

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

In the Matter of the Application of Ozark Energy)	
Partners, LLC for a Certificate of Public Convenience)	
And Necessity to Construct and Operate an Intrastate)	Case No. GA-2006-0561
Natural Gas Pipeline and Gas Utility to Serve Portions)	
Of the Missouri Counties of Christian, Stone and)	
Taney, and for Establishment of Utility Rates)	

**SOUTHERN MISSOURI NATURAL GAS'
APPLICATION FOR RECONSIDERATION AND/OR REHEARING**

COMES NOW Southern Missouri Gas Company, L.P. d/b/a Southern Missouri Natural Gas ("SMNG" or "Company") and, pursuant to Section 386.500, RSMo.¹, and 4 CSR 240-2.160, respectfully applies for reconsideration and/or rehearing of the Commission's *Report and Order* in the above-captioned proceeding which was issued February 5, 2008, and effective February 15, 2008 ("*Report and Order*"), as more fully described below. In support thereof, SMNG respectfully states as follows:

Legal Principles That Govern Applications For Rehearing

1. Commission decisions must be lawful (i.e. the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 759 (Mo. Banc 2003); *State ex rel. Alma Telephone Company v. Public Service Commission*, 40 S.W.3d 381 387 (Mo.App. W.D. 2001). The decision is reasonable only if it is supported by competent and substantial evidence on the whole record. *Alma*, 40 S.W.3d at 387. Moreover, the decision must not be arbitrary, capricious or unreasonable. Section 536.140(2)(6), RSMo.

¹ Statutory references are the Missouri Revised Statutes (2000), unless otherwise noted.

2. Under Missouri law, the absence of adequate findings of fact and conclusions of law also renders a Commission order unlawful. *Friendship Village v. Public Service Commission*, 907 S.W.2d 339, 344 (Mo.App.W.D.1995). Section 386.420, RSMo. requires that the findings of fact must not be completely conclusory. *State ex rel. Laclede Gas Company v. Public Service Commission*, 103 S.W.3d 813, 816 (Mo.App.W.D. 2003). Section 536.090, RSMo. supplements Section 386.420, and requires that the Commission's findings provide insight into how controlling issues should be resolved. *Id.* The findings of fact must be sufficiently definite and certain so that a reviewing court can review the decision intelligently to ascertain if the facts afford a reasonable basis for the decision without resorting to the evidence. *Id.*

3. A review of the evidentiary record in this case and applicable law demonstrates that certain issues decided by the Commission in its Report and Order fail to comply with the above-referenced principles in certain respects and that therefore, rehearing should be granted as to certain issues. Those issues are outlined below.

Issues on Which Reconsideration and Rehearing Are Sought

A. The Commission's Decision Related To OEP's Qualifications to Provide the Service Is Unreasonable And Should Be Reconsidered.

4. The Commission's finding that Ozark satisfies the criteria of being qualified to provide the proposed service on page 6 of the Report And Order is not based upon competent and substantial evidence in the record and are not supported with adequate findings of fact. The Commission's finding on page 5 that Randy Hole is deeply knowledgeable of natural gas pipeline construction and finance is not based upon competent and substantial evidence in the record, and instead is based upon the hearsay testimony of Mr. Epps, and should therefore not be

relied upon for this finding. Similarly, the Commission's findings that Mr. Handlin "has 49 years of natural gas engineering experience in four different states, and manages a gas company on the west side of Missouri and in Oklahoma" is not based upon competent and substantial evidence, and instead is based upon the hearsay testimony of Mr. Epps, and should not be relied upon for this finding. The record reflects the fact that Staff has not investigated the backgrounds of the owners of OEP (Tr. 36). Staff witness Michael Straub testified that he did not know the identity of Mr. Hole or Mr. Handlin, prior to the hearing. (Tr. 36-37)

5. The Commission's finding that "Ozark has the benefit of expertise from Steven Cattron and Greg Pollard" is also not based upon the competent and substantial evidence in the record. Mr. Steve Cattron, President of Cattron Enterprises², confirmed during the hearings that

** _____ ** (Tr. 116) In fact, Mr. Cattron testified that "I think we would probably be more involved in assisting in bringing the right people to the table. . . So in all aspects, whether it's operations, whether its gas procurement, it going to be much of our role to assist them in identifying the people to make it happen." (Case No. GA-2007-0168--Tr. 319) Mr. Cattron denied that he would be providing the primary technical expertise for running the natural gas company (Tr. 328) or making the decisions regarding OEP's critical decisions. (Tr. 320) Therefore, the Commission's finding is not supported by competent and substantial evidence in the record, and its decision on this issue is not adequately explained.

6. The Commission's finding that OEP has the necessary qualifications to provide the proposed service based upon the experience of Mr. Dan Epps is also not based upon

²Mr. Greg Pollard is an employee of Cattron Enterprises, and the record does not indicate that he has a contract to perform services for OEP in the future.

competent and substantial evidence. The record demonstrates that Mr. Epps has no background in working for or otherwise managing a natural gas local distribution company. (Tr. 167-68) He has never worked for a traditional local distribution company, or a company that provided natural gas service to customers using compressed natural gas. (Tr. 168). He has never worked for a company which constructed natural gas pipelines or local distribution systems. (Tr. 167). He has never worked for a company that purchased fixed priced contracts for natural gas. (Tr. 168) It does not appear that Mr. Epps personally has relevant experience or other qualifications to operate or manage a local distribution company. In fact, Mr. Epps candidly testified that he does not consider himself an expert in any of the following areas: the operation or regulation of natural gas distribution companies, the operation or regulation of natural gas pipeline companies, or in the area of natural gas safety regulation. (Tr. 169). It is unlawful and unreasonable for the Commission to rely upon Mr. Epps' limited excavation experience in the telecommunications field for its conclusion that OEP has the necessary existing expertise to provide natural gas service.

7. The Commission itself expressed the following concern in the Report And Order at pages 7-8: "Further, the Commission is concerned about Ozark's ability to remain well managed." The Commission's decision to grant OEP a certificate of convenience and necessity conditioned upon "Ozark maintaining its level of management expertise" is not reasonable, under the circumstances, when the record does not demonstrate with competent and substantial evidence that OEP's existing "level of management expertise" is adequate to provide safe and adequate natural gas service to the area. The Commission's condition that it will require that "Ozark specifically include with its Annual Reports to the Commission information concerning the expertise of its current management" (Report And Order, p. 8) does not adequately or

reasonably address the Commission's stated concern with OEP's existing management level. Since this condition does not require that OEP's management have any specific level of expertise in operating a natural gas company, it does not ensure that OEP's management will have the necessary expertise to provide the public with safe and adequate service in the future. This condition only requires that OEP's Annual Reports include a discussion of the expertise, if any, of its existing management. The Commission should reconsider this condition and its finding that OEP has the necessary expertise to provide the proposed natural gas service.

B. The Commission's Decision To Grant A Conditional Certificate to Serve Branson Is Not Reasonable Since OEP Has No Municipal Franchise To Serve Branson, and Does Not Intend to Serve Branson In The Immediate Future.

8. As Commissioner Murray pointed out in her Dissenting Opinion, "Ozark Energy Partners, LLC does not have a franchise for the city of Branson and has no plans to serve Branson in the immediate future." (Dissenting Opinion Of Commissioners Connie Murray, p. 2). Under these circumstances, it is unreasonable and unlawful to grant OEP a certificate of convenience and necessity, even on a "conditional" basis, since it is not intending to serve Branson in the near future.

9. The competent and substantial evidence in the record demonstrates that OEP has not included specific costs associated with serving Branson in its Feasibility Study. As a result, OEP has failed to meet the requirements of 4 CSR 240-3.205(1)(A)(5) to provide "a feasibility study containing the plans and specifications for the utility system and estimated costs of construction of the utility system during the first three (3) years of construction. . . and an estimate of the number of customers, revenues and expenses during the first three (3) years of operation" as it relates to Branson, Missouri. It is therefore unlawful and unreasonable for the Commission to grant OEP a conditional certificate of convenience and necessity to serve

Branson, Missouri. OEP has failed to meet its burden of proof to demonstrate that its proposal to serve Branson, Hollister, or surrounding unincorporated areas is economically feasible at all since it has made no attempt to include the required investments, an estimate of the number of customers, revenues and expenses during the first three (3) years of operation in Branson, Hollister, or any specific city in its Feasibility Study.

C. The Commission's Decision Is Unlawful And Unreasonable Since It Failed To Address Specific Issues Raised In the Proceeding, Including the Adequacy of OEP's Supply Plan and Feasibility Study.

10. In this proceeding, SMNG challenged the adequacy of OEP's unique supply plan. (SMNG Brief at 5, 21-27). However, the Report And Order failed to address this issue, and does not provide adequate findings of fact and conclusions of law to explain how the Commission resolved this issue. See Section 386.420 and 536.090. These statutes require that the Commission decisions be in writing and that such decisions contain a concise statement of the findings on which the Commission bases its orders. See *State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791, 795 (Mo. Banc 1986); *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo.App. 1983), *cert. denied*, 464 U.S.819, 104 S.Ct.81, 78 L. Ed. 2d 91, (1983); *State ex rel. Noranda Aluminum, Inc. Public Service Commission*, 24 S.W.3d 243 (Mo.App. W.D. 2001). However, the Commission's decision contains no findings of fact on the issue of the adequacy and reasonableness of OEP's supply plan.

11. The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. See *State ex rel. Ozark Elec. Coop. v. Public Service Commission*, 527 S.W.2d 390, 394 (Mo.App. 1975);

State ex rel. Intercon Gas v. Public Service Commission, 848 S.W.2d 593, 597 (Mo.App. W.D. 1993). OEP also has the burden of proof to show that its unique supply strategy will result in safe and adequate service to the public. SMNG respectfully submits that OEP has failed to meet this burden of proof on this issue, and the Commission's Report And Order does not address the unique safety and reliability issues raised by OEP's supply plan. Therefore, the Commission's findings of fact and conclusions of law are inadequate.

12. In this proceeding, SMNG challenged the adequacy of OEP's Feasibility Study. (SMNG Brief at 5, 21-27). However, the Report And Order failed to address this issue, and does not provide adequate findings of fact and conclusions of law to explain how the Commission resolved this issue. See Section 386.420 and 536.090. For the reasons stated above, the Commission's Report And Order is unlawful and unreasonable.

WHEREFORE, SMNG hereby respectfully requests that the Commission reconsider its decision in this case, and/or grant a rehearing on the Report And Order issued on February 5, 2008, as more fully described herein.

Respectfully submitted,

/s/ James M. Fischer

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MISSOURI NATURAL GAS

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 14th day of February, 2008.

/s/ James M. Fischer

James M. Fischer