this case the TOP costs being charged Respondent by its supplier are the basis for setting the rates to be charged customers in the future.

Respondent's PGA clause has been the vehicle for the timely recovery of as much as three-fourths of Respondent's operating expenses since its original establishment in 1962. During the period, October, 1983 through September 30, 1988, of the twenty-eight (28) PGA changes implemented by Respondent, nineteen (19) were decreases in gas costs. In fiscal year 1988, Respondent's purchased gas expenses declined to $302.8 million, a decrease of $177.1 million in annual gas costs for virtually the same amount of gas. Clearly, Respondent's PGA clause has operated to the benefit of its customers. Based on this finding and the finding that Respondent's PGA clause provides for the recovery of TOP charges as a cost of gas, the Commission determines that it is legal for Respondent to recover these TOP charges, and similarly-imposed TOP charges, pursuant to its PGA clause.

Public Counsel has proposed that the concept of risk sharing be applied in this case. Public Counsel argues that the payment of the TOP charges should be shared between the Respondent's ratepayers and shareholders. The Commission is of the opinion that Public Counsel's suggested concept of equitable sharing is inconsistent with the mandate of the filed rate doctrine since there is no question

of imprudence in this case. Therefore, the Commission will not adopt Public Counsel's proposal.

The Commission believes that it is appropriate to note here that this decision regarding these TOP charges does not relieve Respondent of the obligation to attempt to reduce or eliminate the pass-through of future TOP charges from its suppliers by participating in proceedings at the FERC. The Commission finds it unnecessary to address herein the situation where a company is attempting to pass-through TOP charges after making no effort to have their amount reduced or eliminated in proceedings at the FERC.

Finally, Public Counsel argues that Respondent's TOP charges should be recovered from all its customers. Respondent interprets its PGA clause to exclude the recovery of TOP charges from its interruptible customers. Respondent points to paragraph A.2. on sheet 15 of its PGA tariff as confining interruptible customers to payment of the CD-1 Commodity and GRI charges only. The pertinent part of Respondent's tariff states as follows:

> ...the cost of purchased gas applicable to seasonal and interruptible sales shall include only MRTC's wholesale CD-1 Commodity charge and GRI charge. (Emphasis supplied.)

Public Counsel counters that the word "only" does not confine Respondent to charging interruptible customers only the two charges listed in that sentence. Rather, Public Counsel states that the word "only" modifies the phrase, "Commodity charge". Public Counsel states that this provision merely prohibits Respondent from charging interruptible customers CD-1 Demand charges and limits them to charging CD-1 Commodity charges. Public Counsel argues that the remainder of the charges are applicable to interruptible customers.

The Commission determines that Public Counsel's position as to the interruptible customers is reasonable and should be adopted as the correct interpretation of Respondent's tariff and the equitable manner in which to assign

recovery of Respondent's TOP charges. Interruptible customers should pay TOP charges since they share with Respondent's other customers in the benefits of lower gas charges resulting from the spot market purchases associated with these TOP charges.

A Motion To Strike Complainants' Unauthorized Reply Brief was filed in this case by Respondent on September 14, 1989. Respondent filed the motion in response to a letter filed in the case papers on September 13, 1989, by Complainants taking issue with a statement contained in the Staff's reply brief. The Commission is of the opinion that it is unnecessary to grant the motion to strike. The letter constituted neither a pleading nor a brief and was not considered by the Commission in its deliberations.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law.

Respondent is a public utility subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 1986, as amended. Pursuant to Section 386.390, RSMo 1986, a complaint may be made by any corporation setting forth any charge established or fixed by any public utility claimed to be in violation of any provision of law. The burden of proof rests with Complainants to show by clear and satisfactory evidence that a rate approved by this Commission is unlawful. State ex rel. City of St. Louis v. Public Service Commission, 36 S.W.2d 947 (Mo. 1931); Section 386.430, RSMo 1986.

Based upon all the analysis set forth in the findings of fact, the Commission has determined that neither Complainants nor Public Counsel has shown that it is illegal or inappropriate for Respondent to recover 100 percent of the TOP charges at issue herein through its PGA clause. Accordingly, the Commission concludes that this complaint should be dismissed. The Commission further concludes that Respondent's tariffs filed in Case No. GR-89-136 to recover TOP charges which were approved by the

Commission on an interim basis subject to refund, should be made permanent provided these tariffs are applied hereinafter to the Company's interruptible customers pursuant to the Commission's findings herein.

It is, therefore,

ORDERED: 1. That the complaint filed herein by American National Can Company, et al., is dismissed hereby.

ORDERED: 2. That the tariffs filed by Laclede Gas Company in Case No. GR-89-136 to recover take-or-pay charges which were approved by this Commission on an interim basis subject to refund, are made permanent hereby, on the condition that these tariffs are applied hereinafter to the Company's interruptible customers as set forth herein.

ORDERED: 3. That the Motion To Strike Complainants' Unauthorized Reply Brief is denied hereby.

ORDERED: 4. That any objections not heretofore ruled upon are overruled hereby and any outstanding motions are denied hereby.

ORDERED: 5. That this Report and Order shall become effective on the 31st day of October, 1989.

BY THE COMMISSION

Harvey G. Hubbs

Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller,
Fischer and Rauch, CC., Concur
and certify compliance with the
provisions of Section 536.080,
RSMo 1986.

Dated at Jefferson City, Missouri,
on this 19th day of October, 1989.

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 19th day of October, 1989.

Harvey G. Hubbs
Secretary