

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Kinder Morgan)
Interstate Gas Transmission, LLC,)
Lakewood, Colorado vs. Aquila,)
Inc., Omaha, and Nebraska)
Resources Company, Tulsa,)
Oklahoma, alleging violations of)
the State Natural Gas Regulation)
Act.)
 Entered: October 7, 2008

BY THE COMMISSION:

On May 10, 2008, Kinder Morgan Interstate Gas Transmission LLC (KMIGT), Lakewood, Colorado, filed a Formal Complaint against Aquila, Inc. n/k/a Black Hills Corporation (Black Hills) Omaha, and Nebraska Resources Company (NRC), Tulsa, Oklahoma, alleging violations of the State Natural Gas Regulation Act (SNGRA)¹.

On July 15, 2008, the Commission entered an order granting Petitions for Intervention filed by Northern Natural Gas (Northern); the Public Advocate; Northwestern Corporation d/b/a Northwestern Energy (Northwestern); and SourceGas Distribution, LLC (SourceGas). Black Hills filed an Answer to the Complaint and a Motion to Dismiss. NRC also filed an Answer, a Motion to Dismiss, and Motion to Stay Discovery. After submission of briefs, Oral Argument on the Motions took place on September 23, 2008.

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

KMIGT alleges that NRC and Black Hills have violated the prohibition against duplicative or redundant natural gas mains or other natural gas services by constructing what has been termed the "KMIGT Lateral" for the purposes of serving a high-volume user in an area where KMIGT has existing natural gas utility infrastructure. KMIGT further contends that NRC has violated the SNGRA by taking actions and entering into agreements to cause the construction or operation of the KMIGT Lateral.²

Authority to Consider Motions to Dismiss

As a preliminary matter, the Commission must first determine whether it has the authority to entertain a Motion to Dismiss. KMIGT has argued that the Motions filed by Black Hills and NRC are in essence motions for summary judgment and that the Commission, as an administrative agency lacks the authority to grant summary judgment.³ In support of its position, KMIGT relies upon *Big John's Billiards, Inc. v. Balka*, 254 Neb. 528, 577 N.W.2d 294 (1998) and

¹ Neb. Rev. Stat. §§ 66-1801 to 66-1864.

² Formal Complaint, ¶ 23.

³ *Kinder Morgan Interstate Gas Transmission, LLC v. Aquila Inc. and Nebraska Resources Company*, Docket No. FC-1331, Comments and Suggestions of KMIGT Regarding Hearing Officer's Order Scheduling Planning Conference, pg. 2 (July 23, 2008).

Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev., 251 Neb. 852, 560 N.W.2d 436 (1997) which involve the Department of Revenue and the state tax commissioner. KMITG further contends that pursuant to *Neb. Rev. Stat. § 75-132*, it is entitled to a hearing on the merits and that a motion to dismiss is not permissible.⁴

In response, NRC and Black Hills contend that this matter is not a contested case as the Commission has not yet determined that "a reasonable grounds for investigation"⁵ exists and therefore KMITG does not yet have a right to hearing on the matter.

The Motions at issue in this matter are distinguishable from a motion for summary judgment. A summary judgment involves an evaluation of evidence to determine whether an issue of material fact exists and, therefore, is a factual determination resulting in a disposition of the factual merits of a controversy.⁶ The evidence is viewed in the light most favorable to the parties against whom a motion for summary judgment is made and that party is given the benefit of all reasonable inferences deducible from the evidence.⁷ Making a determination regarding the issues presented by the Motions to Dismiss filed by NRC and Black Hills does not require any factual determinations or weighing of evidence. It requires only interpretation of the scope of the SNGRA and the question of whether KMITG has stated a claim for which the Commission can grant relief.

Having determined that the prohibition against granting summary judgment does not apply to the present situation, we must next determine whether a hearing is required, and if so, whether such requirement has been satisfied. NRC and Black Hills read the Administrative Procedures Act (APA)⁸ and the SNGRA together to reach a conclusion that no hearing is required. Our analysis thus requires examination of both Acts.

The APA defines contested case as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing".⁹ We find that the formal complaint

⁴ "If a carrier or jurisdictional utility does not satisfy a complaint filed pursuant to section 75-131 within the time allowed and there appears to be a reasonable ground for investigation of the complaint upon its merits, the commission shall convene a hearing on the matters complained of pursuant to its rules of procedure and shall give the parties written notice of the time and place for such hearing. After the hearing, the commission shall make such order with respect to the complaint as it deems just and reasonable. Such order must be consistent with the statutory authority that formed the basis for the complaint." *Neb. Rev. Stat. § 75-132*.

⁵ *Id.*

⁶ *Riley v. State of Nebraska*, 244 Neb. 250, 506 N.W.2d 45 (1993).

⁷ *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995).

⁸ *Neb. Rev. Stat. § 84-901 et. seq.*

⁹ *Neb. Rev. Stat. § 84-901(3)*.

filed by KMITG clearly fits within this definition and therefore, this matter is a contested case.

A party's right to a hearing before the Commission on a complaint against a jurisdictional utility is further addressed by § 75-132.

If a carrier or jurisdictional utility does not satisfy a complaint filed pursuant to section 75-131 within the time allowed and there appears to be a reasonable ground for investigation of the complaint upon its merits, the commission shall convene a hearing on the matters complained of pursuant to its rules of procedure and shall give the parties written notice of the time and place for such hearing. After the hearing, the commission shall make such order with respect to the complaint as it deems just and reasonable. Such order must be consistent with the statutory authority that formed the basis for the complaint.¹⁰

Under both the APA and § 75-132, KMITG is entitled to be heard. However, it does not follow that a full evidentiary hearing preceded by discovery is necessary. Such a requirement would be contrary to administrative efficiency. The issues raised by the Motions in this matter present questions of law as to whether, based upon the allegations set forth in the complaint, KMITG states a claim upon which relief can be granted. All parties were afforded the opportunity to brief the legal issues and an oral argument was held before the full Commission. No factual findings are necessary and therefore a full evidentiary hearing is not required. The Commission therefore finds that under the present circumstances all parties have had adequate opportunity to be heard on the legal issues presented and the Commission has the authority to consider a Motion to Dismiss.

Having held the Commission has the authority to consider a Motion to Dismiss, we must now examine the substantive issues presented by NRC's and Black Hills' Motions.

Duplicative Piping

Nebraska state law specifically prohibits the installation of duplicative "natural gas utility infrastructure."

Except as otherwise expressly authorized in the State Natural Gas Regulation Act, no person, public or private, shall extend duplicative or redundant natural gas mains or other natural gas services into any area which has

¹⁰ Neb. Rev. Stat. § 75-132.

existing natural gas utility infrastructure or where a contract has been entered into for the placement of natural gas utility infrastructure.¹¹

"Natural gas utility infrastructure" is not a defined term. In construing a statute, we must "determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense."¹² Therefore, we must look to other defined terms and the remaining provisions of the SNGRA to discern its meaning and the scope and effect of the Act.

A "natural gas public utility" is defined as

any corporation, company, individual, or association of persons or their trustees, lessees, or receivers that owns, controls, operates, or manages, except for private use, any equipment, plant, or machinery, or any part thereof, for the conveyance of natural gas through pipelines in or through any part of this state. ... *Natural gas public utility does not include any gas gathering system or interstate pipeline;*¹³

An "interstate pipeline" is "any corporation, company, individual, or association of persons or their trustees, lessees, or receivers engaged in natural gas transportation subject to the jurisdiction of the Federal Energy Regulatory Commission under the federal Natural Gas Act, 15 U.S.C. 717 et seq., as such act existed on January 1, 2003"¹⁴ KMITG is an interstate pipeline providing transportation services regulated by the Federal Energy Regulatory Commission (FERC).¹⁵ Therefore, as an interstate pipeline, KMITG is specifically excluded from the definition.

The focus on the conduct of intrastate utility business continues in another definition in the Act. "Intrastate natural gas utility business means all of that portion of the business of a natural gas public utility over which the commission has jurisdiction under the State Natural Gas Regulation Act."¹⁶

Finally, "jurisdictional utility means a natural gas public utility subject to the jurisdiction of the commission. Jurisdictional utility does not mean a natural gas public utility which

¹¹ Neb. Rev. Stat. § 66-1852(1).

¹² *Steffen v. Progressive Northern Insurance Company*, 276 Neb. 378, 383-384, 754 N.W.2d 730, 736 (2008).

¹³ Neb. Rev. Stat. § 66-1802(11).

¹⁴ Neb. Rev. Stat. § 66-1802(8).

¹⁵ *Kinder Morgan Interstate Gas Transmission LLC v. Aquila Inc. and Nebraska Resources Company*, Docket No. FC-1331, Formal Complaint Regarding Violations of the State Natural Gas Regulation Act ¶ 1 (May 20, 2008).

¹⁶ Neb. Rev. Stat. § 66-1802(9).

is not subject to the jurisdiction of the commission pursuant to section 66-1803."¹⁷

Taking into account the SNGRA as a whole, it does not appear that "natural gas utility infrastructure" was intended to include interstate facilities such as those operated by KMITG.

The Commission previously addressed the application of the duplicate piping prohibition in *SourceGas Distribution LLC, f/k/a Kinder Morgan, Inc. - Retail v. Panhandle Feeders, Inc.*, Docket No. FC-1325. Panhandle sought service from KMITG, an interstate facility, in order to bypass existing service it was receiving from SourceGas, an intrastate jurisdictional utility. The Commission found that it is preempted from applying the Nebraska double-piping statute to the construction of a bypass of a local distribution company by an interstate pipeline to provide interstate transportation of natural gas directly to an end-user.

Panhandle is distinguishable from the present situation in that the *intrastate jurisdictional utility* sought to enforce the duplicate piping prohibition. However, it is illustrative of the intended scope of the prohibition. To hold that an interstate provider such as KMITG could seek the protection of its facilities under the state duplicative piping prohibition, but has no obligation to honor the prohibition in the construction of its own facilities, would lead to an untenable result. KMITG would have a State-protected right to "cherry-pick" customers from an intrastate jurisdictional facility, and at the same time, use the law to prevent an intrastate utility from acquiring KMITG customers.

The Commission therefore finds that "natural gas utility infrastructure" as used in *Neb. Rev. Stat. § 66-1852(1)* does not include interstate transportation facilities such as those operated by KMITG. Therefore, the Motions to Dismiss are granted.

Transacting Business Without a Certificate

KMITG has also alleged that NRC has violated the SNGRA by taking actions and entering into agreements to cause the construction or operation of the KMITG Lateral.¹⁸ Black Hills is constructing the lateral at issue, and NRC has assigned its interest in the KMITG Lateral to Black Hills who has taken over the project.¹⁹

"No jurisdictional utility shall transact business in Nebraska until it has obtained a certificate from the commission that public convenience will be promoted by the transaction of the business and

¹⁷ Neb. Rev. Stat. § 66-1802(10).

¹⁸ Formal Complaint, ¶ 23.

¹⁹ Formal Complaint, ¶¶ 12 and 13.

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permitting the applicants to transact the business of a jurisdictional utility in this state."²⁰

In light of KMIGT's allegation that it is Black Hills, a jurisdictional utility, who is constructing the line, the Commission finds as a matter of law that no violation has occurred. Therefore, the Motion to Dismiss should be granted.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Commission has the authority to consider motions to dismiss on questions of law.

IT IS FURTHER ORDERED that NRC's Motion to Dismiss is granted.

IT IS FINALLY ORDERED that Black Hills' Motion to Dismiss is granted.


MADE AND ENTERED at Lincoln, Nebraska, this 7th day of October, 2008.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



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



Chair

ATTEST:



Executive Director