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February 4, 1999

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
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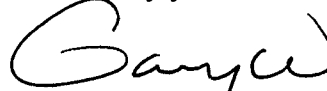
RE: Case No. GR-96-227

Dear Mr. Roberts:

Enclosed for filing with your office please find an original and fourteen copies of Associated Natural Gas Company's Application for Rehearing in this matter.

If there are any questions about this, please let me know.

Sincerely yours,


Gary W. Duffy

FILED
FEB 4 1999
Missouri Public
Service Commission

Enclosures
cc w/enclosures:
Office of Public Counsel
Ricky Gunter

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

FILED
FEB 4 1999
Missouri Public
Service Commission

In the matter of Associated Natural Gas Company's)
Tariff Revisions to be Reviewed in its 1995-1996)
Actual Cost Adjustment.)

Case No. GR-96-227

APPLICATION FOR REHEARING

Comes now Arkansas Western Gas Company, d/b/a Associated Natural Gas Company, pursuant to § 386.500 RSMo 1994, and applies for rehearing of the Report and Order issued on January 26, 1999, effective February 5, 1999, in respect to the matters set out herein. The Report and Order, in the particulars described, is unlawful, unjust or unreasonable.

Rehearing Required Due to Absence of Hearing Officer

1. The Commission must grant a rehearing and this case must be reheard because the only person who could judge the credibility of the witnesses at the hearing -- through attendance at the entire hearing -- took no part in the ultimate decision-making. The evaluation of credibility in relation to oral conflicting testimony, on material matters, is a necessary component of any rational conclusion in a quasi-judicial setting. *Gamble-Skogmo, Inc. v. Federal Trade Comm'n.*, 211 F.2d 106 (8th Cir. 1954). Because this case involved the credibility of two expert witnesses with diametrically opposed testimony, fundamental fairness requires that the evidence be reheard by someone who can judge the credibility of the witnesses in person and then participate in the decision-making. The hearing officer (Gregory George) who conducted the April 7, 1998, hearing,

and was therefore present during the entire hearing and able to judge the credibility of the only two witnesses, is not the same hearing officer (Morris Woodruff) who prepared a recommended decision for consideration by the Commission. Further, the transcript indicates only two Commissioners even viewed a *portion* of the proceeding. Two commissioners who did not attend the hearing on April 7, and thus were incapable of judging the credibility of the oral testimony of the two witnesses on the material issue, voted to accept the arguments made by the Staff witness. A rehearing is required where the demeanor of the witnesses is an important factor and the person who initially participated in judging that credibility is not available for the final decision. *Appalachian Power Co. v. FPC*, 328 F.2d 237, 240 (4th Cir. 1964) cert. denied, 379 U.S. 829, 85 S.Ct. 59, 13 L.Ed.2d 38 (1964); *Van Teslaar v. Bender*, 365 F.Supp. 1007 (D.Md. 1973).

Conclusion Regarding Sheet 44 Is Contrary to Law and Evidence

2. On page 11, the Report and Order finds that "Staff's position is persuasive" that "as of July 8, 1982, the date tariff sheet 44 was canceled, ANG had fully recovered its storage costs incurred up to that date." This conclusion is contrary to both the law and the evidence. ANG pointed out that Sheet 44 made no reference to gas in storage and *only produced a recovery of gas costs when gas was sold*. By definition, gas held in inventory -- which is the issue in this case -- was *not sold*. IT WAS HELD IN INVENTORY. Therefore, it was both legally and physically impossible for ANG to recover the costs of the gas held in storage by means of tariff sheet 44 which only provided for recovery of dollars for gas *sold*. The text of canceled Sheet 44 does not even address recovery of storage costs. There is no reference anywhere on Sheet 44 to gas in storage. (Ex. 4, p. 11) Mr. Wallis, the only Staff witness, admitted that. (MSK-5, p. 14, lines 21-25) The operation of Sheet 44 was clearly demonstrated by Mr. Kidd, ANG's witness, through several examples. In

simple terms, Sheet 44 operated to recover gas costs as gas was consumed by customers. Mr. Wallis advocated the opposite position that Sheet 44 provided for recovery of gas costs as the gas was purchased. Mr. Wallis provided no analyses, illustrations or examples to demonstrate how Sheet 44 operated. Neither did Mr. Wallis examine any of the monthly filings made pursuant to Sheet 44. (MSK-5, p. 13) Nor did Mr. Wallis present testimony refuting the operation of Sheet 44 as described by Mr. Kidd. Sheet 44 did not even cover the entire time period from 1962 through 1982 in which Mr. Wallis alleged the up-front recovery was accomplished, since it was in existence only from 1978 to 1982.

3. A tariff sheet approved by the Commission has the force and effect of law and the Commission is required to abide by its terms. *St. Louis County Gas Company v. Public Service Commission*, 286 S.W. 84 (Mo. 1926). The Commission cannot lawfully conclude that Sheet 44 governed the recovery of storage gas 17 years ago when gas in storage is not even mentioned on the tariff sheet. The Commission cannot lawfully conclude now -- 17 years later -- that Sheet 44 operated in a totally different manner to recover gas costs *as gas was purchased* by the gas company because the Commission does not have the authority to retroactively change the effect of an approved tariff sheet.

No Competent and Substantial Evidence to Support Commission's Conclusion

4. The Staff produced no documentary evidence whatsoever to corroborate the unsubstantiated opinion of Mr. Wallis that ANG actually "double-recovered" the cost of the gas it held in inventory. The general basis for the "double-recovery" allegation by Staff was that ANG had previously recovered the gas inventory costs many years ago -- perhaps as early as the 1960's. Therefore, while on its face, the disallowance is of dollars during the twelve-month ACA period, the

essence of Staff's position is that a balance shown on ANG's books since 1982 of approximately \$800,000¹ isn't really there, and hasn't been there since sometime prior to 1982 and perhaps, according to Staff, maybe as far back as the early 1960's. Sheet 44 compared annualized current gas cost for the most recent twelve month period of actual data to annualized base gas costs. The difference was divided by annual sales to develop a factor to apply to customer billings during a one month period; therefore, it was necessary to repeat that calculation twelve times a year. It is beyond belief for someone to contend that a monthly PGA recovery, based upon a twelve month annualized cost, with a two month lag in implementing cost changes and no true-up provision, provides "exact" recovery of current cost (whether or not inclusive of storage costs). By alleging that Sheet 44 provided "exact" recovery of one component of gas cost (storage costs), Staff has applied and the Commission (through a 3-2 vote) has adopted a level of "exactness" to Sheet 44 that never existed.

5. The Staff of the Commission has audited the books and records of this gas company on numerous occasions prior to and after July 1982; most recently in the 1997 rate case. In this case, the Staff admitted that the gas in storage was reflected in rate base in the 1997 case. ANG finds it incredible that an \$800,000 balance can be recognized to exist on its books in a rate case and then within two months, the Staff argues that the balance is just a fiction and hasn't really been there since 1982. In light of this drastic contradiction, ANG finds it equally incredible and unreasonable that the Commission can adopt the Staff's argument with *no documentation* to support or explain this dramatic turnaround in positions.

¹ The \$827,927 is a total company figure, as opposed to a Missouri jurisdictional figure. Mr. Kidd explained that the exact jurisdictional allocation to Missouri cannot be known until the gas is withdrawn. (Ex. 4 NP, pp. 2-3)

Legally Insufficient Findings of Fact

6. The entire scope of analysis performed on the alleged double recovery issue is contained on page 11 of the Report and Order. These purported "findings" are nothing more than conclusions. The extent of the analysis is simply that fixed and variable storage charges would have been included on pipeline supplier invoices in the pre-Order 636 environment. The Report and Order does not explain *how* the mere inclusion of storage costs on an invoice from a pipeline means that the storage costs were then recovered from customers. The recovery of gas costs is dictated by the content of the tariff sheets. The record demonstrated that ANG provided evidence that Sheet 44 could not have provided up-front recovery of storage costs as suggested by Staff. These purported findings of fact in no fashion meet the Commission's duty to render findings of fact and conclusions of law. As stated by the Missouri Supreme Court in *Iron County v. State Tax Commission*, 480 S.W.2d 65 (Mo. 1972), a mere statement of the chronology of events along with a conclusion does not constitute a resolution of factual issues. "They do not provide any basis for the Circuit Court to perform its limited function in reviewing administrative agency decisions because they do not show how the controlling issues have been decided." *Id.* at 70. See also §536.090 RSMo 1994. There must be an analysis by which the Court can reasonably determine the manner in which the Commission has thoughtfully weighed the various facts and applied them to the law in reaching its conclusion. If the reviewing court must speculate as to what part of the evidence the Commission believed and found to be true and what part it rejected, the findings of fact are inadequate. *State ex rel. International Telecharge, Inc. v. Public Service Commission*, 806 S.W.2d 680 (Mo. App. 1991). In this situation, the Commission has merely recited the positions of the parties, and then made a quantum leap to a conclusion without setting out the specific path of its reasoning. The law does not

permit the Commission to act in that fashion.

Commission Conclusion Is Unconstitutionally Retrospective in Operation

7. The Commission's Report and Order is unconstitutional and unreasonable because it operates retrospectively without prior notice to ANG. The effect of the Report and Order is to retroactively change the provisions of a tariff sheet that was canceled 17 years ago by determining that the tariff operated to recover gas costs on an as-invoiced basis instead of an as-sold basis. The Commission is simply a committee created by the legislature. *State ex rel. MK&T Ry. Co. v. Public Service Commission*, 210 S.W. 386 (1919). As a creation of the legislature, it cannot take actions which are in conflict with the principles in the Missouri Constitution which are applicable to the legislature. The Commission has done so in this instance because of its retrospective change in the operation of Sheet 44 in violation of Article 1, section 13 of the Missouri Constitution.

The Commission Has Misapplied The Law Concerning FERC Order 636

8. There is no relevant difference between pre-Order 636 and post-Order 636 services as far as Sheet 44 is concerned, and the Commission's Report and Order does not point out any. The only difference between pre-Order 636 and post-Order 636 is that ANG, in a post-Order 636 environment, would have more suppliers; therefore, it would have had more invoices to annualize under Sheet 44 if that sheet had continued to exist in the post-Order 636 environment. There still would be fixed (demand) and variable (volumetric) costs to recover under the mechanism contained on Sheet 44. Of course pipeline services were "bundled" prior to Order 636, but that doesn't prove anything in this proceeding and the Commission made no finding of fact tying the bundling to recovery of storage costs as invoiced. The purchased gas adjustment rates determined under Sheet

44 in a pre-Order 636 environment and a post-Order 636 environment would not differ just because services are bundled in the first instance and unbundled in the second instance. Schedule MSK-9 proves that it was physically impossible to recover storage costs under Sheet 44 until the stored gas was withdrawn and *consumed*. Staff's introduction of the notion of bundled costs in a pre-Order 636 environment as a determining factor has misled the Commission into believing that bundling of costs is tantamount to recovery of costs. It is not and there is nothing in the Report and Order which describes how that magical transformation took place. Staff did not even provide examples to support such a conclusion.

**Due to the Passage of Time and the Numerous Instances in Which
ANG's Books and Records Have Been Examined By the Commission,
The Commission Is Barred By the Doctrines of Laches and Estoppel
From Making This Disallowance**

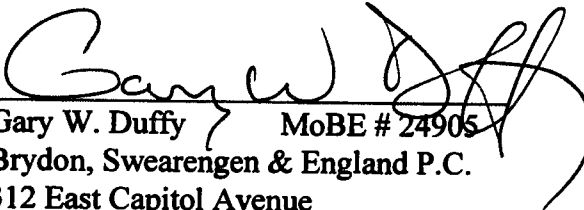
9. As ANG has stated earlier, the major issue in this case is whether the gas inventory balance is there or not. It is on ANG's books, and Mr. Wallis did not challenge that. (Tr. 66) He also did not challenge the calculation of the numbers shown on the books. (Tr. 66) He just *alleged* that the dollars had really been recovered prior to 1982, or put another way, the storage balance shown on ANG's books "doesn't exist to begin with." Mr. Wallis used the operation of Sheet 44 to make the allegation of prior recovery. Mr. Wallis had ample opportunity to dispute Mr. Kidd's calculations demonstrating that Sheet 44 could not have provided the "up-front" recovery as alleged by Staff. At no time did Mr. Wallis indicate that Mr. Kidd's calculations were incorrect. As indicated in paragraph 5 above, this case is not the only recent opportunity the Staff and the Commission had to investigate the gas inventory balance. ANG just went through a general rate case in 1997. In June of 1997, in Case No. GR-97-272, the Staff filed testimony recommending amounts

for total company gas inventory for rate base purposes which included the LNG and NGPL non-S2 storage. Mr. Wallis was one of two Staff witnesses on the issue. (See Schedules MSK-13 and MSK-14 attached to Mr. Kidd's surrebuttal) In Mr. Wallis' testimony filed at the end of June, 1997, in the rate case, Mr. Wallis made no disallowance for, or reference to the alleged non-existence of, the amounts of NGPL non-S2 and LNG storage which would have been outstanding as of or during the test year in the rate case. (Ex. 4, p. 19) The graphs depicting the gas volumes maintained in storage attached to Mr. Wood's testimony in the rate case clearly show inventory levels for both NGPL and the LNG facility for the four years covered on the graphs. These graphs are attached as Schedule MSK-14 of Mr. Kidd's surrebuttal testimony in this case. (Ex. 4 HC) The effect of Mr. Wallis' testimony (combined with that of Mr. Wood) in the rate case was to recommend that ANG earn a return on its investment in the very same storage balances that, in this case, he is saying do not exist. In fact, he admitted in his deposition that the Staff in Case No. GR-97-272 *included* NGPL non-S2 storage gas and LNG storage gas. (MSK-5, p. 21) Therefore, as far as Mr. Wallis was concerned in late June 1997, the inventory balances were there. But then he filed a recommendation in this case on August 4, 1997, the essence of which is that the inventory balances are not there. This and other inconsistent positions taken by Staff in this case are an indication of Staff's misconception of the storage recovery issue. Furthermore, because the Staff has maintained and the Commission has accepted in the past that there is this balance of costs reflecting gas in storage, and because ANG relied on such representations in settling a portion of its most recent rate case, the Commission is prevented or estopped from reaching a different result in this proceeding. Additionally, because the Commission is essentially disallowing items from 17 years ago, the doctrine of laches prevents the Commission from concluding that the pertinent balance does not exist since it had numerous

opportunities to raise the issue in the intervening 17 years and failed to do so.

WHEREFORE, the Commission should vacate and its Report and Order issued January 25, 1999, and schedule this case for a rehearing.

Respectfully submitted,

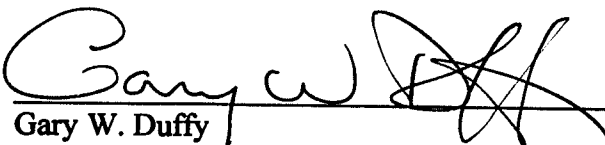

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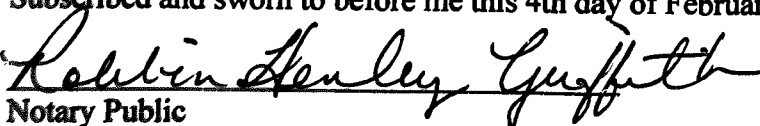
STATE OF MISSOURI)
)SS
COUNTY OF COLE)

VERIFICATION

Being first duly sworn, Gary W. Duffy states upon his oath that the facts in the foregoing document are true and correct to the best of his knowledge, information and belief and further states that the listed attorneys are authorized to make this filing on behalf of Associated Natural Gas Company.


Gary W. Duffy

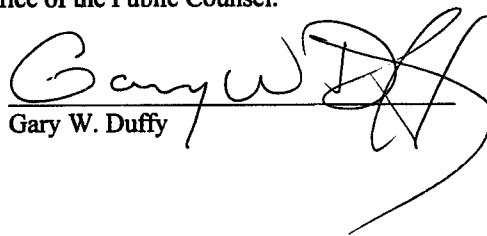
Subscribed and sworn to before me this 4th day of February 1999.


Notary Public

ROBBIN HENLEY GRIFFITH
A Notary Public of
Miller County, Missouri
My Commission Expires 12/28/2001

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing was hand-delivered this 4th day of February, 1999 to counsel for the Office of the Public Counsel.


Gary W. Duffy