

133 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Missouri Interstate Gas, LLC
Missouri Gas Company, LLC
Missouri Pipeline Company, LLC

Docket No. CP06-407-007

ORDER GRANTING CLARIFICATION AND ESTABLISHING
HEARING PROCEDURES

(Issued November 1, 2010)

1. On August 24, 2010, the Commission issued an order (Remand Order)¹ addressing the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacating the Commission's decision allowing MoGas Pipeline LLC (MoGas) to continue to include the full purchase price of certain pipeline facilities in its initial rates following a merger.² The Remand Order referred this proceeding to a settlement judge to determine whether the parties could reach a settlement on this issue. Requests for clarification or, in the alternative, rehearing of the Remand Order were filed by the Missouri Public Service Commission (Missouri Commission) and the Municipal Intervenors.³ As discussed below, we grant the requests for clarification.

2. Pursuant to the Remand Order, a settlement conference was convened in this proceeding on September 16, 2010. Following the conference, the settlement judge issued a report recommending termination of the settlement judge proceedings in this docket. Based on this recommendation, the Chief Administrative Law Judge (Chief Judge) issued an order on September 17, 2010, terminating settlement judge procedures. In this order, the Commission is establishing hearing procedures to address the issue on remand.

¹ *Missouri Interstate Gas, LLC*, 132 FERC ¶ 61,161 (2010).

² *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581 (D.C. Cir. 2010) (*Mo. PSC*).

³ The Municipal Intervenors consist of the Municipal Gas Commission of Missouri and the Cities of St. James, St. Robert, Richland, and Waynesville, Missouri.

Background

3. In a series of orders, the Commission approved, subject to conditions, the merger of two state-regulated pipelines, Missouri Pipeline Company, LLC and Missouri Gas Company, LLC, with one Commission-regulated interstate pipeline, Missouri Interstate Gas, LLC (Missouri Interstate).⁴ In approving the merger and issuing a certificate of public convenience and necessity under section 7 of the Natural Gas Act (NGA), the Commission authorized initial rates for service on the combined facilities of the new Commission-regulated interstate pipeline, MoGas. The Commission dismissed the protest of the Missouri Commission alleging that the Commission's approved rate base established for the purpose of determining MoGas's initial rates included an unlawful acquisition premium for Missouri Interstate, 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.⁵ The Commission declined to change its previous decision⁶ 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. The Commission explained that it would be a more efficient use of its administrative resources to address the issue in detail in the rate proceeding MoGas would be filing within 18 months of commencing operations.⁷

4. In *Mo. PSC*, the D.C. Circuit held that the Commission erred by deferring consideration of the disputed acquisition premium to an NGA section 4 proceeding.⁸ The court found that the Commission's action was inconsistent with its own precedent which establishes that such premiums are disallowed unless the Commission applies the so-called "benefits exception."⁹ The court also found that the Commission's action was inconsistent with its rejection of the acquisition premiums included in the costs associated with the facilities of the two state-regulated pipelines.¹⁰

⁴ *Missouri Interstate Gas, LLC*, 119 FERC ¶ 61,074 (2007), *order on reh'g*, 122 FERC ¶ 61,136 (2008), *reh'g denied*, 127 FERC ¶ 61,011 (2009).

⁵ *Missouri Interstate Gas, LLC*, 122 FERC ¶ 61,136, at P 55 (2008).

⁶ *Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312, at P 24-26 (2002).

⁷ *Missouri Interstate Gas, LLC*, 122 FERC ¶ 61,126, at P 53 (2008).

⁸ *Mo. PSC*, 601 F.3d at 586.

⁹ *Id.* at 582, *citing RioGrande Pipeline Co. v. FERC*, 178 F.3d 533, 536-37 (D.C. Cir. 1999); *Kansas Pipeline Co.*, 81 FERC ¶ 61,005 (1997).

¹⁰ *Mo. PSC*, 601 F.3d at 586-587.

5. The Remand Order referred this proceeding to a settlement judge to determine whether the parties could reach a settlement on the acquisition premium issue. In deciding to establish settlement judge procedures, the Remand Order noted that since the issuance of the Commission's prior decisions in this proceeding, MoGas filed an NGA section 4 rate case in Docket No. RP09-791-000 where the parties had entered into an uncontested Stipulation and Agreement of Settlement (Settlement) resolving all issues in the proceeding. The Remand Order noted that Article X of the Settlement provides that: (1) the Settlement will not affect the instant proceeding involving the appropriateness of an acquisition premium that was pending on appeal when the Settlement was filed; and (2) in the event the case is remanded to the Commission, a final Commission order shall not affect the Settlement Rates. On this basis, the Remand Order concluded that "resolution of the issue on remand only will impact the rates for a locked-in period from June 1, 2008, the date MoGas commenced jurisdictional interstate service, to January 1, 2010, the effective date of the Settlement Rates."¹¹ Given these circumstances, the Remand Order found that it was appropriate for the parties to be given an opportunity to settle the issues related to the appropriate rate base to use to calculate MoGas's initial rates for the locked-in period.

Requests for Clarification or, in the Alternative, Rehearing

6. The Missouri Commission and the Municipal Intervenors request clarification or, alternatively, rehearing of the statement in the Remand Order that provides that resolution of the issue on remand only will impact the rates for a locked-in period. Specifically, the Missouri Commission and Municipal Intervenors request that the Commission clarify that the statement was limited to the "immediate" impact of resolution of the acquisition premium issue and was not meant to negate the explicit provision of Article X of the Settlement that the "Participants shall abide by any final Commission order addressing the acquisition premium issue." In support, the parties state that Article X of the Settlement specifically does not resolve the issue of whether the rate base set forth in MoGas's books contains an inappropriate acquisition premium. Thus, the parties assert that a Commission decision in this proceeding will not only impact the rates for the locked-in period, but may also impact the appropriate level of rate base in a future rate proceeding.

7. The Commission grants the requested clarification. As explained by the parties, the Settlement does not resolve the acquisition premium issue. Therefore, a Commission decision on the merits in this proceeding will not only impact rates for the locked-in period but may establish precedent for setting an appropriate rate base for MoGas in a future rate proceeding initiated under NGA section 4 or 5.

¹¹ Remand Order, 132 FERC ¶ 61,161 at P 6.

Establishment of Hearing Procedures

8. As discussed above, settlement judge procedures were unsuccessful in resolving the acquisition premium issue in this proceeding and have been terminated by the Chief Judge. Accordingly, the Commission will establish additional procedures to address the acquisition premium issue consistent with Commission precedent.

9. After issuance of the decision in *Mo. PSC*, MoGas filed supplemental information addressing the acquisition premium issue.¹² In its Supplemental Filing, MoGas explains that the facilities at issue consist of a former oil pipeline that Missouri Interstate purchased in 2002. According to MoGas, the alleged acquisition premium was not paid by Missouri Interstate, but by a prior owner of the Missouri Interstate facilities. MoGas asserts that its purchase of the Missouri Interstate facilities meets the benefit exception test as set forth by the court in *Mo. PSC* that considers: (1) whether the acquired facility is being put to a new use; (2) whether the purchaser had demonstrated specific dollar benefits; (3) whether the transaction at issue is an arms length sale between un-affiliated parties; and (4) whether the purchase price of the asset at issue is less than the cost of constructing a comparable facility.¹³ MoGas states that Missouri Interstate purchased the facilities from an unaffiliated seller at the net book value reflected on the seller's books (\$10,088,000) and that Missouri Interstate placed such facilities into interstate service for the first time. MoGas also submits an affidavit and cost study prepared by Alliance Wood Group Engineering, L.P. that provides an estimate of the costs to construct new facilities comparable to the facilities Missouri Interstate purchased in 2002.¹⁴ Based on the results of the study, MoGas asserts that specific dollar benefits result from the acquisition of the Missouri Interstate facilities because it would have cost approximately \$13.9 million to construct new facilities in 2002 comparable to the Missouri Interstate facilities for which it paid approximately \$10.1 million in 2002. On this basis, MoGas requests that the Commission find that its initial rates properly included the full purchase price of the Missouri Interstate facilities.

10. In its July 7, 2010 motion and answer, the Missouri Commission disagrees that MoGas has met its burden of showing a benefits exception to justify the inclusion of an acquisition premium in rate base consistent with Commission precedent.¹⁵ In addition, the Missouri Commission claims that MoGas's Supplemental Filing raises material issues

¹² See MoGas's June 22, 2010 Supplemental Filing (Supplemental Filing).

¹³ *Id.* 2-3 (citing *Mo. PSC*, 601 F.3d at 586).

¹⁴ See Supplemental Filing, Appendix A.

¹⁵ The Municipal Intervenors and Union Electric Company filed answers in support of the Missouri Commission's motion.

of fact that require a hearing. According to the Missouri Commission, the material issues of fact include the amount of the acquisition premium, as well as issues related to MoGas's estimate of building a new pipeline contained in Appendix A to its Supplemental Filing relating to costs, outside services, allowance for funds use during construction, and the appropriate costs of construction.

11. We find that the acquisition premium issue raises issues of material fact that cannot be resolved based on the record before us. Accordingly, the Commission will set the issue on remand for hearing.

The Commission orders:

(A) The requests for clarification of the Remand Order are granted as discussed in this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the NGA, particularly sections 7, 8, and 16 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the NGA, a public hearing shall be held concerning the acquisition premium issue raised in this proceeding.

(C) A Presiding Administrative Law Judge (ALJ), to be designated by the Chief Judge for that purpose pursuant to 18 C.F.R. § 375.304, must convene a prehearing conference in this proceeding to be held within 15 (days) of the date this order is issued, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference will be held for the purpose of establishing a procedural schedule. The ALJ is authorized to conduct further proceedings in accordance with this order and the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.