

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of MoGas Pipeline LLC)
)
) Cause No.

APPLICATION AND COMPLAINT

COMES NOW, MoGas Pipeline LLC (“MoGas”), by and through its counsel of record, pursuant to MO. REV. STAT. §§ 386.270 and 386.390 and 4 C.S.R. 240-2.060, 240-2.065(3), and 240-2.070 and for its Application and Complaint, states as follows:

PARTIES AND JURISDICTION

1. MoGas is an interstate pipeline regulated by the Federal Energy Regulatory Commission (“FERC”). FERC authorized MoGas to begin interstate service as of June 1, 2008.

2. MoGas was formed by the consolidation of two intrastate natural gas transmission pipelines, Missouri Pipeline Company, LLC (“MPC”) and Missouri Gas Company, LLC (“MGC”) (collectively, the “Transporters”), with one interstate pipeline, Missouri Interstate Gas, LLC.

3. Until April 20, 2007, the Transporters were gas corporations as defined in Mo. REV. STAT. § 386.020(18) and were regulated by the Missouri Public Service Commission (the “PSC”). On April 20, 2007, FERC issued an order granting Transporters’ application for authority to reorganize as one interstate pipeline and issuing certificates, thereby asserting jurisdiction over Transporters.

4. In December 2008, PSC Staff brought a civil action against Transporters seeking penalties for the consolidation and FERC application. The Circuit Court granted judgment in Transporters’ favor, and the Court of Appeals affirmed, holding Transporters’ consolidation was lawful. *State ex rel. Pub. Serv. Comm’n v. Mo. Gas Co. et al.*, 311 S.W.3d 368 (Mo. App. 2010).

5. The PSC has jurisdiction over this Application and Complaint by virtue of its having fixed, in a decision that became final on or about April 20, 2010, purported retroactive rates, tolls, charges or schedules for the transportation of natural gas on pipelines owned and operated by MoGas which rates, tolls, charges or schedules are in violation of Missouri statutes, regulations and law.

6. MoGas was and continues to be directly harmed by the PSC's unlawful fixing of purported retroactive rates, tolls, charges or schedules for the transportation of natural gas on pipelines owned and operated by MoGas.

7. In the alternative, to the extent that the PSC's interpretation of Tariffs, as set forth below, is correct, which MoGas specifically denies, that interpretation renders certain Tariff provisions void *ab initio* and MoGas was and continues to be directly harmed by the Tariffs.

8. In PSC Case No. GD-2009-0378, PSC Staff filed a motion to cancel Transporters' Tariffs. Staff moved to withdraw that motion and close the case on June 24, 2009, which the PSC granted. Accordingly, the PSC continues to keep Transporters' Tariffs on file.

9. Pursuant to 4 CSR 240-2.060(1)(G), MoGas incorporates by reference the information required by 4 CSR 240-2.060(1)(B)-(F) contained in its Application to Terminate filed in Case No. GO-2009-0094 as if fully set forth herein.

10. An affidavit of the President of MoGas is attached hereto as Exhibit A and incorporated herein by reference.

GENERAL ALLEGATIONS

11. This case concerns the lawfulness of certain provisions of Transporters' tariffs as interpreted by the PSC.

12. Before April 20, 2007, the Transporters were subject to regulation by the PSC and were required to maintain tariffs with the PSC regarding all rates and charges (the “Tariffs”).¹ True and correct copies of the Tariffs are attached hereto as Exhibits B and C and incorporated herein by reference.

13. The Tariffs were issued in 1996, long before current ownership was involved with the pipeline. *Id.*

14. The Tariffs set forth the specific figures, in dollars and cents, as the applicable maximum and minimum charges on a per unit basis that the Transporters were allowed to charge shippers of natural gas on the pipelines operated by the Transporters. (*See* Tariffs at §3.1, “Applicable Rates”).

15. In a separate provision, titled “Range of Rates,” Transporters were permitted to enter agreements for less than the maximum and more than the minimum charges set forth in §3.1. Tariffs at §3.2(a).

16. Section 3.2(b) of the “Range of Rates” provision of the Tariffs provides as follows:

b. For all Transportation Agreements entered into by Transporter with any affiliate of Transporter after the effective date of tariff sheets having a Date of Issue of January 18, 1995, in those instances in which the term of the Agreement is greater than three (3) months:

(1) The lowest transportation rate charged to an affiliate shall be the maximum rate that can be charged to non-affiliates. Any renegotiation or other type of modification to the rates of any then-effective Transportation Agreement is to be considered an applicable Transportation Agreement for the purpose of setting this maximum rate for non-affiliates.

¹ Though MPC and MGC had separate tariffs filed with the PSC, both contained substantially the same terms, and both tariffs had parallel provisions. Unless otherwise noted, all references to the “Tariffs” shall refer to the parallel provisions provided in both MPC and MGC’s tariffs.

- (2) Transporter will submit each such Transportation Agreement for Commission approval in those instances in which the rate offered to a non-affiliate is proposed to be greater than any rate offered to any affiliate.
- (3) Transporter will submit a rate comparison for all Transportation Agreements.
- (4) Rate comparisons for compliance with these provisions will be calculated assuming a 25% load factor.
- (5) These provisions will be applied to the Transporter's service area and the service area of [other Transporter's] as separate entities and on a separate basis.

17. Section 3.2(c) of the "Range of Rates" provision of the Tariffs establishes the following three-stage procedure for implementing a change to the Tariff provisions: (1) Staff determination that the Tariff provisions "are not effective in preventing rate discrimination to non-affiliates"; (2) informal Staff contact with the Transporters; and (3) Staff discretion to proceed by filing a formal notice "to that effect with the Commission." (*Id.* at §3.2(c)).

18. The Tariffs provided that on the date the PSC files a formal notice under Section 3.2(c), the Tariff would prospectively be governed by the following provision:

The transportation rate charged to any affiliate on the Transporter's pipeline pursuant to a Transportation Agreement for a term greater than three (3) months entered into after January 5, 1995 shall be the maximum rate which may be charged to non-affiliates.

Id.

19. Between July 1, 2003 and June 1, 2006, the Transporters charged the applicable charges to shippers of natural gas on the pipelines owned and operated by the Transporters.

20. Between July 1, 2003 and June 1, 2006, the Transporters had one marketing affiliate, Omega Pipeline Company ("Omega").

21. During this same period, Transporters had only one Transportation Agreement with Omega beginning February 1, 2005 (the “Omega Transportation Agreement”).

22. At the time the Omega Transportation Agreement was executed, Transporters submitted a rate comparison to the PSC that included the rate Omega paid pursuant to the Omega Transportation Agreement. (Tariffs §3.2(b)(3-4).) Transporters were not required to submit the Omega Transportation Agreement itself because Omega was not offered a lower rate than offered to non-affiliates. (*Id.* at §3.2(b)(2).) The PSC did not respond to that submission.

23. On June 1, 2006, Omega was sold to unaffiliated company.

24. On June 21, 2006, the PSC Staff filed a *Complaint Concerning Tariff Violations and Motion for Expedited Treatment*, Cause No. GC-2006-0491 (the “Complaint”).

25. At no time prior to filing the Complaint did the PSC Staff initiate the three-stage procedure set forth in §3.2(c) of the Tariffs.

26. The matter was heard and submitted for decision on December 15, 2006. Seven months after submission, and after several PSC meeting discussions in which it was openly acknowledged that Staff had failed to prove their case, the PSC held a hearing for additional argument.

27. On August 28, 2007, the PSC issued its original Report and Order (the “RO”).

28. In the RO, the PSC stated that: “Staff has never filed the notice described by Section 3.2c. However, Staff filed this complaint, seeking to reduce rates under the terms of the MPC and MGC tariffs, on June 21, 2006. If that date is accepted as the date Staff gave notice to MPC and MGC, then the revised tariff provision and the reduced rates went into effect on that date.”

29. However, as of the date the Complaint was filed, Omega had been sold. Accordingly, Transporters had no marketing affiliate, and therefore no affiliate rate, at the time of the filing of the Complaint.

30. Former Commissioner Connie Murray dissented to the RO, stating that the procedure in the case lacked fairness and gave “the appearance that the [PSC] is more interested in obtaining a desired result than in being an impartial administrative tribunal.”

31. After motion by the parties, the PSC issued its Revised Report and Order in Cause No. GC-2006-0491 on October 11, 2007 (the “Revised Report and Order” or “RRO”).

32. In the Revised Report and Order, the PSC determined that certain rates the Transporters charged to all shippers as of July 1, 2003 should be retroactively reduced by substantial amounts.

33. In doing so, the PSC relied solely upon a new interpretation of Section 3.2 of the Tariffs. (RRO at 37-40.)

34. The PSC extracted Subsection (1) from §3.2(b) and stated that, “by the terms of tariff provision 3.2b(1), the lowest transportation rate [Transporters] offered to Omega is the maximum rate they can charge to a non-affiliated shipper.” (RRO at 38.)

35. The PSC further stated that subsections (2)-(5) “establish a procedure by which [Transporters] could obtain an exception to that rule [contained in subsection (1)] by requesting Commission approval of specific agreement that would allow for the charging of a lower rate to an affiliated shipper.” (RRO at 39.)

36. According to the PSC’s interpretation of §3.2(b), Transporters should be subjected to a retroactive and automatic rate adjustment regardless of the (1) requisite contained in §3.2(b) of the existence of a Transportation Agreement with an affiliate for a term greater than

three months, and (2) the subsequent prospective submission process for such Transportation Agreements described in §3.2(b)(1)-(5).

37. In addressing §3.2(c), the PSC stated that “the purpose of section 3.2c is to allow Staff to eliminate the possibility that [Transporters] could obtain an exception to the general rule by eliminating subsections (2)-(5) if Staff finds that [Transporters] are abusing that exception process. In other words, if Staff brings 3.2c into effect by giving notice to the Commission, the requirement that the lowest rate charged to an affiliate shipper becomes absolute, with no possible exceptions.” *Id.*

38. Even if taken as correct, this interpretation acknowledged that §3.2(c) can only become effective prospectively upon Staff notice. In the RO, the PSC had previously acknowledged that notice was never provided during the time that Transporters had a marketing affiliate.

39. The PSC therefore purposefully ignored §3.2(c), knowing that the PSC could not effect a prospective rate cut, and instead extracted Subsection (1) from §3.2(b) in order to attempt unlawful automatic and retroactive rate reductions.

40. In addition, the PSC did not make its determination based upon the February 1, 2005, Omega Transportation Agreement, or suggest that there should be any rate reductions based on the terms of that Agreement. (RRO at 41.) The PSC thereby acknowledged that the rate Omega paid under that Agreement was higher than any other shipper. Moreover, §3.2(b) could not have been invoked based on the lack of a qualifying Transportation Agreement and Transporters’ compliance with the submission requirements described in §3.2(b)(1)-(5).

41. In the Revised Report and Order, the PSC conceded that it lacked the jurisdiction to order the Transporters to make any refunds to their customers. (RRO at 40.)

42. The PSC further stated that it was “not attempting to determine an appropriate rate for [Transporters]” but rather was “acting to enforce an existing tariff.” *Id.*

43. Nonetheless, the PSC stated that “[i]f any customer of [Transporters] seeks such a refund, they will need to file an appropriate petition in circuit court.” *Id.*

44. Despite its explicit concession, on information and belief, the PSC has in fact encouraged, promoted, and coerced the Transporters’ customers to seek retroactive rate refunds of sums previously paid for natural gas transportation on the Transporters’ system.

45. On information and belief, the PSC, Staff and its counsel have suggested to the Transporters’ customers, including without limitation Union Electric Company d/b/a AmerenUE, that if the customers fail or refuse to seek such retroactive rate refunds, the PSC will take adverse action against the customers in the customers’ interaction with the PSC which also regulates the customers.

46. Such adverse action includes, without limitation, holding such amounts against Transporters’ customers’ Purchased Gas Adjustment (“PGA”).

47. Several of the Transporters’ customers, including Union Electric Company d/b/a AmerenUE, the City of Cuba, Missouri, the City of St. Robert, Missouri, the City of St. James, Missouri, the City of Waynesville, Missouri, and the Municipal Gas Commission of Missouri, have since filed actions in circuit court seeking retroactive rate refunds and have specifically pointed to the Revised Report and Order as the authority for such retroactive transportation rates.

48. On December 22, 2009, the Court of Appeals for the Western District issued an opinion in *State ex rel. Missouri Pipeline Co., LLC, et al. v. Missouri Public Service Commission*, Case No WD 70325, relating to the Revised Report and Order. In that opinion, the Court of Appeals stated that because no separate suit challenging the lawfulness of the Tariffs

had been filed, it was not considering the issue. Accordingly, the issues raised in this petition have not been decided and could not have been decided in that action.

49. On April 20, 2010, the PSC's Revised Report and Order became final.

COUNT I
Objection to Unlawful and Unconstitutional Tariff Provisions

50. MoGas adopts and incorporates by reference each and every allegation set forth in paragraphs 1 through 49 above as if fully set forth herein.

51. MoGas objects to §3.2 of the Tariffs on the grounds that §3.2 is unlawful and unconstitutional as interpreted by the PSC in the Revised Report and Order.

52. In the Revised Report and Order, the PSC declared that §3.2 of the Tariffs functions to automatically and retroactively adjust the Transporters' rates without the need for compliance with the requirements of §3.2(b) or (c) of the Tariffs.

53. While MoGas believes that the PSC's declaration was incorrect, the PSC's declaration in the Revised Report and Order if applied or enforced constitutes an automatic adjustment clause in §3.2 of the Tariffs and as such violates Mo. Rev. Stat. § 393.140(11) in the following respects:

- a) it permits the PSC to impose rate changes without publishing the proposed rates for thirty days in a form plainly stating the changes proposed to be made in the schedule then in force and the time when the change would go into effect; and
- b) it permits the PSC to order a rate change without the filing and approval of a compliance tariff by the PSC.

54. As declared by the PSC in the Revised Report and Order, the automatic adjustment clause in §3.2 of the Tariffs violates due process in the following respects:

- a) it permits the PSC to establish new rates for the Transporters different from those properly filed with the PSC;
- b) it permits the PSC to order automatic and retroactive rate cuts without observing the procedures of a general ratemaking case, without weighing ratemaking factors, and without considering the reasonableness of the Transporters' resulting rates;
- c) it permits the PSC to impose confiscatory rates.

WHEREFORE, MoGas Pipeline LLC asks the Public Service Commission to declare § 3.2 of the Tariffs of Missouri Gas Company, LLC and Missouri Pipeline Company, LLC, to be unlawful, unconstitutional, and void ab initio.

COUNT II
The Tariffs as Revised and Interpreted by the PSC are Statutorily Unlawful and Unconstitutional

55. MoGas adopts and incorporates by reference each and every allegation set forth in paragraphs 1 through 54 above as if fully set forth herein.

56. A present controversy and dispute exists concerning the lawfulness and constitutionality of the PSC's purported revision of the Tariffs in the Revised Report and Order.

57. In the Revised Report and Order, the PSC purported to revise retroactively the rates in the Transporters' Tariffs in an unlawful manner and in violation of the Transporters' due process rights.

58. Specifically, the PSC's retroactive revision of the rates in the Transporters' Tariffs violates Mo. Rev. Stat. § 393.140(11) in the following respects:

- a) it imposed rate changes without publishing the proposed rates for thirty days in a form plainly stating the changes proposed to be made in the schedule then in force and the time when the change would go into effect; and
- b) it ordered a rate change without the filing and approval of a compliance tariff by the PSC.

59. Specifically, the PSC's retroactive revision of the rates in the Transporters' Tariffs violates the Transporters' due process rights in the following respects:

- a) it established new rates for the Transporters different from those properly filed with the PSC, in violation of the Filed Rate Doctrine;
- b) it effected an automatic and retroactive rate cut without observing the procedures of a general ratemaking case, without weighing ratemaking factors, and without considering the reasonableness of the Transporters' resulting rates; and
- c) it allowed for the imposition of confiscatory rates.

WHEREFORE, MoGas Pipeline LLC asks the Public Service Commission to declare that the rates set forth in the Tariffs of Missouri Gas Company, LLC and Missouri Pipeline Company, LLC, as revised, interpreted and applied by the Missouri Public Service Commission in the Revised Report and Order, are invalid, unlawful, unconstitutional, void, and of no force and effect.

COUNT III
Objection to Unlawful and Unconstitutional Tariff Rates

60. MoGas adopts and incorporates by reference each and every allegation set forth in paragraphs 1 through 59 above as if fully set forth herein.

61. MoGas objects to the tariff rates declared by the PSC in the Revised Report and Order on the ground that said rates are unlawful and unconstitutional.

62. In the Revised Report and Order, the PSC declared that §3.2 of the Tariffs automatically adjusted the Transporters' rates as follows (adjustments shown in **bold font**):

Transportation Type/ Delivery Points	Firm Reservation per MDQ	Firm Commodity per Dt.	Interruptible Commodity per Dt.
MPC Delivery	\$ 0.00	\$ 0.1699	\$ 0.1699
MGC Delivery Except the Fort	\$0.00	\$.20	\$.20
MGC Delivery To the Fort	\$18.10	\$.30	\$ 1.15

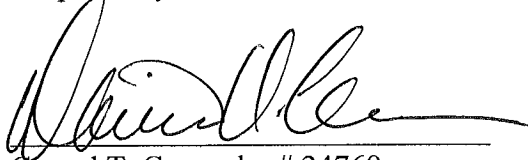
63. In the Revised Report and Order, the PSC expressly stated that when it declared the above rates to be the Tariff rates, it was "not attempting to determine an appropriate rate for the companies."

64. The adjusted Tariff rates shown in bold in paragraph 62, above, violate due process in the following respects:

- a) the rates are unjust, unreasonable, and confiscatory; and
- b) the rates were declared in a retroactive manner;
- c) the rates were declared without regard to whether the rates were appropriate.

WHEREFORE, MoGas Pipeline LLC asks the Public Service Commission to declare that all rates determined by the PSC pursuant to § 3.2 of the Tariffs of Missouri Gas Company, LLC and Missouri Pipeline Company, LLC, are invalid, unlawful, unconstitutional, void, and of no force and effect.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gerard T. Carmody", written over a horizontal line.

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