BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

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Missouri Public
Service Commission

In the matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and the Acquisition by Gateway Pipeline Company of the Outstanding Shares of UtiliCorp Pipeline, Inc.	)	**Case No. GM-2001-585**

AMICUS BRIEF OF THE MUNICIPAL GAS COMMISSION OF MISSOURI, THE CITIES OF CUBA, RICHLAND, ST.JAMES, SULLIVAN, AND WAYNESVILLE, MISSOURI AND FIDELITY NATURAL GAS, INC.

COMES NOW the Municipal Gas Commission of Missouri ("MGCM"), the Cities of Cuba, Richland, St. James, Sullivan, and Waynesville, Missouri, (the "Cities") and Fidelity Natural Gas, Inc., ("Fidelity"), and pursuant to Commission Rule 4 CSR 240-2.075 (6) submits its amicus brief in Case No. GM-2001-585 *In the Matter of the Joint Application of Gateway Pipeline Company, Inc., Missouri Gas Company and the Acquisition by Gateway Pipeline Company of the Outstanding Shares of UtiliCorp Pipeline, Inc.* ("Joint Application")

INTRODUCTION

MGCM is a statewide municipal joint action agency specifically authorized by Missouri law (Section 393.700 et. seq., RSMo) to operate as gas utility for the benefit of the combined requirements of its members. The MGCM currently has 14 Missouri municipal natural gas systems as members ranging from approximately 200 to over 74,000 meters. These municipal natural gas systems serve over 82,000 retail customers in the state. The Cities of Cuba, Richland, St. James, and Waynesville, Missouri all own and

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operate municipal gas systems that are captive customers of either Missouri Gas Company ("MGC"), Missouri Pipeline Company ("MPC") or both. Fidelity is a pipeline that provides service to the City of Sullivan that is also a captive customer of MGC and MPC.

MGCM, the Cities, and Fidelity did not file requests for intervention in this case as a result of resource constraints, in combination with uncertainty regarding potential issues and other considerations. However, the interest in this case, and this filing of an amicus brief, is based upon continued monitoring of the case, the evidence and concerns raised by the parties opposing the Joint Application and the Cities status as captive customers of the pipeline.

Because the MGCM, the Cities, and Fidelity are not a party to this proceeding, they have not been permitted access to any of the material designated as "Highly Confidential". However, the available Rebuttal Testimony filed by parties who have had access to the "Highly Confidential" material has caused MGCM, the Cities and Fidelity to be concerned about the merits of the Joint Application.

STANDARD FOR REVIEW

MGCM, the Cities, and Fidelity believe that Gateway Pipeline Company ("Gateway") cannot lawfully acquire the stock of UtiliCorp Pipeline, Inc. ("UPL"), a wholly owned subsidiary of UtiliCorp United Inc. ("UCU"), and unregulated parent and holder of stock of MGC and MPL, two state regulated utilities without approval of the Missouri Public Service Commission ("MoPSC" or "Commission"), particularly if the stock transfer also includes, in essence, a transfer of the assets of MGC and MPL to Gateway. Section 393.190.1 of Missouri Revised Statutes, in part, reads:

"No gas corporation, electric corporation, water corporation or sewer corporation shall hereafter assign, lease, transfer, mortgage or otherwise dispose of, or encumber the whole or any part of its franchise, works, or system necessary or useful in the performance of its duties to the public nor by any means, direct or indirect, merge or consolidate such works or system, or franchise, or any part thereof, with any corporation, person or public utility, without having first secured from the Commission an order authorizing it to do so."

In addition, pursuant to Commission Rule 4 CSR 240-2.060(7)(D), the Joint Applicants must show why the transfer of assets is not detrimental to the public interest. MGCM, the Cities, and Fidelity believe that the right to sell property is a basic tenet of the ownership but that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934). MGCM, the Cities, and Fidelity also believe "The obvious purpose of [Section 393.190] is to ensure the continuation of adequate service to the public served by the utility." State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980). Thus MGCM, the Cities, and Fidelity believe that the Commission should consider such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely, as a standard of review for this case as it has in others. *See* In the Matter of the Joint Application of Missouri Gas Energy et al., Case No. GM-94-252 (*Report and Order,* issued October 12, 1994) 3 Mo.P.S.C.3d 216, 220

DISCUSSION OF ISSUES

The issues of most direct concern to MGCM, the Cities, and Fidelity as set out in the List of Issues, will be now be discussed.

1. Should the request of the Joint Applicants for Gateway to acquire all of the stock of UPL be approved? Would the sale be detrimental to the public interest?

The request of the Joint Applicants for Gateway to acquire all of the stock of UPL should be denied. A principal owner for the Joint Applicants has had a history of service difficulties with other pipelines owned resulting in significantly high, above market costs being passed on to customers. In addition, the Joint Applicants financial health and ability to absorb the transaction is in question. For the reasons listed below, MGCM, the Cities, and Fidelity believe that the approval of this transaction would be detrimental to the public interest.

A. A principal owner of Gateway has had a history of service difficulties with other pipelines. In his rebuttal testimony, Laclede Gas Company ("LGC") witness Christopher C. Pflaum testified:

> "...the pipelines previously overseen by the principal owner of Gateway have been involved in a significant array of litigation relating to gas supply and transportation arrangements....In almost all instances, however, **an overriding element in such litigation was that it resulted in the implementation of a gas supply and/or transportation arrangement that was either priced well above other service alternatives or was necessitated by the need to deal with the fallout from such an arrangement**." [Emphasis added] (Ex. 9,pp.4, lines 13-21)

Examples of litigation are as follows:

> 1) "...Kansas Pipeline Partnership (KPP), controlled by ** __________ **, received its first gas transportation contract with Western Resources, Inc. (WRI) after intervening in a rate application. After the contract was secured, KPP persuaded WRI to lift the price ceiling on its contract from the rate charged by the dominant pipeline Williams Natural Gas (Williams) to a level based on the cost of service. Subsequent to lifting the contract cap, in 1994, KPP filed for a further increase in rates based upon a hypothetical cost of service. The contract amendment alone has resulted in over $13 million per year in increased gas costs to Kansas consumers over the past six years." (Ex. 9, pp. 5, lines 6-14)

2) " ...In Case Nos. GR-94-101 and GR-94-228 [before the Commission], it was ...estimated that the total excess cost to Kansas and Missouri consumers of the various uneconomic contracts with **________** -affiliated entities, barring regulatory intervention, would have been $547 million. (Ex.9, pp.6, lines 11-15)

3) "...Kansas Pipeline interrupted firm service to WRI (presently Kansas Gas Service) and United Cities Gas in the winter 1993/1994 in connection with a delivered supply arrangement...The interruptions by KPP seem to have occurred because it was using interruptible transportation on interstate pipelines to provide firm delivered service on KPP." (Ex. 9, pp. 7, lines1-3, 5-7)

B. The financial viability of Gateway to operate MGC and MPC is uncertain. Missouri Public Service Commission Staff ("Staff") Witness Roberta McKiddy testified as follows after thoroughly reviewing the financial details of the transaction, including Gateway's capital structure, business plan, and pro forma financial statements given to the Staff:

"...Under UtiliCorp ownership, the costs of capital of MPC and MGC are 5.89 percent and 3.42 percent, respectively. Under Gateway ownership, the costs of capital for MPC and MGC will rise..." (Ex.19, pp.9, lines 24-26)

"...An increase in the overall cost of capital will result in an increase in the cost of service for MPC and MGC." (Ex19, pp.9, lines 3-5)

"...Gateway provides no formal plans to support the pro forma financial statements provided to the staff. Without supporting documentation, Staff believes the pro forma statements provided by Gateway are not credible, and nothing short of speculative." (Ex.19, pp.23, lines 9-12)

C. MGC and MPC are already unprofitable companies, reporting net losses of $350,000 and $27,000 in calendar year 2000. (Ex. 17, pp.3, lines 4-8). UCU, as a large multi-state and multi-national corporation with reported assets of $14.1 billion and total revenues of $28.975 billion at the end of calendar year 2000, is better able to withstand unfavorable financial results associated with these properties than Gateway. (Ex. 17, pp. 7, lines 12-17). The dollar losses from MGC and MPC represent only 0.0013% of UtiliCorp's total revenues.

D. Seeking an increase in rates for MGC and MPC does not appear to be a feasible approach for improving the profitability of the companies. As Staff witness Mark Oligschlaeger testified:

> "...Unlike most situations involving utilities whose rates are regulated by the Commission, the service offered by MGC and MPC is directly subject to price competition from propane suppliers. Seeking to increase rates for MPC and MGC may have the unintended result of inducing current end users of gas service in the pipelines' service territories to change their fuel source from gas to propane. This result would in turn lead to decreased profitability for the gas pipelines, and any further increase in gas rates would potentially result in even further customer losses to propane, ending in a so-called " death spiral". (Ex. 17, pp. 4, lines 13-20)

E. UCU has an "obligation to serve" certain customers in the area through its local distribution company ("LDC"), Missouri Public Service ("MPS"), which is in turn a customer of MGC and MPC. Thus UCU would be less likely to abandon gas service in these territories than Gateway. (Ex. 17, pp.8, lines 15-18)

If so, are there conditions the Commission could impose to reduce or eliminate any detriment?

Yes. In his rebuttal testimony, LGC witness Dr. Pflaum lists seven conditions that the Commission could impose to help mitigate the detriments that approval of the Joint Application would have on the customers of MGC and MPC. These are:

> "1) MPC and MGC should be required to continue to provide firm transmission (FT) service to existing users of the pipelines...at rates reflecting their cost of service, provided that such rates should be capped for a period of not less than 5 years. This rate cap should include a prohibition on any type of rate restructuring, including any changes that would establish rate or zone boundaries or require an LDC to purchase services that have traditionally been included as part of MPC's or MGC's tariffs.
>
> 2) MPC and MGC should be at risk for any loss of transportation volumes or any incremental expenditures designed to increase the throughput capability of the pipelines. Should MPC's or MGC's revenues fall because customers leave it or its capital or operational costs increase above the amounts currently reflected in rates

in order to serve new loads, the pipelines should not be permitted to raise their rates to existing users to make up that shortfall.

3) MPC and MGC's certificate should continue to forbid it from bypassing the LDCs it serves and from providing direct service to industrial customers.

4) MPC and MGC should be required to provide existing users...with a right of first refusal to continue to take up their existing contract entitlements for firm transportation.

5) MPC and MGC should be prohibited from taking any actions that would subject them to FERC jurisdiction without prior approval of the Commission... (Note: the rest of this response was deemed Highly Confidential and thus MGCM, the Cities, and Fidelity did not have access to this information.)

6) MPC and MGC should be required to submit plans showing that its addition of any firm transportation customers that increase its peak throughput will not impose additional costs or lessen service reliability to existing users of the pipeline.

7) Finally, to ensure reliability, MPC and MGC should be obligated to provide firm delivered service to its customers. (Ex. 9, pp. 14, lines 6-23; pp.15, lines 1-16).

MGCM, the Cities, and Fidelity believe that these seven conditions are necessary to protect MGC and MPC's existing customers.

2. Do the original conditions that the Commission placed on UtiliCorp when it acquired these properties apply to Gateway should the Commission approve the proposed transaction?

Yes. In the *REPORT AND ORDER* in Case No. GM-94-252 *In the Matter of the Joint Application of Missouri Gas Company, A Missouri Corporation, Missouri Pipeline Company, A Missouri Corporation, and UtiliCorp United Inc., d/b/a Missouri Public Service, a Delaware Corporation, for an Order Authorizing the Sale, Transfer and Assignment of Certain Rights, Properties, and Assets from Missouri Gas Company and Missouri Pipeline Company to UtiliCorp United Inc., d/b/a Missouri Public Service or to*

Wholly-Owned Subsidiary Corporations to be Formed by UtiliCorp United Inc., and in Connection Therewith, Certain Other related Transactions, an issue settled among the Parties and approved by the Commission was:

> "...As to the physical separation of MPC's intrastate pipeline from a portion of a pipeline which crosses the Mississippi River, all parties agree that the prohibition against interconnecting the intrastate system to the interstate system is a condition which was imposed at the time the certificate was issued to MPC in Case NO. GA-89-126, and it will remain a condition of the certificate if transferred."

If so, should the Commission waive this provision?

The Commission should not waive this provision because the matter of its continuing jurisdiction over MGC and MPC would not remain fully under the control of the Commission if the provision were waived. The regulatory umbrella of the MoPSC provides real protection to customers of investor owned utilities even when the Commission's authority is latent and not immediately exercised. The loss of that assurance of oversight and recourse would be a real and immediate detriment to Missouri pipeline customers.

Might the Commission lose jurisdiction over these pipelines? If so, how would the loss of jurisdiction affect the public interest?

Yes, the Commission could lose jurisdiction over the pipelines if interstate interconnection were permitted. Even if continuing state jurisdiction is theoretically possible under those circumstances, the factual basis necessary to preserve jurisdiction cannot be sustained by the Commission with any degree of assurance. This change of circumstance would place an immediate burden on potentially affected parties by requiring, among other things, their vigilant monitoring of the Gateway's potential actions and filings before the FERC.

Loss of Commission jurisdiction over these pipelines would be detrimental to the public interest because of the differences between Commission regulation and FERC regulation of natural gas pipelines. Relatively small entities, like the Cities and Fidelity, would be virtually disenfranchised if future rate proceedings, complaints, etc. were shifted to FERC jurisdiction and venue. Moreover, as explained by Staff witness Carmen Morrissey in her reclassified rebuttal testimony:

1. "...the FERC does not have an operation-of-law requirement. So, with respect to rate cases, the FERC does not have a required deadline by which it must issue a final order. This means rate increases sought by interstate pipeline companies, are permitted to go into effect, subject to refund, six month's after they are filed. Customers are then **obligated** [emphasis added] to pay those high, subject to refund rates until a final FERC order is delivered following a hearing or after an acceptable settlement is reached. It typically takes 3-5 years for pipeline rate case to be settled or decided at FERC."(Ex. 18, pp. 6, lines 3-10)

2. "...another FERC procedure, which delays final results (beyond those of a typical MoPSC case) is FERC's use of "tolling orders". Although there is a requirement for FERC to deliver an order on rehearing requests within 30 days, it usually disposes of this requirement by issuing a brief order indicating that it is "reconsidering" its previous order(s). This maneuver then allows FERC an unlimited time for issuing its substantive order on rehearing; all the while customers endure high rates and/or uncertainty." (Ex. 18, pp 6, lines 11-16)

Under state jurisdiction, any natural gas company requesting an increase in tariffed rates files their new tariffs reflecting the increase in rates with the Commission. Typically, the Commission suspends the new tariffs for a period of up to, but not exceeding, eleven months (until the operation-of-law date), thus opening a rate case and allowing parties affected by the proposed increase to present their positions regarding the "just and reasonable" nature of the increase. By having an operation-of-law date eleven months from the date of the filed tariffs, the company requesting the rate increase receives final order from the Commission in a timely manner, and natural gas customers affected by the increase are obligated to pay only the increase in rates found "just and reasonable" by the Commission. Any procedure that exposes gas natural customers to paying increase rates not found just and reasonable for any period of time is detrimental to the public interest.

In addition:

3. "... FERC's agenda is dictated by an obligation to a broader base of companies, geographic regions, customers, and political influences, than that of this Commission. The pipeline companies that have considerable impact on gas service and rates to Missouri consumers are usually not a high priority for FERC and are not reviewed as closely/thoroughly as they would be if their requests were being presented to this Commission. (Ex.18, pp. 6, lines 17-22)

4. "[If]...the MoPSC is merely an intervenor/interested party at FERC (not the decisional authority), it has less control over the outcome of FERC-regulated pipeline issues. At the FERC this Commission is left to merely offer up its views on what is in Missouri's best interest and then must live with decisions made by FERC. At FERC, this Commission has less access to data, less leverage in negations, usually less resources than that of our opponents, and no guarantee that the interests of Missouri consumers will receive a high priority because Missouri's interests are many times at odds with the federal agenda and the broader, public interest perspective of FERC. Moreover, Missouri consumers have less opportunity for input and are likely to suffer higher rates and more delays and uncertainty than if the MoPSC is the decisional authority." (Ex.18, pp. 7, lines 3 -13)

Although it is theoretically possible that Missouri natural gas ratepayers may ultimately receive the same result from FERC rate case decision as from state Commission rate case decisions, it is inconceivable to MGCM, the Cities, and Fidelity that the process that any intervenor must endure at the FERC maintains the status quo of "not detrimental to the public interest". Located In Washington D.C., the FERC is not in very good position to understand the operation of Missouri's natural gas industry, its companies, its customers, or the environment in which these companies operate when serving Missouri customers. As demonstrated in the Kansas Pipeline Case (FERC Docket No. RP99-485) where the Missouri Commission is an intervenor, FERC litigation is time consuming (This case has gone on for 3 years.), cumbersome (Over 600 documents have been filed by the parties in this case, with the Missouri Commission filing approximately 1,500 pages of pleadings, testimony, etc.) and expensive. The increase distance, time, and resource commitment that parties representing the interest of Missouri ratepayers must expend to protect the interest of those ratepayers, added to the additional rate expenses and uncertainty face by Missouri ratepayers, make loss of state jurisdiction to FERC jurisdiction detrimental to the public interest.

CONCLUSION

Competent and substantial evidence on the record shows the proposed sale to be detrimental to the public interest for the reasons discussed above. The Commission must therefore either (i) deny the proposed sale or (ii) authorize the sale only by imposing the conditions set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by first-class mail, or hand-delivery, to counsel for parties of record; the Office of the Public Counsel; and the General Counsel's Office of the Missouri Public Service Commission on this 18th day of September 18, 2001.