BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of Associated Natural Gas Company's Tariff Sheets to be Reviewed in Its 1992-1993 Actual Cost Adjustment.	)))	**Case No. GR-93-169**
In the Matter of Associated Natural Gas Company's Tariff Sheets to be Reviewed in Its 1993-1994 Actual Cost Adjustment.	)))	**Case No. GR-94-189**

CONCURRING OPINION OF COMMISSIONER DUNCAN KINCHELOE

While we concur with the result reached by the Commission in these cases,[1] we write additionally to emphasize that although the result here is different from the result reached in Case No. GR-90-38, et al., in that no adjustment or disallowance was found to be appropriate in the present case, the Commission's decision is consistent with its prior decision in ***In re Associated Natural Gas Company of Fayetteville, Arkansas***, 3 Mo. P.S.C. 3d 495 (1995).

In GR-90-38 the Commission found that ANG's actions in entering into the SEECO contract, specifically its failure to contemporaneously evaluate other gas suppliers adequately prior to entering into the SEECO contract, were imprudent. Convincing evidence showed that ANG paid a premium above gas costs that were available on the spot market, that it paid this premium to a company with which it was affiliated, and that it failed to exercise due diligence in effectively exploring alternative purchases. The company's evidence to the contrary, though clamorous, was neither convincing nor credible. For that reason the SEECO contract will remain imprudent throughout its life.

The financial impact of those imprudent contractual practices

[1] For ease of reference, we will refer to these cases in the singular.

on ANG rates must be evaluated individually for each ACA period, based on market conditions for the period in question. At that stage, the inquiry is not to determine the prudence of the contract but to quantify the monetary effects, if any, of the imprudence.

All charges for gas service must be just and reasonable. Section 393.130.1, RSMo 1994. The Actual Cost Adjustment (ACA) process addresses a component charge for gas service, the amount charged for a company's actual cost of the gas itself. The burden of proof is on the company. Section 393.150.2, RSMo 1994. Even apart from statute, as the moving party seeking recovery of its costs in rates through the PGA/ACA process -- and the party with greatest access to information -- ANG bears the burden of proof. That burden generally comprises two elements, the burden of going forward with the evidence, and the burden of persuasion. ***Black's Law Dictionary*** 196-197 (6th ed. 1990).[2] The party having the burden of proof must initially meet its burden of producing evidence sufficient to establish a prima facie case.[3] ***Drysdale v. Estate of Drysdale***, 689 S.W.2d 67, 72 (Mo. App. 1985). Once that burden has been met and a prima facie case established, the burden of going forward with the evidence shifts to the adverse party. ***Frank v. Wabash Railroad Co.***, 295 S.W.2d 16, 22 (Mo. 1956). However, where facts related to an issue are peculiarly within the control or knowledge of one party, the burden of

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[2] These twin elements are also alternately referred to as the necessity of establishing a fact (burden of persuasion) and the necessity of making a prima facie showing (burden of going forward). ***Id.*** *See also* ***Hofstatter v. Johnson***, 208 S.W.2d 924, 928 (Mo. App. 1948).

[3] A prima facie case may be defined as follows: "Such as will prevail until contradicted and overcome by other evidence . . . . A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded." ***Black's Law Dictionary***, 1189-1190 (6th ed. 1990).

production falls on that party. ***Dwyer v. Busch Properties, Inc.***, 624 S.W.2d 848, 851 (Mo. banc 1981). *See also* ***In Re Churchill Truck Lines***, 27 Mo. P.S.C. (N.S.) 430, 495 (1985). While the burden of going forward with the evidence may shift, the burden of proof never shifts. ***Anchor Centre Partners v. Mercantile Bank***, 803 S.W.2d 23, 30 (Mo. banc 1991). The Commission's decision in this case does not alter that burden of proof, which remains with ANG.

In the present case ANG made a good faith effort to show that its gas costs during the ACA periods were reasonable. Staff in contrast relied to a great extent on the Commission's decision in GR-90-38, arguing that the Commission had in effect established a 25 cent benchmark as the appropriate premium under the SEECO contract. However, the Commission never intended its disallowance in GR-90-38 to be used as a benchmark in future ACA periods. In rejecting a Staff recommendation that the Commission require ANG to, in effect, abrogate the SEECO contract, the Commission specifically stated that ANG "should be given the opportunity to demonstrate in a future case that no damage has occurred as a result of the imprudent SEECO contract in a different ACA period."[4] ***Associated Natural Gas***, 3 Mo. P.S.C. 3d at 511. The Commission went on to caution that this might be a very difficult undertaking for ANG without the functional equivalent of a RFP process. ***Id.***

ANG made an attempt to follow the Commission's directive in GR-90-38. Staff responded by invoking a 25 cent benchmark. We do not believe Staff's use of the 25 cent benchmark rose to the level of creating a

[4] The Commission's approach in attempting to analyze the impact of an imprudent contract during a discrete period of time is consistent with its approach in ***In Re Capital City Water Company***, 3 Mo. P.S.C. 333 (1995).

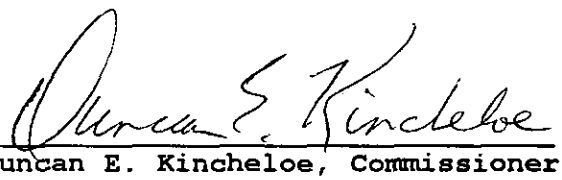
serious doubt about the reasonableness of ANG's gas costs during the ACA periods in question, and therefore we concur in the result reached. Similarly, Staff's evidence did not adequately explain why ANG's use of NYMEX futures strip prices in general,[5] or the use of the September 28, 1993 NYMEX future strip price in particular, was unreasonable or inappropriate. Likewise, the same shortcoming may be found in Staff's objection to ANG's use of gas prices from the Gulf Coast basin in adjusting the basis differences between the spot index and NYMEX futures price. However, we want to underscore that the Commission's decision should not be interpreted as shifting to Staff the burden of proof, as opposed to the burden of going forward with evidence. Nor should it be interpreted to endorse the adequacy of ANG's method of demonstrating the reasonableness of its gas costs in other ACA periods in which contrary evidence might be produced or argued more effectively.

An incidental result of ANG's imprudent failure to explore adequately its purchasing alternatives has been a significant shortage of contemporaneous information from which other parties may formulate positions on the justness and reasonableness of its rates. The evidence presented by the Staff, ANG and other parties will always be imperfect because of that data shortage. The company's responsibility for this circumstance makes it especially fitting that ANG bears the burden of proof. It does not, however, relieve other parties of responsibility to respond to a prima facie case. Recognizing this, we simply conclude that based upon the available evidence which was presented to the Commission

[5] Staff's witness in GR-90-38 hinted that the use of NYMEX futures strip prices might not be appropriate, but did not delve into this issue because the witness concluded that ANG's evidence was irrelevant as an after-the-fact analysis. ***Re Associated Natural Gas Company***, 3 Mo. P.S.C. 3d at 503.

in this case, ANG made a prima facie showing that its imprudence respecting the SEECO contract resulted in no harm to ratepayers during the ACA periods in question. That showing was not adequately rebutted in this case.

Respectfully submitted,



Duncan E. Kincheloe, Commissioner

Zobrist, Chm., McClure and Drainer, CC., join in this Concurring Opinion.

Dated at Jefferson City, Missouri, on this 31st day of October, 1996.