

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

Ozark Medical Center d/b/a Ozarks Healthcare,	)	
	)	
Complainant,	)	
	)	
v.	)	<b><u>File No. GC-2022-0158</u></b>
	)	
Summit Natural Gas of Missouri, Inc.,	)	
	)	
Respondent.	)	

**SUMMIT NATURAL GAS OF MISSOURI, INC.’S INITIAL BRIEF**

COMES NOW the Respondent Summit Natural Gas of Missouri, Inc. (“SNGMO”) by and through the undersigned counsel, and as its *Initial Brief*, states as follows to the Missouri Public Service Commission (“Commission”):

**STANDARD**

The Court of Appeals has confirmed that the burden of proof in this matter rests with Ozarks Medical Center (“OMC”). Among other things, this means that “if the evidence is ‘equally balanced and the [fact-finder] is left in doubt, the litigant having the burden of proof loses. . . .’”

The following is a more complete description of the burden of proof and burdens of producing evidence as they relate to Commission complaint cases:

In cases where a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions, . . . the burden of proof at hearing rests with complainant." *AG Processing, Inc. v. KCP & L Greater Mo. Operations Co.*, 385 S.W.3d 511, 514 (Mo. App. 2012) (citations and internal quotation marks omitted). The burden of proof has two parts: the burden of production and the burden of persuasion. *White v. Director of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010). As the *White* court explained:

The burden of production is "a party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder[.]" BLACK'S LAW DICTIONARY 223 (9th ed.2009). The burden of

persuasion is defined as "[a] party's duty to convince the fact-finder to view the facts in a way that favors that party." *Id.*

*White*, 321 S.W.3d at 304-05.

The burden of producing evidence is "simply the burden of making or meeting a prima facie case." *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557, 563 (Mo. banc 1932). Once a plaintiff has discharged his burden of production, the burden shifts to the other party "to produce, if he desires, competent controverting evidence which, if believed, will offset the plaintiff's prima facie case." *Id.* "If this is done the defendant has met the burden of evidence cast upon him, and made a prima facie defense, whereupon the burden swings back to the plaintiff to bring forward evidence in rebuttal, and so on." *Id.* While the burden of producing evidence may shift from one party to the other and back again, the burden of persuasion does not. *Brinker v. Director of Revenue*, 363 S.W.3d 377, 380 (Mo. App. 2012). The party having the burden of proof carries "the risk of nonpersuasion." *McCloskey*, 46 S.W.2d at 563 (citation omitted). Therefore, if the evidence is "equally balanced and the [fact-finder] is left in doubt, the litigant having the burden of proof loses; he must sustain his case by the greater weight of the evidence." *Id.*

*Mo. Pub. Serv. Comm'n v. Office of Pub. Counsel (In re Emerald Point Util. Co.)*, 438 S.W.3d 482, 490-491 (Mo. App. W.D. 2014) (emphasis added).

## **BACKGROUND**

At all times relevant herein OMC was, and as of the time of this filing is, a transportation customer of SNGMO that utilizes a natural gas marketer. (Ex. 200 C; Tr. 91, 105 (Reeves)). As a transportation customer, OMC "must manage their own gas supply needs and must secure natural gas supply directly from a pipeline supplier or through the use of a marketer who secures supply from a pipeline supplier on behalf of the (transportation) customer. Because the transportation customer is providing its own supply, it is the transportation service customer's obligation to nominate (purchase) appropriate amounts of gas supply so that there is neither an over, nor under, supply of natural gas on SNGMO's system for that customer to use." (Ex. 201, p. 5) (parenthesis added). When a transportation customer fails to appropriately estimate its expected usage, either by nominating too much or too little natural gas, the "[i]mbalances . . . are calculated at the end of

each delivery month, also known as a month end imbalance volume. All month end imbalance volumes are then billed or credited through SNGMO's Cashout Provisions<sup>1</sup>." (*Id.*)

In February of 2021, the midwestern United States experienced a severe winter weather system known as Winter Storm Uri. As a result of the extreme cold and subsequent increased demand for natural gas during Winter Storm Uri, SNGMO requested that its transportation customers curtail their usage of natural gas in order to ensure that service would not be interrupted for its firm service customers (residential and commercial) (Ex. 201, p. 8). In response to SNGMO's request for curtailment of natural gas usage, OMC attempted to switch to its backup propane heating system (Tr. 82 (Reeves)). However, due to the extreme conditions, the backup propane system malfunctioned and was not able to be utilized (*Id.*, at 82-83, 98). Consequently, OMC continued to purchase gas from SNGMO throughout the month of February 2021 (Ex. 100 C, p. 5).

The difference between the amount of gas purchased by a transportation customer either from a pipeline supplier or via their marketer, and what SNGMO actually supplies a transportation customer daily "rolls into a running, cumulative imbalance that is assessed at the end of the delivery month. Therefore, a [transportation] customer has the ability to correct or minimize their cumulative imbalance throughout the month." (Ex. 201, p. 7). For reasons not explained in the exhibits, or at hearing, neither OMC nor their natural gas marketer attempted to balance its nominated gas usage for the month of February, 2021 (Tr. 99 (Reeves)).

As a result of not balancing its nominations (or gas supplied to the SNGMO system with the gas being used by OMC) throughout February, 2021, "OMC's net nominations were 2,413 dekatherms (Dth), but its actual consumption was 3,639 Dth, which resulted in a shortage (or

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<sup>1</sup> SNGMO's imbalance provisions are located in PSC MO No. 3 Original Sheet Nos. 34 and 35. Cash-out provisions are located in P.S.C. MO No. 3 Original Sheet Nos. 36-37.

imbalance) of -1,225 Dth or -33.67% (Ex. 201, p. 7). During Winter Storm Uri, the weighted average cost of gas for OMC's service area went from a monthly low of \$78.72 per Dth to a monthly high of \$632 per Dth (Ex. 201, p.8). Per SNGMO's tariff sheets, "[f]or negative imbalances, the highest Weekly Weighted Average price for the delivery month is applied. In addition, there is a tiered multiplier that applies for imbalances that exceed 5%, 10%, and 15%, respectively. In this instance, OMC's imbalance was -33.67%, which means the Tier 3 (maximum) multiplier of 120% of index price was applied." (Ex. 201, p. 9). Because of all the factors discussed above, OMC's bill from SNGMO for the month of February 2021 was \$463,336.84 (Ex. 100 C, p. 6).

On December 10, 2021, OMC filed its formal *Complaint* against SNGMO, requesting the Commission either issue an Accounting Authority Order ("AAO") authorizing OMC to track and defer the full amount of the February 2021 bill associated with Winter Storm Uri, or in the alternative, to order a payment plan favorable to OMC. An evidentiary hearing was held May 24, 2022. On May 25, 2022, the Commission issued its *Post-Hearing Brief Order* directing the parties to address the Commission's authority to grant an AAO or order a payment plan in addition to the *List of Issues*.

## ISSUES

In the following paragraphs, SNGMO will address the issues identified in the *Joint List of Issues, Order of Witnesses, And Order of Opening Statements And Cross Examination* filed with the Commission on May 13, 2022, and the *Post-Hearing Brief Order* issued May 25, 2022.

- 1. Should the Public Service Commission address OMC's cashout imbalance by authorizing/directing SNGMO to track and defer the imbalance as a regulatory asset for recovery in SNGMO's next general rate proceeding?**

No. Although SNGMO would agree that the Commission generally has authority to grant an AAO, the Commission may not do so in the instant case, as it would run afoul of the Filed Rate Doctrine, state statute, and would be a “taking” in violation of both the United States and Missouri Constitutions.

As mentioned above, SNGMO’s transportation customer rates are controlled by the provisions of its Commission approved tariff sheets (see footnote 1). “A tariff has the same force and effect as a statute, and it becomes state law.” *State ex rel. Mo. Gas Energy v. PSC* 210 S.W.3d 330, 337 (Mo. App. W.D. 2006) (internal citations omitted). Additionally, the Filed Rate Doctrine holds that “[i]t is a settled rule that the legal rate is the filed rate, and it is the duty of the carrier, here [SNGMO], to charge and collect the rate as it is in the tariffs on file with the regulatory agency, here the PSC.” *Agnew v. Missouri-Am. Water Co.*, 567 S.W.3d 652, 662 (Mo. App. E.D. 2018) (internal citations omitted) (emphasis added). Therefore, issuing an AAO requiring SNGMO to track and defer OMC’s lawful charges would force SNGMO into the position of violating its legal duty as a carrier to adhere to its own Commission approved and filed tariffs.

Moreover, an AAO “allows current losses . . . to be separately accounted, thus preserving the uncollected, deferred fees until the next rate case. At that time the losses in combination with any other factors may be considered in determining a new rate.” *Office of Public Counsel & Midwest Energy Consumers Grp. v. Evergy Mo. West, Inc.*, 609 S.W.3d 857, 871 (Mo. App. W.D. 2020) (internal citations omitted). It is agreed by all parties that the issuance of an AAO in the instant case would have the effect of shifting the responsibility and burden of repayment of OMC’s debt among SNGMO’s ratepayers. (Tr. 30-31, 40, 47, 66). Additionally, “[n]atural gas sheet 30 of SNGMO’s tariffs requires it to credit the ACA for cash-out revenues collected from transportation customers.” (Ex. 300, p. 2) “If a transportation customer does not pay a bill by the end of the ACA period, there would be no offset gas costs, and the additional gas costs would be

borne by the PGA sales customers.” (*Id.* at p.4). By tracking and deferring OMC’s outstanding debt, payment of that debt is assumed by the whole of SNGMO’s ratepayers either through its PGA/ACA tariffs, or at SNGMO’s next filed rate case.

This proposed arrangement poses an additional significant legal issue in that although “[t]he whole idea of AAOs is to defer a final decision on current extraordinary costs until a rate case is in order, [and] . . . the utility is allowed to make a case that the deferred costs should be included, . . . there is no authority for the proposition . . . that the PSC is bound by the AAO terms.” *Missouri Gas Energy v. PSC*, 978 S.W.2d 434, 438 (Mo. App. W.D. 1998). Therefore, the granting of an AAO in this case could very well result in a denial of SNGMO’s recovery of valid charges under its tariff and would be a “taking” in violation of both the United States and Missouri Constitutions in that SNGMO’s lawful interest and expectancy in the tariffed rates would be turned by Commission interference into something less than a legal interest or expectancy, something that SNGMO may or may not be allowed to receive in the future<sup>2</sup>.

Additionally, OMC touts the shifting of the responsibility for payment of its debts to SNGMO’s ratepayers as an “elegant” solution that would spread OMC’s costs “across [SNGMO’s] service area to reflect OMC’s status as a not-for-profit entity providing valuable services.” (Tr. 30; Ex. 100, p. 8) Not only is such an arrangement unlawful in that it violates the Filed Rate Doctrine, it also unlawful in that it is discriminatory, and in violation of §§ 393.130.2 and 393.140(11), RSMo, which state, in relevant parts:

No gas corporation . . . shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas . . . or for any service

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<sup>2</sup> *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo. App. E.D. 1995). Missouri considers the same factors the Supreme Court has considered in making a determination of whether a taking has occurred under Article 1, § 26 of the Missouri Constitution. These factors are “(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.”

rendered or in connection therewith, except as authorize by this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

-§ 393.130.2 (emphasis added)

No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified , nor to extend to any person or corporation any form or contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

-§ 393.140(11) (emphasis added)

OMC argues that there is in fact “some amount of discrimination that is proper” in that OMC was unable to curtail its usage (by its nature and by failure of its propane auxiliary reserves) and that it is a non-profit establishment that serves the public benefit. (Tr. 34-35; Ex. 100, p. 8) However, of SNGMO’s thirty-five transport customers, fifteen had a negative imbalance as a result of the severe conditions of Winter Storm Uri and were in the same or similar circumstance or condition as OMC (Tr. 166 (Marcum)). Although many similarly situated transport customers had significantly larger cash-out charges in the month of February 2022, no other transportation customer filed a formal complaint against SNGMO challenging the cashout imbalance provision. (Tr. 141 (McCarter)). Indeed, OMC admits that it has been unable to find a previous case in which the Commission has issued an AAO regarding a billing dispute (Tr. 35). Granting an AAO exclusively for OMC in this case would be discriminatory and violate the provisions of §§ 393.130.2 and 393.140(11).

Similarly, OMC rationalizes and excuses the spreading of its cash-out imbalance among SNGMO’s ratepayers to “reflect OMC’s status as a not-for-profit entity providing valuable

services”, that “OMC’s patients are also the same [SNGMO] customers that Mr. Marcum refers to”, and that “the benefit of an AAO is that the Commission can grant relief to both SNGMO and OMC while minimizing the impact to consumers by spreading OMC’s cashout debt amongst all of SNGMO’s sales customers” (Ex. 100 C, p. 8; Ex. 101 C, p.5). This offered validation for OMC’s unloading of its debt burden on SNGMO’s ratepayers relies on the spurious assertion that OMC’s service area, and SNGMO’s service area, are one and the same.

OMC states that it provides medical services in six Missouri counties (as well as two counties in Arkansas), namely Howell, Oregon, Shannon, Texas, Douglas, and Ozark. SNGMO only provides natural gas service to three (Howell, Texas, and Douglas) (P.S.C. MO No. 3 Original Sheet Nos. 4D, 4E, 4F, 4G, 4H, and 4I). The issuance of an AAO would result in OMC’s costs being unfairly and discriminatorily spread to those SNGMO customers living in the same rate area (Rogersville) as OMC, but not within OMC’s service area or to SNGMO’s entire customer base.

**2. Should the Public Service Commission order SNGMO to address OMC’s cashout imbalance through a separate payment arrangement? If so, what should the length and payment terms be for any ordered payment arrangement?**

No. The Commission should not and cannot order the parties to submit to a payment plan. The Commission lacks authority to do so as it is “purely a creature of statute, [its] powers are limited to those conferred by [statute] either expressly, or by clear implication as necessary to carry out the powers specifically granted.” *AG Processing Inc., v. Mo. PSC*, 408 S.W.3d 175, 183 (Mo. App. 2013) (internal citations omitted). SNGMO is unaware of any authority conferred anywhere in § 386.250, RSMo, or elsewhere in the revised statutes or promulgated rules, or in Missouri caselaw that would permit the Commission to order such a payment plan for a transportation customer.



## CONCLUSION

In further response to the Commission's *Post-Hearing Order* regarding the Commission's authority to order an AAO or payment plan, SNGMO states that the Complaint fails to state a claim upon which relief may be granted. A complaint must allege a violation of a "tariff, statute, rule, order, or decision within the Commission's jurisdiction. . . ." 20 CSR 4240-2.070(1); *See also* Section 386.390, RSMo. OMC fails to show a violation of any tariff, statute, rule, order, or decision.

Moreover, "[a] complaint fails to state a claim when, assuming that everything alleged is the complaint is true, the Commission has no authority to grant the relief sought." *Order Dismissing Complaint*, Case No. WC-2017-0251, quoting *Zeller v. Scafe*, 498 S.W.3d 846, 849 (Mo. App., W.D. 2016). The remedies requested in this case are not available in the circumstances described.

**WHEREFORE**, SNGMO respectfully requests that the Commission consider this *Initial Brief* and, thereafter, issue such orders as it should believe reasonable and just.

Respectfully submitted,

**BRYDON, SWEARENGEN & ENGLAND, P.C.**

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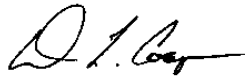
**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 17<sup>th</sup> day of June 2022, to:

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