R&O Binder

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the matter of Missouri Public Service Company's tariff filing to implement recovery of take-or-pay settlement costs in a take-or-pay recovery rider.	))	CASE NO. GR-89-104

REPORT AND ORDER

Date Issued: October 19, 1989

Date Effective: October 31, 1989

APPEARANCES: Gary W. Duffy, Attorney at Law, Hawkins, Brydon, Swearengen & England, P.C., P. O. Box 456, Jefferson City, Missouri 65102-0456, for Missouri Public Service.

James C. Swearengen, Attorney at Law, Hawkins, Brydon, Swearengen & England, P.C., P. O. Box 456, Jefferson City, Missouri 65102-0456, and Jeffrey L. Dangeau, Attorney at Law, 1083 Sain Street, Fayetteville, Arkansas 72701-1408, for Arkansas Western Gas Company.

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

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.

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.

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.

Stuart W. Conrad, Attorney at Law, Lathrop, Koontz & Norquist, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, Missouri 64108, for Sedalia Industrial Gas Users Association.

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.

Michael L. Jackson, Attorney at Law, Carson, Coil, Riley, McMillin, Levine and Veit, P.C., P. O. Box 235, Jefferson City, Missouri 65102, for United Cities 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 M. 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 21, 1988, UtiliCorp United Inc. d/b/a Missouri Public Service (MoPub or Company) proposed a tariff rider to recover take-or-pay (TOP) charges. The Commission suspended this tariff until October 22, 1989, and docketed the matter as Case No. GR-89-104.

Timely applications to intervene were granted by the Commission to Union Electric Company, United Cities Gas Company, the Laclede 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. The Commission denied untimely applications to intervene by the Sedalia Industrial Gas Users Association as well as American-National Can Company and eight other industrial gas customers of Laclede Gas Company.

The parties prefiled testimony pursuant to the schedule established by the Commission and participated in a hearing held by the Commission on July 25, 1989. The parties filed briefs pursuant to a schedule established by the hearing examiner.

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.

The tariffs proposed by MoPub in this case seek to recover TOP charges passed through to MoPub by the principal pipeline supplier to its Northern System. These charges are imposed on MoPub by PEPL pursuant to tariffs approved by the Federal Energy Regulatory Commission (FERC). These FERC tariffs reflect an allocation of TOP costs to PEPL from its upstream pipeline supplier, Trunkline Gas Company and an allocation of PEPL's own TOP costs.

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 by the LDC 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 Pipeline After Partial Wellhead Decontrol, 40 FERC 61,172, 89 PUR 4th. 312, 331, (August 7, 1987) (Order No. 500).

The fundamental question at issue herein is whether TOP charges may be recovered legally pursuant to a rider which provides for their pass-through to the ratepayers without requiring Company to file a general rate increase. The Commission determines that TOP charges may not be recovered pursuant to such a rider. The Commission finds that TOP charges are a part of Company's cost of gas. Staff's witness, Hubbs, points out in his prefiled direct testimony:

> ...PEPL is billing MoPub pursuant to FERC-approve tariffs for both the sale and transportation of gas to MoPub's northern system. Purchase of gas by MoPub from PEPL at FERC-authorized and approved rates, of which take-or-pay costs are a part, constitute a 'cost of gas' as defined in the PGA Clause.

There is already an established procedure for recovery of Company's gas costs outside of a general rate case. This procedure is set forth in Company's Purchased Gas Adjustment (PGA) clause.

MoPub's PGA clause 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 suppliers.

The language of Company's PGA tariff mandates the recovery of MoPub's gas costs pursuant to its PGA mechanism. Accordingly, the Commission determines that MoPub's TOP charges should not be recovered pursuant to a separate tariff rider but rather should be recovered pursuant to its PGA clause.

The Commission further determines that the pass-through of Company's TOP charges via its PGA mechanism would 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 Company by its supplier will be the basis for the rates to be charged customers in the future.

Company's PGA clause has been for many years the vehicle for the timely recovery of Company's costs as well as the means of rapidly flowing through to ratepayers decreases in the cost of gas.

The next issue to be answered in this case concerns the proposal of Public Counsel that the payment of TOP charges should be shared between the Company'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 Company 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.

Based on all the foregoing analysis, the Commission determines that Company should withdraw the tariffs filed herein and file a modification of its PGA tariff providing for the recovery of its TOP charges pursuant to the PGA. The Commission further determines that Company should modify its PGA to provide for the collection of TOP charges from its transportation customers. Transportation customers share, with other customers, responsibility for the purchase deficiencies which triggered TOP liabilities. Finally, the Commission is of the opinion that, if the language contained in the purpose clause of Company's proposed rider is transferred to the modified PGA authorized herein, said language should be clarified to confine recovery of TOP charges associated with written or verbal obligations of the Company, to such obligations included in PEPL's tariffs approved by the FERC for recovery from Company.

Conclusions of Law

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

Company is a public utility subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 1986, as amended. Company has filed the tariff which is the subject of this case pursuant to Section 393.140.11, RSMo 1986. Pursuant to Section 393.150, RSMo 1986, the Commission has the authority to review the propriety of a new rate and the burden of proof to show that an increased rate is just and reasonable is upon the company.

The Commission has determined that it is legal to pass through, outside a general rate case, one hundred percent of these TOP charges assessed against Company by its pipeline supplier, PEPL through FERC-approved rates. The Commission has also determined that Company may not pass through the TOP charges which are the subject of this case pursuant to a separate tariff rider. The Commission has further determined that Company may legally recover one hundred percent (100%) of the TOP charges at issue herein pursuant to its PGA clause upon modification of its PGA clause to provide for such recovery. Therefore, the Commission concludes that MoPub should withdraw the rider proposed herein and file in lieu of it, a modification of its PGA tariff consistent with the findings set forth in this Report and Order.

It is, therefore,

ORDERED: 1. That the tariff rider for recovery of take-or-pay charges submitted to the Commission by UtiliCorp United Inc. d/b/a Missouri Public Service on November 21, 1988, is rejected hereby.

ORDERED: 2. That UtiliCorp United Inc. d/b/a Missouri Public Service is authorized hereby to file a modification of its Purchased Gas Adjustment clause to provide for the recovery of the take-or-pay charges assessed against it by Panhandle Eastern Pipeline Company consistent with the findings and conclusions set forth herein.

ORDERED: 3. 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.