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December 12, 1997

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. GR-97-272 Associated Natural Gas Company

Dear Mr. Roberts:

Enclosed for filing with your office please find an original and fourteen copies of an Application for Rehearing and Motion for Stay in this proceeding.

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

Sincerely yours,

Gary W. Duffy

Enclosures
cc w/enclosures:
Office of Public Counsel
Robin E. Fulton
Paul H. Gardner
Jeffrey L. Dangeau

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the matter of Associated Natural Gas Company's Tariff Revision Designed to Increase Rates for Gas Service to Customers in the Missouri Service Area of the Company.	)))))	Case No. GR-97-272

APPLICATION FOR REHEARING AND MOTION FOR STAY

COMES NOW Associated Natural Gas Company (hereinafter "ANG") and pursuant to § 386.500 RSMo 1994 and 4 CSR 240-2.160, respectfully states as follows:

On December 3, 1997, the Commission issued its Report and Order in this case and made the order effective on December 13, 1997. ANG respectfully states that the Commission's decisions on certain issues, identified below, are unlawful, unjust and unreasonable in the respects set out herein.

Gathering and Transmission Costs

The Commission said on page 8 that it was ruling in favor of Staff and Noranda on this issue. The Staff of the Commission, as the party with the burden of proof on this issue, failed to show by clear and satisfactory evidence that a change was required. There was no competent and substantial evidence in the record to support the Commission's decision. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

85.

The Commission has ordered a radical change in the regulatory treatment of Arkansas Western Gas Company's ("Arkansas Western")Gathering and Transmission (G&T) facilities. The Commission's order effectively removes these facilities from Arkansas Western's rate base, treats them as gas costs, ignores their cost of service, and outright abandons the rate base method of ratemaking as to these facilities. Under the statutory scheme from which the Commission derives its ratemaking authority, however, there is no statutory authority to determine rates for the G & T facilities by any method other than the rate base method. The G&T facilities are public utility property which Arkansas Western uses to provide utility service to its Missouri customers through the ANG division, and there is no dispute about the value of the rate base or the cost of service associated with these facilities. There has also been no allegation that the costs associated with the G&T facilities were not prudently incurred. Arkansas Western is entitled to earn a return of and on its prudent investment in utility property.

The Commission has ignored the value of the rate base and the cost of service associated with these facilities and has adopted a ratemaking method based entirely on the prudence of the ANG division's gas purchases. The Commission's order denies Arkansas Western any reasonable opportunity to earn a constitutionally adequate return on this investment and therefore results in the unconstitutional confiscation of Arkansas Western's property.

In 1957, the Arkansas Supreme Court faced a similar issue in *Acme Brick v. Ark. Public Service Comm.*, 277 Ark. 436, 299 S.W.2d 208 (1957). In *Acme Brick,* the Arkansas Public Service Commission ("APSC") substituted the fair field price method of

rate making (i.e., the price Arkla paid other producers for its purchased gas in the various fields where Arkla had gas production) for the rate base/rate of return method in setting the rates Arkla would be allowed to recover on its gas production assets. The court found as a matter of law that the APSC lacked statutory authority to depart from the rate base/rate of return method, and explained its holding as follows:

> The Public Service Commission has no authority, in the absence of further legislation, to discard the rate base method in favor of the field price method in determining the net profits a public utility can earn in this state. In fact it is difficult to pose the question of a proper net return for a public utility company without stating the answer. This is true because the very concept of "net return" means a return on some kind of a basis, and that basis has traditionally been (in some way) the capital prudently invested.
>
> We cannot read our statutes creating and defining the powers and duties of the Public Service Commission without concluding that they limit it to the rate base method for regulating the return allowable to a public utility company. In fact it appears that such a method was so obvious that the legislature did not deem it necessary to spell it out. Running through all the pertinent statutes is the idea that earnings or returns are based on the amount of property owned by the utility and on nothing else. To begin with all rates received by a public utility must be "just and reasonable," and if not they are unlawful (Ark. Stats. 73-204). The Commission has the power to fix just and reasonable rates for public utilities. (Ark. Stats. 73-218) and in order to do so, it is given the power to "fix the value of the whole or any part of the property of any public utility," (Ark. Stats. Same Section No. (4)). Also the Commission has the power and authority by order to require any public utility to furnish a verified, itemized, and detailed inventory of its property. (Ark. Stats. 73-220).
>
> The Commission has power to require a public utility to keep a uniform system of accounts subject to its jurisdiction and inspection (Ark. Stats. 73-221) at all times. A public utility is required to "prepare and transmit to the Commission a certified statement of the gross earnings from its properties" annually, Ark. Stats. 73-248.
>
> * * *
>
> We have somewhat laboriously set out above the reasons that compel us to this inevitable conclusion: The Commission was not empowered under

> our present statutes to remove approximately $10,000,000 worth of property out of the Company's rate base (thereby departing from the traditional rate base method), and in lieu thereof to measure the justness and reasonableness of the Company's earning on an entirely new basis or theory, viz; the fair field price method. If the Commission and this court should embark on the new and untried fair field price method of regulating public utilities, it would amount to abandoning our entire previous experiences and legal concepts in rate regulation which have thus far proved fair and satisfactory. Our thought on this point is well expressed by the language used in the case of *City of Detroit v. Federal Power Commission*, 230 F.2d 810. In that case, the Circuit Court of Appeals District of Columbia, in speaking of the rate base method (as compared to the fair field price method) said: "It has been repeatedly used by the Commission (Federal Power Commission), and repeatedly approved by the courts as a means of arriving at lawful -- 'just and reasonable' -- rates under the act. Unless it is continued to be used at least as a point of departure, the whole experience under the act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognizable meaning."

299 S.W.2d at 444-446.

The Arkansas Supreme Court's holding in *Acme Brick* was based on the fact that the rate base method of ratemaking was firmly entrenched in the statutory and constitutional scheme which defined the APSC's ratemaking authority. The court found that "running through all the pertinent statutes is the idea that earnings or returns are based on the amount of property owned by the utility and nothing else." 227 Ark. at 44. The Court cited Arkansas statutes which authorize the APSC to fix just and reasonable rates; to fix the value of the utility's property; and to require utilities to furnish inventories of their properties, keep a uniform system of accounts and provide annual statements of gross earnings.

The constitutional and statutory scheme of utility ratemaking in Missouri is nearly identical to that of Arkansas. Utility rates must be just and reasonable. Section

393.130.1 RSMo 1994. The Commission may prescribe uniform systems of accounts. Section 393.140.4 RSMo 1994. The Commission may require the filing of annual reports which set forth the utility's financial condition and contain a full description of its property. Section 393.140.6 RSMo 1994. The Commission may ascertain the value of utility property. Section 393.230.1 RSMo 1994. The Commission must give due regard to a reasonable average return on capital actually expended. Section 393.270.4 RSMo 1994.

In *State ex rel. Missouri Water Company v. Public Service Commission*, 308 S.W.2d 704 (Mo. 1957), the Missouri Supreme Court, in a decision addressing the Commission's ratemaking authority, quoted with approval from a decision of the Iowa Supreme Court:

> The foregoing indicates that while, if certain portions of the *Hope*[1] case are considered independently of their context and the decision as a whole, it might tend to support the contention that the decision is authority to ignore fair value and 'the normal conventions of rate-making', the fact is, when the *Hope* case is fully considered together with the statutes with which it dealt, and viewed from the mature consideration of consequences observed and mentioned in the (so-called) Canadian River Gas Co. Case, even the *Hope* case cannot be taken to be an authority that the finding of a rate base and 'conventions of rate-making' should be omitted in any public utility rate-regulating proceeding. The sum total of this *Hope* decision is thus seen to have been often misunderstood, distorted and exaggerated by those who used it as an authority for the proposition that formerly-established normal conventions of rate-making are now obsolete and that a rate base need not be determined in a public utility rate-making procedure. Indeed, this court does not perceive how any calculations of depreciation, legitimate financial expenses or indeed other calculations indispensible to regulating the rates of a public utility company without

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[1] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333.

> violating its rights under the due process clause can proceed without giving consideration to the somewhat baffling, but nevertheless unavoidable problems attendant upon ascertaining a rate base reflecting, to avoid confiscation, the fair present value of the property.

308 S.W. 2d 704, 716, quoting *Iowa-Illinois Gas & Electric Co. v. City of Forth Dodge, Iowa,* 85 N.W. 2d 28, 40 (1957).

As the Missouri Supreme Court recognized, the Commission cannot determine utility rates in a manner consistent with the utilitiy's due process rights wihtout basing those rates on a rate base. In the present case, the Commission has illegally abandoned the rate base method with regard to the G&T facilities in favor of an alternative method. The Commission should revise its order to set a rate for the G&T facilities which allows Arkansas Western a fair opportunity to earn a constitutionally adequate return on the rate base associated with the G&T facilities. Such a rate was described in the testimony of Mr. Gunter and Ms. Campbell.

Modification of Service Classifications

The Commission acted unreasonably and unlawfully in determining that a class which consists of both firm and interruptible customers represents a "homogeneous grouping." The Staff failed to meet its burden of proof to show by clear and satisfactory evidence that a change was necessary in existing tariffs. There was no competent and substantial evidence to support the Commission's determination. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

Unauthorized Use Charge Level for Interruptible Sales and Transportation Services

The Commission said on page 18 that it was ruling in favor of Staff on this issue. The Staff of the Commission, as the party with the burden of proof on this issue, failed to show by clear and satisfactory evidence that changes in ANG's approved tariff were required. There was no competent and substantial evidence in the record to support the Commission's decision. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

Removal from PGA and Transportation Tariff the Existing Language Regarding the Gathering and Transmission Rate Related to the AWG Facilities Allocated to ANG

The Commission said on page 20 that it was ruling in favor of Staff on this issue. The Staff of the Commission, as the party with the burden of proof on this issue, failed to show by clear and satisfactory evidence that changes in ANG's approved tariff were required. There was no competent and substantial evidence in the record to support the Commission's decision. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

Proposed Modifications to the Current Transportation Tariff

On page 21, the Commission "overruled" ANG's three overall objections to the

Staff proposals regarding transportation service. The Commission's decision in this regard is in error because there was a lack of effective notice to transportation customers of the self-described "major" changes proposed by Staff, the Staff is effectively usurping the tariff filing role of the utility by proposing tariffs in its testimony, and the Staff's proposals are effectively complaints which do not follow the statutory process. The Commission acted illegally in adopting the Staff proposals without any indication that the statutory burden of proof imposed on Staff to show by clear and satisfactory evidence had been met. The Commission acted illegally in determining on page 21 that the Staff did not have to meet the "clear and satisfactory" burden of proof (which the Commission erroneously refers to as a "heightened burden of proof") when the Staff proposes changes to tariff provisions which have been approved by the Commission. There was no competent and substantial evidence in the record to support the Commission's decision on this matter. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

Elimination of ANG Providing Sales Service to Transportation Customers

On page 23 of its Order, the Commission found that elimination of sales service to transportation customers was required to avoid any affiliate bias and any resulting detriment to ANG's remaining ratepayers. Staff failed to prove by clear and satisfactory evidence any actual or threatened affiliate bias or detriment to other ratepayers. Furthermore, there is not competent and substantial evidence in the record to support

the Commission's decision, and the Commission's findings are legally insufficient because they are inadequate to allow a reviewing court to determine the Commission's rationale.

ANG has entered into contracts with its transportation customers to provide sales service as provided under its tariffs, and ANG and its transportation customers have entered into other related supply contracts which support the sales contracts. The Commission's decision illegally and unreasonably interferes with these contracts because it fails to authorize continuation of the sales service until these contracts expire.

Elimination of ANG Back-Up Sales to Transportation Customers

The Commission found, on page 24 of its Order, that elimination of back-up sales service to transportation customers was required to avoid detrimental impact on sales customers. Staff failed to prove by clear and satisfactory evidence any actual or threatened detrimental impact on sales customers. Furthermore, any possibility of such detrimental impact was eliminated by the October 15, 1997, amendment to ANG's PGA tariff which requires back-up sales to be billed at the highest price ANG pays for gas in the month of billing. There is not competent and substantial evidence in the record to support the Commission's decision, and the Commission's findings are legally insufficient because they are inadequate to allow a reviewing court to determine the Commission's rationale.

ANG has entered into contracts with its transportation customers to provide

back-up sales service as provided under its tariffs. The Commission's decision illegally and unreasonably interferes with these contracts because it fails to authorize continuation of the back-up sales service until these contracts expire.

Requirement That All Transportation Customers Have Electronic Meters with Telecommunications Capability (EGM)

The Commission said on page 26 that all of ANG's transportation customers should be required to have EGM, and determined that a $25 per month charge for EGM was appropriate. The Staff of the Commission, as the party with the burden of proof on this issue, utterly failed to produce any evidence, much less a showing by clear and satisfactory evidence, that these changes in ANG's approved tariff were required. Further, the Commission lacks statutory authority to require the installation of such equipment since there are no public interest, health or safety aspects to such equipment. Section 393.140(2) RSMo 1994. There was not competent and substantial evidence in the record to support the Commission's decision. In particular, there was no evidence whatsoever as to cost support for the $25 per month charge for monthly operation of the EGM equipment. The Commission acted arbitrarily and capriciously in approving the $25 charge when in a recent case where a similar charge was proposed by a utility with cost support for the elements of a charge, the Commission ruled that there was not adequate support for the charge. The Commission is thus unfairly and illegally imposing a higher standard of proof on a utility company than its own Staff when the Staff proposes a charge or change in the tariff. Further, the findings of fact of

the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

The Commission has acted unreasonably in not addressing in the Report and Order the fact that ANG cannot comply immediately with the Commission's unlawful decision requiring the installation of EGM equipment on all transportation customers. Without conceding the merits of the issue, ANG will be proposing compliance tariffs on this issue which describe a reasonable period of time during which ANG will continue with the status quo until such EGM equipment is ordered, installed, and tested and installation of telecommunications facilities arranged at the approximately 15 sites involved. If the Commission nevertheless rejects such proposed compliance tariffs, denies the requested stay to allow a reasonable time for ANG to come into compliance, and requires immediate compliance, it is ANG's position that the Commission will be acting unreasonably, arbitrarily, and without just cause.

Proposed Change in Balancing

The Commission found, on page 27 of its Order, that ANG's present balancing provisions should be terminated so that Staff's unauthorized use charge could be implemented. Since the Commission acted unreasonably and illegally in adopting Staff's unauthorized use charge as described in the following section, elimination of ANG's balancing provisions is unreasonable and illegal for the same reasons.

The Commission also found that transportation customers should be responsible for ensuring that their gas needs are delivered to ANG's city gate and that this

requirement is not a mandate for flawless nominations and takes. Staff failed to prove by clear and satisfactory evidence any need whatsoever for elimination of ANG's balancing service or that it is even physically possible for ANG to limit volumes of gas received at its city gate to actual volumes to be delivered to its transportation customers. There is not competent and substantial evidence in the record to support the Commission's decision, and the Commission's findings are legally insufficient because they are inadequate to allow a reviewing court to determine the Commission's rationale.

ANG has entered into contracts with its transportation customers which provide for certain balancing tolerances and penalties as provided under its tariffs. The Commission's decision illegally and unreasonably interferes with these contracts because it fails to authorize continuation of the balancing service until these contracts expire.

Proposed Unauthorized Use Charge for Transportation Customers

The Staff of the Commission, as the party with the burden of proof on this issue, failed to show by clear and satisfactory evidence that changes in ANG's approved tariff were required. There was no competent and substantial evidence in the record to support the Commission's decision. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

ANG has entered into contracts with its transportation customers which provide for certain balancing tolerances and penalties as provided under its tariffs. The Commission's decision illegally and unreasonably interferes with these contracts because it fails to authorize continuation of the balancing service until these contracts expire.

Proposal To Require Refunding of Monies Collected Through Balancing Provisions

The Commission on pages 31-32 orders ANG to credit the revenue from all unauthorized use charges, which are also being established as a result of this case, to ratepayers through the Actual Cost Adjustment provisions of the PGA clause. ANG understands this to be a prospective ruling only which requires no refunding of any amounts collected in the past, since there is no provision ordering a refund of past amounts. Further, the Commission lacks the statutory authority to order pecuniary refunds. *State ex rel. And to Use of Kansas City Power & Light Company v. Buzard*, 168 S.W.2d 1044, 350 Mo. 763 (1943).

Prior to this ruling, ANG's charges of a similar nature established by contract (and which amounted to approximately $20,000 in the test period) were used as an offset to the revenue requirement. As a result, the $20,000 was used in determining the non-PGA rates for ANG which were settled at $1,500,000 in this proceeding. With this change as ordered by the Commission, the crediting will now shift from the non-PGA rates to the PGA rates. As a direct result, ANG's revenue requirement for non-PGA rates by definition increases by the amount of the credit. Rather than creating a

"windfall" as determined by the Commission, the Commission's ruling effectively wipes out $20,000 in non-PGA revenue which was previously assumed to continue to be in place in the future, and requires ANG to credit that amount to the ratepayers through non-PGA rates. Therefore, ANG's authorized revenue increase must be increased by an additional $20,000. The Commission has made no provision for ANG's revenue requirement to increase as a result of this shift from non-PGA to PGA revenues, and thus the Commission is unconstitutionally confiscating said amount from ANG without due process.

The unauthorized usage charges which the Commission has ordered ANG to credit to sale customers include penalties which ANG will be required to pay to pipelines. The Commission's order is unlawful and unreasonable because it does not exclude the penalties from the crediting requirement. Without such an exclusion, ANG will be unable to recover the cost of these penalties and its property will be unconstitutionally confiscated.

Curtailment Policy

On page 24, the Commission ruled that ANG should eliminate backup sales service to its transportation customers. On page 32, the Commission ruled that if transportation customers need plant protection gas, they must arrange for it on their own but that ANG will be prohibited from allowing such gas service for transportation customers. The Commission's ruling lacks competent and substantial evidence in support of it. The Commission is acting arbitrarily and capriciously in allowing gas for

plant protection to sales customers but not to transportation customers when there is no evidentiary basis for such discrimination in treatment. The findings of fact of the Commission on this issue are legally insufficient because they do not allow a reviewing court to determine the rationale of the Commission.

General Effect of Modifications to Transportation Tariffs

The transportation tariff changes which the Commission has ordered will make transportation service unworkable for many of ANG's transportation customers and force them to switch to sales service. This is likely to increase the total costs which these customers pay for gas service and stifle economic growth in ANG's service area. It is common knowledge that gas costs are an important factor in business decisions to locate or expand plants in any given area. The transportation tariff changes which the Commission has ordered will put ANG's Missouri service area at a clear disadvantage in competing for business locations and expansions.

Motion for Stay

Since the Report and Order is not clear on the timing of implementation of several matters which will require more than just the filing of tariff sheets, ANG requests that if the Commission intends immediate compliance with certain of the provisions, and will not accept proffered compliance tariffs with reasonable time periods for transition to the changed provisions in the Report and Order, that the Commission issue an order staying the effect of the Report and Order in the following aspects until ANG can take

the steps which are necessary for it to be in compliance:

A. Stay the implementation of the newly-ordered unauthorized use charges and tariffs regarding the elimination of sales and back-up service to transportation customers until August 1, 1998, when all current contracts containing balancing provisions and penalties for non-compliance will expire.

B. Stay the newly-ordered requirement for installation of Electronic Gas Measurement equipment until August 1, 1998, to allow ANG sufficient time to order, install and test the equipment and arrange for installation of telecommunications facilities at the approximately 15 sites involved.

C. Since the Commission is likely to take until after December 13, 1997 to rule on this application for rehearing and motion for a stay, at a minimum, ANG should not be required to file tariffs on the issues outlined above until twenty days after an order on this Application for Rehearing is issued by the Commission and effective.

WHEREFORE, ANG applies for rehearing of the Report and Order in the respects set out above, and for a stay of the requirement to file compliance tariffs on the listed issues until 20 days after the Commission rules on this Application for Rehearing and Motion for Stay.

Respectfully submitted,

Gary W. Duffy MoBE# 24905
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
(573) 635-7166
(573) 635-3847 facsimile

State of Missouri)
)ss
County of Cole)

Gary W. Duffy, being first duly sworn, states upon his oath that he has read the foregoing document and that the facts alleged therein are true and correct to the best of his knowledge, information and belief, and that the above-referenced attorneys are authorized to file said pleading.

Gary W. Duffy

Subscribed and sworn to before me this 12th day of December, 1997.

Deborah L. Baker
Notary Public

DEBORAH L. BAKER
NOTARY PUBLIC - NOTARY SEAL
STATE OF MISSOURI
COUNTY OF CALLAWAY
My Commission Expires July 9, 2001

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served on all counsel of record in this proceeding this 12th day of December, 1997, either by hand delivery or by first class mail, postage prepaid.

Gary W. Duffy

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