

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: Andrew J. French, Chairperson
Dwight D. Keen
Susan K. Duffy

In the Matter of the Investigation into Kansas)
Gas Service Company, a Division of One Gas)
Inc., Regarding the February 2021 Winter) Docket No. 21-KGSG-332-GIG
Weather Events, as Contemplated by Docket)
No. 21-GIMX-303-MIS.)

**ORDER DENYING NGTCC'S PETITION FOR RECONSIDERATION OF THE
DENIAL OF ITS MOTION REQUESTING ISSUANCE OF A SUBPOENA**

This matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the pleadings and record, the Commission makes the following findings:

1. On February 15, 2021, pursuant to K.S.A. 77-536(a), the Commission issued an Emergency Order in Docket No. 21-GIMX-303-MIS (21-303 Docket), directing all jurisdictional natural gas and electric utilities to coordinate efforts and take all reasonably feasible, lawful, and appropriate actions to ensure adequate transportation of natural gas and electricity to interconnected, non-jurisdictional Kansas utilities.¹ Jurisdictional natural gas utilities were ordered to do everything necessary to ensure natural gas service continued to be provided to their customers in Kansas.² The Commission authorized every jurisdictional natural gas distribution utility that incurs extraordinary costs associated with ensuring their customers or the customers of interconnected Kansas utilities that are non-jurisdictional to the Commission continue to receive utility service during Winter Storm Uri to defer those costs to a regulatory asset account.³ The Commission mandated that once Winter Storm Uri ended, and after all costs have been

¹ Emergency Order, 21-GIMX-303-MIS, Feb. 15, 2021, ¶ 3.

² *Id.*

³ *Id.* ¶ 4.

accumulated and recorded, each jurisdictional utility is directed to file a compliance report in the 21-303 Docket detailing the extent of such costs incurred, and present a plan to minimize the financial impacts of this event on ratepayers over a reasonable time frame.⁴

2. On March 9, 2021, the Commission issued an Order Adopting Staff's Report and Recommendation to Open Company-Specific Investigations, which initiated this Docket.⁵ The Commission's Order also included a Protective/Discovery Order.

3. On May 28, 2021, Kansas Gas Service (KGS) filed a Motion for Limited Waiver from Section 11.06 of its tariff provisions to remove the multipliers from the calculation of penalties incurred by Marketers and Individually Balanced Transportation Customers for violating KGS' Operational Flow Orders (OFO) and/or Period of Curtailment Orders (POC) issued during Winter Storm Uri.⁶

4. On June 10, 2021, the Commission issued a Supplemental Protective and Discovery Order to allow the Office of the Kansas Attorney General to review discovery produced in this Docket.⁷

5. On July 30, 2021, the Natural Gas Transportation Customer Coalition⁸ (NGTCC) filed a Motion Requesting the Issuance of a Subpoena Compelling Testimony and Production Of Documents from S & P Global Platts Gas Daily,⁹ for all documents relating to the S & P Global Platts Gas Daily Index for Southern Star Pipeline from February 10-20, 2021, and further compelling the testimony of records custodian witness(es) to explain the subpoenaed documents

⁴ *Id.* ¶ 5.

⁵ Order Adopting Staff's Report and Recommendation to Open Company-Specific Investigations; Order on Petitions to Intervene of Bluemark Energy, LLC and CURB; Protective and Discovery Order, 21-303 Docket, March 9, 2021, ¶ 10.

⁶ Motion for Limited Waiver, May 28, 2021, ¶ 12.

⁷ Supplemental Protective and Discovery Order, June 10, 2021, ¶ 6.

⁸ NGTCC was granted intervention on July 1, 2021.

⁹ Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily Pursuant to K.S.A. 66-150 and K.A.R. 82-1-227, July 30, 2021.

and in what manner they were used, included or excluded from the Gas Daily Index Prices for the period February 10-20, 2021.¹⁰ NGTCC also sought stays on: (1) any use of the S & P Global Platts Gas Daily Index Price posting as a reference in any KCC approved tariff and/or as the basis for the collection of any penalty, until the Commission completes its review of S & P Global Gas Daily Price Index Postings, and issues a further Order regarding the utilization of S & P Global Gas Daily Price Index Postings from February 2021,¹¹ and (2) the pass through to Kansas ratepayers costs resulting from a price term referencing the S & P Global Platts Gas Daily Price Index until the Commission completes its review of S & P Global Platts Gas Daily Price Index and issues an Order on the utilization of S & P Global Gas Daily Price Index Postings from February 2021.¹²

6. On August 3, 2021, NGTCC supplemented its Request to Issue a Subpoena by adding KGS' responses to Data Requests, to purportedly evidence that KGS has failed to investigate, challenge, or appeal the Index Pricing that is the basis of the requested \$451 million recovery from Kansas ratepayers.¹³

7. On August 6, 2021, Intervenors Bonavia Properties, L.L.C., Catholic Diocese of Wichita, and TempleLive Wichita LLC endorsed NGTCC's Motion to Issue a Subpoena to S & P Global, claiming the "entire foundation of KGS's financial plan and tariff hinge on the legitimacy of the S&P Global Platts gas daily index."¹⁴

¹⁰ *Id.*, p. 10.

¹¹ *Id.*, p. 11.

¹² *Id.*

¹³ Supplement to Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena, Aug. 3, 2021, ¶ 6.

¹⁴ Joinder to Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily Pursuant to K.S.A. 66-150 and K.A.R. 82-1-227, Aug. 6, 2021, p. 1.

8. On August 27, 2021, Staff filed its opposition to NGTCC's motion for a subpoena, questioning the jurisdictional authority to provide NGTCC the relief requested.¹⁵ Staff notes that the Federal Energy Regulatory Commission (FERC) monitors the publication of indices, such as S & P Global, requires all data providers to register with it, and subjects all market participants to potential audit by FERC.¹⁶ The FERC already has an open docket relating to price indices.¹⁷ And more specifically, Staff explains FERC's Office of Enforcement (OE), rather than this Commission, has the authority to investigate market behavior relating to the data reported to S & P and take corrective action where a market participant behaves inappropriately.¹⁸

9. On September 9, 2021, the Commission denied NGTCC's motion for a subpoena, finding that while it shares NGTCC's concerns regarding the wholesale natural gas markets and potential market manipulation, the power to investigate wholesale market behavior relating to the data reported to S & P Global and take corrective action where a market participant behaves inappropriately rests with the FERC, rather than the Commission.¹⁹ Similarly, the Commission explained the authority to recalculate wholesale prices rests on the federal level.²⁰ Since FERC is the agency tasked with investigating and taking corrective action in the wholesale natural gas markets, the Commission's authority to issue and enforce the subpoena requested by NGTCC is questionable, at best.²¹ Because there is some question as to the validity of a Commission-issued subpoena to an entity outside its jurisdiction, and because the FERC and the AG have ongoing investigations, the Commission denied NGTCC's motion for issuance of a subpoena to S & P

¹⁵ Response of Commission Staff to the Natural Gas Transportation Customer Coalition's Motion for Subpoena, Motion for Administrative Notice, and Motion to Stay Request for Waiver, Aug. 27, 2021, ¶ 8.

¹⁶ *Id.*, ¶ 11.

¹⁷ *Id.*

¹⁸ *Id.*, ¶ 12.

¹⁹ Order Denying NGTCC's Motion Requesting Issuance of a Subpoena, Sept. 9, 2021, ¶ 9.

²⁰ *Id.*, ¶ 10.

²¹ *Id.*, ¶ 11.

Global.²² The Commission's denial of NGTCC's motion for a subpoena did not in any way affect or alter the scope or conduct of the various ongoing investigations regarding Winter Storm Uri, including this Docket.

10. On September 14, 2021, NGTCC filed a Petition for Reconsideration.²³ In its Petition for Reconsideration, NGTCC offers the Commission and the public a substantially different rationale for its requested subpoena than the rationale proffered in its initial motion. Despite NGTCC's claims in its initial motion that it sought the subpoena to determine whether the Gas Daily Price Indices were "free from price manipulation, price gouging, and profiteering,"²⁴ and to pursue the need for "a detailed investigation of Platts Gas Daily Index Price Postings ... before the Commission permits this enormous \$840 million burden to be placed on the shoulders of Kansas ratepayers,"²⁵ NGTCC's Petition for Reconsideration now suggests a very different goal in seeking a subpoena:

NGTCC members are transportation customers. We are not sales customers of Kansas Gas Service ("KGS"). As noted hereinafter, the Requested Subpoena and documents related thereto will be used for the purpose of resisting KCC Sanctioned Penalties which we believe are excessive and which hold no reasonable relationship to the contended violation of the KGS transportation tariff.²⁶

In its Petition for Reconsideration, NGTCC makes clear the requested subpoena is not designed to investigate price manipulation, price gouging, or profiteering in the wholesale markets. Nor is NGTCC seeking a subpoena to protect all Kansas ratepayers from the elevated gas costs of Winter Storm Uri. Instead, NGTCC is specifically representing the interests of one specific

²² *Id.*, ¶ 13.

²³ Petition for Reconsideration of KCC Order Denying NGTCC's Motion Requesting Issuance of a Subpoena (PFR), Sept. 14, 2021.

²⁴ Motion of the Natural Gas Transportation Customer Coalition Requesting the Commission Issue a Subpoena Compelling Testimony and Production of Documents from S & P Global Platts Gas Daily Pursuant to K.S.A. 66-150 and K.A.R. 82-1-227, p. 11.

²⁵ *Id.*, ¶ 25.

²⁶ PFR, ¶ 3.

subset of commercial customers seeking to resist potential penalties.²⁷ Accordingly, in advancing this rationale for seeking reconsideration, NGTCC is clearly not representing the broader interests of the vast majority of gas customers in Kansas, including residential customers.

11. In this Order, the Commission reaches no decision on the reasonableness or appropriate amount of any potential penalties. NGTCC and other intervenors will have an opportunity to argue their position as this proceeding progresses. However, to address NGTCC's Petition for Reconsideration, the Commission finds it necessary to examine the overarching rationale for the subject penalty provisions, which NGTCC's Petition and Constitutional arguments fail to address.

12. The legitimate and lawful basis to assess penalties for unauthorized gas usage during an OFO or POC is detailed at paragraph 9 of KGS' Motion for Limited Waiver.²⁸ Unauthorized usage penalties exist to ensure transportation customers or their marketers procure and deliver sufficient gas to serve their own needs. The penalties are a reasonable deterrent for potential free riders looking to use gas meant for other users. Also, as KGS points out, the failure of third parties to deliver sufficient gas onto the system jeopardizes the ability of other customers to receive uninterrupted service – which had very real public safety consequences in February, 2021. Using a published index price, with multipliers as a deterrent, is a reasonable manner of achieving this legitimate goal.

13. Given the above rationale for penalties, one can see the potentially deleterious result of NGTCC's requests on residential customers. Put simply, if NGTCC is successful in resisting legitimate penalties, its members can become "free riders" and pass their gas costs on to

²⁷ *Id.*, ¶ 15.

²⁸ Motion for Limited Waiver, May 28, 2021, ¶ 9.

the remaining ratepayers. NGTCC's Petition for Reconsideration appears to recognize this argument in its recitation of CURB and Staff's positions:

Based on pleadings in this Docket, the NGTCC understands the position of the Citizen's Utility Ratepayer Board (CURB) and the KCC Staff to be that Penalties must be assessed or otherwise KGS sales customers would be providing an impermissible subsidy to the KGS transportation customers.²⁹

In essence, CURB and Staff contend that not all of the approximately \$390 million of additional gas costs of KGS in February 2021 should be the responsibility of sales customers. Instead, the Penalties must be assessed against transport customers that were in noncompliance with OFO and POC requirements. The Penalty amounts would then be an offset to amounts otherwise payable by sales customers.³⁰

Thus, NGTCC recognizes that by advocating for reduction or elimination of penalties, it is potentially subjecting residential customers to a large portion of the \$390 million of additional gas costs that might otherwise be paid by the gas marketers. So, to be clear, NGTCC is seeking the subpoena for the benefit of its members and their gas marketers, rather than to root out profiteering or to protect residential customers – who NGTCC very clearly does not represent.

14. On September 29, 2021, NGTCC supplemented its Petition for Reconsideration, to identify its members that “publicly support a full and thorough investigation of the prices that Kansas Gas Service proposes to charge them, through the marketers in this docket and believe that issuance of the subpoena which is the subject of NGTCC's Petition for Reconsideration is a critical piece of that investigation.”³¹ In doing so, NGTCC appears to acknowledge its members are not subject to the penalties – except through their marketers, hence its interest in a subpoena. Furthermore, NGTCC's Supplement only identifies 42³² of its roughly 400³³ members who wish

²⁹ *Id.*, ¶ 28.

³⁰ *Id.*, ¶ 29.

³¹ Natural Gas Transportation Customer Coalition's Supplement to its Petition for Reconsideration, Dated September 14, 2021, ¶ 4.

³² *Id.*, Exh. A.

³³ *Id.*, ¶ 1.

to go on record as supporting its motion for a subpoena. With roughly only 10% of its membership expressing support for a subpoena, the Commission questions whether the vast majority of NGTCC's membership opposes issuing a subpoena. Regardless, the level of support for a subpoena among NGTCC's membership is irrelevant as to whether a subpoena is appropriate. NGTCC's Supplement is afforded no evidentiary weight by the Commission.

15. The real issue underlying NGTCC's request for a subpoena is the penalties gas marketers and other individually-balanced gas transporters may be subject to. While there is a legitimate and lawful basis for such penalties, as explained above, the Commission has made no decision on the appropriate amount of such penalties, including whether or how much of such penalties should be waived. Until the Commission reaches a decision on the appropriate amount of penalties, NGTCC's protestations about excessive penalties are not ripe. NGTCC will have an opportunity to challenge any penalties at the time the Commission issues a decision.

16. While NGTCC's claims regarding "excessive penalties" are not ripe, the Commission does find that NGTCC is incorrect in asserting KGS' tariff penalty provision is unlawful on its face. As an initial matter, it is unclear whether any NGTCC member is actually subject to penalties. The penalties allowed in KGS' tariff are to be levied against marketers and individually-balanced transporters of gas on the KGS system. For most transportation customers, this means their gas marketer will be assessed penalties. Most if not all of the NGTCC members are *not being assessed any penalty by KGS*. To the extent an NGTCC member agreed to pay its marketer's penalties in a private agreement, such an arrangement is a private contractual matter beyond this Commission's jurisdiction and irrelevant to the constitutionality of a KGS tariff.

17. More importantly, FERC is the final and conclusive voice on whether wholesale market prices and indices appropriately reflected legitimate market conditions. NGTCC does not

dispute this fact in any of its multiple filings. NGTCC's argument that potential penalties are excessive *presumes* the index price used for penalties was the result of market manipulation.³⁴ While that may be a legitimate inquiry – and FERC has opened an investigation³⁵ – it is a backward and incorrect way to analyze the lawfulness or constitutionality of a tariff penalty provision. FERC has not made a finding that market prices were the product of market manipulation. Absent such a finding, the KGS tariff and associated penalties, which rely on a published index price, are facially lawful and constitutional.

18. Though NGTCC argues KGS' penalty tariff is facially unlawful, its argument appears to actually contend the penalty is excessive as applied – assuming the use of an unlawful index price. FERC is investigating the issue of market manipulation.³⁶ To the extent wholesale prices and indices did not legitimately reflect market conditions and FERC “re-prices” the market, this Commission expects Kansas customers to be compensated accordingly. And it may be appropriate for transportation penalties to also be reduced at that time. Presumably, a decision on penalties in this Docket could include mechanisms for such retroactive compensation. But, to be clear, this Commission has not yet issued a decision on penalties, and NGTCC has no penalty to challenge at this time.

19. As a final matter, the Commission is troubled by paragraph 10 of NGTCC's Petition for Reconsideration, which laments the economic consequences its members face while not addressing the economic impact to all other customers, including the residential class.

³⁴ PFR, ¶ 41.

³⁵ See Staff Report and Recommendation, Docket No. 21-GIMX-303-MIS, March 1, 2021, p. 5 (“In response to the electric service interruptions experienced in SPP, as well as the widespread and sustained service interruptions experienced by the Electric Reliability Council of Texas (ERCOT), the Federal Energy Regulatory Commission (FERC) and the North American Electric Reliability Corporation (NERC) have announced a joint inquiry into the event. Additionally, FERC has announced that its Office of Enforcement will be examining potential wrongdoing in markets during the cold weather event”). Pursuant to K.A.R. 82-1-230(h), the Commission takes administrative notice of Staff's Report and Recommendation.

³⁶ *Id.*

NGTCC correctly points out that its members are likely to be terribly impacted by the natural gas price spike – which may ultimately flow to its members through OFO and POC penalties. But NGTCC’s proposed solution would potentially allow its members to evade those economic impacts at the expense of other Kansas ratepayers – largely the residential class. If NGTCC evades penalties on the theory that they may be based on a manipulated or illegitimate index price, but FERC does not ultimately reprice the wholesale market, then KGS’ sales customers – largely the residential class – will be forced to “pick up the tab” for keeping the gas flowing to NGTCC’s members. In other words, there would be a very real possibility that NGTCC becomes unjustly enriched at the expense of other KGS customers. A much more equitable solution is for all customers to pay their fair share while FERC finishes its investigation. If FERC finds certain markets or indices should be retroactively adjusted, then all Kansans and Kansas businesses – whether sales or transportation customers – can be treated equitably in accordance with those findings. Granting NGTCC’s request for special treatment as compared to other Kansans at this phase would be inequitable and wrong. Thus, NGTCC’s Petition for Reconsideration of its request to issue a subpoena is denied.

THEREFORE, THE COMMISSION ORDERS:

- A. NGTCC’s Petition for Reconsideration is denied.
- B. This Order constitutes non-final agency action.³⁷

BY THE COMMISSION IT IS SO ORDERED.

French, Chairperson; Keen, Commissioner; Duffy, Commissioner

Dated: 10/12/2021

BGF



Lynn M. Retz
Executive Director

³⁷ K.S.A. 77-607(b)(2).

CERTIFICATE OF SERVICE

21-KGSG-332-GIG

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of electronic service on 10/12/2021.

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