

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal)	Application No. FC-1327
Complaint of the Nebraska Public)	
Advocate, seeking a)	
determination that Kinder)	
Morgan, Inc. and/or its)	
successor in interest, SourceGas)	
Distribution, LLC improperly)	ORDER DISMISSING COMPLAINT
implemented, billed and received)	
payment for interim and final)	
rates in NG-0036 for which)	
customers are entitled to a)	
credit or refund from Kinder)	
Morgan, Inc. and/or SourceGas)	
Distribution, LLC.)	
)	Entered: September 9, 2008

BY THE COMMISSION:

On July 6, 2007, a formal complaint was filed with the Nebraska Public Service Commission ("Commission") by the Nebraska Public Advocate ("Complainant" or "PA") against Kinder Morgan, Inc. ("Kinder Morgan") and SourceGas Distribution, LLC, ("SourceGas"), as Kinder Morgan, Inc.'s successor in interest to its jurisdictional utility distribution system in Nebraska, (together "Respondents"). Both SourceGas and Knight Inc., ("Knight"), the successor in interest of Kinder Morgan, filed timely answers to the Complaint.

Oral arguments were held on certain legal issues relating to the above-captioned docket on October 30, 2007. The Commission issued its findings on the oral arguments in an order on November 20, 2007. SourceGas filed a Motion for Reconsideration and Oral Argument on December 3, 2007. Appeals of the Commission's November 20, 2007 order were also filed by other parties with the District Court. Subsequently, by agreement of the parties, Joint Motions to Dismiss and Remand and a Stipulated Agreement of the parties was filed with the District Court. On February 11, 2008, the District Court granted the Motion and Remanded the matter back to the Commission for further proceedings.

A hearing on the above-captioned complaint was held on July 16, 2008, in the Commission Hearing Room. The Complaint alleges that Respondents incorrectly implemented interim and final rates in connection with Kinder Morgan's most recently concluded rate case¹ by not prorating ratepayer's charges to reflect gas usage at the old and new rates. The Public Advocate argues that both

¹ See Application No. NG-0036, *In the Matter of the Application of Kinder Morgan, Inc., Lakewood, Colorado, seeking approval of a general rate increase*. Order Approving Stipulation (December 27, 2006).

interim and final rates should have been applied to usage occurring on or after the effective date of the rate and to the extent that the change in rates occurred during a billing cycle, usage for the period should have been prorated between the old and new rates.

Respondents contend that SourceGas properly implemented the interim and final rates pursuant to the settlement entered into in NG-0036, the corresponding tariff, and language of the State Natural Gas Regulation Act ("SNGRA")² and that prorating was not required by any of the three. The Public Advocate filed this Complaint seeking refunds for ratepayers of any increases collected by SourceGas on gas service rendered before the effective date of the interim rates and final rates.

O P I N I O N S A N D F I N D I N G S

Background

On December 27, 2006, the Commission issued a final order in Docket No. NG-0036, approving a Stipulation and Settlement Agreement ("Rate Case Order") that was jointly submitted to the Commission for approval by Kinder Morgan and the PA.³ The Stipulation contained the following language,

This Settlement Agreement has been entered into by the Parties as a means to resolve all outstanding issues in Kinder Morgan's pending rate proceeding and as a fair and reasonable resolution of all such matters and issues raised therein, without resolving specific issues of law and fact other than those expressly set out herein.⁴

The Settlement Agreement was a generic or "black box" settlement, meaning it contained the final terms agreed upon by Kinder Morgan and the PA, but not specific justification or rationale behind the agreed upon terms. The agreement did not include specific language regarding the implementation of either the interim or final rates.

Subsequent to the issuing of the Rate Case Order, on January 5, 2007, Ms. Laura Demman, Director of the Commission's

² See Neb. Rev. Stat. § 66-1801 et. seq. (Reissue of 2003).

³ See *supra*, Application No. NG-0036, Stipulation and Agreement of Settlement, (November 28, 2006).

⁴ *Id.* at 6.

Natural Gas Department, sent an inquiry to Mr. Bentley Breland, the Vice President of Certificates and Rates for Kinder Morgan, via electronic mail requesting clarification of Kinder Morgan's method of implementing the new rates that became effective January 1, 2007. Mr. Breland responded on January 9, 2007, to Director Demman via electronic mail and stated as part of his response the following, "We [Kinder Morgan] will not be pro-rating charges on the bills issued after January 1."⁵ Mr. Breland went on to explain the method Kinder Morgan was using to implement the final rates.

The Complainant was copied on both the January 5, 2007 electronic mail from Director Demman and the January 9, 2007 response to Director Demman from Mr. Breland. On March 30, 2007, Kinder Morgan transferred its Nebraska jurisdictional utility distribution system and certificate of convenience to SourceGas.

On May 15, 2007, the PA filed a Petition for Declaratory Order with the Commission that was referenced at the Commission as Docket No. NG-0047. In his May 15, 2007 filing, the PA sought a determination from the Commission that Kinder Morgan had improperly implemented both the interim and final rates in the NG-0036 rate case. On July 6, 2007, the PA withdrew Docket No. NG-0047 and filed the above-captioned Formal Complaint, Docket No. FC-1327.

Discussion

The Complaint requests that the Commission find that Kinder Morgan incorrectly implemented both the interim rate increase on September 1, 2006, and the final rates on January 1, 2007. For a remedy, the PA seeks customer refunds of any money collected by Kinder Morgan for gas service rendered before the effective dates of the rate changes. SourceGas in its answer to the complaint and oral arguments states that to issue such an order with the relief requested by the PA would violate the terms of the Settlement Agreement and constitute an impermissible collateral attack on the NG-0036 Rate Case Order.

Under the Administrative Procedure Act and the Commission's Rules of Procedure, any party seeking reversal, modification, or vacation of an order of the Commission has thirty days from the date the order is mailed by the Commission to file an appeal with the District Court.⁶ The Commission Rate Case Order,

⁵ See Ex. 3 & 34.

⁶ See Neb. Rev. Stat. § 84-917(2006 Cum Supp.); Title 291 Neb. Admin. Code, Ch. 1, Sec. 021.01.

approving the Stipulation and Settlement Agreement in NG-0036, was mailed by the Commission on December 27, 2006. Therefore, all parties had until January 26, 2007, to file an appropriate petition of appeal with the District Court to appeal the Commission's Rate Case Order.

The Complainant received the information from Kinder Morgan that the company did not intend to prorate the implementation of the new rates effective on January 1, 2007, on January 9, 2007, when the PA was copied on Mr. Breland's electronic mail response to Director Demman, in advance of the deadline to appeal the final order in NG-0036. The PA filed nothing concerning the NG-0036 final order until May 15, 2007, well after the deadline for filing an appeal.

The PA asserts that by not prorating the implementation of both the interim and final rates in the NG-0036 rate proceeding, Kinder Morgan violated the SNGRA and therefore the complaint proceeding in the above-captioned docket does not constitute an attempt to vacate, modify, or reverse the final Commission order in NG-0036. We disagree. The PA and Kinder Morgan entered into a binding and comprehensive Stipulation and Settlement Agreement that both parties jointly submitted to the Commission for approval. The Stipulation and Settlement Agreement were subsequently approved by this Commission in the Rate Case Order.

In the NG-0036 Rate Case Order, we expressed our concerns with the "black box" agreement process,

This type of settlement makes the Commission's review of the terms of the Stipulation extremely difficult. In the future, the Commission expects more detailed rationale and justification to be filed with a settlement agreement.⁷

It seems our concerns had merit. The PA has, in the current complaint before us, petitioned this Commission to reconsider the final outcome of the NG-0036 rate proceeding and make certain findings concerning that docket after the Commission entered the final Rate Case Order approving the Stipulation and Settlement Agreement in NG-0036 that purported to resolve all outstanding issues in the NG-0036 rate proceeding. As we stated above, we were not privy to the specifics of the negotiations between the PA and the utility, and therefore, have no knowledge as to what, if anything was contemplated by the parties

⁷ See *supra*, Application No. NG-0036, Order Approving Stipulation, p. 5, (December 27, 2006).

concerning the implementation of either the interim or final rates. Agreement was reached by the PA and Kinder Morgan and the parties jointly submitted the Stipulation and Settlement Agreement to the Commission for approval.

The Settlement Agreement is silent as to how the interim and final rates were to be implemented. Concerning the interim rates, the PA and Kinder Morgan agreed that no refunds would be issued to customers in relation to the interim rates charged by Kinder Morgan. The Settlement Agreement states,

The Parties acknowledge that Kinder Morgan's interim rates were established at an overall revenue level that is less than the revenue increase reflected in the settled rates. Accordingly, **no refund is required** pursuant to the Act.⁸ (emphasis added).

Concerning the final rates, the Settlement Agreement simply contained the date upon which the new rates would be effective.⁹ It is unclear to us and we have no way of determining what the PA and Kinder Morgan intended regarding implementation of rates, nor what representations or assumptions may or may not have been made by the parties to each other during negotiations in the NG-0036 proceeding.

Instead, in the current proceeding before us, the PA would have this Commission re-examine the terms of the Stipulation and Settlement Agreement that we gave final approval to in our Rate Case Order in NG-0036. We find that to do so would constitute a collateral attack on our Rate Case Order.

The Nebraska Supreme Court has defined a collateral attack as, "When a judgment is attacked in a way other than by proceeding in the original action to have it vacated, reversed, or modified, or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'"¹⁰ It is well established that the rule on collateral attack also applies to administrative bodies, including the Commission.¹¹

⁸ See *supra*, Application No. NG-0036, Stipulation and Agreement of Settlement, p. 11, (November 28, 2006).

⁹ *Id.* at p. 6.

¹⁰ See *County of Douglas v. Feenan*, 146 Neb. 156 (1945); *State ex rel. Southeast Rural Fire P. Dist. v. Grossman*, 188 Neb. 424 (1972); *State v. Wessels and Cheek*, 232 Neb. 56 (1989); *County of Adams v. Nebraska State Bd of Equal.*, 252 Neb. 847 (1997).

¹¹ See *County of Adams v. Nebraska State Bd. Of Equal.*, 252 Neb. 847 (1997); *Schilke v. School District No. 107*, 207 Neb. 448 (1980); *In re Application of M&S Transport Co.*, 153 Neb. 260 (1950).

The Formal Complaint in the above-captioned proceeding was not filed by the PA as a direct challenge to the Commission's final Rate Case Order in NG-0036. The PA has tried to make a distinction between the above-captioned Formal Complaint and the NG-0036 rate case proceeding. He asserts the issue is one of the legality of the method employed by Kinder Morgan to implement interim and final rates under the provisions of the SNGRA. However, the practical effect of the Formal Complaint is to have this Commission, outside of the proceedings in the NG-0036 rate proceeding, go back and re-examine the Stipulation and Settlement Agreement, and the actions of Kinder Morgan in relation to the NG-0036 rate proceeding and order.

Neither the SNGRA, Commission rules and regulations, nor the NG-0036 Rate Case Order specifically requires proration to be used when a utility implements a rate change as the PA suggests. Reasonable interpretations of the SNGRA provisions could differ on the issue of proration and our rules and regulations and NG-0036 Rate Case Order are silent on the implementation method required for the rate changes. In the absence of a specific rule or order, such a requirement would need to be established in the context of the rate case proceeding. For this Commission to make the determinations sought by the PA in the above-captioned proceeding, we would have to reconsider and re-scrutinize the NG-0036 rate case proceeding and all the issues involved with that proceeding. To do so, in our opinion, would be a collateral attack of an earlier order.

Filing a separate and "new" proceeding before us that challenges some aspect of an earlier and separate case, and would require us to revisit our earlier decision, does not change that the new proceeding is an impermissible collateral attack on an earlier judgment by the Commission. Therefore, we find the Formal Complaint filed by the PA in the above-captioned docket constitutes an impermissible collateral attack of our December 27, 2006 final Rate Case Order in Docket No. NG-0036,¹² and should therefore not be allowed.

Finally, the correct and appropriate procedural avenue open to the PA within the proceedings of the original action concerning the issues before us in this Formal Complaint, was to file an appeal. It is clear that the PA did not file an appeal within the thirty day time period following the mailing of the

¹² See *supra*, Application No. NG-0036, Order Approving Stipulation, (December 27, 2006).

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Commission Rate Case Order in NG-0036 as required by statute and Commission rules and regulations.¹³

Conclusion

The Commission is of the opinion and finds that the above-captioned Formal Complaint was not a proper appeal of the original proceeding and therefore, is an impermissible collateral attack on the Docket NG-0036 final Rate Case Order and should therefore be dismissed.

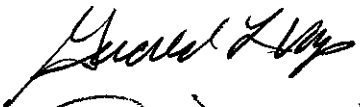


O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Formal Complaint in the above-captioned matter be, and is hereby, dismissed for the reasons delineated above.

MADE AND ENTERED at Lincoln, Nebraska, this 9th day of September, 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:


 Chair:

ATTEST:

 Executive Director

//s// Anne C. Boyle
 //s// Frank E. Landis

¹³ See Neb. Rev. Stat. § 84-917(2006 Cum Supp.); Title 291 Neb. Admin. Code, Ch. 1, Sec. 021.01.