**ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 19, 2010**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 09-1121**

---

**MISSOURI PUBLIC SERVICE COMMISSION,**
**PETITIONER,**
**v.**
**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

---

**ON PETITION FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

---

# BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

---

**THOMAS R. SHEETS**
**GENERAL COUNSEL**

**ROBERT H. SOLOMON**
**SOLICITOR**

**HOLLY E. CAFER**
**ATTORNEY**

**FOR RESPONDENT**
**FEDERAL ENERGY REGULATORY COMMISSION**
**WASHINGTON, DC 20426**

**NOVEMBER 13, 2009**
**FINAL BRIEF: JANUARY 4, 2010**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

### A. Parties and Amici:

Except for the following parties appearing before the Commission, all parties and intervenors appearing before this Court and the Commission are listed in Petitioner's Rule 28(a)(1) certificate:

Georgia-Pacific Corp.

Missouri Gas Energy, a Division of Southern Union Co.

Omega Pipeline Co.

Panhandle Eastern Pipe Line Co., L.P.

Union Electric Co. d/b/a Ameren UE

U.S. Department of Defense

### B. Rulings Under Review:

1. *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007) ("Certificate Order"), R. 33, JA 156;

2. *Missouri Interstate Gas, LLC*, 122 FERC ¶ 61,136 (2008) ("Rehearing Order"), R. 62, JA 275; and

3. Missouri Interstate Gas, LLC, 127 FERC ¶ 61,011 (2009), R. 90, JA 340.

### C. Related Cases:

Petitioner Missouri Public Service Commission previously petitioned this Court for review of the first two orders on review. *Missouri Pub. Serv.*

*Comm'n v. FERC*, No. 08-1160 (D.C. Cir. Sept. 10, 2008) (dismissed). Counsel is aware of no other related cases pending in this or in any other court.

*/s/ Holly E. Cafer*
Holly E. Cafer
Attorney

November 13, 2009
FINAL BRIEF: January 4, 2010

## TABLE OF CONTENTS

**PAGE**

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**



---

***Cases chiefly relied upon are marked with an asterisk.**

## TABLE OF AUTHORITIES

**COURT CASES:** **PAGE**



**ADMINISTRATIVE CASES:**

## TABLE OF AUTHORITIES

**ADMINISTRATIVE CASES:** **PAGE**

## TABLE OF AUTHORITIES

**STATUTES:** **PAGE**

## GLOSSARY

| | |
|---|---|
| 2002 Missouri Interstate Certificate Order | *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312 (2002) |
| Add. | Addendum |
| Applicants | Missouri Interstate Gas, LLC, Missouri Pipeline Company, LLC and Missouri Gas Company, LLC |
| Br. | Petitioner's Brief |
| Certificate Order | *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007), R. 33, JA 156 |
| Commission or FERC | Federal Energy Regulatory Commission |
| JA | Joint Appendix |
| Missouri Commission | Petitioner Missouri Public Service Commission |
| Missouri Gas | Missouri Gas Company, LLC, a former state-regulated pipeline, now merged with Missouri Interstate and Missouri Pipeline to form MoGas |
| Missouri Interstate | Missouri Interstate Gas, LLC, a former interstate pipeline, now merged with Missouri Gas and Missouri Pipeline to form MoGas |
| Missouri Pipeline | Missouri Pipeline Company, LLC, a former state-regulated pipeline, now merged with Missouri Gas and Missouri Interstate to form MoGas |
| MoGas | MoGas Pipeline LLC, the new interstate pipeline company created following the merger of Missouri Gas, Missouri Interstate and Missouri Pipeline. *See* Rehearing Order at P 1 n.4, JA 276. |
| NGA | Natural Gas Act |
| P | Paragraph number in a FERC order |

| | |
|---|---|
| R. | Record item number |
| Rehearing Order | *Missouri Interstate Gas, LLC*, 122 FERC ¶ 61,136 (2008), R. 62, JA 275 |

**ORAL ARGUMENT IS SCHEDULED FOR FEBRUARY 19, 2010**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

**No. 09-1121**

---

**MISSOURI PUBLIC SERVICE COMMISSION,**
**PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,**
**RESPONDENT.**

---

**ON PETITION FOR REVIEW OF ORDERS OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

---

# BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

---

## STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in setting temporary, initial rates for a new pipeline resulting from the merger of two intrastate pipelines and one interstate pipeline, reasonably allowed the new pipeline to continue to recover the full purchase price of the interstate pipeline's existing facilities, while explaining that the new pipeline will have the

burden of justifying its rates in a future rate case to be filed no later than 18 months after it commences service.

## STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to Section 19(b) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r(b).

## STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in Addendum A.

## INTRODUCTION

In the proceeding below, the Commission approved, subject to conditions, the merger of two state-regulated intrastate pipelines, Missouri Pipeline Company, LLC ("Missouri Pipeline") and Missouri Gas Company, LLC ("Missouri Gas"), with one Commission-regulated interstate pipeline, Missouri Interstate Gas, LLC ("Missouri Interstate") (jointly, "Applicants"). *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007) ("Certificate Order"), R. 33, JA 156, *on reh'g*, 122 FERC ¶ 61,136 (2008) ("Rehearing Order"), R. 62, JA 275, *reh'g denied*, 127 FERC ¶ 61,011 (2009), R. 90, JA 340. In approving the merger and issuing a certificate of public convenience and necessity under NGA section 7, 15 U.S.C. § 717f(c), the Commission authorized temporary, initial rates for service on the combined facilities of the new entity, a Commission-regulated interstate pipeline, now known as MoGas Pipeline LLC ("MoGas").

Petitioner Missouri Public Service Commission ("Missouri Commission") challenged several aspects of the certificate before the Commission, including the Commission's jurisdiction to act on the merger. Before this Court, the Missouri Commission now raises only one issue: whether the Commission erred in allowing MoGas to continue to recover the full purchase price of Missouri Interstate's existing facilities in its rate base pending a more detailed evaluation of the issue in the NGA section 4, 15 U.S.C. § 717c, rate case MoGas was required to file 18 months after commencing service.

The Missouri Commission alleges that the Commission's approved rate base established for the purpose of determining MoGas's initial rates includes an unlawful "acquisition premium," an amount above the depreciated value of the underlying assets, carried over from a prior sale of those assets, before their acquisition by Missouri Interstate. Specifically, the Missouri Commission argues that the Commission failed to address this issue and that the Commission improperly deferred consideration of the issue until the NGA section 4 rate case MoGas must file 18 months after it commences service.

In the orders on review, the Commission did in fact address the alleged acquisition premium. The Commission reasonably relied upon its own orders granting Missouri Interstate its original NGA section 7 certificate, which permitted Missouri Interstate to include the full purchase price of its facilities in rate base

because they were decommissioned oil pipeline facilities being newly committed to natural gas utility service. Moreover, the Commission relied upon Missouri Commission orders approving the sale of the facilities to Missouri Interstate as an arms-length transaction. Consistent with the NGA section 7 public interest standard and established precedent, however, the Commission declined to apply an increased level of scrutiny to this issue at this time. Rather, the Commission confirmed that MoGas will have the burden of justifying the entirety of its rate proposal in the NGA section 4 rate case it was required to file within 18 months of commencing service and that the parties could challenge the alleged acquisition premium at that time.

## STATEMENT OF THE FACTS

### I. Statutory And Regulatory Framework

Under the NGA, the Commission has jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b). Section 7(c) of the NGA, 15 U.S.C. § 717f(c), requires natural gas companies to obtain a certificate of public convenience and necessity from the Commission before they can construct, acquire or operate interstate natural gas pipeline facilities. "Under that authority, FERC employs a 'public interest' standard to determine the initial rates that a pipeline may charge for newly certificated service." *Missouri Pub.*

*Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003) (citing *Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)).

Under NGA sections 4 and 5, the Commission sets permanent rates for previously certificated pipelines under the "just and reasonable" standard. 15 U.S.C. §§ 717c, 717d; *see also Missouri Pub. Serv. Comm'n*, 337 F.3d at 1068 (NGA section 4 "requires rates to be 'just and reasonable,' 15 U.S.C. § 717c, rather than merely in the 'public interest' as required by" NGA section 7). In section 4 cases, the Commission acts on the pipeline's rate proposal; in section 5 cases, the Commission acts on its own motion or upon a third-party complaint. 15 U.S.C. §§ 717c, 717d. As this Court has recognized, NGA section 7-set "initial rates 'offer a temporary mechanism to protect the public interest until the regular rate setting provisions of' [section] 4 of the NGA, 15 U.S.C. § 717c, come into play." *Missouri Pub. Serv. Comm'n*, 337 F.3d at 1068 (quoting *Algonquin Gas Transmission Co. v. FPC*, 534 F.2d 952, 956 (D.C. Cir. 1976)).

## II. The Commission's Proceedings And Orders

### A. Background

This proceeding involves the merger of three pipeline companies, two previously regulated by the Missouri Commission and one regulated by the Commission.

In June 2006, Missouri Interstate, Missouri Pipeline and Missouri Gas jointly applied ("Merger Application," R. 1, JA 31) to the Commission for authority to reorganize into a single new interstate natural gas company to be regulated by the Commission. Certificate Order at P 1, JA 156. At the time of application, all three Applicants were each wholly-owned subsidiaries of United Pipeline Systems, LLC, itself a wholly-owned subsidiary of Gateway Pipeline Company. *Id*. at PP 2, 5 & n.2, JA 157-58. Missouri Interstate was a Commission-regulated interstate pipeline. *Id*. at P 5, JA 157-58. Missouri Gas and Missouri Pipeline were both "Hinshaw pipelines" exempt from Commission jurisdiction under section 1(c) of the NGA, 15 U.S.C. § 717(c).[1] *Id*. at P 1, JA 156. As Hinshaw pipelines, Missouri Gas and Missouri Pipeline were subject to regulation by the Missouri Commission. *Id*. at PP 1-4, JA 156-57.

Missouri Interstate received its first certificate of public convenience and necessity from the Commission, permitting operation as a new interstate pipeline and establishing initial rates, in 2002. *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312 (2002) ("2002 Missouri Interstate Certificate Order") (excerpts attached

[1] A "Hinshaw pipeline" is a person engaged in the transportation of natural gas in interstate commerce but exempt from Commission jurisdiction under 1(c) of the NGA by virtue of meeting the following conditions: 1) it receives the gas within or at the boundary of a state; 2) all gas so received is consumed within such state; and 3) the rates and services of such person are subject to regulation by the state. 15 U.S.C. § 717(c).

hereto as Addendum B). Missouri Interstate was created at the direction of the Missouri Commission for the purpose of converting a decommissioned oil pipeline, previously owned by Missouri Pipeline, to interstate natural gas transportation service. With Missouri Interstate controlling the interstate, FERC-regulated, pipeline, Missouri Pipeline and Missouri Gas were able to remain state-regulated pipelines. *See* Certificate Order at PP 3-5, JA 157-58. The 2002 Missouri Interstate Certificate Order required Missouri Interstate to file a cost and revenue study to justify, following its first 3 years of operations, its initial, cost-based recourse rates (if it chose not to file a full-blown NGA section 4 rate case proposing new rates). 2002 Missouri Interstate Certificate Order at P 52, Add. B-12.

On March 17, 2006, Missouri Interstate submitted the required cost and revenue study in FERC Docket No. RP06-274. Certificate Order at P 101, JA 192-93. Missouri Interstate proposed no changes to the initial rates approved in the 2002 Missouri Interstate Certificate Order. *Id*. The Missouri Commission filed a protest, raising many of the same issues it would later raise in response to the Merger Application. *Id*. at P 102, JA 193; Missouri Commission Protest at 4-5, Docket No. RP06-274 (filed Mar. 29, 2006), R. 94, JA 25-26.

### B. Certificate Order

While Docket No. RP06-274 remained pending, the Applicants filed the Merger Application proposing that Missouri Interstate abandon its interstate pipeline facilities by transfer to Missouri Pipeline, causing it to become a FERC-jurisdictional pipeline. Missouri Pipeline would then abandon all of its facilities by transfer to Missouri Gas. Certificate Order at P 6, JA 158. As to rates, the Applicants proposed initial, cost-based recourse rates for the new entity, utilizing two rate zones. Zone 1 would consist of all of the facilities of the former Missouri Pipeline and Missouri Interstate, and Zone 2 would include all of the facilities of the former Missouri Gas. *Id*. at P 38, JA 170-71. Also, the Applicants proposed that existing customers with negotiated rates would continue to pay the same rates they paid before the merger. *Id*. at P 39, JA 171. The Applicants further proposed to file a general NGA section 4 rate case no later than 18 months after the new entity, MoGas, commenced service. *Id*. at P 3, JA 157.

The Missouri Commission and others protested the Application, requesting that FERC reject the application, or, alternatively, reject or modify the proposed rates and tariff as inconsistent with the public convenience and necessity. *Id.* at PP 9-10, JA 159-60. As relevant here, the Missouri Commission questioned whether the Applicants' rate base, specifically the gross plant, included costs above

the net book value of the facilities, *i.e.* an acquisition premium. Missouri Commission Protest at 35, R. 11, JA 104.

In the Certificate Order, the Commission approved the Merger Application with conditions. Certificate Order at PP 1, 103-04, JA 156-57, 193-94. The Commission found that the merger will enhance competition, and will confer other benefits on customers, including those accruing from the efficiency of combined operations. *Id*. at PP 50-51, JA 174-75. In so doing, the Commission approved, with modifications, the Applicants' proposed initial recourse rates and the proposal that existing shippers continue to pay existing negotiated rates until new rates are established in the NGA section 4 rate case the Applicants committed to file no later than 18 months after commencing service. *Id*. at PP 82, 104, JA 187, 194. The Commission addressed a number of other rate and tariff issues, resolving some immediately and deferring more detailed consideration of others until the contemplated section 4 rate case. *Id*. at P 55, JA 176 (addressing use of end-of-year balances for determining plant balances and accumulated depreciation), P 56, JA 176 (deferring consideration of Accumulated Deferred Income Tax), PP 59-69, JA 177-81 (addressing capital structure and return on equity), P 70, JA 182 (deferring consideration of long term debt cost). *See also id*. at P 81, JA 186-87 (explaining that FERC's standard of review under NGA section 7 is "somewhat more lenient" than that of NGA section 4 "just and reasonable" review because "a

new pipeline does not have an operational history upon which to base a proposal for just and reasonable rates").

As to the acquisition premium issue raised by the Missouri Commission, the Commission identified acquisition premiums in the gross plant for Missouri Pipeline and Missouri Gas, the former state-regulated pipelines, and required that those sums, totaling $2,916,586, be removed from the rate base. *Id*. at PP 54-55, JA 175-76. As to the alleged Missouri Interstate acquisition premium, the Commission noted that the Missouri Commission raised this issue, and many others, in Docket No. RP06-274. *Id*. at P 101, JA 193. However, the Commission terminated, as moot, Missouri Interstate's cost and revenue study proceeding, in Docket No. RP06-274, filed in compliance with the 2002 Missouri Interstate Certificate Order, since Missouri Interstate would cease to exist, and therefore no longer charge separate rates, upon completion of the approved merger. *Id*. at P 102, JA 193.

### C. Rehearing Order

The Missouri Commission timely requested rehearing of the Certificate Order raising a number of issues, only one of which, the Missouri Interstate acquisition premium issue, is now before this Court. Request for Rehearing at 9, 25-29, R. 36, JA 205, 221-25. The Missouri Commission claimed that FERC had acknowledged, but failed to address, the allegation raised in Docket No. RP06-274

that the Missouri Interstate rate base includes an acquisition premium, not arising from the instant merger, and not from Missouri Interstate's purchase of its facilities from the prior owner, but carried over from a prior owner's purchase of the facilities from another prior owner. *Id*. at 25-26, JA 221-22. The Missouri Commission referenced documents from prior Missouri Commission proceedings purporting to show that the "vast majority" of MoGas's rate base of over $10 million is an unauthorized acquisition premium. *Id*. at 27, JA 223.

In an answer to the Missouri Commission's request for rehearing, the Applicants explained that FERC had approved the inclusion of the full purchase price of the Missouri Interstate facilities in rate base in the 2002 certificate proceeding. Applicants' Answer to Request for Rehearing at 3-4, R. 40, JA 253-54 (citing 2002 Missouri Interstate Certificate Order at PP 24, 26, Add. B-9 – B-10). The Applicants urged FERC to reject the Missouri Commission's argument as a collateral attack on the 2002 order. *Id*. at 4, JA 254.

In the Rehearing Order, the Commission granted rehearing in part, clarified other issues, and, as to the issue currently before this Court, denied rehearing. Rehearing Order at PP 1, 51-57, JA 275-76, 294-97. As to the alleged Missouri Interstate acquisition premium, the Commission first rejected Applicants' contention that the Missouri Commission's argument was a collateral attack on the 2002 Missouri Interstate Certificate Order. *Id.* at P 53, JA 296. The Commission

explained that the Missouri Commission properly raised the issue in Docket No. RP06-274, but reaffirmed its decision to terminate that docket as moot because, after the merger, "Missouri Interstate will cease to exist and because it will be a more efficient use of our administrative resources to review the issues raised in the cost and revenue study proceeding at the same time we consider other rate issues in the rate proceeding MoGas will file in 18 months." *Id*. Further, the Commission explained that it would not turn the certificate proceeding, governed by the NGA section 7 public interest standard, into a full rate case, governed by the more exacting NGA section 4 just and reasonable standard, and that it would not arbitrarily select one issue from Docket No. RP06-274 for litigation here. *Id*. at PP 54, 57, JA 296, 297. The Commission reasoned that initial rates in certificate proceedings are typically approved on the basis of estimates, as is the case here where there is no operating history for MoGas for the Commission and parties to evaluate. *Id*. at P 54, JA 296.

In any event, however, the Commission held that it would not disturb its finding, in the 2002 Missouri Interstate Certificate Order, permitting Missouri Interstate to include the full $10,088,000 purchase price for the facilities in its initial rates "because the facilities will be devoted to gas utility service for the first time." *Id*. at P 55, JA 296-97 (citing 2002 Missouri Interstate Certificate Order at P 26, Add. B-9). Further, the Commission relied upon the Missouri Commission's

approval of the acquisition of the Missouri Interstate facilities as an arms-length transaction. *Id*. Nevertheless, the Commission reiterated that "MoGas will have the burden of justifying any rates it proposes when it files its rate case in 18 months and the parties may challenge MoGas' rate proposal." *Id*. at P 55, JA 297.

### D. Later Events

The Missouri Commission concurrently filed for judicial review and rehearing of the Rehearing Order. As such, the petition for review (D.C. Cir. No. 08-1160) was dismissed as premature. The Commission issued an order on rehearing, which did not address the single issue now before this Court, on April 3, 2009. *Missouri Interstate Gas, LLC*, 127 FERC ¶ 61,011, JA 340. The Missouri Commission's instant petition for review followed.

Subsequent to the Commission's orders in this proceeding, on June 30, 2009, MoGas filed, in FERC Docket No. RP09-791, the NGA section 4 rate case contemplated by the Certificate Order. The Commission suspended MoGas's proposed rates, to be effective January 1, 2010, subject to refund under NGA section 4 and set the rate proposal for a hearing before an administrative law judge. *MoGas Pipeline LLC*, 128 FERC ¶ 61,101 (2009). As noted therein, MoGas commenced service under the initial rates set in the certificate proceeding on June 1, 2008. *Id*. at P 2. Thus, the initial rates are effective for the 18-month period of June 1, 2008 to January 1, 2010. In the rate proceeding, the Missouri Commission

has again challenged the inclusion of the full purchase price of the Missouri Interstate facilities in MoGas's rate base. *See* Missouri Commission Protest at 12-13, Docket No. RP09-791 (filed July 13, 2009). That case remains pending before the Commission.

## SUMMARY OF ARGUMENT

The Commission's orders in this proceeding fully satisfy its NGA section 7 obligation to protect consumers by maintaining the status quo pending the outcome of a full "just and reasonable" rate review under NGA section 4. In the parlance of *Atlantic Refining*, the Commission acted here to "hold the line": the Commission allowed MoGas to continue to include the full purchase price of the Missouri Interstate facilities in rate base, just as it had for Missouri Interstate as a separately certificated pipeline. Moreover, the Commission's orders accepted MoGas's proposal to file an NGA section 4 rate case within 18 months of commencing service – and MoGas has already made that filing – thus ensuring that consumers will not bear the burden of a lengthy delay in the final resolution of a just and reasonable rate.

The Missouri Commission misses the mark in arguing that the Commission failed to address the alleged acquisition premium. The orders demonstrate that the Commission reasonably relied upon its prior order addressing this *same issue* in first certificating Missouri Interstate under the NGA section 7 standard, as well as the Missouri Commission's own order approving the *same transaction* it now alleges results in an unlawful acquisition premium.

In addition, the Commission's orders represent a reasonable exercise of its discretion to defer more detailed consideration of the alleged acquisition premium

until the filing of MoGas's NGA section 4 rate case. Courts have consistently recognized the Commission's discretion to allocate issues among proceedings. Here, where the Commission maintained the status quo by relying upon prior orders addressing the very same issue, the Commission's deferral of a more detailed evaluation of that issue to MoGas's contemplated rate proceeding was a reasonable exercise of that discretion.

## ARGUMENT

### I. Standard Of Review

Commission orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also, e.g.*, *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (pipeline construction certificate); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004) (certificated boundary of natural gas storage field). Under the arbitrary and capricious standard, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted)); *see also Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (when "the subject of [the court's] scrutiny is a ratemaking–and thus an agency decision involving complex industry analyses and difficult policy choices–the court will be particularly deferential to the Commission's expertise") (citation omitted).

The Commission's factual findings, if supported by substantial evidence, are conclusive. *See* 15 U.S.C. § 717r(b). The substantial evidence standard "requires more than a scintilla," but "can be satisfied by something less than a

preponderance of the evidence." *B&J Oil & Gas*, 353 F.3d at 77 (quotation omitted).

Furthermore, it is well established that "an agency need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 231 (1991). Rather, as the Supreme Court held in *Mobil*, "an agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities." *Id*. at 230 (citations omitted).

## II. Consistent With Its NGA Section 7 Obligations, The Commission Reasonably Permitted MoGas To Continue To Include The Entire Purchase Price Of The Missouri Interstate Facilities In Its Rate Base

The Commission reasonably permitted MoGas to continue to include the entire purchase price of the Missouri Interstate facilities in the rate base for its initial, temporary rates, relying on the 2002 Missouri Interstate Certificate Order's findings under the section 7 public interest standard, as well as the Missouri Commission's approval of the underlying sale transaction. Rehearing Order at PP 53-55, JA 296-97. The Commission recognized that the NGA section 7 public interest standard is "somewhat more lenient," Certificate Order at P 81, JA 187, than the section 4 just and reasonable standard, and the Orders fully satisfy the section 7 standard.

### A. NGA Section 4 Rate Proceedings Demand An Increased Level Of Scrutiny Not Required In The Instant Section 7 Certificate Proceeding

In evaluating proposed initial rates under NGA section 7, the Commission applies the "public interest" standard. *Atlantic Refining Co.*, 360 U.S. at 391-92. As this Court recently explained, "[t]here is no dispute that the 'public interest' standard of NGA [section] 7 is less exacting than the 'just and reasonable' requirement of [section] 4." *Missouri Pub. Serv. Comm'n*, 337 F.3d at 1070 (citing *Atlantic Refining*, 360 U.S. at 390-91); Certificate Order at P 81, JA 187 (the public interest standard is "somewhat more lenient than the just and reasonable standard"); Rehearing Order at P 54, JA 296 (noting the "increased level of scrutiny required in rate proceedings").

While maintaining this distinction, the Commission may apply, to the extent necessary "to protect consumers," and "to the extent practicable, the same ratemaking policies that it applies in section 4 rate cases in determining just and reasonable rates . . . ." *Missouri Pub. Serv. Comm'n*, 337 F.3d at 1070-71 (quoting *Kansas Pipeline Co*., 97 FERC ¶ 61,168 at 61,785 (2001)). But, the Commission "does not make the statutory finding under section 4 of the NGA that the initial rates are just and reasonable." *Maritimes & Northeast Pipelines, LLC*, 81 FERC ¶ 61,166 at 61,726 (1997), *cited in* Rehearing Order at P 54, JA 296; *cf. Cities of Fulton v. FPC*, 512 F.2d 947, 949 (D.C. Cir. 1975) (*Atlantic Refining* "suggests"

that the Commission must apply the just and reasonable standard to initial rates). *See also Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 809 (10th Cir. 1986) (citing *Atlantic Refining* and explaining that the NGA section 7 public interest determination as to initial rates "does not depend on a finding that the rates are just and reasonable"). In other words, while the Commission may apply, to the extent practicable, the same ratemaking policies in section 7 and section 4 cases, the statutory public interest and just and reasonable standards remain distinct. *Contra* Br. 3 ("FERC applies the same *standard*" in section 4 and section 7 cases) (emphasis added)); *see also id.* at 2 (alleging that the Commission's orders "result[] in initial rates in excess of a just and reasonable level in violation of the requirements of the NGA"). In this light, the Missouri Commission's misinterpretation of the applicable standard is evident.

The Commission's interpretation of the NGA section 7 public interest standard, like this Court's interpretation in, for example, *Missouri Public Service Commission*, maintains the distinction between section 7 and section 4 in keeping with the structure and purpose of the Act. "It is standard agency procedure for FERC to assign an initial rate when issuing a section 7 certificate, and for the [customer] to challenge that rate in a later section 4 rate filing." *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 430 n.4 (D.C. Cir. 1993) (citing *Atlantic Refining*). As the Supreme Court recognized in *Atlantic Refining*, the

purpose of a section 7 initial rate is "to hold the line awaiting adjudication of a just and reasonable rate." 360 U.S. at 392 (the Commission "so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act"). Accordingly, as this Court has emphasized, initial rates are a "temporary mechanism to protect the public interest until the regular rate setting provisions" of NGA section 4 are triggered. *Algonquin*, 534 F.2d at 956.

### B. The Commission's Decision To Allow MoGas To Continue To Recover The Full Purchase Price Of The Missouri Interstate Facilities Satisfies The NGA Section 7 Public Interest Standard

Consistent with the applicable section 7 public interest standard, in the orders on review the Commission reasonably acted to maintain, temporarily, the status quo and allow MoGas to continue to recover the full purchase price of the Missouri Interstate facilities. Rehearing Order at P 54, JA 296. In so doing, the Commission reasonably relied upon the 2002 Missouri Interstate Certificate Order allowing Missouri Interstate to recover the full purchase price of its facilities, as well as the Missouri Commission's approval of the underlying sale transaction. *Id*. at P 55, JA 296-97.

As the Commission explained in the Certificate Order, "[t]he Commission's longstanding policy is to allow only the net book value of facilities in rate base for pipelines which provide regulated natural gas services, with limited exceptions."

Certificate Order at P 54, JA 175 (citing *Enbridge Pipelines (KPC)*, 100 FERC ¶ 61,260 at P 48 (2002) (citing cases)); *see* Br. 6, 21. In applying this policy to the review of alleged acquisition premiums in section 4 rate cases, the Commission has considered whether the acquired facilities are being committed to a new public service and whether there are measurable benefits to consumers resulting from the acquisition. *Enbridge Pipelines*, 100 FERC ¶ 61,260 at P 22 (citing *Longhorn Partners Pipeline*, 73 FERC ¶ 61,355 at 61,112 (1995), *on further review*, 82 FERC ¶ 61,146 at 61,543-44 (1998), *reh'g denied*, 85 FERC ¶ 61,207 (1998), *order on voluntary remand*, 100 FERC ¶ 61,020 (2002)); *see also id*. at PP 48-58 (applying policy). Thus, in *Enbridge Pipelines*, an NGA section 4 rate case also involving the Missouri Commission, the Commission refused to allow recovery of the full purchase price, finding that the existing natural gas facilities were "already devoted to natural gas service." *Enbridge Pipelines*, 100 FERC ¶ 61,260 at P 52.

The 2002 Missouri Interstate Certificate Order, relied upon by the Commission in the Rehearing Order, addressed a challenge, brought by the Municipal Gas Commission of Missouri (an intervenor in this case), to Missouri Interstate's proposal to include the full purchase price of its facilities in rate base. In other words, the Commission addressed the same issue raised by the Missouri Commission here. 2002 Missouri Interstate Certificate Order at PP 24-26, Add. B-9 – B-10. As described in the Rehearing Order, the Commission

> found that it would 'permit Missouri Interstate to include the $10,088,000 purchase price of the existing facilities as the original cost in rate base for recourse ratemaking purposes because the facilities will be devoted to gas utility service for the first time . . . .'

Rehearing Order at P 55, JA 296-97 (citing 2002 Missouri Interstate Certificate Order at P 26, Add. B-9). The Missouri Interstate facilities were formerly part of an oil pipeline system and were decommissioned in the 1980s. 2002 Missouri Interstate Certificate Order at P 4, Add. B-2 – B-3; *see also* Certificate Order at P 5, JA 157-58 (noting that Missouri Interstate was formed in order to operate a "former oil pipeline" and to construct a new segment of pipeline to reach a new source of gas).

The Missouri Commission did not, on rehearing, and does not, before this Court, dispute the Commission's factual finding that the facilities were first devoted to gas utility service at the time of the 2002 Missouri Interstate Certificate Order. *See* Br. 18 ("[Missouri Interstate] was a defunct oil pipeline at the time of acquisition and later converted to natural gas service and certificated by FERC"). As such, the Commission reasonably relied upon this finding as justifying inclusion of the full purchase price of the Missouri Interstate facilities. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 542 (D.C. Cir. 1999) (remanding FERC orders denying oil pipeline's request to include full purchase price in rate base under the Interstate Commerce Act, where FERC orders did not address the

applicable factors, and finding that conversion of pipeline from refined products to liquefied natural gas is a new use).

Likewise, the Commission reasonably relied upon the Missouri Commission's prior approval of the underlying sale of the Missouri Interstate facilities from UtiliCorp United to Gateway (Missouri Interstate's parent). As the Commission explained, the Missouri Commission "approved this arms-length sale transaction between the non-affiliated parties [Gateway and UtiliCorp United] and the purchase price in the [sale] Agreement." Rehearing Order at P 55, JA 297 (quoting 2002 Missouri Interstate Certificate Order at P 26, Add. B-9). By contrast, the sole case the Missouri Commission points to where the Commission considered, in any detail, an acquisition premium in a section 7 proceeding, lacks the key features the Commission relied upon here. *See* Br. 27 (citing *Kansas Pipeline Co.*, 81 FERC ¶ 61,005 at 61,017-18 (1997)). In *Kansas Pipeline*, the Commission rejected an acquisition premium where the facilities were not being initially dedicated to a new service and where at least some of the acquisition premium resulted from transactions with affiliates. *Kansas Pipeline*, 81 FERC ¶ 61,005 at 61,018. *Compare Missouri Pub. Serv. Comm'n*, 337 F.3d at 1074 (remanding Commission's approval of initial rates where the Commission reversed course from a prior order addressing the same issue, without adequate explanation, and where the transaction at issue was not an arms-length transaction).

The Commission's directive requiring MoGas to remove the acquisition premiums from the rate base attributed to the former Missouri Pipeline and Missouri Gas underscores the Commission's reasoned basis for allowing MoGas to continue to recover the full purchase price of the Missouri Interstate facilities. Certificate Order at P 54, JA 175 (citing Merger Application, Exhibit S at 6, JA 69 (listing an acquisition premium as a line item for both Missouri Gas and Missouri Pipeline, but not Missouri Interstate)). The Missouri Commission errs in describing this as "inconsistent." Br. 8. Neither FERC nor the Missouri Commission (to the Commission's knowledge) has previously authorized the inclusion of the Missouri Gas or Missouri Pipeline acquisition premiums in rate base. Moreover, the Missouri Gas and Missouri Pipeline facilities are not being placed into natural gas service for the first time. Further, the instant merger is indisputably an affiliate transaction. *See supra* p.6 (noting common ownership of three former pipelines). As such, the Commission's treatment of the proposed acquisition premiums for the Missouri Gas and Missouri Pipeline facilities is more akin to the Commission's action in *Kansas Pipeline Co.*, 81 FERC ¶ 61,005 at 61,017-018, relied upon by the Missouri Commission (Br. 27). Accordingly, the Commission's differing treatment of these two sets of premiums – allowed where justified and excluded where not – is based on a rational distinction that demonstrates the reasonableness of its action.

The Commission's reasons for declining to apply an "increased level of scrutiny" to the alleged Missouri Interstate acquisition premium are consistent with the NGA and well-established precedent. Rehearing Order at P 54, JA 296. The Commission did not subject "any of the rate base information from Missouri Gas or Missouri Pipeline to the increased level of scrutiny required in rate proceedings" and the Missouri Commission presented no reason to "cherry pick" the acquisition premium issue for additional scrutiny. *Id*. Moreover, as is typical in pipeline certificate proceedings, the Commission lacks an operating history for MoGas, as a combined interstate pipeline, to evaluate. *Id*. ("[A]lthough arguably all three pipelines have an operating history that could be adduced and evaluated, the fact is that none of those histories reflect how MoGas will operate."); *see also* Certificate Order at P 81, JA 187 ("a new pipeline does not have an operational history upon which to base a proposal for just and reasonable rates"). Even the Missouri Commission has emphasized that MoGas is an "entirely *new company*." Missouri Commission Answer at 3 n.12, R. 43, JA 271 (emphasis in original). Thus, the Commission acknowledged that "the rate base for the initial rates we have approved is based on estimates, as is usually the case in a certificate proceeding." Rehearing Order at P 54, JA 296 (citing *Maritimes & Northeast Pipelines, LLC*, 81 FERC ¶ 61,166 at 61,726).

Finally, underscoring the temporary nature of initial rates, and consistent with NGA section 7 practice and precedent, the Commission rejected MoGas's contention that the Missouri Commission should be precluded from challenging the acquisition adjustment in the appropriate proceeding. *See Algonquin*, 534 F.2d at 956 (initial rates are a "temporary mechanism to protect the public interest until the regular rate setting provisions" of NGA section 4 are triggered). Rather, the Commission confirmed that the Missouri Commission's argument is not a "collateral attack," Rehearing Order at P 53, JA 296, MoGas "will have the burden of justifying any rates it proposes when it files its rate case in 18 months," "the parties may challenge MoGas' rate proposal" at that time, and "the Commission may set for hearing any issues which it believes require more scrutiny." *Id*. at P 55, JA 297; *see Algonquin*, 534 F.2d at 955 (remanding FERC orders where the Commission "view[ed] the § 7 condition as rigid, binding on the § 4 proceeding that the Supreme Court in [*Atlantic Refining*] anticipated as providing the appropriate forum for final resolution of the public interest in just and reasonable rates"). Consistent with the Commission's holdings here, when MoGas subsequently filed the required NGA section 4 rate case, the Missouri Commission indeed challenged this issue in that proceeding, and the Commission set the case for hearing. *See supra* p.13-14.

The Missouri Commission's efforts to blur, or indeed eliminate, the line between "public interest" and "just and reasonable" rate review are particularly unconvincing here, where the Commission's orders required MoGas to fulfill its commitment to file a NGA section 4 rate case within 18 months. In cases emphasizing the distinction between NGA section 7 certificate proceedings and NGA section 4 (and 5) rate proceedings, courts have lamented the "inordinate delay . . . in the processing of [rate] proceedings." *Atlantic Refining*, 360 U.S. at 391; *see also Missouri Pub. Serv. Comm'n*, 337 F.3d at 1071, *Consumer Fed'n of America v. FPC*, 515 F.2d 347, 356 (D.C. Cir. 1975), and *Cities of Fulton*, 512 F.2d at 949 & n.8 (all relying upon *Atlantic Refining*). But here, consumers have assurance that the initial rates, established in the orders on review, will remain in effect for a truly temporary period, only until the new section 4 rates take effect. *See* Certificate Order at P 82, JA 187 (noting that FERC traditionally requires new pipelines to file a cost and revenue study within 3 years of commencing operations, but requiring MoGas to fulfill its commitment to file an NGA section 4 rate case within 18 months); *see supra* p.13 (initial rates will be in effect for 18 months). In this context, the Commission's interpretation and application of the public interest standard reflects reasoned decisionmaking.

## III. The Commission Reasonably Exercised Its Discretion To Defer More Detailed Consideration Of The Acquisition Premium Issue Until MoGas's Next Rate Case

As demonstrated in Part II above, the Commission's consideration of the alleged acquisition premium issue fully satisfies the NGA section 7 public interest standard. Moreover, the orders on review reflect the Commission's reasonable exercise of its discretion to defer more detailed consideration of the challenged issue until MoGas files the required NGA section 4 rate case no less than 18 months after commencing service.

The Missouri Commission's demand that the Commission resolve this issue, immediately and finally, in the instant section 7 proceeding (*e.g.*, Br. 22) is contrary to the well-established principle that "an agency need not solve every problem before it in the same proceeding." *Mobil Oil*, 498 U.S. at 231. Rather, as the Court held in *Mobil*, affirming a FERC decision not to address expensive "take-or-pay" contracts in a rulemaking addressing related rate issues, "an agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . and priorities." *Id*. at 230 (citations omitted); s*ee also FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 49 (1968) (holding that the Commission "did not abuse its discretion" in concluding that a particular issue "can be better dealt with" in another proceeding). Likewise, "[a]bsent constitutional constraints or extremely compelling circumstances the

administrative agencies should be free to . . . pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978) (citations omitted).

The Commission reasonably deferred undertaking a more detailed evaluation of the acquisition premium issue, finding that "it will be a more efficient use of our administrative resources to review the issues raised in [Docket No. RP06-274] at the same time we consider other rate issues in the rate proceeding MoGas will file in 18 months." Rehearing Order at P 53, JA 296; *see also id*. at P 54, JA 296 (Commission will not "expend resources" to scrutinize one issue separately). As described above, the Commission explained that it applies an increased level of scrutiny in section 4 (and 5) rate proceedings (like Docket No. RP06-274), as compared to section 7 certificate proceedings. Rehearing Order at PP 54, 57, JA 296, 297. The Commission further explained that in a prior section 7 proceeding, for Missouri Interstate's original certificate, it had permitted Missouri Interstate to include the full purchase price of its facilities in rate base. *Id*. at P 55, JA 296-97. But, the Commission declined to "disturb that finding for the purpose of establishing initial rates for MoGas." *Id*. at P 55, JA 297.

In addition, the Commission's deferral of more detailed consideration of the alleged acquisition premium issue to MoGas's section 4 rate case is consistent with

its own practice and precedent. The primary cases the Missouri Commission references as establishing a policy of disallowing acquisition premiums that the Commission should apply here are cost-of-service rate proceedings, not NGA section 7 certificate proceedings. *See* Br. 8 (citing *Enbridge Pipelines*, 100 FERC ¶ 61,260 at P 48 (NGA section 4 rate case)), 6 (citing *Longhorn Partners Pipeline*, 82 FERC ¶ 61,146 at 61,542 (cost-of-service rate proceeding for oil pipeline)). Moreover, in *Enbridge Pipelines*, in which the Missouri Commission and other parties successfully challenged an acquisition premium, the Commission recognized that the same premium had been included in the pipeline's rate base under its initial rates. *Enbridge Pipelines*, 100 FERC at P 57 (noting that both state and FERC-approved rates had included the acquisition premium in rate base, and that "[t]hese initial rates were based on a cost of service that was higher than the cost of service would have been under the Commission's usual ratemaking principles"). Thus, the Commission has in the past deferred more detailed consideration of assorted rate-related issues, including acquisition premiums, to NGA section 4 proceedings.

Finally, as a practical matter, deferral of more detailed consideration of the acquisition premium issue until the NGA section 4 case will ensure that the Commission and parties have a full opportunity to evaluate this issue in a proceeding devised to result in a just and reasonable rate. The Commission

recognized that "[i]n order to test the validity of the information" in the manner sought by the Missouri Commission, it would need to adopt formal and time-intensive "procedures associated with trial-type hearings," *i.e.* "turn this certificate proceeding into a rate proceeding." Rehearing Order at P 54, JA 54. The Commission's deferral of this issue to the upcoming section 4 rate case ensures that this issue will receive a probing review under the appropriate set of procedures.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be affirmed in their entirety.

Respectfully submitted,

Thomas R. Sheets
General Counsel

Robert H. Solomon
Solicitor

*/s/ Holly E. Cafer*
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

November 13, 2009
FINAL BRIEF: January 4, 2010

***Missouri Public Service Commission v. FERC*** **Docket Nos. CP06-407, *et al.***
**D.C. Cir. No. 09-1121**

## CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,867 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

*/s/ Holly E. Cafer*
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Phone: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov

January 4, 2010

# ADDENDUM A

# STATUTES

TABLE OF CONTENTS

Section 5 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 1(b) of the Natural Gas Act, 15 U.S.C. § provides as follows:

**(b) Transactions to which provisions of chapter applicable**

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 1(c) of the Natural Gas Act, 15 U.S.C. § 717 (c), provides as follows:

**(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence**

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides as follows:

**(a) Just and reasonable rates and charges**
All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
**(b) Undue preferences and unreasonable rates and charges prohibited**
No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission,
**(1)** make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or
**(2)** maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
**(c) Filing of rates and charges with Commission; public inspection of schedules**
Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
**(d) Changes in rates and charges; notice to Commission**
Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides as follows:

**(e) Authority of Commission to hold hearings concerning new schedule of rates**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

**(f) Storage services**

**(1)** In exercising its authority under this chapter or the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 et seq.), the Commission may authorize a natural gas company (or any person that will be a natural gas company on

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides as follows:

completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

**(A)** market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

**(B)** customers are adequately protected.

**(2)** The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

**(3)** If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d, provides as follows:

**§ 717d. Fixing rates and charges; determination of cost of production or transportation**

**(a) Decreases in rates**

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

**(b) Costs of production and transportation**

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), provides as follows:

**(c) Certificate of public convenience and necessity**
**(1)**
**(A)** No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.
**(B)** In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.
**(2)** The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—
**(A)** natural gas sold by the producer to such person; and
**(B)** natural gas produced by such person.

Section 19 of the Natural Gas Act, 15 U.S.C. § 717r(b), provides as follows:

**(b) Review of Commission order**

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28

# ADDENDUM B

100 FERC ¶ 61, 312
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, Linda Breathitt,
and Nora Mead Brownell.

Missouri Interstate Gas, LLC — Docket Nos. CP02-399-000
CP02-400-000
CP02-401-000

# ORDER ISSUING CERTIFICATES

(Issued September 24, 2002)

1. On July 3, 2002, in Docket No. CP02-399-000, Missouri Interstate Gas, LLC (Missouri Interstate) filed an application requesting a certificate of public convenience and necessity to acquire certain facilities and to construct and operate facilities in Missouri and Illinois. Also on July 3, 2002, Missouri Interstate submitted an application in Docket No. CP02-400-000 for a blanket certificate of public convenience and necessity authorizing transportation of gas for others under Part 284, Subpart G of the Commission's regulations, and an application in Docket No. CP02-401-000, for a blanket certificate of public convenience and necessity authorizing certain routine construction and operations activities under Part 157, Subpart F. Missouri Interstate proposes to place an existing facility, a former oil pipeline, into natural gas service for the first time by connecting its western end with Missouri Pipeline Company (MPC) and its eastern end, by means of a one-mile pipeline extension, to the facilities of Mississippi River Transmission Corporation (MRT), in order to transport up to 20,000 Mcf/d of natural gas into Missouri from Illinois.

2. The Commission has reviewed Missouri Interstate's applications in accordance with its September 15, 1999 Policy Statement,[1] and finds it in the public interest to approve the proposed project, subject to the conditions set forth herein, because the project will provide Missouri customers the opportunity to diversify their gas supply

[1]Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement), 88 FERC ¶ 61,277 (1999), order clarifying statement of policy, 90 FERC ¶ 61,128 (2000), order further clarifying statement of policy, 92 FERC ¶ 61,094 (2000).

options with the installation of minor pipeline facilities and a minimal impact to the environment. Accordingly, we find that approval of Missouri Interstate's proposed project is required by the public convenience and necessity.

## I. Missouri Interstate's Proposal

3. Missouri Interstate is a wholly-owned subsidiary of United Pipeline Systems, Inc. (UPS), which also owns 100 percent of two existing natural gas pipelines in the state of Missouri: MPC and Missouri Gas Company (MGC).[2] Missouri Interstate is currently not engaged in the sale or transportation of natural gas. Upon issuance of this certificate, Missouri Interstate will obtain title to the assets of an existing crude oil pipeline, which is currently idle, by transfer from UPS. The purpose of the Missouri Interstate pipeline project is to transport up to 20,000 Mcf/d of natural gas in one direction only, from its interconnection with MRT in Illinois into the State of Missouri, specifically to its interconnection with MPC in the western suburbs of St. Louis. MPC currently delivers gas to Laclede Gas Company, an LDC in the greater St. Louis metropolitan area; to the cities of Washington, Union, St. Claire, and Sullivan; to Union Electric Company d/b/a AmerenUE (AmerenUE), another LDC; and to MGC. MPC currently receives all its gas supplies through its interconnect with Panhandle Eastern Pipe Line Company (Panhandle). [3] Consequently, Missouri Interstate maintains that St. Charles County, the western portion of St. Louis, and the LDC shippers on the MPC line southwest of St. Louis are currently all captive to the mid-continent and western supply areas accessible through the Panhandle system.

4. The existing pipeline facility to be acquired by Missouri Interstate was part of an oil pipeline system originally constructed by Amoco in the late 1940's and operated as such until the early 1980's. In 1989, Amoco discontinued crude oil service through the

---

[2]Though characterized as "intrastate pipelines" in the applications, MPC and MGC appear actually to be "Hinshaw" pipelines, exempt from Commission jurisdiction by virtue of section 1(c) of the Natural Gas Act. MPC receives all the gas it transports from an interconnection with Panhandle Eastern Pipe Line Company within the State of Missouri and delivers it to LDCs, municipalities, and its sister pipeline, MGC, for redelivery and ultimate consumption within the State of Missouri. The rates and services of both MPC and MGC are regulated by the Missouri Public Service Commission.

[3]Gas is physically constrained from flowing from MPC into the Panhandle pipeline, and there are no contractual arrangements for any deliveries to be made by MPC to Panhandle by displacement or otherwise.

system and sold it. Part of the system was converted to a natural gas pipeline and commenced operation as MPC, a Missouri-regulated pipeline owned by UtiliCorp Pipeline Systems, Inc. (UtiliCorp Pipeline).[4] The remainder of the original system was separated physically from the converted portion and decommissioned. That portion of the system is the subject of this application. In 1994, this deactivated portion was cleaned, hydrostatically tested, and purged for storage with nitrogen to prevent internal corrosion. The pipeline was cathodically protected to prevent external corrosion. Although the facility was suitable for natural gas service at that time, and has been qualified for such service under Section 192 of the Department of Transportation regulations, Missouri Interstate states that it has never been used for the transportation of natural gas.

5. Missouri Interstate proposes to acquire (by transfer from UPS)[5] and operate the 5.6 mile, 12-inch diameter pipeline which extends from a point at the edge of the Mississippi River, in Madison County, Illinois, under the river, to a point about five miles west of the Mississippi River, in St. Charles County, Missouri. In addition, Missouri Interstate proposes to construct and operate the following facilities:

> an interconnection with MPC consisting of a few feet of pipe from the eastern terminus of MPC's pipeline near its West Alton delivery point in St. Charles County, Missouri, to the block valve at the western end of the idled 12-inch diameter pipeline. Meter facilities at the point of interconnection, if needed, will be installed by MPC.
>
> approximately one mile of 12-inch diameter pipeline from the capped eastern end of the existing pipeline on the eastern shore of the Mississippi River, through a primarily industrial and commercial area to the interconnection with existing facilities of MRT in Madison County, Illinois. Missouri Interstate will install a block valve as part of the extension to serve as the isolation valve for the eastern side of the Mississippi River.

---

[4]Upon acquisition by Gateway Pipeline Company, Inc. in 2002, UtiliCorp Pipeline's name was changed to UPS.

[5]As is discussed below, Gateway purchased the stock of UtiliCorp Pipeline (now UPS). UPS owns the assets to be transferred to Missouri Interstate, its wholly-owned subsidiary, upon issuance of a certificate.

6. Missouri Interstate proposes to interconnect with MRT's 24-inch diameter East Line at Wood River in Madison County, Illinois. Missouri Interstate and MRT have concluded negotiations for MRT to construct, own and operate a meter station at the interconnection in Wood River to measure volumes of gas delivered into Missouri Interstate by MRT.

7. As discussed below, Missouri Interstate proposes to offer both firm and interruptible open access transportation pursuant to Part 284 of the Commission's regulations and to offer both recourse and negotiated rates. Missouri Interstate's application states that the pipeline is "willing to accept the risk that the pipeline will be undersubscribed and has demonstrated that by designing its initial rates based on 100 percent of the pipeline's capacity plus an imputed allocation of costs to interruptible transportation service."

8. On August 23, 2002, Missouri Interstate, in a response to a data request, informed the Commission that it had executed two precedent agreements with an affiliate, Omega Pipeline Company (Omega): a firm service precedent agreement for 7,000 Dth/d for a term of five years and an interruptible service precedent agreement for up to 10,000 Dth/d for a term of five years. Omega serves Ft. Leonard Wood, Missouri. In addition, Missouri Interstate stated that it had tendered a firm service precedent agreement to another potential customer for approximately 3,200 Dth/d for a term of three years, as requested by that customer, but that agreement has not been executed yet. Including this last agreement, Missouri Interstate anticipates that it will have precedent agreements for "slightly more than 50 percent of its existing capacity at the time of commencement of service, but not less than 35 percent."

## II. Notices, Interventions, and Protests

9. Notice of Missouri Interstate's applications was published in the Federal Register on July 15, 2002.[6] Timely motions to intervene were filed by the Municipal Gas Commission of Missouri (MGCM), the Missouri Public Service Commission (MoPSC), MRT, Laclede Gas Company, Natural Gas Pipeline Company of America, Panhandle,

[6] 67 FR 46490.

and AmerenUE.[7] MGCM[8] protests the application and raises issues addressed below. Comments in opposition to the filing were made by AmerenUE. Missouri Interstate filed answers to the comments and protests. Our procedural rules generally do not permit answers to comments and protests.[9] In order to insure a complete and accurate record, however, we find good cause to accept Missouri Interstate's answers. Comments and protests are considered in the discussion below.

## III. Discussion

10. Since the proposed facilities and services will be utilized in interstate commerce, the abandonment and construction and operation of the facilities and services are subject to the jurisdiction of the Commission and to the requirements of NGA subsections 7(b), (c) and (e).

### A. Application of the Policy Statement

11. The Commission's September 15, 1999 Policy Statement provides guidance as to how it will evaluate proposals for certificating new construction. The Policy Statement established criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Policy Statement explains that in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. Our goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, and the avoidance of unnecessary exercise of eminent domain in evaluating new pipeline construction.

12. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to support the project financially without relying on

---

[7] Timely, unopposed motions to intervene are granted by operation of Rule 214 (18 CFR § 385.214 (2002)) of the Commission's Rules of Practice and Procedure.

[8] MGCM is a statewide municipal joint agency which operates as a gas utility for the benefits of its members, which currently comprise 14 Missouri municipal gas systems serving over 82,000 retail customers.

[9] 18 CFR § 385.213(a)(2) (2002).

subsidization from existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified, after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only after a proposed project's benefits outweigh its adverse effects on economic interests will the Commission proceed to complete the environmental analysis, in which other interests are considered.

13. Where, as here, the applicant is a new pipeline company without any existing customers, the threshold requirement of no subsidization by existing customers is met. However, AmerenUE questions whether there is sufficient market demand to support the project.

14. Missouri Interstate has executed a precedent agreement for 7,000 Dth/d of firm service or approximately 35 percent of the capacity of the proposed line. It anticipates signing a precedent agreement subscribing another 16 percent of its capacity. Consequently, we find Missouri Interstate has demonstrated that there is sufficient demand to support its proposal.

15. There is no indication that the service to be provided by Missouri Interstate will necessarily displace service currently being provided by another pipeline in the market or that it will have an adverse impact on those pipeline's captive customers. Further, introduction of supply options into the area by adding of another interstate transporter will improve reliability and diversity of supply consistent with the Commission's goals.

16. The impact on landowners and communities along the route will be minimal. The proposed pipeline entails very little new construction. The vast majority of the facilities were constructed years ago under rights of way that were established at that time. Activation of existing facilities will involve minimal disturbance of landowners. Construction of the interconnect with MPC will occur on land for which UPS holds or is acquiring the right of way. UPS will transfer the right of way to Missouri Interstate when the requested certificates are issued. The route of the one-mile extension to the interconnection with MRT in Illinois will traverse land that is primarily publicly-owned. Over 60 percent of that route is owned by the Wood River Levee District, the City of Wood River Water Treatment Department, the City of Wood River, or the State of Illinois. Only about 1,000 feet of the route will require easements from private

landowners. Missouri Interstate states that it has personally contacted all landowners along the proposed route and that easements will be required from only two landowners. Missouri Interstate does not anticipate using the right of eminent domain. Accordingly the Missouri Interstate project will have minimal adverse effect on the economic interests of landowners or communities affected by the route of the new pipeline.

17. Missouri Interstate has met the threshold requirements of the Policy Statement in that existing customers will not subsidize through their rates for service the proposed expansion and there will be minimal if any adverse impacts on other pipelines and their captive customers and landowners and communities along the route. Further, to the extent that there are any residual adverse impacts, such impacts will be outweighed by the benefits of Missouri Interstate's new pipeline that will enhance competitive transportation alternatives to a growing region currently served by only one interstate pipeline.

18. On balance we find that the benefits of the project outweigh the potential adverse impacts. St. Charles County, the western portion of St. Louis, and the LDC shippers on the MPC line southwest of St. Louis essentially have current access only to the mid-continent and western supply areas accessible through the Panhandle system. The proposed project will increase competition and offer new sources of gas supply and transportation to Missouri customers served by MPC. Accordingly, we find that approval of Missouri Interstate's proposed project is required by the public convenience and necessity, subject to the conditions set forth herein.

### B. Proposed Cost of Service and Rates

19. Missouri Interstate proposes to offer both firm (FT) and interruptible (IT) open-access transportation on a nondiscriminatory basis pursuant to Part 284 of the Commission's regulations at cost-based recourse rates, and it also requests negotiated rate authority.[10] The proposed maximum cost-based FT reservation rate is $10.086 per Dth. Missouri Interstate states that it currently has no variable costs, so the proposed FT commodity charge is $0. The proposed maximum IT commodity rate is $0.3316/Dth. The proposed IT and FT authorized overrun rates are designed to be equivalent to a 100 percent load factor derivative of the maximum FT cost-based rate and are to be charged based on usage. Missouri Interstate estimates the fuel and gas loss percentage to be zero.

[10] Pro Forma FERC Gas Tariff, Original Volume No. 1.

20. The proposed $2,541,730 annual cost of service is comprised of: (1) operation and maintenance expenses of $244,087, based upon expected operations, (2) depreciation expenses of $334,030, using the annual depreciation accrual rates of 2.5 percent applied to depreciable plant, (3) a return allowance of $1,324,597 calculated from the proposed rate base and capitalization, including a 14 percent return on common equity, (4) federal and state income taxes of $514,016, using a 35 percent federal corporate income tax rate and a 6.25 percent State of Missouri income tax rate, and (5) taxes other than federal and state income taxes estimated at $125,000.

21. Missouri Interstate proposes a gross plant investment of $13,361,180[11] less a depreciation reserve of $334,030[12] and accumulated deferred income taxes of $(206,837), resulting in a net investment rate base of $12,820,313. Adding in a working capital allowance of $25,000 results in the total projected rate base of $12,845,314 as of June 30, 2002. The proposed capital structure is 55.29 percent debt and 44.71 percent common equity, with an estimated 7.33 percent cost of debt and a proposed 14 percent rate of return on common equity. The proposed overall after-tax rate of return is 10.31 percent. Missouri Interstate believes that the requested return and capital structure is commensurate with its investment.

22. The recourse rate structure reflects a straight fixed variable (SFV) rate design with the rates derived using the proposed annual cost of service of $2,541,730 and annualized demand billing determinants of 7,665,000 Dth (which includes both FT and imputed IT service determinants). Missouri Interstate has determined its recourse rate FT demand billing determinants assuming it will be a fully-subscribed service.[13] It also proposes to retain all revenues from IT service since it has established a representative level of imputed IT determinants and allocated costs to the interruptible service.

23. Missouri Interstate states that the negotiated rate may be higher than its recourse rate and may not be based on SFV. Missouri Interstate agrees to comply with the Commission's reporting requirements pertaining to negotiated rates. Missouri Interstate

---

[11]Includes pipeline costs identified as $10,088,925 for line purchase, $2,050,000 of capital improvements & right-of-ways, and $50,000 for an informational website. Intangible plant includes $672,255 of organization costs and $500,000 for tariff filing.

[12]Using 40-year straight-line depreciation.

[13]The rate calculation is based on the full subscription of FT service and does not reflect a discount adjustment.

indicates it will keep separate and identifiable accounts for any quantities transported, billing determinants, rate components, surcharges, and revenue associated with negotiated rates, in sufficient detail to be identified in Statements G, I and J in any future rate case.

### 1. Purchase Price of Existing Facilities

24. Missouri Interstate states that the cost of acquiring the 5.6 miles of 12-inch diameter existing idled oil pipeline assets was approximately $10,088,000 as of the date of closing on January 1, 2002. Missouri Interstate further represents that the acquisition cost is the depreciated net book value of those assets at the time of the sale by UtiliCorp United, Inc. (UtiliCorp United), a publicly-traded corporation, which is unaffiliated with Missouri Interstate. In this regard, Missouri Interstate refers to the Stock Purchase Agreement (Agreement) dated February 2, 2001, between Gateway Pipeline Company, Inc. (Gateway) (the parent of UPS) as Buyer, and UtiliCorp United as Seller, which indicates that UtiliCorp United agrees to sell all its stock in UtiliCorp Pipeline to Gateway for the net book value of the property, plant and equipment of UtiliCorp Pipeline as of the closing date, with depreciation accruing to the assets being sold during the period between the signing of the Agreement and the actual closing date.

25. In its protest, MGCM states the proposed rates are excessive and therefore are unjust and unreasonable. MGCM states that Missouri Interstate presents no actual historic cost of service for the facilities and that its rate base has not been justified. Specifically, it claims it is not clear whether the price of the existing plant investment proposed for inclusion in rate base represents the costs of the facilities to UtiliCorp Pipeline in 1989, or the costs of the facilities to Gateway, effective January 1, 2002. Additionally, MGCM questions whether the existing plant investment covers all of the facilities of the former oil pipeline system, including those currently used by MPC and MGC, or only that portion of the facilities which was decommissioned and will be acquired by Missouri Interstate. MGCM asserts that Missouri Interstate should be required to demonstrate that the acquisition cost is the net book value of the facility when ownership was transferred from UtiliCorp United to Gateway, for subsequent transfer to Missouri Interstate.

26. The MoPSC Report and Order in Case No. GM-2001-585, issued on October 9, 2001, and effective on October 18, 2001, approved the Agreement involving Gateway and UtiliCorp United. We note that the MoPSC approved this arms-length sale transaction between the non-affiliated parties and the purchase price in the Agreement. Because the facilities will be devoted to gas utility service for the first time, we will

permit Missouri Interstate to include the $10,088,000 purchase price of the existing facilities as the original cost in rate base for recourse ratemaking purposes when the assets are transferred to it. However, Missouri Interstate must file its accounting in compliance with the Part 201, Gas Plant Instructions[14] establishing the plant balances by detailed gas plant account for the plant investment shown on Exhibit N, Page 3, which includes among other things, the line purchase described above.

### 2. Depreciation

27. MGCM protests Missouri Interstate's proposed depreciation life of 40 years as excessive. It states that this is in conflict with the bulk of its facilities, which consist of an old interstate oil line originally constructed in the late 1940's and operated to the early 1980's. MGCM asserts that Missouri Interstate may be seeking to reconstitute what obviously were fully amortized facilities to now double collect from consumers for them.

28. We do not agree with MGCM's characterization that Missouri Interstate will be double collecting depreciation based on a 40-year depreciation schedule. Missouri Interstate is a new owner of the facilities, seeking Commission approval to place them into service for use in the transportation of natural gas services in interstate commerce for the first time. The existing facilities have not been used for that purpose in the past. Therefore, since the Commission has never approved rates to be charged for gas transportation service, there could not be a double collection from jurisdictional shippers. The proposed straight-line method of depreciation conforms with the Commission's Uniform System of Accounts, and the depreciation accrual over a 40 year period is reasonable. Accordingly, Missouri Interstate's annual depreciation accrual rates of 2.5 percent for transmission and intangible plant are accepted.[15]

### 3. Rate of Return and Capitalization

29. Missouri Interstate states it has no publicly-traded stock. It is a wholly-owned subsidiary of UPS, which, in turn, is owned by Gateway. Gateway is owned by Mogas

---

[14] 18 CFR Part 201, Uniform System of Accounts Prescribed For Natural Gas Companies Subject To The Provisions Of The Natural Gas Act. (2002).

[15] We note that Missouri Interstate did not mention or request specific depreciation accrual rates for general plant. To the extent Missouri Interstate will have general plant, it must seek authorization for the accounting procedures and specific depreciation accrual rates.

performed under Subparts B or G of Part 284 of the Commission's regulations. We do not understand how it is operationally feasible for Missouri Interstate to render displacement with this short-length pipeline, which has only one receipt and delivery point. GT&C Section 2.36[28] defines transportation to include backhauls and exchanges. If displacement is intended to refer to backhaul transportation, this is inconsistent with statements made in response to data requests that gas will only flow into the State of Missouri, hence, in one direction. We will require Missouri Interstate to a provide further explanation about its intent.

49. Section 3.1 of Rate Schedules FT and IT[29] describes circumstances where Shipper and Transporter agree to establish a fixed rate for the duration of the transportation service. The term "fixed rate" is not well-defined. We will require Missouri Interstate to revise the Section 3.1 to be more explicit as to whether this term applies to cost-based discounted rates, or recourse rates, or to negotiated rates.

## 12. Additional filings

50. In view of all of the above-required revisions to Missouri Interstate's proposed FT and IT recourse rates, we will require Missouri Interstate to file revised, pro forma tariffs within 60 days of the date of this order, as discussed above. Missouri Interstate is placed on notice that the Commission could require additional filings before approving the effectiveness of initial rates; it should act accordingly in submitting revisions to timely place its rates into effect. Missouri Interstate must also file actual tariff sheets at least 60 days prior to its in-service date.

51. When Missouri Interstate makes the first filing referenced above, it is required to modify its cost of service and resulting rates to reflect a return on common equity of 13.3 percent. It shall eliminate the $500,000 "Tariff Filing" expense from intangible plant. It may attempt to justify this cost item and its proposed cost classifications as discussed above. However, if Missouri Interstate desires to make any other changes not specifically authorized by this or a subsequent order in this proceeding prior to placing its facilities into service, Missouri Interstate will need to provide cost data and required exhibits supporting any revised rates under NGA section 7(c). After the in-service date,

---

[28] Pro Forma FERC Gas Tariff, Original Volume No. 1., Original Sheet No. 18.

[29] Pro Forma FERC Gas Tariff, Original Volume No. 1, Original Sheet Nos. 7 and 12, respectively.

Missouri Interstate may make an NGA section 4 filing to change its rate to reflect revised construction costs and operating costs.

52. Consistent with Commission precedent,[30] we will require Missouri Interstate to make a filing at the end of its first three years of actual operation to justify its existing recourse rates. In its filing, Missouri Interstate's projected units of service should be no lower than those upon which its approved initial rates are based. The filing must include a cost and revenue study in the form specified in Section 154.313 of the Commission's regulations to update cost-of-service data, including the cost of plant-in-service. After reviewing the data, we will determine whether we should exercise our authority under NGA section 5 to establish just and reasonable rates. Alternatively, in lieu of this filing, Missouri Interstate may make an NGA section 4 filing to propose alternative recourse rates to be effective no later than three years after the in-service date.

### C. Compliance with Order No. 637

53. In Order No. 637,[31] the Commission revised, among other things, its regulations relating to scheduling procedures, capacity segmentation, and pipeline penalties in order to improve the competitiveness and efficiency of the interstate pipeline grid.

54. Missouri Interstate states that its pro forma tariff terms and conditions are structured to conform to the requirements of the Commission's Order Nos. 636 and 637, and adopt Version 1.5 of the standards of the NAESB pursuant to Order No. 587, et al., but assume approval of the following requested waivers relating to (1) communications utilizing EDI/EDM and EBB/EDM, (2) segmentation, (3) flexible point rights, allocation of capacity to secondary points, and point-limited discount provisions, and (4) imbalance management services, imbalance penalty crediting, and operational flow order procedures.

---

[30]See, e.g., Trunkline LNG Company, 82 FERC ¶ 61,198, at p. 61,780 (1998), aff'd sub nom. Trunkline LNG Co. V. FERC, 194 F.3d 68 (D.C. Cir. 1999); Horizon Pipeline Company, L.L.C., 92 FERC ¶ 61,205, at p. 61,687 (2000); Vector, 85 FERC ¶ 61,083 (1998).

[31]Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,091 (Feb. 9, 2000); order on rehearing, Order No. 637-A, FERC Stats. & Regs., Regulations Preambles (July 1996-December 2000) ¶ 31,099 (May 19, 2000).

***Missouri Public Service Commission v. FERC*** **Docket Nos. CP06-407*, et al.***
**D.C. Cir. No. 09-1121**

## CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 4th day of January 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

| | |
|---|---|
| Jason Tyler Gray<br>Duncan, Weinberg, Genzer & Pembroke, PC<br>1615 M Street, NW<br>Suite 800<br>Washington, DC 20036-3203 | Email |
| Jonathan David Simon<br>Van Ness Feldman<br>1050 Thomas Jefferson Street, NW<br>Washington, DC 20007-3877 | Email |
| Kathleen L. Mazure<br>Duncan, Weinberg, Genzer & Pembroke, PC<br>1615 M Street, NW<br>Suite 800<br>Washington, DC 20036-3203 | US Mail |
| Lera Shemwell<br>Missouri Public Service Commission<br>Harry S. Truman Office Building<br>PO Box 360<br>Jefferson City, MO 65102-0000 | Email |
| Margaret A. McGoldrick<br>Spiegel & McDiarmid LLP | Email |

1333 New Hampshire Avenue, NW
Washington, DC 20036

Mark Christopher Darrell — US Mail
Laclede Gas Company
720 Olive Street
Suite 1512
St. Louis, MO 63101-0000

Paul Korman — Email
Van Ness Feldman
1050 Thomas Jefferson Street, NW
Washington, DC 20007-3877

Samuel Davis Ritchie — Email
Missouri Public Service Commission
Harry S. Truman Office Building
PO Box 360
Jefferson City, MO 65102-0000

Stephen Charles Pearson — Email
Spiegel & McDiarmid LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

*/s/ Holly E. Cafer*
Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-8485
Fax: (202) 273-0901
Email: holly.cafer@ferc.gov