BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Complaint of SWKI-Seward West Central, Inc., and SWKI-Stevens Southeast, Inc. Against Anadarko Natural Gas Company.	)))	Docket No. 14-ANGG-119-COM

PETITION FOR RECONSIDERATION
OF ORDER DENYING COMPLAINT DATED NOVEMBER 7, 2024

SWKI-Seward West Central, Inc. ("SWKI-SWC"), and SWKI-Stevens Southeast, Inc. ("SWKI-SE"), (collectively, the "SWKIs"), pursuant to K.S.A. 77-529(a)(1) and K.A.R. 82-1-235, hereby file with the State Corporation Commission of the State of Kansas ("KCC" or "Commission") this Petition for Reconsideration ("Petition") of the Commission's Order Denying Complaint dated November 7, 2024. In support of its Petition, the SWKIs state as follows:

INTRODUCTION

1. This proceeding arises out of the Black Hills acquisition of the Anadarko Natural Gas Hugoton Residue Delivery System ("HRDS") line and customers in 2013. See Docket No. 13-BHCG-509-ACQ. The SWKIs intervened in that proceeding.

2. This proceeding was commenced on August 27, 2013, when the SWKIs filed a Complaint against ANGC alleging that ANGC failed to file with the Commission and obtain Commission approval of its natural Gas Sales Agreements ("GSAs") with the SWKIs, as required by law, rendering the GSAs void and entitling the SWKIs to relief. Relying on precedent set forth in *Sunflower Pipeline Co. v. State Corp'n Comm'n*, 5 Kan.App. 2d 715 (1981), SWKIs demanded that the Commission order a refund, with interest, of the SWKIs' payments made pursuant to the unfiled and unapproved rates and for any such further relief that the Commission may deem just and appropriate.

3. On January 15, 2015, the Commission dismissed the SWKIs' Complaint, concluding the SWKIs had failed to state a claim upon which relief may be granted.

4. On January 12, 2018, the Court of Appeals issued its *Memorandum Opinion* in *SWKI-Seward W. Cent., Inc. v. Kansas Corp. Comm'n*, 408 P.3d 1006, 2018 WL 385692 (Kan.App. 2018)("*Court of Appeals I*").

5. The Court of Appeals held that the SWKIs had stated a claim upon which relief could be granted and that the Commission erred in dismissing the Complaint. The Court of Appeals remanded the Complaint to the Commission for additional proceedings to determine if the contracts were ever filed with and approved by the Commission and to determine if the SWKIs were entitled to a remedy for Anadarko's violations.

6. In summarizing several cases analyzing the Filed Rate Doctrine, the Court of Appeals stated:

> These cases support the proposition that in the absence of a filed rate, should the appropriate regulatory agency deem the rate reasonable, the time value of the money collected from the unfiled rate is a permissible remedy available under a regulatory agency's broad powers to set and approve rates.

Id. at *13 (emphasis added).

7. The Court of Appeals stated that "where a reasonable rate goes unfiled, the Commission has the statutory authority to order a remedy, a remedy that may include the time value of money paid by the customer pursuant to an unfiled rate." *Id*.

8. Upon remand, and following the filing of briefs, on August 6, 2019, the Commission, without holding any hearing (including an evidentiary hearing), issued its *Order on Contract Status*.

9. In the *Order on Contract Status*, the Commission found that the GSAs were either not timely filed for approval by the Commission or not filed for approval at all by the

Commission—all in violation of Kansas law. However, the Commission concluded the SWKIs were not harmed by Anadarko's failure to file or timely file the GSAs and were not entitled to a remedy. The Commission denied the Complaint for a second time without addressing the Court of Appeals' Filed Rate Doctrine mandate.

10. On October 16, 2019, the SWKIs filed a *Petition for Judicial Review* in the District Court of Shawnee County. Neither the Commission nor Anadarko filed a Petition for Review or a Cross-Petition for Review.

11. On September 25, 2020, Judge Mary Christopher of the Shawnee County District Court issued its *Memorandum Order and Decision* granting the SWKIs' *Petition for Review* and remanding the case back to the Commission—for a second time--to determine whether the unfiled and unapproved rates charged by ANGC and paid by SWKIs were "reasonable" **AND** to determine the appropriate remedy under the Filed Rate Doctrine.

12. The District Court concluded that (1) the Commission failed to follow the instructions on remand from the Court of Appeals; (2) that the Commission failed to make an independent determination as to whether the rates paid by the SWKIs were "reasonable"; (3) that the Commission erred in refusing to conduct an evidentiary hearing or perform any analysis of the rate paid by SWKIs other than to state that the SWKIs paid the contract rate; (4) that by failing to conduct a hearing on remand and by failing to recite specific evidence that the Commission considered, reviewed or relied upon in reaching its conclusions that the rate paid by the SWKIs was reasonable, that the District Court could not discern that the Commission's order is supported by substantial, competent evidence; and (5) that the Commission did not decide an issue requiring resolution and made a decision that lacked sufficient evidence and that was unreasonable or arbitrary under K.S.A. 77-621(c)(3), (7) and (8).

13. The District Court specifically ruled that "The decision of the Commission not to investigate the reasonableness of Anadarko's unfiled [and unapproved] rates was arbitrary and capricious, unreasonable and an abuse of discretion." (emphasis added).

14. The District Court ordered that:

> This matter is remanded to the Commission for additional proceedings consistent with this opinion. The Commission is to make an independent determination as to whether the rate(s) paid by the SWKIs were reasonable. In addition, the Commission is to exercise its discretion and determine the appropriate remedy under the filed rate doctrine consistent with the mandate of the Court of Appeals.

15. The Commission and ANGC appealed the decision of the District Court to the Court of Appeals. On April 8, 2022, the Court of Appeals affirmed the decision of the District Court and remanded the Complaint to the Commission with directions—for a second time. *SWKI-Seward West Central v. Kansas Corp. Comm'n*, 408 P.3d 1006, 2022 WL 1052231 (Kan.App. 2022)(*"Court of Appeals II"*).

16. The Court of Appeals, in affirming the District Court and reversing the Commission, stated:

> The district court found the filed rate doctrine applied. . . While the [prior Court of Appeals] panel did not specifically require the Commission to apply the filed rate doctrine, it did hold that where no filed rate existed, if the rate used by the parties is deemed reasonable, the time value of money collected from the unfiled rate is a permissible remedy. [citation omitted] The Commission found the rate was reasonable but did not address the appropriateness of a remedy based on the time value of money. The Commission's failure to address the possible remedy violated the [prior Court of Appeals] panel mandate. . . On remand, the Commission should address the filed rate doctrine and consider to what extent the time value of money may be an appropriate remedy. . . On remand, we order the Commission to address the [prior Court of Appeals] panel's second direction under the Commission's inherent authority to regulate under K.S.A. 66-101. If it determines a remedy is appropriate, the Commission should apply the time value of money.

Court of Appeals II, 2022 WL 1052231 at *8-9.

17. On the second remand, the Commission conducted an evidentiary hearing on June 9, 2023, and the parties filed post-hearing briefs.

18. On November 7, 2024, the Commission issued its *Order Denying Complaint.* In its *Order*, the Commission ruled that the 50-cent gas delivery charge collected by ANGC from SWKIs was "reasonable" even though ANGC sold the same natural gas off the same HRDS delivery system to its affiliate, AESC, for a 10-cent delivery charge. After ruling that the 50-cent delivery charge paid by SWKIs was "reasonable," the Commission ruled that the SWKIs were not entitled to a refund because "K.S.A. 66-154b[1] only authorizes a refund upon a finding of an unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rate or charge." *Order Denying Complaint* at 13. The Commission's *Order Denying Complaint* fails to follow the mandates of the District Cout and the Court of Appeals and should be reconsidered.

GROUNDS FOR RECONSIDERATION

19. As more fully set forth below, the SWKIs request that the Commission reconsider its November 7, 2024 *Order Denying Complaint* based upon the following: (1) the Commission engaged in unlawful procedure or has failed to follow prescribed procedure by not placing the burden of proof on ANGC; (2) the Commission failed to address an issue requiring resolution and abused its discretion in that it specifically failed to address the Filed Rate Doctrine and what remedy is appropriate under the Filed Rate Doctrine; (3) the Commission failed to comply with the mandates of the District Court and Court of Appeals on remand; (4) the Commission ruling that the unfiled rates are just and reasonable is arbitrary and capricious and unreasonable and is without foundation in fact and not supported by substantial evidence when viewed in light of the

[1] K.S.A. 66-154a and 66-154b are not applicable to the present case. Those statutes only apply to "common carriers." The Court of Appeals previously determined that ANGC was not a "common carrier." *Court of Appeals I* at pp. 11-12. The Commission persists in hanging its hat on inapplicable statutes.

record as a whole; (5) the Commission's Order does not address or discuss the applicability of the Filed Rate Doctrine; (6) the Commission did not properly exercise it discretion and/or abused its discretion in determining that the SWKIs are not entitled to a remedy; (7) in ruling that the SWKIs are not entitled to a remedy, the Commission erroneously interpreted or applied the law and the decision is arbitrary and capricious and unreasonable and is without foundation in fact and not supported by substantial evidence when viewed in light of the record as a whole; (7) that the Commission's Order is not reasonable and is otherwise arbitrary and capricious and does not set forth findings of fact and conclusions of law such that a reviewing court may be apprised of the foundation for its conclusions; and (8) the Commission's Order is otherwise unreasonable, arbitrary, or capricious and is not supported by substantial, competent evidence when viewed in light of the record as a whole.

A. The Commission Should Reconsider its *Order Denying Complaint* and Apply the Filed Rate Doctrine and Award the Time Value of Money Even if the Rates are "Reasonable" (Which They Are Not).

20. Even assuming for sake of argument that the Commission was correct (which it was not) in finding that the unfiled and unapproved rate paid by SWKIs to ANGC was "reasonable," the Commission failed to comply with the mandates of the District Court and the Court of Appeals and apply the Filed Rate Doctrine and abused its discretion in not awarding the SWKIs the "time value of money" for having paid the claimed "reasonable" rate years prior to a Commission review and determination of "reasonableness."

21. The Court of Appeals has already summarized how the Filed Rate Doctrine applies to an unfiled and unapproved rate that is determined to be "reasonable" only after the customer has paid the unfiled and unapproved rate.

22. The Court of Appeals has stated:

> These cases support the proposition that in the absence of a filed rate, should the appropriate regulatory agency deem the rate reasonable, the time value of the money collected from the unfiled rate is a permissible remedy available under a regulatory agency's broad powers to set and approve rates.

Court of Appeals I, 2018 WL 385692 at *13 (emphasis added).

23. It is uncontroverted that ANGC illegally received payment from SWKIs prior to their rate being reviewed and determined by the Commission to be "reasonable" in the *Order Denying Complaint* of November 7, 2024.

24. Under the Filed Rate Doctrine, ANGC was not entitled to any payment for the natural gas until its rates were approved by the Commission. ANGC has conceded this point in earlier briefing before this Commission. In explaining how the Filed Rate Doctrine operates, ANGC stated that:

> An entity that operates as a public utility in Kansas must obtain a certificate of public convenience from the KCC prior to transacting any business that falls within the Commission's jurisdiction conferred by K.S.A. 66-104a.[2]

Anadarko further stated that:

> It is only upon both (1) the granting of the Certificate and (2) the approval of the rate and terms of service [by the Commission] that a public utility transaction may occur.[3]

25. The Commission attempts to justify its decision by cherry-picking soundbites from the lengthy record in this proceeding, specifically: (1) that the parties operated as if the contracts were filed with and approved by the Commission; (2) the SWKIs had an inconsistent and unpredictable load profile and no minimum volume purchase obligations and could terminate on 30 days' notice; (3) the SWKIs had other options for obtaining its natural gas; (4) the rates the SWKIs paid ANGC were below what the SWKIs paid Freedom Pipeline; and (5) the SWKIs stated

[2] *ANGC Brief Addressing Threshold Legal Issues* at p. 9

[3] Id. at 10.

in another proceeding that it was preferable to receive service under the GSAs at issue than face a nearly 40% increase if they were forced to switch to Black Hills.[4]

26. None of the points relied upon by the Commission are relevant to its determinations in this case, nor do they even attempt to apply applicable Kansas law. Kansas law is succinct and clear: if the SWKIs paid a contract rate that was not approved by the Commission, which they did, the rate was unlawful and subject to refund. ANGC was not entitled to collect any payments from the SWKIs until the contracts were filed and approved as reasonable. The SWKIs were denied the use of such funds for the entire 24-year period they paid the unlawful contract rate.

27. The uncontroverted evidence is that the SWKIs were harmed by paying the unfiled and unapproved rate for a period of 24 years prior to approval by the Commission. SWKIs began paying ANGC in January 2000 and the Commission did not find the ANGC rate to be "reasonable" until November 7, 2024—24 years later. See Prefiled Testimony of Dan Clawson at 4-8; Prefiled Testimony of Kirk Heger at 8-14.

28. The SWKIs adduced evidence that SWKIs were harmed by having been denied the use of their money—and ANGC improperly benefitted from the use of the SWKI's money. *Id.* During this same period, the SWKIs were borrowing operating funds from their lenders in the range of 5 to 9 percent—and those borrowings and interest charges could have been reduced but for the early payments to ANGC. *Id.*

29. The Commission received uncontroverted evidence that a "time value of money" calculation from the time of first payment until March 31, 2023, ranged from $3.6 million to $6.9 million for SWKI-WC and from $3.2 million to $6.8 million for SWKI-SE. Prefiled Testimony

[4] *Order Denying Complaint* at pp. 3-4.

of Charles Claar at 1-7. Those calculations should be extended by the Commission through the effective date of any ruling.

30. Even assuming that the ANGC rates were "reasonable," (which they were not) the Commission erred in not applying the Filed Rate Doctrine—as required by K.S.A. 66-109 and K.S.A. 66-1,203 and the mandates of the District Court and the Court of Appeals--and in failing to exercise its discretion/abusing its discretion in refusing to order ANGC to pay a refund of the "time value of money"—as calculated by SWKIs.

31. As stated above, the Court of Appeals held that the Filed Rate Doctrine applies even if the Commission finds that the unfiled and unapproved rate is "reasonable." In its *Order Denying Complaint,* the Commission failed to state why the "time value of money" remedy was not being ordered despite the District Court and the Court of Appeals clearly directing that even if the Commission deemed the rate "reasonable" that the "time value of money collected from the unfiled rate is a permissible remedy available under a regulatory agency's broad powers to set and approve rates." *Court of Appeals I*, 2018 WL 385692 at *13; *Court of Appeals II*, 2022 WL 1052231 at *8-9.

32. The Court of Appeals relied on precedent from the Federal Energy Regulatory Commission ("FERC") for the proposition that the Commission has broad discretion to fashion a remedy, noting that the time value of money paid under the contracts is an appropriate remedy, even when the unfiled rates are belatedly determined to be reasonable.[5]

33. The time value of money reflects the fact that the utility has no right to collect money from the customers until the date that the contracts are filed and approved.[6] Accordingly,

[5] *Id.* at *13.

[6] *See, Prior Notice and Filing Requirements Under Part II of the Federal Power Act,* 64 FERC ¶ 61,139 at 61,979-61,980 (July 30, 1993).

the utility must return the time value of money to the customer for the period that it unlawfully collected rates, even if the rates are later deemed to be reasonable. Moreover, FERC precedent provides that the time value of money refunds are to be collected in addition to any refunds that may be required if the rate is not just and reasonable after a cost-basis analysis.[7]

34. The time value of money remedy is an enforcement mechanism under the Filed Rate Doctrine. The Filed Rate Doctrine is one of the bedrock principles of utility regulation and is codified in K.S.A. 66-109 and K.S.A. 66-1,203. *Sunflower Pipeline Co. v. State Corp. Comm'n*, 5 Kan.App.2d 715, 624 P.2d 466 (1981). During the 11 years this Complaint has been pending, the Commission has repeatedly declined to address the applicability of the Filed Rate Doctrine—despite having been ordered to do so by the Court of Appeals—twice—and the District Court—once. The Commission cannot justify its refusal to comply with appellate mandates and should not risk being told by the courts that it has abused its discretion for a fourth time.

35. The *Order Denying Complaint* is illegal and failed to comply with the mandates of the District Court and Court of Appeals by failing to explain why an award of the time value of money is not an appropriate remedy and failing to make an award of the time value of money.

36. The Commission failed to apply the Filed Rate Doctrine and failed to even consider whether the SWKIs were entitled to a "time value of money" remedy. Instead, the Commission erroneously held that "Since the Commission has found that the rates in both the 1998 and 2002 GSAs are reasonable, no remedy is appropriate." *Order Denying Complaint* at 13. That holding is contrary to the mandates of the District Court and the Court of Appeals and constitutes a failure to address an issue requiring resolution, is an erroneous interpretation or application of the law, is

[7] *See, Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 57 Fed. Reg. 59338 at 61,979 n. 11 (December 15, 1992).

not supported by substantial, competent evidence when viewed in the light of the record as a whole, is not reasonable and is otherwise arbitrary, illegal and capricious.

37. The Commission also failed to exercise its discretion and/or abused its discretion in determining what remedy to order for the clear violation of Kansas law where the SWKIs were harmed by the loss of the "time value of money" and ANGC improperly and illegally benefitted from the "time value" of the SWKIs money. Prefiled Testimony of Dan Clawson at 4-8; Prefiled Testimony of Kirk Heger at 8-14.

38. "Abuse of discretion" has been held to be covered by K.S.A. 77-621(c)(8)—acting in an "otherwise unreasonable, arbitrary or capricious" manner. "[T]he arbitrary and capricious test relates to whether that particular action should have been taken or is justified, such as [1] the reasonableness of the [agency's] exercise of discretion in reaching the determination, or [2] whether the agency's action was without foundation in fact." *Kan. Dep't of Revenue v. Powell*, 290 Kan. 564, 568-569 (2010)(citing *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 365 (1989).

39. An agency's action is "arbitrary and capricious" if it is unreasonable or without foundation in fact or is not supported by substantial evidence. *Davenport Pasture, L.P. v. Board of Morris County Comm'rs*, 31 Kan.App.2d 217, 223, 62 P.3d 699 (2003).

40. "'Arbitrary' also has been said to mean that an action has been taken without adequate determining principles, not done or acting according to reason or judgment; 'oppressive' as harsh, rigorous, or severe; and 'capricious' as changing, apparently without regard to any laws." *Dillon Stores v. Board of Sedgwick County Comm'rs*, 259 Kan. 295, Syl. ¶ 3, 912 P.2d 170 (1996).

41. The Commission's decisions are not based upon any applicable facts or any evidence; rather, the Commission has made every conceivable effort to deprive the SWKIs of any

remedy without justification. The Commission should reconsider its *Order Denying Complaint* and apply the Filed Rate Doctrine and award the time value of money remedy to the SWKIs in the amounts proved by the SWKIs from the time of first payment until March 31, 2023 in the amount of $6,980,642.83 for SWKI-SWC and $6,580,562.51 for SWKI-SE—with additional interest extending on from March 31, 2023 until the effective date of final ruling.

B. The Commission Should Reconsider the *Order Denying Complaint* and Find that ANGC Failed to Carry Its Burden of Proof to Show that the Unfiled/Unapproved Rates Were "Reasonable."

42. At the outset of any evidentiary proceeding before the Commission to determine whether the never filed and never approved rates were "reasonable," the Commission must make an initial determination of which party bears the burden of proof. That is particularly important in this proceeding since the Anadarko rates have no presumption of "reasonableness" because they were never filed and never approved by the Commission. *Cent. Kansas Power Co. v. State Corporation Commission*, 181 Kan. 817, 827, 316 P.2d 277, 285 (1957).

43. Had ANGC filed its contracts with the Commission, ANGC would have had the burden to prove the contracts with SWKIs were not "unreasonable, unfair, unjust, unjustly discriminatory, and unduly preferential." K.S.A. 66-1,205(a). There was no reason for the Commission to take that burden away from ANGC at this late date and reward ANGC for failing to file its rates for approval. The Commission should have ruled that ANGC had the burden of proof to convince the Commission that its unfiled and unapproved rates were "reasonable" and that ANGC failed to meet that evidentiary burden and based upon that alone, the Commission should have found the unfiled and unapproved rates to not be "reasonable." ANGC has not, and has admitted through its witnesses that it cannot, justify the rates it charged the SWKIs as

"reasonable" and the Commission's continued persistence in rewarding a regulated public utility for flouting Kansas law is disgraceful.

44. The failure of the Commission to assign the burden of proof on "reasonableness" is an erroneous interpretation or application of the law and/or is otherwise unreasonable, arbitrary or capricious.

C. The Commission Should Reconsider its Order Denying Complaint Finding that the 1998 GSA Rate was "Reasonable" and Order a Refund of the 40-Cent Differential Charge With Interest

45. AESC entered into a GSA with SWKI-SE dated July 1, 1998. However, ANGC admitted in this Complaint proceeding that AESC never supplied gas pursuant to the 1998 GSA because, according to ANGC, the AESC-SWKI-SE GSA was assigned to ANGC no later than 2000 and ANGC provided all natural gas service to SWKI-SE. *ANGC Brief on Contract Filing*, at fn.17.

46. On remand from the decision of the District Court and *Court of Appeals II*, the Commission failed to perform any type of analysis of the "reasonableness" of the 1998 GSA.

47. Rates, fares, tolls and charges imposed by a public utility upon its customers are required to be just and reasonable, not unjustly or unreasonably discriminatory and not unduly preferential.[8] The Commission, in setting rates for a natural gas utility, must fix rates within a "zone of reasonableness" after balancing interests of the utility's investors, ratepayers and the public. [9] The Kansas Supreme Court mandates the Commission consider and balance the interests of the utility's investors vs. the ratepayers, the present ratepayers vs. the future ratepayers, and the public interest.[10]

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[8] *Grindsted Products, Inc. v. Kansas Corp. Com'n,* 262 Kan. 294, 309 (1997); K.S.A. 66-10ld.

[9] *Kansas Gas and Elec. Co. v. State Corp. Com'n,* 239 Kan. 483, 488 (1986).

[10] *Kansas Gas and Elec. Co. v. State Corp. Com'n,* 239 Kan. 483, 488 (1986).

48. The Commission erred in ignoring the testimony of former KCC Utilities Division Director David Dittemore, who testified that:

> The Commission should examine ANGC's costs to provide service under a traditional rate of return approach at the time the contracts were executed. If the comprehensive data necessary to conduct such an analysis is not available, the Anadarko rates charged to SWKIs should be deemed unreasonable.

Dittemore Prefiled Testimony at p. 13.

49. No such analysis was undertaken by either ANGC or the Commission, in clear contravention of Kansas law. ANGC attempted to justify the 40-cent differential between the 10-cent delivery charge that ANGC charged its affiliate, AESC, and the 50-cent delivery charge that ANGC charged the SWKIs by claiming that the differential was justified by "business differences and operational parameters of each of the [HRDS] customers. Those parameters addressed the load profiles, market risks, commodity price exposures, and credit risks attendant to each customer." *Anadarko Post Hearing Brief* at 12.

50. ANGC claimed that the *Pre-Filed Testimony of Charles Johnson* proved this claim. *Id*. However, as the Commission will recall, Johnson's testimony was completely discredited when Johnson (and Anadarko witness Gorman) admitted that they had no information regarding how Anadarko rates were set—and that no Anadarko files were located relating to how ANGC rates were set. Johnson and Gorman admitted that they could only speculate as to how ANGC might have set its rates. *Transcript* at 219-221; 267-269. Mere speculation is not the standard to determine just and reasonable rates that are not unjustly discriminatory or unduly preferential. In addition, unapproved rates, like those charged by ANGC, have no presumption of reasonableness. *Cent. Kansas Power Co. v. State Corp.Comm'n*, 181 Kan. 817, 827, 316 P.2d 277, 285 (1957).

51. On the other hand, SWKIs adduced competent evidence that during the same periods that ANGC contracted to provide gas to SKWIs at an Index Rate plus 50 cents, ANGC

had contracted with its affiliate, AESC, to provide the exact same type of gas, off the exact same HRDS pipeline system at the Index Rate plus 10 cents. *SWKI Exhibit 9*. There was no competent evidence tending to show that ANGC incurred greater costs to provide gas to SWKIs than the ANGC costs to provide gas to AESC.

52. Similarly, SWKIs adduced competent evidence that during the same time periods, ANGC provided the exact same type of natural gas, off the exact same HRDS pipeline system at the same Index Rate plus 20 cents to Black Hills Energy, National Beef Company, LLC and Texas-Kansas-Oklahoma Gas, LLC. *Id*. There was no competent evidence tending to show that ANGC incurred greater costs to provide natural gas to SWKIs than the ANGC costs to provide natural gas to these third parties.

53. To further debunk the ANGC claim that differential pricing was appropriate between customers on the HRDS, the SWKIs adduced evidence that, after charging SWKIs a discriminatory rate—and charging affiliate AESC a preferential rate from 2002-2013—ANGC notified customers on the HRDS in 2013 that it would be replacing existing contracts with a "uniform" delivery charge. *Exhibit DNDR-1*. This fact disproved any claim that there was a "reasonable" basis for the differential rates between SWKIs and AESC from 2002 to 2013.

54. Finally, even the Commission's Chief Engineer, Leo Haynos, testified that he could not justify the discrimination in delivery charges to customers served on the same HRDS pipeline. Transcript at 281-282.

55. Instead, the Commission disregarded all this competent evidence and fixed upon an unrelated July 1, 1998 GSA between AESC and Anadarko Petroleum which had 50-cent delivery charge. The Commission, without citation to any legal authority, held that the SWKIs rate is "just and reasonable," "since its rates are the same as an affiliate contract [between AESC

and Anadarko Petroleum] entered into the same day." (emphasis added). *Order Denying Complaint* at 8. This is not the law in Kansas and the Commission is not free to make up the laws as it sees fit. The Commission failed to comprehend that there was no competent evidence adduced by ANGC that the AESC/Anadarko Petroleum contract was approved by the Commission as "reasonable" and adduced no competent evidence that there were sufficient similarities to the gas being delivered by ANGC from the HRDS, or similarities to the cost of delivery under the contracts.

56. This lack of analysis cannot stand. Kansas law requires more than a mere pronouncement that a challenged rate is reasonable. In *Southwestern Bell Tel. Co. v. State Corporation Commission,* 192 Kan. 39, 46–47, 386 P.2d 515 (1963), the Supreme Court stated:

> In a seriously contested rate investigation there must be a determination of (1) a rate base, (2) a fair rate of return, and (3) reasonable operating expense. In determining these factors, there are numerous elements pertaining to each which must be fairly and reasonably determined if a fair return is to result.

57. There are so many unproved issues with the AESC/Anadarko Petroleum GSA that the Commission should not rely on anything regarding the AESC/Anadarko Petroleum GSA. First, the Commission Staff previously determined that AESC had never been granted a Certificate of Public Convenience and Necessity ("CCN") by the Commission to operate as a public utility in Kansas. The Commission Staff determined that the failure of AESC to obtain a CCN was a violation of K.S.A. 66-131. Finally, the Commission and AESC entered into a settlement agreement which assessed a civil penalty against AESC for operating as a public utility in Kansas without a CCN. *Commission Order of January 15, 2015 Granting Motion to Dismiss and Approving Settlement Agreement*.

58. Seen in this light, the AESC/Anadarko Petroleum GSA is a nullity as it was executed by an entity without the legal power to operate as a public utility in Kansas (for which it

paid civil penalties assessed by this very Commission) and the GSA was never approved by the Commission—and could not have been approved by the Commission because AESC did not have a required CCN. It beggars belief that the Commission relied upon an AESC contract to deprive the SWKIs of an appropriate remedy, despite having found that AESC was not a legal public utility authorized to do business within the state.

59. The Commission also failed to explain why it was appropriate to rely on an unrelated "affiliate contract" with a 50-cent delivery charge instead of the ANGC/AESC 10-cent delivery charge—when the ANGC/AESC GSA is for the exact same natural gas delivered from the same HRDS pipeline in the same area. The Commission should have found that a delivery charge five times as much as ANGC charged its affiliate was not "just and reasonable" under any type of analysis.

60. The Commission also failed to note that there is no foundation for the Commission to even conclude that the AESC/Anadarko Petroleum GSA was for similar service. No evidence was even adduced as to whether the AESC/Anadarko Petroleum GSA was filed/approved by the Commission. As such, the Commission had no basis for placing any reliance on the AESC/Anadarko Petroleum "affiliate contract."

61. The Commission also mischaracterizes the testimony of David Dittemore on "affiliate contracts." The Commission states:

> Dittemore testified, "absent a demonstration of the reasonableness of the rate, that the default rate of what [ANGC is] charging an affiliate would be appropriate." Thus, under the criteria suggested by Dittemore, the 1998 GSA is just and reasonable, since its rates are the same as an affiliate contract entered into the same day.

Order Denying Complaint at 8.

62. However, a review of the transcript of Dittemore's testimony makes clear that the "affiliate contract" referenced by Dittemore is the 10 cent ANGC/AESC contract—not the 50-cent AESC/Anadarko Petroleum contract. *Transcript* at 105-107 (Commissioner Keen asking about the ANGC/AESC "affiliate contract" and Dittemore responding "I would probably change that slightly to say that there's not been justification for the 50-cent rate that's been charged. And we believe that absent a demonstration of the reasonableness of the rate, that the default rate of what they're charging an affiliate would be appropriate."

63. Clearly, Dittemore was not being asked about the AESC/Anadarko Petroleum "affiliate contract" and Dittemore also noted that "And I think the Commission has a long history of looking at affiliate transactions very, very closely." *Transcript* at 107-108.

64. Seen in its proper context, Dittemore was testifying that "absent a demonstration of the reasonableness of the rate, that the default rate of [the lower rate ANGC is] charging an affiliate would be appropriate." *Id*. (emphasis added).

65. The Commission also erred in failing to consider the other ANGC rates on the HRDS which were lower than the SWKIs rates—those being Black Hills Energy, National Beef Company, LLC and Texas-Kansas-Oklahoma Gas, LLC.

66. In essence, the Commission has determined that one unfiled and unapproved rate is "reasonable" based on another unfiled and unapproved rate that has never been determined to be "reasonable." If there was a hornbook example of arbitrary and capricious decision-making, this would be it. There is an appalling lack of evidence to support this determination, let alone substantial, competent evidence.

67. The finding that the 1998 GSA rate was "reasonable" did not correctly apply Kansas rate-making law, erroneously interpreted or applied the law, is not supported by

substantial, competent evidence when viewed in light of the record as a whole, is not reasonable and is otherwise arbitrary and capricious.

68. The Commission erred in concluding that the ANGC/SWKI-SE rate was "reasonable" and, on reconsideration, the Commission should determine that the ANGC/SWKI-SE rate was unreasonable and order a refund of 40-cents per unit—order a refund of $451,155.19 to SWKI-SE--with interest and the time value of money as requested by SWKIs at the hearing.

D. The Commission Should Reconsider its *Order Denying Complaint* Finding that the 2002 GSA Rate was "Reasonable" and Order a Refund of the 40-Cent Differential Charge With Interest.

69. The Commission similarly erred in finding that the 2002 GSA rate between ANGC and SWKI-SWC was "reasonable." *Order Denying Complaint* at 13.

70. Unlike the Commission "analysis" on the 1998 GSA between ANGC/SWKI-SE—here the Commission claims to have used a "zone of reasonableness" analysis. Despite noting that the "zone of reasonableness" analysis includes "calculating a fair rate of return"—the record of this proceeding and the *Order Denying Complaint* are devoid of any evidence or analysis of a "fair rate of return" analysis of the ANGC contracts—whether with SWKIs, ANGC affiliates, or third parties on the HRDS.

71. The Commission claims that it "examines comparable rates charged to other customers to evaluate the reasonableness of the contractual rates." *Order Denying Complaint* at 10. The "other customers" are those contained in Redacted Exhibit A-43. The Commission claims that Exhibit A-43 references four contracts--apparently executed in 2001--that had a delivery charge of 75 cents. However, Exhibit A-43 is completely devoid of any information that could allow the Commission to determine whether the service being provided to those unnamed customers is for similar service and at similar costs as provided by ANGC to the SWKIs.

72. However, none of the Exhibit A-43 customers were receiving the same natural gas from the same HRDS pipeline that served the SWKIs, AESC, Black Hills Energy, National Beef Company, LLC and Texas-Kansas-Oklahoma Gas, LLC—because all customers receiving natural gas from ANGC from the HRDS are listed in SWKI Exhibit 9.

73. The Commission also failed to make any determination of whether the contracts listed in Exhibit A-43 had been approved by the Commission, and whether there were circumstances which would justify the Commission finding that the 75 cent rates—or any other rate listed in Exhibit A-43--were "just and reasonable." Instead, the Commission simply concluded that ANY rate between 10 cents and 75 cents per unit was "reasonable" without regard to any rate making analysis. The zone of reasonableness analysis must rest upon a firmer foundation than a brief scan of unrelated contract prices, based upon unknown costs and unknown service type. Using the Commission's analysis framework as a guide, if a consumer purchases a Seiko digital watch for $45 and a Rolex watch for $10,000, the "zone of reasonableness" for the purchase price of any other watch in the world is between those two dollar amounts. The absurdity of this reasoning is visible on its face. As such, the Commission completely abandoned its duty to make a "reasonableness" analysis of the ANGC/SWKI-SWC rate.

74. Furthermore, ANGC has admitted since the outset of this proceeding that none of its rates were "cost based." *ANGC Motion to Dismiss and Answer* at para. 50.

75. In essence, the Commission has determined that one unfiled and unapproved rate is "reasonable" based on four other unfiled and unapproved rates that have never been determined to be "reasonable."

76. The finding that the 2002 GSA rate was "reasonable" did not correctly apply Kansas ratemaking law and erroneously interpreted or applied the law, is not supported by

substantial, competent evidence when viewed in light of the record as a whole, is not reasonable and is otherwise arbitrary and capricious.

77. The Commission should reconsider its Order Denying Complaint and order a refund of 40 cents per unit—which comes to $416,782.25 for SWKI-SWC—and order interest and the time value of money as requested by SWKIs.

WHEREFORE, the SWKIs respectfully request that the Commission reconsider its *Order Denying Complaint*, apply the Filed Rate Doctrine and order all refunds, interest and time value of money requested by the SWKIs, and for any such further relief that the Commission may deem just and appropriate.

Respectfully submitted,

POLSINELLI PC

By: /s/ Anne E. Callenbach

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ATTORNEYS FOR SWKI-SEWARD WEST CENTRAL, INC. AND SWKI-STEVENS SOUTHEAST, INC.

VERIFICATION

I, Anne E. Callenbach, do solemnly, sincerely and truly declare and affirm that I am counsel to SWKI-Seward West Central, Inc. and SWKI-Stevens Southeast In., I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief, and this I do under the pains and penalties of perjury.

By: /s/ Anne E. Callenbach
Anne E. Callenbach

November 22, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been e-mailed this November 22, 2024, to:

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KANSAS CORPORATION COMMISSION

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