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

OBJECTION OF SWKI-SEWARD WEST CENTRAL, INC. AND SWKI-STEVENS SOUTHEAST, INC. TO JOINT MOTION FOR APPROVAL OF STIPULATED SETTLEMENT AGREEMENT

SWKI-Seward West Central, Inc. ("SWKI-SWC"), and SWKI-Stevens Southeast, Inc. ("SWKI-SE"), (collectively, the "NPUs"), pursuant to K.A.R. 82-1-230a, hereby file their Objection with the State Corporation Commission of the State of Kansas ("KCC" or "Commission") to the Joint Motion for Approval of Stipulated Settlement Agreement ("Joint Motion") and corresponding Stipulated Settlement Agreement ("Settlement Agreement") filed by the Commission Staff, Anadarko Energy Services Company ("AESC"), and Anadarko Natural Gas Company ("ANGC") on January 15, 2014. In support of their Objection, the NPUs allege and state as follows:

I. Background

1. On August 27, 2013, the NPUs filed a Complaint against ANGC, alleging that ANGC's failure to file its customer-specific contract rate schedules with the NPUs constituted violations of Kansas law, including K.S.A. 66-109, K.S.A. 66-1,203 and K.S.A. 66-117. These provisions of Kansas law require certain contracts and rate schedules to be filed with and approved by the Commission. The NPUs have asserted that ANGC has not filed the NPUs' Agreements with the Commission, has not received Commission approval of the Agreements, and that the failure to do so renders the charges contained in the Agreements unlawful and

subject to refund, with interest. ANGC subsequently filed pleadings in response to the Complaint.

2. On November 26, 2013, Staff filed a Report and Recommendation ("Report and Recommendation") in this matter, recommending that: (i) civil penalties in the amount of $41,000 be assessed against ANGC for the failure to file the June 1, 2002 Gas Sales Agreement between ANGC and SWKI-Seward West Central, Inc.; and (ii) civil penalties be assessed in the amount of $55,000 against AESC for the failure to obtain a Certificate of Convenience to operate within the State as a public utility for the period 1998 to 2013. Staff further stated in its Report and Recommendation that the "contractual dispute" between ANGC and the NPUs is "legal in nature and beyond the scope of this Report", recommending that the Commission request legal briefs from the parties on that issue. Notably, Staff's Report and Recommendation found that ANGC did not file the contracts between ANGC and the NPUs as required by Commission Order in Docket No. 00-ANGG-218-COC (the "218 Order").

3. On January 6, 2014, the NPUs, Commission Staff, ANGC and Advisory Counsel participated in a prehearing conference by telephone to discuss the status of this matter and agree on the appropriate next steps towards bringing the Complaint to a reasonable resolution. During the January 6, 2014 conference, all parties specifically agreed that **prior to continuing on in the normal procedural course, that is, the filing of formal responses to Staff's Report and Recommendation, the issuance of discovery, and the establishment of a full procedural schedule, certain preliminary legal issues should be briefed by the parties.** All parties agreed that they would confer and attempt to agree upon the scope of legal issues to be briefed, and file the list of issues to be briefed on January 20, 2014.[1] Importantly, during the January 6

[1] The parties later realized that state offices were closed on January 20, 2014 in observance of Martin Luther King, Jr.'s birthday and agreed that filing of the list of legal issues would be made on January 21, 2014.

conference, the parties also discussed the timing of settlement negotiations, and agreed that such negotiations would be held after the filing of both initial and reply briefs on the threshold issues.

4. On the afternoon of January 15, 2014, counsel for the NPUs, Staff, and ANGC again convened by teleconference to discuss the scope of legal issues to be briefed, verbally outlined what they believed the issues were, and agreed to circulate their respective lists of legal issues on January 16, 2014 for discussion and possible agreement.

5. Immediately following the January 15, 2014 conference, Staff counsel notified the undersigned by telephone that Staff and ANGC had entered into a Settlement Agreement resolving certain issues in this matter between Staff and ANGC. Minutes later, counsel for the NPUs received electronic service of the Joint Motion and Settlement Agreement.

II. Staff and ANGC Filed the Joint Motion for Approval of The Settlement Agreement Without Notice to the NPUs and Abrogated the Parties' January 6, 2014 Agreement Regarding the Procedural Process in this Matter

6. To say that the NPUs were blindsided by the filing of the Joint Motion and Settlement Agreement would be a serious understatement. Despite the participation of all parties in the January 6, 2014 teleconference, **during which no mention of an impending settlement was made**, and the January 15, 2014, teleconference, **during which no mention of an impending settlement was made**, the NPUs were not informed of the existence of the Settlement Agreement, or even of the fact that settlement negotiations were being pursued contrary to the schedule that had been agreed to by the parties on January 6, until minutes before the Settlement Agreement was filed. The NPUs are aware of no other complaint brought before the Commission where the complainant was deliberately excluded from settlement negotiations while Staff and the alleged wrong-doer fashioned and filed a settlement agreement without the complainant's knowledge or participation. In addition to being a shocking example of bad faith,

the actions of Staff and ANGC amount to a breach of trust by ANGC and Commission Staff that the procedures agreed upon in the January 6, 2014 teleconference would be followed.

7. The first paragraph of the Joint Motion alleges that "notice" of the motion was provided[2] to the NPUs and all customers served by ANGC on the Hugoton Residue Delivery System ("HRDS"). If, by "notice," Staff is referring to the telephone call to counsel for the NPUs minutes before the Joint Motion was filed, then the NPUs did receive notice. However, the NPUs assert that the circumstances under which the NPUs received notice is not unlike the notice one receives upon hearing a locomotive's blaring whistle immediately prior to impact.

8. As noted, during the January 6, 2014 prehearing telephone conference, all parties affirmatively agreed that it would be necessary for the NPUs and ANGC to file legal briefs outlining and arguing certain threshold legal issues prior to holding settlement negotiations, issuing discovery, filing testimony, and scheduling an evidentiary hearing and oral argument on the merits of Staff's Report and Recommendation and the underlying complaint. The parties agreed that such briefs would be filed on February 19, 2014, with reply briefs filed on March 6, 2014. The NPUs took Staff and ANGC at their word that these procedures would be followed. Instead, Staff and ANGC nullified the agreement regarding procedures for this docket by conducting closed settlement negotiations and filing a Settlement Agreement that contains numerous arguments, assertions, and responses that are contrary to Staff's Report and Recommendation.[3]

III. Jurisdiction and Standard of Review for Settlement Agreements

[2] Staff refers to K.A.R. 82-1-216(b) in suggesting that notice was provided. The NPUs note that this regulation addresses service of pleadings. The NPUs further note that no other HRDS customers appear on the Certificate of Service that accompanied the Joint Motion.

[3] See *Joint Motion for Approval of Stipulated Settlement Agreement* at ¶¶ 8, 10; Stipulated Settlement Agreement at footnote 1 and ¶¶ 6b., 6c., 6d.

9. The Settlement Agreement presented in this case is a non-unanimous settlement pursuant to K.A.R. 82-1-230a(a)(3). Kansas Administrative Regulations governing complaints brought before the Commission permit the parties to the proceeding (which presumably includes the complainant) to present a voluntary settlement of the subject matter of the complaint if both of the following conditions are met: (i) the matter in controversy affects only the parties involved; and (ii) the issue has no direct or substantial impact upon the general public.[4] The NPUs will demonstrate, *infra*, that Staff and ANGC have not and cannot meet both of these conditions. Pursuant to K.A.R. 82-1-230a(b), the Commission has the authority to approve, reject or modify a settlement agreement. In approving, rejecting, or modifying a settlement, the Commission must make an independent finding that its decision regarding the settlement is supported by substantial competent evidence in the record as a whole.[5]

10. The NPUs recognize that Kansas law strongly encourages settlements.[6] In general, Kansas favors compromising and settling disputes when the agreement is entered into intelligently, and in good faith.[7] The Commission has the power to accept a non-unanimous settlement agreement if it finds the proposed settlement to be reasonable.[8] The Commission may accept a non-unanimous settlement agreement provided an independent finding is made, supported by substantial evidence in the record as a whole, that the settlement will establish just and reasonable rates.[9] Although the non-unanimous Settlement Agreement at issue in the present docket does not impact rates, the Commission still must find that the terms of the proposed

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[4] K.A.R. 82-1-220(f).
[5] Docket No. 08-ATMG-280-RTS, *Order Approving Contested Settlement Agreement* (May 12, 2008) (hereafter "Atmos Settlement Order"), ¶ 11; *Citizens' Utility Ratepayer Board v. Kansas Corporation Comm'n*, 28 Kan.App.2d 313, 316 (2000.)
[6] *Bright v. LSI Corp.*, 254 Kan. 853, 858, 869 P.2d 686 (1994).
[7] *Id.* and Atmos Settlement Order at ¶ 11.
[8] *Farmland Industries, Inc. v. Kansas Corporation Comm'n.*, 24 Kan.App.2d 172, 186-88, 943 P.2d 470 (1997).
[9] *Citizens' Utility Ratepayer Bd. v. State Corp. Com'n. of State of Kansas*, 28 Kan.App.2d 313, 316-317, 16 P.3d 319, 323-324 (Kan. App. 2000); *Farmland Industries*, 24 Kan.App.2d at 186-87, 943 P2d 470.

settlement are supported by substantial competent evidence as contained in the record as a whole.[10]

11. In accepting a non-unanimous settlement, the Commission's order must express the basic facts on which the Commission relied to arrive at its decision. K.A.R. 82-1-232(a)(3) requires that each order of the Commission contain "[a] concise and specific statement of the relevant law and basic facts which persuade the Commission in arriving at its decision." The purpose of the Commission's rules addressing findings of fact is to facilitate judicial review and to avoid unwarranted judicial intrusion into administrative functions. Therefore, the Commission must express the basic facts with sufficient specificity to convey the facts which persuaded the Commission to arrive at its decision.[11] Although the findings do not need to be rendered in minute detail, the findings must be specific enough to allow judicial review of the reasonableness of the conclusion. The reasonableness of the Commission's order must be supported by findings of fact which are in turn supported by evidence in the record.[12] The Commission must separately state findings of fact, conclusions of law, and policy reasons for its decision if it is an exercise of its discretion.[13] Any findings of fact must be based exclusively upon the evidence on record in the adjudicative proceeding and on matters officially noticed at the proceeding.[14]

12. The Commission has established a five-part test to evaluate settlement agreements and ensure that the settlement is supported by substantial competent evidence in the record as a

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[10] *See, e.g,* consolidated Docket Nos. 13-ATMG-741-COM and 14-4CEG-003-COC, Order Approving Unanimous Settlement Agreement and Transportation Agreement, January 9, 2014.
[11] *Ash Grove Cement Co. v. Kansas Corporation Commission*, 8 Kan.App.2d 128, 132, 650 P.2d 747 (1982).
[12] *Zinke & Trumbo v. Kansas Corporation Commission*, 242 Kan. 470, 474, 749 P.2d 21 (1988).
[13] K.S.A. 77-526(c).
[14] K.S.A. 77-526(d).

whole.[15] This five-part test was initially established in the Atmos Settlement Order and has been repeatedly utilized in both rate cases and in other regulatory proceedings not specifically involving ratemaking. The five factors are:

(1) Has each party had an opportunity to be heard on its reasons for opposing the settlement?

(2) Is the agreement supported by substantial evidence in the record as a whole?

(3) Does the agreement conform to applicable law?

(4) Will the agreement result in just and reasonable rates?

(5) Are the results of the agreement in the public interest, including the interests of customers represented by any party not consenting to the agreement?

IV. The Settlement Agreement Does Not Conform to Commission Requirements Pertaining to Settlement Agreements and Should be Rejected as Premature

13. Parties to settlement agreements typically attempt to establish, either through a joint motion or proposed order, that a proposed stipulation conforms to the five-part test outlined above.[16] The Settlement Agreement and Proposed Order filed by Staff and the Anadarko companies are entirely devoid of any attempt to comply with the five-part test utilized to evaluate settlement agreements. The bare assertion that "[t]his Stipulated Settlement Agreement is in the public interest and will mitigate the costs and uncertainty inherent in litigation" is wholly inadequate. The NPUs will address each of the above five criteria below.

A. Has each party had an opportunity to be heard on its reasons for opposing the settlement?

14. No. As indicated above, the settlement discussions between Staff and ANGC were held without the NPUs' knowledge and contrary to the procedural schedule that had been agreed upon between the parties on the January 6th prehearing conference. At this juncture of the

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[15] *Citizens' Utility Ratepayer Bd. v. State Corp. Com'n. of State of Kansas*, 28 Kan.App.2d 313, 316-317, 16 P.3d 319, 323-324 (Kan. App. 2000); Atmos Settlement Order at ¶ ¶ 9-10.

[16] *See, e.g.*, Docket No. 13-SEPE-433-TAR; Docket No. 13-WSEE-629-RTS.

proceeding, the NPUs submit that they have not had an opportunity to be heard regarding their reasons for opposing the settlement, and are filing this Objection in part to ensure that the Commission has a full and complete record concerning the Settlement Agreement. Further, typically the Commission will either receive written testimony concerning the five factors for evaluating a settlement or hear oral argument concerning a proposed settlement prior to rendering a formal order. The NPUs anticipate that such will be the case here. A failure to allow interested parties to present their evidence would create an incomplete record of fact, impair the ability of appellate courts to review the reasonableness of the order, and potentially cause the decision of the Commission to appear unsupported by fact and otherwise arbitrary.[17]

B. Is the agreement supported by substantial evidence in the record as a whole?

15. No. The Commission's current record in this matter consists of the NPUs' Complaint, various responsive pleadings filed by ANGC and the NPUs, and Staff's Report and Recommendation. At this point in time, the parties have yet to agree upon the legal issues that are required to be briefed and resolved prior to filing formal responses to Staff's Report and Recommendation, conducting discovery, and other matters. The NPUs submit that, in light of the early stage of this matter, the record is incomplete. Further, as discussed below, the Settlement Agreement directly contradicts Staff's filed Report and Recommendation, thereby complicating any finding that the Settlement Agreement is supported by substantial evidence in the record as a whole. Although the Commission *may* accept a non-unanimous settlement agreement so long as it makes an independent finding, supported by substantial competent evidence in the record, it is nevertheless required to express the basic facts upon which it relied

[17] "Findings must be specific enough to allow judicial review of the reasonableness of the order. To guard against arbitrary action, conclusions of law must be supported by findings of fact which are in turn supported by evidence in the record." *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n of State of Kansas*, 28 Kan. App. 2d 313, 316, 16 P.3d 319, 323-24 (2000); *Zinke & Trumbo,* 242 Kan. at 475, 749 P.2d 21.

with sufficient specificity to convey to the parties, and to the courts, an adequate statement of facts which persuaded the Commission to arrive at its decision.[18]

16. In *Ash Grove Cement Co v. Kansas Corporation Commission,* the Court found that the Commission had substantial latitude to weigh the evidence presented to it because no impermissible requirements were placed upon the intervener. The Court also noted that while the Commission has great latitude with regard to weighing evidence, the Supreme Court has also reasoned that a failure to support factual investigations precludes meaningful appellate investigation.[19] In the instant case, Staff and ANGC are creating an unreasonable and impermissible requirement by attempting to force settlement of an issue without allowing the aggrieved party to develop and present legal arguments to the Commission. It is the NPUs duty to indicate to the Commission that there are insufficiencies in the evidence which may impair future review at this stage in the process of review.[20]

C. Does the agreement conform to applicable law?

17. No. The Commission may only accept a non-unanimous settlement agreement if it finds the proposed settlement to be reasonable, and makes an independent finding that the stipulation is supported by substantial evidence in the record as a whole. As discussed above, the surreptitious means by which this Settlement Agreement was negotiated and filed should render it unreasonable on its face. Over its century-long history, the Commission has developed standard practices for parties to conduct business in an orderly and productive manner. Those practices include the process by which parties propose and agree upon a procedural schedule that accommodates the various parties' schedules and ensures that everyone is granted the ability to

[18] *Ash Grove Cement Co. v. Kansas Corporation Commission,* 8 Kan.App.2d 128, 132, 650 P.2d 747, 751 (1982).
[19] *Tucker v. Hugoton*, 253 Kan. 373, 378
[20] *Id.*

be heard. In this case, the parties agreed that it was necessary to address certain preliminary issues before addressing the merits of Staff's Report and Recommendation.

18. In direct contravention of that agreement, Staff and ANGC pursued closed settlement negotiations without the participation or knowledge of the NPUs. To add insult to injury, this Settlement Agreement was then brought to the NPUs attention less than an hour before the NPUs received electronic notice that the Joint Motion had been filed. The sequence of events clearly indicates that Staff and ANGC had no interest in hearing or addressing any of the NPUs' thoughts or concerns about the proposed settlement, despite the fact that the NPUs are the complainant in this case and would necessarily be significantly impacted by the filing.

19. The nature of the notice ANGC and Staff provided to the NPUs may attempt to comply with the letter of the law, but ignores its purpose to such an extent as to make it at best a meaningless gesture, and in truth, a functional violation of the law. In *Mullane v. Central Hanover Bank & Trust Co.,* the U.S. Supreme Court noted that "while the fundamental requisite of due process of law is the opportunity to be heard, this right has little reality or worth unless one is informed of the pending matter and can decide whether to participate. . . Notice should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case."[21] The rationale behind settlement agreements is presumably so that aggrieved parties can reach an agreement without consuming the full resources of a court or commission. For Staff and ANGC to negotiate a settlement without properly notifying the NPUs transforms what should be an opportunity for meaningful negotiation into an escalation of an already contentious matter.

[21] 339 U.S. 306, 314, 70 S.Ct. 652, 657-58, 94 L.Ed. 865 (1950).

D. Will the agreement result in just and reasonable rates?

20. No, but the NPUs submit that this factor is inapplicable to the present case.

E. Are the results of the agreement in the public interest, including the interests of customers represented by any party not consenting to the agreement?

21. No. It is important to note that the proposed Settlement Agreement contains numerous broad blanket agreements by Staff not to pursue any claims against any Anadarko company for failure to file agreements between 1998 and 2013. Specifically, "Staff agrees not to recommend or advocate any further penalty against ANGC and AESC for violations of public utilities statutes regarding the sale and/or transportation of natural gas in question, for the period July 1, 1998 through November 1, 2013, in any KCC Docket, state or federal court, or arbitration or mediation proceeding."[22] In one brief sentence, Staff agrees to forgo all of its statutorily-delegated duty to investigate any "violation of public utilities statutes regarding the sale and/or transportation of natural gas in question" for a 15-year period. This is despite the fact that it is impossible to know whether there are any parties who might have been validly aggrieved by ANGC or AESC during that period, and impossible to know what information may be brought to light if the parties are given an opportunity to conduct discovery and file testimony as proposed during the January 6th scheduling conference. This blanket agreement not to investigate and if necessary pursue any claims validly brought to Staff's and the Commission's attention simply cannot be deemed to be in the public interest.

22. Additionally, granting the Joint Motion at this time will create significant precedential problems that will extend beyond the scope of this docket. Customers of public utilities are granted the procedural right to initiate complaint proceedings before the Commission if they believe they have been treated in a manner that is unreasonable, unfair, unjust, unjustly

[22] Stipulated Settlement Agreement at ¶ 6.b.

discriminatory, or unduly preferential, or if a service has been performed or will be performed that is illegal, unreasonably inadequate, inefficient, unduly insufficient, or unattainable.[23] Assuming that the Commission ascertains that there is a *prima facie* case for a complaint, this process allows the customers to have their issues adjudicated by the Commission.

23. In this case, Staff issued its Report and Recommendation determining that there was a *prima facie* case for Commission action. Staff and ANGC then participated in scheduling conferences in which they 1) failed to disclose the fact that they were pursuing closed settlement negotiations, despite the scheduling of such negotiations being an express topic of discussion during the January 6 teleconference; and 2) agreed that it was necessary to postpone discussion of the merits of Staff's Report and Recommendation until certain preliminary issues were addressed. As a result of Staff's and ANGC's actions, the NPUs have acted under the false premise they would have an opportunity to establish the merits of the complaint, which Staff's Report and Recommendation upheld as presenting a *prima facie* case for Commission action. Instead, Staff and ANGC now submit a Joint Motion that directly and expressly contradicts the findings of the Report and Recommendation, with no explanation as to why such a reversal is justified or lawful.

24. If approved by the Commission, the Settlement Agreement will set a dangerous precedent. Staff will be able to issue a Report and Recommendation affirming that there is a valid legal basis for a complaint. Then, before there is any opportunity to develop the substantive facts that gave rise to that complaint, Staff can enter into a non-unanimous settlement agreement with the alleged wrong-doer **that entirely contradicts its findings of its Report and Recommendation,** under terms that it believes are appropriate. In opposing this proposed settlement, the complainant will be forced to argue against Staff on the merits of Staff's own

[23] K.A.R. 82-1-220(a).

Report and Recommendation, and will have had no opportunity to substantiate the factual validity of its claim. This is a wholly inappropriate position in which to place a complainant who may have been legitimately wronged, as it dramatically undercuts their ability to develop their case and be heard in both settlement negotiations and before the Commission.

V. Specific Objections to the Stipulated Settlement Agreement

25. In addition to the objections noted above regarding lack of notice to the NPUs, the nullification of the parties' agreement regarding procedures in this case, and the failure of the Settlement Agreement to conform to Kansas law, the NPUs specifically object to certain statements and agreements in the Settlement Agreement.

Staff's Representation that the Stipulation "Shouldn't Affect the NPUs" is Incorrect

26. When the NPUs were contacted by Staff counsel on January 15, 2014, Staff counsel represented that the Settlement Agreement "shouldn't affect the NPUs" and that the Settlement Agreement "only concerned the issues between Staff and the Anadarko companies." Not so. The Settlement Agreement contains a provision[24] whereby Staff, ANGC and AESC agree that:

> During the period July 1, 1998 through November 1, 2013, ANGC and AESC have either: (a) submitted to the Commission any contracts for the sale of natural gas from the Hugoton Residue Delivery System ("HRDS") or (b) that any such contract(s) that were not submitted for filing to the Commission have been executed by the contracting parties thereto, and performance thereunder has either been (i) in compliance with the terms of the applicable contracts, or (ii) performance under the contracts has taken place without complaint to the Commission, except as filed in the above entitled Docket on July 27, 2013.

27. This provision demonstrates that both Staff and the Anadarko companies fail to understand the nature of the NPUs' complaint. The NPUs' complaint is not a contract dispute, where one party alleges that performance under the agreement was somehow deficient or

[24] Stipulated Settlement Agreement at ¶ 6.b.

incompetent, or the other party alleges that payment under the agreement was inadequate. The NPUs have recognized that both parties performed their obligations pursuant to the agreement-that is not the issue here. Rather, the NPUs assert that because the agreements were not filed with and approved by the Commission as required by Kansas law and the 218 Order, the rates contained in the agreements are void, unlawful, and subject to refund. The fact that Staff and the Anadarko companies continually assert that performance under the Agreements was adequate is wholly irrelevant—performance under an unlawful agreement does not alter the fact that the agreement is unlawful, nor does it transform the agreement into a lawful contract.[25]

28. This principle has been clearly upheld by the Kansas courts, most notably in *Sunflower Pipeline Co. v. State Corporation Commission.* In *Sunflower*, the Court found that "Sunflower failed to file with the commission the new contracts providing for a charge of 65¢ per Mcf,"[26] a rate which exceeded the 25 cents per Mcf rate that the Commission had last approved. Despite the fact that a rate of 25 cents per Mcf was below the utility's cost of gas, and the fact that the customers voluntarily paid the 65 cent rate, the Commission held that the contracts for 65 cents per Mcf were "void as against public policy."[27] Further, the Court held that a full refund of all rates collected above 25 cents per Mcf was not only justified, but found as follows:

> **[P]artial refunds would amount to retroactive ratemaking by the commission.** Sunflower, having previously failed to properly invoke commission jurisdiction to approve new rates, would have had the commission approve of new rates retrospectively by allowing Sunflower to retain some or all of the excess charges. Also, since we conclude the contracts for 65¢ per Mcf were void as against public policy, **any less than a full restitution to the user-contractors would be depriving them of their property** (that portion of the restitution of less than 40¢ per Mcf), **without due process of law**. This is because any restitution

[25] *Sunflower Pipeline Co. v. State Corporation Commission*, 5 Kan.App.2d 715, 624 P.2d 466 (1981) (rev. denied).
[26] *Id.* at 718.
[27] *Id.* at 722.

ordered in an amount less than 40¢ per Mcf would be depriving them of property to the extent that they paid at an illegal rate in excess of 25¢ per Mcf.[28]

29. Following the guidance of Kansas courts, the Commission has also recognized this unfiled rate principle. In 2003, the Commission issued an Order on a Petition for Reconsideration in *In re KanOkla Telephone Ass'n, Inc.*,[29] that dealt with the Commission's determination that a contract that violated a general exchange tariff by using Local Exchange Service to provide interexchange telecommunications was unlawful and void. The Commission cited to *Sunflower* for the proposition that "contracts between a utility and its customers may not establish terms, conditions or rates different from those approved terms, conditions and rates contained in the utility's tariffs."[30] The Commission's opinion also cited the United States Supreme Court case *American Telephone and Telegraph v. Central Office Telephone, Inc.*,[31] where a reseller of long distance telephone service brought an action against a long distance company arising from alleged defects in the company's provisioning and billing for services rendered. The Supreme Court ultimately determined the reseller's state law breach of contract and tort claims were preempted and barred by the federal filed-rate doctrine.[32] The Commission in its *KanOkla* Order stated that "[b]ecause approved tariffs have the force and effect of law, the Commission affirms its previous findings and conclusions that to the extent SWBT's [Southwestern Bell Telephone] SelectData Contract with KanOkla and arrangement is provisioned in such a manner as to violate SWBT's GET § 20.6.1, KanOkla's SelectData Contract and arrangement are *unlawful and void.*" (emphasis added).

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[28] *Id.* at 722.
[29] 2003 WL 21673765 (Kan.S.C.C.).
[30] *Id.* at ¶ 7.
[31] 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed 2nd 222 (1998).
[32] *Id.*

30. If Staff and the Anadarko companies are attempting to assert specific principles of equity, or otherwise argue that performance under the agreements should be taken into consideration when the Commission hears and decides the NPUs' Complaint, the appropriate setting for that argument is in the parties' respective legal briefs which are to be filed on February 19, 2014. Whether the agreements between the NPUs and the Anadarko companies are valid and lawful is a matter of Kansas law that the Commission must decide. Any agreement between Staff and the Anadarko companies asserting that performance under the agreements was adequate is immaterial to the question of regulatory compliance with Kansas state law that the NPUs have raised before the Commission.

31. It is important to note here that parties to an agreement cannot contract or agree to avoid any regulatory oversight demanded by statute through their civil instrument, and that contracts which attempt to do this are illegal and void. This principle was set forth in 1915 by the Kansas Supreme Court in *Ridgway v. Wetterhold* and remains sound law nearly 100 years later.[33] In that case, the Kansas Supreme Court held that where services were performed pursuant to an agreement which required a party performing a service to file documents with a state regulator, namely, the patent office, the **failure to register** destroys the right to recover for services provided pursuant to a right created through the filing with the agency, both under the contract and under the doctrine of *quantum meruit*.

32. In *Ridgway*, as is the case here with ANGC, the failure to file destroys the right to even *offer* the services rendered, making the entire contract illegal. Just as a failure to file a patent creates no rights to contract in consideration of such a patent, a failure to file as a utility creates no right to provide service as a utility. The Court in *Ridgway* held that the contract was

[33] *Ridgway v. Wetterhold*, 96 Kan. 736, 153 P. 490 (1915).

not divisible, but that the **entire contract** was void.[34] Furthermore, it is a well-established principal at law that the equitable remedy of *quantum meruit* is unavailable to a party to an illegal contract, and does not allow a party to recover for something outside of contract which would not have been available under the original instrument.[35] In *Ridgway*, as is the case here with ANGC, the party providing the services cannot recover damages under the doctrine of *quantum meruit*.

33. Although there may be some instances where recovery is not completely banned due to a failure to obtain a necessary certification, the court must examine the authorizing statutory language very carefully to determine whether it was the intent of the legislature to permit elements of the contract to be severable, and do so before construing severability in the context of the agreement between the parties.[36] Severability is determined by whether the activity could have been conducted without relying on the illegal element of the transaction.[37] As a general principle, where a certification is required for an agreement to be legal, failure to be certified taints the entire agreement, and can neither be severed nor excused by an agreement between the parties.[38] A failure to obtain a necessary certification renders the contracting party incapable of performing because they do not have the power to initially make the contract, regardless of whether they are capable of render the services described in the contract.[39] The NPUs submit that such is the case here.

34. Furthermore, the assertion by Staff counsel that the Settlement Agreement "shouldn't affect the NPUs" is simply wrong. Staff is a material witness in this docket with

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[34] *Id* at 490-91.
[35] *Id.*
[36] *Woodmont v. Rockwook*, 852 F.Supp 948, 954-55.
[37] *Morrison v. Bancet*, 149 Kan. 200, 2020 (1939).
[38] *Brumm v. Goodman*, 164 Kan 281 (1948).
[39] *Id.*

respect to whether the agreements were filed with and approved by the Commission, and its ongoing participation is integral to the prosecution and enforcement of this complaint. It was the KCC Staff's initial Report and Recommendation in the Black Hills case that first brought ANGC's failure to file to the attention of the Commission and the NPUs. Notably, ANGC did not dispute Staff's assertion in its Report and Recommendation in that case that the contracts at issue had not been filed with or approved by the Commission.

35. In this case, Staff's Report and Recommendation specifically found that ANGC did not file the contracts between ANGC and the NPUs as required by the 218 Order. Staff further specifically found that this failure to file is a violation of K.S.A. 66-117. Staff's participation in the Joint Motion and its acquiescence with the stipulated provision that all ANGC's and AESC's natural gas supply and transportation agreements have either been filed with the Commission or have been substantially performed represents a dramatic and troubling reversal away from what was presented as a reasoned and factually-based recommendation to the Commission. Staff should not now be permitted to withdraw its finding that ANGC violated K.S.A. 66-117 under the guise of settlement.

36. One of the more far-reaching aspects of the proposed Settlement Agreement is that Staff "agrees not to recommend or advocate any further penalty against ANGC or AESC for violations of public utilities statutes" regarding the sale and/or transportation of natural gas in *any* KCC docket, state or federal court, or arbitration or mediation proceeding.[40] In addition to suggesting that Staff has unjustifiably pre-judged this complaint, this provision precludes parties other than the NPUs from pursuing *any* legitimate claims without the opportunity to intervene, or even receive notice of the rights they will lose should the settlement agreement be approved.

[40] Stipulated Settlement Agreement at ¶ 6.b.

37. As the Commission is aware, the NPUs are seeking a refund of all unlawfully collected rates paid pursuant to the agreements at issue. The Kansas Court of Appeals has specifically found that refunds are the appropriate remedy for the collection of unlawful rates and has concluded that a "full refund should be ordered when charges are not made pursuant to a rate legal at the time of the charge."[41] In light of the provision in the Settlement Agreement whereby Staff agrees not to recommend or advocate any further penalty against ANGC or AESC for violations of public utilities statutes, it seems clear that Staff will not take a position adverse to the Anadarko companies when the parties' make their respective arguments pertaining to refunds. Indeed, as part of the Settlement Agreement, ANGC and AESC have already specifically denied that either entity owes or is responsible for any refunds, credits or other financial considerations to any purchasers of natural gas from AESC and ANGC.[42]

AESC's Disclaimer of Commission Jurisdiction Should Be Rejected

38. In executing the Settlement Agreement, AESC contends that it is not, and has never been, a public utility or entity subject to the jurisdiction of the Commission.[43] As noted in Staff's Report and Recommendation, SWKI-SE entered into a gas sales agreement with AESC on July 1, 1998.[44] Staff also noted that because Anadarko Gathering Company ("AGC") operated the pipeline that was providing gas service to SWKI-SE, it is unclear how AESC was delivering gas supply to SWKI-SE without the involvement of AGC.[45] Staff stated that "[a] series of Anadarko Petroleum Corporation affiliates have intertwined transactions in the natural gas industry of Southwest Kansas. It is clear to Staff that while the companies are affiliates,

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[41] *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 5 Kan.App.2d 715, 721, 624 P.2d 466 (1981) (rev. denied.).
[42] Stipulated Settlement Agreement at ¶ 6.d.
[43] Stipulated Settlement Agreement at footnote 1.
[44] Staff Report and Recommendation at p. 3.
[45] *Id.*

their transactions are conducted as if they were in fact one company." Staff concluded that **AESC has been providing retail gas sales to SWKI-SE since 1998 without obtaining Commission approval** to do so and therefore is in violation of K.S.A. 66-131.[46] Finally, Staff noted that "AESC has conducted business as a public utility from July 1, 1998 until the present. Staff believes this action was unintentional and was due to the failure of Anadarko to treat affiliate actions as arms-length transactions."[47] As a result, Staff recommended that the Commission assess AESC civil penalties of $55,000 for operating as a public utility without obtaining a Certificate of Convenience in violation of K.S.A. 66-131.[48] The superficial fines recommended by Staff do not reach the more fundamental organizational problems which have permitted ANGC and its affiliates to operate as utilities while evading regulation as such.

39. The NPUs submit that Staff is correct in that the Anadarko companies' affiliate transactions are not arms-length transactions. This fact is amply demonstrated by the Joint Application in Docket No. 13-BHCG-509-ACQ, in which the **AESC contract with SWKI-SE** was listed as a Kansas asset owned by ANGC that was to be transferred to Black Hills, the pertinent sections of which are attached hereto as Exhibit A.[49]

40. Accordingly, any attempt by AESC to disclaim the jurisdiction of the Commission or to assert that it has not conducted the business of a public utility in Kansas should be rejected.

CONCLUSION

Absent the filing with and approval by the Commission, the contract rates set forth in the Gas Sales Agreements are unlawful and void. To the NPUs' knowledge and as acknowledged by

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[46] Staff Report and Recommendation at p. 5.
[47] *Id.* at p. 6.
[48] *Id.*
[49] *See*, Docket No. 13-BHCG-509-ACQ, February 11, 2013 Joint Application, at ¶ 5; Exhibit 3 (Asset Purchase Agreement), Schedule 1.1c.

Staff in its filed Report and Recommendation, ANGC never filed the NPUs' Gas Sales Agreements for approval by the Commission in direct contravention of Kansas law, ANGC's own tariff, and the 218 Order, which required all contracts to be filed with and approved by the Commission. Therefore, despite the Settlement Agreement submitted by Staff and the Anadarko companies, the contracts remain unlawful. Accordingly, the NPUs are entitled to a full refund, with interest, as was provided in the *Sunflower Pipeline* case. The NPUs respectfully request that the Commission either:

(i) reject the Settlement Agreement;

(ii) modify the Settlement Agreement to remove factual inaccuracies and unsupported assertions that prejudice the NPUs' claim;

(iii) require that the Settlement Agreement be withdrawn until such time as the parties' legal briefs have been filed and ruled upon and the record has been fully developed; or

(iv) suspend any action on the Settlement Agreement until such time as the parties' legal briefs have been filed and ruled upon and the record has been fully developed.

WHEREFORE, the NPUs respectfully request that the Commission accept this Objection and either: (i) reject the Settlement Agreement; (ii) modify the Settlement Agreement to remove factual inaccuracies and unsupported assertions that prejudice the NPUs' claim; (iii) require that the Settlement Agreement be withdrawn until such time as the parties' legal briefs have been filed and ruled upon and the record has been fully developed; or (iv) suspend any action on the Settlement Agreement until such time as the parties' legal briefs have been filed and ruled upon and the record has been fully developed; and for any such further relief that the Commission may deem just and appropriate.

Respectfully submitted,

POLSINELLI PC

By: _____

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

VERIFICATION

STATE OF Missouri)
) ss.
COUNTY OF JACKSON)

I, Anne E. Callenbach., being duly sworn, on oath state that I am counsel to SWKI-Seward West Central, Inc., and SWKI-Stevens Southeast, Inc., that 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.

By: A Callenbach
Anne E. Callenbach

The foregoing pleading was subscribed and sworn to before me this January 28, 2014.

Andrea J Chilton
Notary Public

My Commission Expires:

11/14/2017

ANDREA J. CHILTON
Notary Public - Notary Seal
STATE OF MISSOURI
Jackson County
My Commission Expires: Nov. 14, 2017
Commission # 13404320

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading has been X emailed, ___ faxed, ___ hand-delivered and/or mailed, First Class, postage prepaid, this January 28 2014, to:

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A Callenbach

Anne E. Callenbach

SCHEDULE 1.1(c)
ATTACHED TO AND MADE A PART OF THAT CERTAIN
GAS SUPPLY AND TRANSPORTATION CONTRACTS TO THE ASSET PURCHASE AGREEMENT BETWEEN
ANADARKO NATURAL GAS COMPANY LLC AND BLACK HILLS/KANSAS GAS UTILITY COMPANY LLC
DATED EFFECTIVE JUNE 1, 2012

GAS SUPPLY AND TRANSPORTATION CONTRACTS, SEWARD AND STEVENS COUNTY, KANSAS

Contract No.	Counterparty	Seller	Contract Date	Contract Term	Pricing Terms	Delivery/Receipt Points	Meter No.
Term / Month to Month Evergreen							
SLS01672 / QCM-6647	National Beef Pack (Liberal)	ANGC	November 1, 2002	Mth to Mth, 30 days notice (NAESB)	Pricing negotiated by Marketing 10/1/12 - 12/31-11 70,000 MMBtu/mth @ $4.20 + $0.20 Remaining volume at GD Panhandle, Tx.-Okla + $0.20 1/1/13 - 3/31/13 70,000 MMBtu/mth @ $4.255 + $0.20 Remaining volume at GD Panhandle, Tx.-Okla + $0.20 4/1/13 - 6/30/13 70,000 MMBtu/mth @ $4.18 + $0.20 Remaining volume at GD Panhandle, Tx.-Okla + $0.20 7/1/13 - 9/30/13 70,000 MMBtu/mth @ $3.86 + $0.20 Remaining volume at GD Panhandle, Tx.-Okla + $0.20 10/01/13 - 12/31/13 70,000 MMBtu/mth @ $4.08 + $0.20 Remaining volume at GD Panhandle, Tx.-Okla + $0.20 01/01/13 - 3/31/2013 Baselead 80,000 MMBtu/mth @ $3.62 < 80,000 MMBtu/mth - GD Panhandle, Tx-Okla + $0.20 > 80,000 MMBtu/mth - GD Panhandle, TX-Okla - $0.05 (Buyback)	National Beef Sale	55289 & 033851
QCM-14827	Supreme Feeders Co.	AESC	April 1, 2008	Mth to Mth, 30 days notice (NAESB)	IF PEPL + $0.75/MMBtu	Supreme Feeders Tap	033606
IGSA-1292 / QCM-16803	Supreme Feeders Co.	AGC	October 16, 1978	None, in the event seller breaches any of the terms and conditions, AGC can terminate with 10 days notice	IF PEPL + $0.50/MMBtu	Supreme Feeders	40540
IGSA-580	SWKI - Seward - West	ANGC	June 1, 2002	Mth to Mth, 30 days notice	IF PEPL + $0.50/MMBtu	Seward West 1	033524
IGSA-500	SWKI - Stevens Southeast	AESC	July 1, 1998	Mth to Mth, 30 days notice	IF PEPL + $0.50/MMBtu	SWKI Stevens SE	033374
Term / Year To Year Evergreen							
SLS01362 / QCM-512	AESC	ANGC	October 1, 1999	Through June 30, 2013, Yr to Yr , 60 days notice	IF SSCGP + $0.10/MMBtu	Various Fuel Points	
SLSL1290 / QCM-14658	Black Hills	AGC	June 1, 1996	Through May 31, 1999, Yr to Yr, 60 days notice	IF PEPL + $0.20/MMBtu	Seward County Fire Station PNG Crossover 1 PNG Crossover 2 PNG Sales 1 PNG Sales 2 PNG Pseudo	40538 55148 55149 55159 55160 99969
SLSL 1345 / QCM-14691	Black Hills	AESC	January 1, 1999	Through February 28, 2001, Yr to Yr, 60 days notice	IF PEPL + $0.20/MMBTU	Various Irrigation Meters	
GSA-1645 / QCM-443	Black Hills	ANGC	December 1, 2000	Through November 30, 2001, Yr to Yr, 60 days notice	IF PEPL + $0.20/MMBTU	Tulsa Dairy Farm Union Pacific Railroad Rail Switch Heater	NGM646283 NGM762161
SLS02159 / QCM-15552	TKD Gas LLC	AESC	August 1, 2007	Through July 30, 2010, Yr to Yr, 60 days notice	IF PEPL + $0.20/MMBtu / IF PEPL, plus gathering & fuel	Various Irrigation Meters