

G-004, 011/C-91-731 ORDER DISMISSING COMPLAINT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Dee Knaak	Commissioner
Norma McKanna	Commissioner
Don Storm	Commissioner

In the Matter of the Complaint
of Great Plains Natural Gas
Company Against Peoples Natural
Gas Company and UtiliCorp
United, Inc.

ISSUE DATE: December 20, 1991
DOCKET NO. G-004, 011/C-91-731
ORDER DISMISSING COMPLAINT

PROCEDURAL HISTORY

I. Proceedings to Date

On October 1, 1991 Great Plains Natural Gas Company (Great Plains) filed a complaint against Peoples Natural Gas Company (Peoples) and its parent company, UtiliCorp United, Inc. The Complaint alleged that Peoples had entered into a contract with a Great Plains customer, Minnesota Corn Processors, to build a natural gas pipeline to provide the customer with sales and transportation service.

The Complaint claimed the contract violated Minnesota law as follows: 1. it violated the flexible rates statute, Minn. Stat. § 216B.163 (1990), by using flexible rates to compete against another regulated utility; 2. it violated Peoples' own tariffs by failing to require a contribution in aid of construction; 3. it granted the customer an unreasonable rate preference or advantage in violation of Minn. Stat. §§ 216B.03 and .07 (1990); 4. it violated the flexible rates statute, Minn. Stat. § 216B.163 (1990), by offering flexible rates which do not cover the incremental costs of providing the service; 5. it violated the statutory requirement that utilities file plans for "major utility facilities" in advance of construction, Minn. Stat. § 216B.24 (1990).

On October 4, 1991 the Commission issued a notice soliciting comments on the Complaint. On October 18, 1991 Peoples filed an answer and memorandum. Peoples admitted entering into the contract and denied the contract violated any applicable law. Peoples asked the Commission to dismiss the Complaint without further proceedings.

On October 31, 1991 Great Plains filed reply comments. On the same date, the Department of Public Service (the Department) filed its report and recommendation. The Department recommended prohibiting Peoples from performing under the contract because the contract did not ensure recovery of the incremental costs of providing service and because it was not clear that contract rates were set to compete with the price of unregulated, as opposed to regulated, fuels.

To meet the Department's concerns, the parties amended the contract to provide that Peoples would not serve the Company's existing load. Also, Peoples warranted that it would remove the pipeline from rate base if it were abandoned before its costs had been recovered. The Department then recommended allowing performance by Peoples and dismissing the Complaint.

The matter came before the Commission on November 7, 1991.

FINDINGS AND CONCLUSIONS

II. Factual Background

Minnesota Corn Processors (MCP) in Marshall, Minnesota is a long time customer of Great Plains. It uses natural gas for heating only; its manufacturing operations are powered by coal. In late 1989 MCP initiated discussions with Great Plains about converting its manufacturing operations to natural gas and contracting for the provision of transportation service through a pipeline to be constructed and operated by Great Plains.

After extensive negotiations, Great Plains offered to build the pipeline and provide service under its interruptible flexible transportation tariff. Under the terms of the contract MCP would be required to maintain its alternate fuel capacity, would promise to take at least 3 million Mcf over the course of the next four years, would pay \$0.17 per Mcf delivered during the first year, could negotiate a different rate under the flexible tariff in subsequent years, and would not be required to contribute to the cost of constructing the pipeline.

MCP entered into similar negotiations with Peoples. As a result of those negotiations, MCP and Peoples signed a contract under which Peoples agreed to serve the Company under its interruptible flexible transportation tariff. Under the terms of that contract MCP promised to take at least 5 million Mcf over the course of the next five years and was required to use natural gas for manufacturing for the next six years unless the cost of using coal fell below 85% of the cost of using gas. The contract price was Peoples' standard interruptible transportation rate of

\$0.0829 per Mcf (plus monthly customer and transport charges), until such time as MCP qualified for lower rates under Peoples' flexible tariff. The contract did not require the company to contribute to the cost of constructing the pipeline.

After reviewing the Department's comments, Peoples and MCP amended the contract to exclude the heating load currently served by Great Plains. Peoples also assumed the risk of default by MCP by agreeing to remove the pipeline from rate base if it should be abandoned before construction costs had been recovered.

III. Commission Action

The parties state there are no disputed issues of material fact in this case and contested case proceedings are not required. The Commission agrees.¹ The issues before the Commission are whether Peoples has violated the flexible rates statute by using flexible rates to compete with another regulated utility and whether Peoples has violated Minn. Stat. § 216B.24 (1990) by failing to file its plans to build the pipeline at an earlier date. These issues will be considered in turn.

A. The Contract Does Not Violate the Flexible Rates Statute

Great Plains emphasizes that the flexible rates statute, Minn. Stat. § 216B.163 (1990), was intended to allow gas utilities to retain large customers who might otherwise convert to cheaper unregulated fuels. The statute allows the utility to offer competitive rates to these customers, as long as the rates offered cover the incremental costs of providing service. The rationale is that keeping these customers on the system, making some contribution to its fixed costs, is better for captive customers than losing their contribution entirely. The Commission agrees with Great Plains that this is the basic purpose of the statute.

¹ The parties believe Peoples' agreement to remove the pipeline from rate base if it is abandoned before its costs are recovered ends the need to examine the three claims of the Complaint resting on the allegation that contract rates do not ensure recovery of incremental costs, since that allegation rested solely on projections of the costs of constructing the pipeline. The Commission notes that a utility's willingness to make up the difference between incremental costs and flexible rates does not legitimize rates below incremental costs. In this case, however, the likelihood that rates would fail to cover incremental costs was so low and depended on contingencies so unlikely that it is reasonable to accept Peoples' guarantee in lieu of further development of the incremental cost issue.

Great Plains then argues that allowing Peoples to serve Minnesota Corn Processors at flexible rates would violate the purpose of the statute by allowing one regulated utility to use flexible rates to compete for the customer of another. The Commission disagrees.

First, this is not a case in which one utility is using flexible rates to take away the load of another utility. The new load Peoples wants to serve does not yet exist. It will exist only if MCP follows through with its plans to convert its manufacturing operations from coal to natural gas. Great Plains will continue to serve MCP's existing load (office heating) whether or not the conversion occurs. Great Plains is not losing an existing load to another utility. That would raise more serious statutory issues, since the purpose of the flexible rates statute is to prevent the loss of large loads already on the system and the threat those losses pose to the rates of captive customers.

Second, it is not clear that flexible rates were the decisive factor in MCP's decision to contract with Peoples. Peoples' standard rate is lower than Great Plains' flexed rate offer (\$.0829 as opposed to \$.14 per Mcf). It would be cheaper for MCP to take service from Peoples at the standard rate than from Great Plains at the flexible rate. MCP has agreed to take service at the standard rate initially and whenever it does not qualify for the flexible rate. Conceivably, MCP could take service at the standard rate for the entire length of the contract. In that case, there would be no issue under the flexible rates statute. Presumably, there would be no issue at all, since gas utilities do not have exclusive service territories and generally can serve any new load their distribution facilities can reach. Furthermore, once Peoples begins serving MCP at the standard rate, MCP is properly a customer of Peoples, eligible for service at flexible rates if it demonstrates its eligibility under the statute and the Commission-approved flexible rate tariff.

Finally, once it has been determined that Peoples' contract with MCP does not violate the flexible rates statute, the complaint rests entirely on the contention that Great Plains has an exclusive right to serve this load. This contention has no basis in law or policy. Minnesota does not have assigned service areas for gas utilities. It does have assigned service areas for electric utilities, which suggests that the Legislature intentionally treated the two types of utilities differently. Peoples, then, is free to serve this new load, in the absence of special circumstances, such as unnecessary duplication of facilities or harm to existing ratepayers, requiring Commission intervention. The Commission sees no special circumstances here and will not interfere with Peoples' decision to serve.

B. Peoples' Failure to Make an Earlier Filing under Minn. Stat. § 216B.24 (1990) Does Not Prohibit Performance Under the Contract

Great Plains also alleged that Peoples should have filed its plans to build the pipeline to MCP under Minn. Stat. § 216B.24 (1990) as soon as it committed to build it, instead of waiting until Great Plains raised the issue in its Complaint. The statute does not set a deadline for making the filings it requires.

The Commission agrees with the Department that it is unclear that the pipeline is a "major utility facility" within the meaning of the statute. It is not necessary to resolve that issue today, however, since the filings in this case give the Commission adequate notice of Peoples' intention to build the pipeline. The Commission sees no need for more detailed inquiry into Peoples' construction plans and no need to take action on the timing of Peoples' filing.

IV. Conclusion

The Commission concludes that the contract between Peoples and Minnesota Corn Processors does not violate the flexible rates statute or any other statutory provision. The Commission finds that Peoples' filings in this case satisfy any requirement under Minn. Stat. § 216B.24 (1990) that it file notice of its intention to build the pipeline. The Commission will dismiss Great Plains' Complaint against Peoples.

ORDER

1. The Complaint filed on October 1, 1991 by Great Plains Natural Gas Company against Peoples Natural Gas Company is dismissed.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)