

G-012/M-93-1252 ORDER FINDING CONTRACTS INVALID AND REQUIRING REFUND

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
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Commissioner

In the Matter of the Petition of Western Gas
Utilities, Inc. for Approval of a Gas Sales
Contract with Rahr Malting Company

ISSUE DATE: June 6, 1994

DOCKET NO. G-012/M-93-1252

ORDER FINDING CONTRACTS INVALID
AND REQUIRING REFUND

PROCEDURAL HISTORY

On May 1, 1993, Western Gas Utilities, Inc. (Western or the Company) signed a Gas Sales Agreement with Rahr Malting Company (Rahr). The parties had already put the contract into effect on March 31, 1993. Although the contract was never filed with the Commission, it came under Commission consideration in Docket No. G-012/AA-93-218, In the Matter of Western Gas Utilities, Inc. Converting Its Demand Entitlements on Northern Natural to New Services (the 218 Docket). In that docket the Commission also examined Western's compliance with Commission rules and Orders, and Western's diversification of gas supply.

On November 30, 1993, Western filed a request for Commission approval of an amended Gas Sales Agreement with Rahr. The amended Agreement became the subject of the docket herein (the 1252 Docket). The Agreement was signed by the parties on October 25, 1993; gas sales under the Agreement began on November 1, 1993. The parties suspended service under the October 25, 1993 contract on May 1, 1994.

In March, 1994, the Department of Public Service (the Department) filed comments in both dockets regarding both contracts. The Department recommended that Western refund ratepayers for service provided under the unfiled May 1, 1993 contract. The Department recommended that the Commission disapprove the proposed October 25, 1993 contract. The Department argued that the terms of both contracts were harmful to ratepayers. According to the Department, Western's sales of excess firm capacity do not contribute to the recovery of demand costs of that capacity. The Department also argued that the terms of the contracts violate the spirit and intent of Federal Energy Regulatory Commission (FERC) Order 636.

In March and April, 1994, Western filed responsive comments. Western denied any ratepayer harm resulting from either contract. Western argued that the agreements are prudent means of recovering costs of carrying firm entitlement for Western's firm customers during non-peak demand days.

On May 19, 1994, the contract issues under both dockets came before the Commission for consideration under the 1252 Docket. The remaining issues under the 218 Docket were considered and resolved in the 218 proceeding.

FINDINGS AND CONCLUSIONS

I. The Terms of the Contracts

In 1990 the Commission approved an arrangement between Western and Rahr under which a seven-mile pipeline was constructed by Rahr and operated and maintained by Western.¹ The pipeline connects the Northern Natural Gas (NNG) pipeline at the Marystown Town Border Station (TBS) with Rahr's barley malt processing plant in Shakopee, Minnesota. Under the arrangement between Western and Rahr, Western leases a portion of the Rahr pipeline capacity in order to serve other customers.

Under the terms of the May 1, 1993 and October 25, 1993 contracts, Rahr is able to purchase approximately 2,000 MMBtus/day of interruptible gas supply from Western in the first agreement and up to 2,500 MMBtus/day in the second. Western uses its firm transportation capacity contract with NNG to transport the gas through NNG's pipeline system to the Marystown TBS. At the Marystown TBS, the gas is transferred to Rahr, which transports the gas on its own pipeline for use in its Shakopee plant.

Under the Western/Rahr contracts, Rahr agreed to be curtailed prior to any other Western interruptible customer. The contracts provided for a sales margin, above Western's variable costs, to be paid to Western for volumes sold to Rahr.

II. The Governing Statute

Western stated that the October 25, 1993 contract was filed pursuant to Minn. Stat. § 216B.05, which states as follows:

Subd. 1. Schedules. Every public utility shall file with the commission schedules showing all rates, tolls, tariffs and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it.

Subd. 2. Rules and service agreements. Every public utility shall file with and as a part of the schedule all rules that, in the judgment of the commission, in any manner affect the service or product, or the rates charged or to be charged for any service or product, as well as any contracts, agreements or arrangements relating to the service or product or the rates to be charged for any service or product to which the schedule is applicable as the commission may by general or special order direct.

Subd. 3. Public inspection. Every public utility shall keep copies of the schedules open to public inspection under rules as the commission may prescribe.

¹ In the Matter of the Joint Venture Between Rahr Malting and Western Gas Utilities to Construct a Seven-Mile Gas Pipeline in Scott County, Minnesota, Docket No. G-012/DI-90-227, ORDER APPROVING OWNERSHIP AND CAPACITY LEASE AGREEMENT AND REQUIRING FILING (August 6, 1990).

The governing statute thus requires utilities to file all tariffs and to obtain Commission approval prior to a modification of an existing tariffed rate.

III. Commission Action

Western stated that it failed to file the May 1, 1993 contract and commenced service under the October 25, 1993 contract prior to filing or approval due to inadvertence and a misunderstanding of Minn. Stat. § 216B.05, subd. 2. At the May 19, 1994 Commission meeting, Western's representative apologized for Western's noncompliance and agreed that future contracts should be filed and approved prior to service. Western asked the Commission to refrain from action on the May 1, 1993 contract and to approve the October 25, 1993 contract.

In considering action on these two contracts, the Commission must look to the important policy considerations of Minn. Stat. § 216B.05, under which both agreements should have been filed for Commission review.

Minn. Stat. § 216B.05 contemplates a centralized system for filing utility tariffs which is under the physical control of the Department and the authority of the Commission and the Department. The filings are a means by which the Department performs its duties of analysis, investigation and enforcement and the Commission performs its duties of utility oversight.

The requirement of Commission approval prior to tariff changes is the most important policy provision of Minn. Stat. § 216B.05. Only through oversight and approval can the Commission discharge its duty of ensuring just and reasonable rates. Minn. Stat. §§ 216B.08, 216B.03.

Western's failure to file its tariffs or to seek Commission approval before implementing them cannot be excused by oversight or misunderstanding of published statutes and rules. Further, Western has a long history of noncompliance and tardiness in filing.²

The Commission is well aware that Western is a small utility, and has made allowance for this fact. The Commission has in the past granted Western time extensions when its filings are overdue. Department and Commission Staff have given significant support and assistance to Western's employees as they prepared reports and filings for the Commission. The Commission cannot, however, excuse Western of the core responsibilities which allow the Commission to perform its regulatory function. In this case, the Commission cannot allow Western to implement a special tariff with Rahr without filing the contract or to commence sales under a second contract prior to Commission review and approval.

For these reasons, the Commission finds that Western's May 1, 1993 and October 25, 1993 contracts with Rahr are not valid under Minnesota law. The Commission will therefore not address the merits of the proposed October 25, 1993 contract, nor approve or reject the contract.

Further, because Western served Rahr without filing or seeking timely approval of the contracts, the Commission will require a refund of margins obtained through the contracts. This is the best means available to ensure that ratepayers will not be harmed under the unfiled, unreviewed contracts.

Western's filings show that it received \$13,200.66 as its share of sales margins under the May 1, 1993 contract. The Commission will require the Company to apply the contract formula under the October 25, 1993 contract to determine its share of sales margins under that contract. This amount, along with the previous \$13,200.66, should be refunded to ratepayers through the annual true-up.

Finally, the Commission will issue a cease and desist order requiring Western to cease service

² A concurrent docket, G-012/AA-93-218, is examining Western's history of noncompliance with Commission rules and diversification requirements.

under its contract with Rahr. Although the parties did suspend gas service on May 1, 1994, the cease and desist order will ensure that the parties fully understand that the contracts are invalid and may not be implemented. Further contracts between Western and Rahr, if any, must be filed for Commission review and approval before service commences.

ORDER

1. Western's May 1, 1993 and October 25, 1993 contracts with Rahr are invalid; parties shall cease and desist any sales under the contracts.
2. Within 10 days of the date of this Order Western shall submit a proposed plan to refund to ratepayers through the annual true-up Western's share of margins obtained under the provisions of the contracts.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)