

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the matter of United Cities Gas Company's proposed)
revisions to the purchased gas adjustment clause)
reflecting recovery of take-or-pay costs and determin-) CASE NO. GR-90-233
ation of purchased gas adjustment proration in the)
Neelyville District.)

APPEARANCES: Gary W. Duffy, Attorney at Law, Brydon, Swearingen & England, P.C.,
P. O. Box 456, Jefferson City, Missouri 65102-0456, for United Cities
Gas Company.

Lewis R. Mills, Jr., First 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.

William M. Shansey, Assistant General Counsel, Missouri Public
Service Commission, P. O. Box 360, Jefferson City, Missouri 65102,
for Staff of the Missouri Public Service Commission.

HEARING

EXAMINER: Beth O'Donnell

REPORT AND ORDER

Procedural History

On March 12, 1990, United Cities Gas Company (United or Company) filed tariff sheets with a requested effective date of May 1, 1990, which proposed to allow Company to include take-or-pay (TOP) costs in their actual cost adjustment (ACA) computation which were invoiced and paid during periods prior to the Commission's decision allowing recovery of TOP costs through the purchased gas adjustment (PGA) and ACA mechanism. Company extended the effective date of the proposed tariff several times finally extending it to June 30, 1990.

On April 11, 1990, the Office of the Public Counsel (Public Counsel) filed a motion to suspend the proposed tariff. On June 19, 1990, the Commission's Staff (Staff) filed a memorandum in this case recommending that the Commission suspend this tariff.

On June 26, 1990, the Commission suspended the proposed tariff for 120 days to October 28, 1990. On October 17, 1990, the Commission issued an order establishing a procedural schedule. Testimony was prefiled by the parties and a hearing was held January 8, 1991, at which prefiled testimony was received. At the hearing the parties agreed that there remained no factual issues in the case and proposed that the parties brief the Commission as to the legal questions at issue. Briefs were subsequently filed pursuant to the schedule as amended.

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 language to which Staff and Public Counsel object in this case is contained in a tariff filed by Company on March 12, 1990, and subsequently suspended by the Commission on June 26, 1990. On June 11, 1990, Company filed an alternative tariff sheet omitting the language to which Staff and Public Counsel objected. On June 29, 1990, the Commission approved this alternate tariff which omitted the language objected to by Staff and Public Counsel.

From these facts the Commission determines that the tariff suspended on June 26, 1990, which contained the language to which Staff and Public Counsel objected and about which the parties to this case prefiled testimony and briefed the Commission, has been superseded by the tariff filed by Company on June 11, 1990, and subsequently approved by the Commission on June 29, 1990. Therefore, the Commission finds that there is no tariff remaining at issue in this case the propriety of which the Commission must determine.

Company filed the tariff which purports to be at issue in this case in order to recover in rates \$16,099.58 in TOP costs through its ACA factor which Company had paid to interstate pipelines pursuant to federally-approved tariffs during the 1988-1989 ACA period. Company states that it did not include these TOP

payments made before July 1, 1989, in the 1988-1989 ACA period because the Commission had not yet decided at that time whether TOP costs were recoverable in the rates of Missouri local distribution companies.

The Commission had indicated by an order issued in Case No. GR-89-237, on May 30, 1989, that tariffs proposing to recover TOP costs would go into effect on an interim basis subject to refund pending the outcome of its decision in Case No. GC-89-85, et al. The Commission would ultimately issue a decision in Case No. GC-89-85, et al. effective October 31, 1989, finding TOP costs recoverable in the rates of local distribution companies through the PGA mechanism.

Company states that it had a policy of not placing rates into effect subject to refund and, therefore, did not file these costs before the close of its 1988-1989 ACA period on June 30, 1989. The audit of Company's 1988-1989 ACA period subsequently closed March 30, 1990 when, in Case No. GR-90-21, the Commission made Company's 1988-1989 ACA factor permanent upon the recommendation of its Staff. On March 12, 1990, United had filed the tariff which purports to be at issue in this proceeding.

In the alternative, Company argues that, if the Commission decides not to approve this tariff, it nonetheless should allow Company to recover the \$16,099.58. Company states that recovery of this money is the reason it originally proposed this tariff language. In support of this alternative position Company argues that the Commission should find that Staff, since it knew about Company's expenditure of this amount, should have warned Company to include it before the ACA audit was closed. Company argues that the remedy for Staff's supposed failure is the recovery by Company of the \$16,099.58.

Company further argues that even if it failed to take steps to recover this sum prior to the close of the case considering its 1988-1989 ACA period, it should be permitted to recover this sum because recovery of such TOP costs was new and

unfamiliar and Company should not be held to such a strict standard under those circumstances.

Company also argues that, if the Commission does not allow this sum to be reflected in rates, the Commission will have engaged in the illegal "trapping" of costs incurred pursuant to tariffs approved by the Federal Energy Regulatory Commission (FERC). Company contends, absent a finding of imprudence, that such trapping is illegal under the decision of the United States Supreme Court in *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 345 (1988). In addition, Company argues that recovery of this amount would not constitute a collateral attack on the ACA case which reviewed Company's 1988-1989 ACA period (GR-90-21) nor a violation of the finality of closed ACA periods because this cost was not addressed at all either during that ACA period, or during the audit of that ACA period or in the case reviewing that ACA period.

Finally, Company contends that Staff's argument is specious that including this amount in Company's ACA factor would reduce Company's incentive to find and include all appropriate gas costs on a timely basis because Company's failure to include this amount until later lost Company the time value of the money.

Staff warns that, if the Commission permits recovery of this sum, it will have the effect of placing upon Staff a duty to warn companies of possible filing errors and oversights thereby, in the future, shifting the responsibility for the recovery of their costs from the companies where it now lies to the Staff. Staff further argues that the close of United's 1988-1989 ACA audit case did not represent a Staff imposed deadline for seeking the recovery of gas costs during that period but rather represented part of the carefully crafted PGA/ACA mechanism which permits companies to recover actual gas costs without engaging in impermissible retroactive ratemaking and without experiencing regulatory lag.

Staff points out that Company had the opportunity to amend its ACA factor between the time in October of 1989 when the Commission decided that TOP costs may be recovered by local distribution companies and the close of Company's 1988-1989 ACA audit case in March of 1990. Finally, Staff points out that the case cited by Company to support its argument that it should be permitted to recover the amount because the procedure was new and unfamiliar is not persuasive since that case (Case No. GR-89-48) dealt with a question of prudence while this case concerns the finality of a closed ACA period.

Public Counsel responds to Company's arguments by pointing out that the Supreme Court case dealing with the trapping of federally-approved costs by a state commission, *Mississippi Power & Light, op. cit.*, did not deal with previously incurred costs but rather dealt with a projected test year and current FERC-approved rates.

The Commission determines that the Company should not be permitted to recover the \$16,099.58 in a subsequent ACA period. Company had ample time after the Commission's decision allowing recovery of TOP costs to include the \$16,099.58 in the costs reviewed during the 1988-1989 ACA audit period. The Commission's decision on recovery of TOP costs became effective on October 31, 1989, and the review of the ACA audit of Company's gas costs for the period 1988-1989 ended with the closing of Case No. GR-90-21 on March 30, 1990.

Company will not be permitted to recover these costs after the ACA factor for a given period is made permanent. This approach is necessary so that actual cost adjustments become final. Such factors should not be indefinitely readjusted for costs Company later finds it wishes to recover. The termination of that period does not represent an artificial deadline imposed by the whim of Staff but rather a date necessary to effectuate finality.

Whether the \$16,099.58 was considered during the review of the 1988-1989 ACA period is not the aspect of finality that is pertinent. The question is whether costs later discovered to have been incurred during that period should be included in future ACA factors ad infinitum. The Commission believes they should not.

Nor can Staff's failure to warn Company to recover all costs by the period's end or forego their recovery, be a reason to impair this principle of finality. First, it is not Staff's responsibility to see to the recovery of Company's gas costs. This responsibility rests with Company. Second, the finality of the end of an ACA period does not rest upon the good conduct of Staff. This is not a situation involving equity law. Nor can Company's inexperience with the recovery of TOP costs be the basis for forgiving the oversight and allowing the recovery. The issue is not a question of prudence where circumstances might leaven a judgment of imprudence.

The Commission does not view the disallowance of this \$16,099.58 as an instance of unlawful trapping by a state commission of a FERC-mandated wholesale rate. *Mississippi Power & Light, op. cit.* Absent a showing of imprudence, the Commission would have allowed these costs if they had been included in the audit figures before the fixing of the 1988-1989 ACA factor. The matter at issue in this case is not the recoverability of the \$16,099.58 but the necessity to submit gas costs in a timely fashion.

Conclusions of Law

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

Company is subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 1986, as amended.

The Commission has found that the tariff which the parties address in this case has been superseded by a subsequent tariff filed by Company and approved by the

Commission. Tariffs which have been superseded by subsequent tariffs become moot. *State ex rel. Missouri Public Service Company v. Fraas*, 627 S.W.2d 882, 884-885 (Mo. App. 1981). Therefore, the Commission concludes that there is no tariff remaining at issue in this case the propriety of which the Commission must determine. The Commission further concludes that, where no live issue remains as to the propriety of this tariff, it is beyond the Commission's powers to make a pure declaration of law as to the possible propriety of the language in the superseded tariff. *State ex rel. Kansas Power & Light Company v. Public Service Commission*, 770 S.W.2d 740, 742 (Mo. App. 1989).

In addition to the Commission's findings as to the impropriety of permitting recovery of the sum Company seeks in this case, the Commission concludes that allowing recovery of this sum would constitute impermissible retroactive ratemaking. Recovery of a specific cost in a previous period due to the mismatch of costs and revenue constitutes retroactive ratemaking. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 59 (Mo. banc 1979) (UCCM). The period is over for auditing the over or under recovery of costs and using that audit to set prospective rates.

IT IS THEREFORE ORDERED:

1. That the request of United Cities Gas Company to recover \$16,099.58 of take-or-pay (TOP) costs paid during Company's 1988-1989 actual cost adjustment (ACA) period be denied hereby.

2. That this Report and Order shall become effective on the 16th day of April, 1991.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

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

Dated at Jefferson City, Missouri,
on this 5th day of April, 1991.