

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Complaint of Merit Energy) Docket No.: 16-CONS-564-CINV
Company against ONEOK Field Services,)
LLC to establish just and reasonable charges) CONSERVATION DIVISION
for gas gathering pursuant to K.A.R. 82-3-802.)
_____) License No.: 32446

STAFF'S RESPONSE TO MERIT ENERGY PETITION FOR RECONSIDERATION

Staff opposes Merit's petition for reconsideration. The Commission's February 28, 2017, Order correctly enumerates and considers the list of nine non-exclusive factors set forth in K.A.R. 82-3-802(k) and the decision should remain unaltered.

Background

1. On November 1, 2016, the Commission held an evidentiary hearing in this docket regarding Merit's amended complaint pursuant to K.A.R. 82-3-802 which requested that the Commission investigate the fees and terms ONEOK Field Services, LLC (OFS or ONEOK) is charging Merit for natural gas services and find that OFS is providing Merit wellhead purchasing services on a basis that is not just and reasonable and is discriminatory.

2. The ultimate question before the Commission was whether a \$0.███/MCF service fee and an annual service fee escalation that matches production decline are just and reasonable and not unjustly discriminatory as prohibited by K.A.R. 82-3-802 and K.S.A. §55-1,103.

3. The Commission issued an order in the matter on February 28, 2016. Therein, the Commission ordered in pertinent part that: 1. OFS' gas gathering fee charged to Merit be reduced from \$0.███/MCF to \$0.███/MCF and the annual service fee escalator shall be based on the CPI Index; and 2. The gas gathering fee in the 2015 Interim Agreement between Merit and

OFS shall be retroactively applied (trued-up) from the effective date of the Agreement, based upon the new gathering fee of \$0.██/MCF.

4. Merit filed a timely petition for reconsideration of the Commission's order on March 14, 2017. Merit's petition for reconsideration contends that the Commission's order was unreasonable, arbitrary and capricious on the following grounds:

a. The Commission's determination that use of the high and low fee range is appropriate in resolving the complaint rather than the use of averages as suggested by Merit and Commission staff.¹

b. The Commission's determination of a "range of reasonableness" based on the high and low fee range derived from the GG-1 reports.²

c. The Commission's analysis with regard to the value of the gathering fees in existing contracts between Merit and OFS.³

d. The Commission's findings that Merit produced no evidence that other producers were unable or unwilling to file complaints if they thought it necessary to do so.⁴

Legal Standard

5. Should this matter become subject to judicial review, the burden of proving the invalidity of the Commission's order rests with Merit.⁵ A court may grant relief from an administrative order only if it finds one or more conditions are met under K.S.A. §77-621(c).⁶ In

¹ Petition for reconsideration, ¶ 1.

² *Id.*, ¶ 2

³ *Id.*, ¶ 5

⁴ *Id.*, ¶ 8

⁵ See K.S.A. §77-621(1): "The burden of proving the invalidity of agency action is on the party asserting invalidity".

⁶ K.S.A. §77-621(c) provides: "The court shall grant relief only if it determines any one or more of the following: 1. The agency action, or statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied; 2. the agency has acted beyond the jurisdiction conferred by any provision of law; 3. the agency has not decided an issue requiring resolution; 4. the agency has erroneously interpreted or applied the law; 5. the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure; 6. the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification; 7. the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the

the petition for review, Merit argues only that the Commission's actions are unreasonable, arbitrary or capricious.⁷ Therefore, Commission staff limits its analysis of the arguments made by Merit in light of that standard only and does not reach other factors that might be raised pursuant to the Kansas Judicial Review Act.

Discussion

6. The Commission's conclusion that use of the high and low fee range is appropriate was founded upon analysis of the agreed upon GG-1 reports⁸ and is not unreasonable, arbitrary or capricious.

a. Merit argues that the Commission erred in utilizing the range between the reported high and low fees. Essentially, Merit relies on the testimony of its witnesses and Commission Staff who suggest the use of averages to "smooth out" outlier fees that might be inappropriate for consideration in this matter. Merit submits that the Commission 'ignored' testimony, but the Commission's order indicates otherwise.

b. The Commission was careful to follow factors set forth in K.A.R. 82-3-802(k). The first factor considered by the Commission pertained to the fees or terms that the gatherer receives from other shippers.⁹ Upon request by the Commission, 42 applicable GG-1 reports that were agreed upon by Merit, OFS and Commission staff were considered.¹⁰ The Commission reviewed pre-filed testimony and heard from live witnesses. With regard to post hearing briefs filed by the parties, the Commission noted that no party provided any reason

court under this act; or 8. *the agency action is otherwise unreasonable, arbitrary or capricious.*" (Italics added).

⁷ Petition for reconsideration, ¶1, 5, 8.

⁸ Order, ¶ 35.

⁹ See K.A.R. 82-3-802(k)(1)

¹⁰ Order, ¶ 35.

why the full range of high and low fees reported on the GG-1 forms should not be considered.¹¹

7. The Commission does not ignore evidence or testimony in the record regarding the use of averages or weighted averages as suggested by Merit. The Commission noted that “the parties focused their analysis of the gathering fees on OFS’ GG-1 reports almost exclusively on the average or weighted average of those fees...”¹² Instead, the Commission exercised its discretion to reach a resolution different than Merit or Commission Staff contemplated.

8. There is a significant distinction between the Commission ignoring evidence or opting instead to exercise discretion in fashioning an analysis to remedy the dispute between parties – perhaps using a methodology not requested by any party.¹³ Here, the Commission found an analysis based on averages or weighted averages unworkable and inappropriate for this particular docket, specifically recognizing concerns raised by OFS.¹⁴ The Commission found that adoption of a “range of rates” analysis provided a workable means to incorporate data from OFS’ GG-1 forms into the decision-making process. The Commission’s use of the range of fees is a logical method of analyzing the GG-1 reports, especially considering that this is a matter of first impression with no past Commission decisions for guidance.¹⁵

¹¹ *Id.*, ¶ 37.

¹² *Id.*, ¶ 36.

¹³ See K.S.A. §55-1,104: “Commission can employ any form of analysis and remedy that is designed to accomplish the goals of this act while respecting the legitimate property interests of the person offering the gas gathering services.”

¹⁴ Order, para 38: “...OFS [...] argues that the limited nature of the information supplied by the GG-1 reports counsels the Commission “to adopt a range of reasonableness” and avoid “merely employing an average of fees (simple or otherwise) when it [is] unknown what services are provided for those fees.”

¹⁵ See Commission Staff post hearing brief, page 2 final paragraph.

9. The “range of reasonableness” recognized by the Commission is valid.

a. Merit next argues that establishing a “range of reasonableness” based upon a range of high and low fees “gives the Commission unbridled discretion to take any number it wants without any accountability and is arbitrary and capricious.”¹⁶

b. The U.S. and Kansas Supreme Courts have held that “any rate selected by a regulatory commission within the broad ‘zone of reasonableness’ cannot properly be attacked as confiscatory, and only when a Commission determination is so wide of the mark as to be outside the realm of fair debate” may a court nullify it.¹⁷ As discussed previously, the Commission reviewed the data from the agreed upon GG-1 reports and relied upon data therein in reaching an appropriate figure.

10. The Commission’s gathering fees analysis is not arbitrary and capricious

a. Third, Merit argues that the Commission failed to appreciate the economic impact between \$0.██/\$0.██/ MCF and \$0.██/ MCF and thereby issued an arbitrary and capricious order. Merit specifically references the following language from the Commission’s order:

“Commission that the gathering fees in the existing contracts between Merit and OFS do not add much that is new for consideration beyond [f]actors 1 and 2 above. Subtracting the \$0.██/ MCF from the offered fee of \$0.██/ MCF or the average of \$0.██ on OFS’ 51 renegotiated 2015 contracts with fees of \$0.██ and \$0.██ respectively. These are very near the \$0.██/ MCF currently in place with the 2007 OXY contract and \$0.██/ MCF fee offered to Merit prior to this complaint proceeding.”¹⁸

A fair reading of the order as a whole is that in this paragraph the Commission is not attempting to assess the economic impact to the parties at this stage of the analysis, but rather, is seeking to place the gas gathering fees in a context within the “range of reasonableness.” In fact, the Commission considered the fiscal impact of its decision upon the parties later in the

¹⁶ Petition for reconsideration, ¶ 2.

¹⁷ Order, ¶ 26

¹⁸ Petition for reconsideration, quoting Order ¶70.

order¹⁹ and declined to give this factor much weight due to the need to “engage in a good deal of speculation”²⁰ to do so.

11. **The Commission’s findings regarding the absence of complaints filed by other producers are not unreasonable, arbitrary or capricious.**

a. The Commission correctly notes that Merit provided no evidence in the record to reach a conclusion other than the one reached by the Commission.²¹ Merit implies that because other producers operate on a smaller scale than Merit and three other producers contained in the GG-1 forms, they are somehow unable to avail themselves of the protections afforded under K.A.R. 82-3-802. This claim is purely speculative and no supporting evidence is provided to support such a claim.

Wherefore, Staff respectfully requests the Commission deny Merit’s petition for reconsideration for the reasons stated above.

Respectfully submitted,



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¹⁹ Order, para 71.

²⁰ Order, para 74.

²¹ Order, Para. 33

CERTIFICATE OF SERVICE

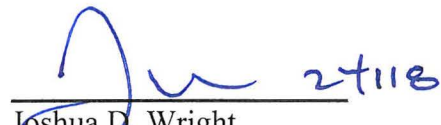
I certify that on 3-24-17, I caused a complete and accurate copy of this Response to be served via United States mail, with the postage prepaid and properly addressed to the following:

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