

BEFORE THE STATE CORPORATION COMMISSION
 OF THE STATE OF KANSAS

In the Matter of the Complaint Against Texas-)	
Kansas Oklahoma Gas, LLC)	
Respondent,)	
)	
For an Order for Adjustment and Refund of)	
Unfair, Unreasonable and Unjust Rates for the)	
Sale of the Natural Gas for Irrigation Based on)	Docket No. 15-TKOG-236-COM
Inaccurate and/or False Pressure Base)	
Measurements.)	
)	
By Circle H Farms, LLC, Richard L. Hanson,)	
Rome Farms, and Stegman Farms Partnership,)	
Complainant.)	

STAFF'S CLOSING BRIEF FOLLOWING HEARING HELD JANUARY 10 & 11, 2017

The Staff of the State Corporation Commission of the State of Kansas ("Staff" and "Commission," respectively) hereby submits its Closing Brief as ordered by the Commission at the conclusion of the Evidentiary Hearing held on January 10 and 11, 2017 in docket 15-TKOG-236-COM.

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I. Background

1. On December 4, 2014, Circle H Farms, LLC, Richard L. Hanson, Rome Farms and Stegman Farms Partnership (Complainants) filed a complaint alleging Texas-Kansas Oklahoma Gas, LLC (TKO) inaccurately calculated the thermal content of natural gas (BTU value) contained in the volume of gas (MCF) sold to the Complainants. Circle H Farms, LLC, Rome Farms, and Stegman Farms Partnership are irrigation customers of TKO while Richard L. Hanson is a residential customer of TKO.

2. The Complainants allege the improper calculation resulted in TKO overcharging for natural gas sold to the Complainants. The Complainants request the Commission order TKO to adjust future gas sales to properly calculate the BTU value of natural gas that it sells and to refund any overcharge for past natural gas sales to the Complainants and all TKO public utility customers.

3. In response to the Complaint, TKO maintains it is a normal industry practice for the seller of gas to establish a pressure base in its gas sales contracts. TKO notes the terms of its contracts with the Complainants were agreed to by the Complainants and approved by the Commission.

4. TKO does not address the Complainants' position that a modification of the gas sales pressure base requires a corresponding modification of the BTU calculation. TKO states that it did not inflate the BTU value of the gas sold. Because all of its customers were billed in the same manner, TKO further postulates the Complainants were not treated in an unduly discriminatory fashion. Rather, TKO suggests the billing methodology serves as an allocation methodology of the TKO revenue requirement.

5. On April 14, 2016, the Commission issued an Order on Jurisdiction, stating the Commission will exercise jurisdiction over the issues set forth in the complaint during the timeframe from April 12, 2010 to the present, as April 12, 2010 was the date the Commission issued its Order Granting Applications with Conditions which recognized TKO as a public utility in the 08-TKOG-314-COC Docket.

6. On January 10 and 11, 2017, an evidentiary hearing was held before the Commission. At the conclusion of the evidentiary hearing, the Commission requested simultaneous briefs to be due 30 days after the filing of the transcript.

7. On February 22, 2017, the counsel for all parties communicated by email to reach an agreement regarding which topics in the confidential testimony of Staff witness Leo Haynos (page 256 to page 294 of the transcript) are truly confidential as to the respective briefs. The parties agreed that the only topic that is truly confidential is any reference to the testimony of the terms of the contract between TKO and Anadarko, as Anadarko is not a party to this action and has not signed a non-disclosure agreement.

II. Issues

Commission's Legal Questions for Briefing

A. Was the 1961 Order, Docket No. 34,856-U, or K.A.R. 82-3-3a ever codified in relevant part into current regulations and are those regulations applicable to this situation? Why or why not? (See K.A.R. 82-3-101(a)(36), (b) as raised at the hearing).¹

B. Does the statute of limitations apply to this action; and if so, which one and why?

C. Does the Commission have the authority to hear and determine issues of contract law?

¹ Transcript of TKO Evidentiary Hearing, p.33-34 (Jan. 10-11, 2017).

D. Does the Commission have the jurisdiction to consider remedies in equity?

Staff Issues

E. Whether TKO misapplied a BTU factor to the Complainants' natural gas invoices which resulted in an overcharge of approximately 9.5%.²

F. Whether TKO should be required to refund the alleged overcharge to the Complainants and to all TKO customers that are served under the Commission's jurisdiction.³

G. Whether TKO should be assessed a civil penalty for failing to follow directives from Commission Orders regarding service supplied to residential customers.⁴

H. Whether the Commission should order TKO to initiate a rate case to set rates, gas tariffs, and service requirements for all of TKO jurisdictional customers using traditional rate making methods.⁵

III. Relevant Law

8. K.S.A. 66-104 states, in pertinent part:

"The term 'public utility' is defined as 'every... company... that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, for... the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil..."

9. With respect to any public utility subject to the authority and regulation of the Commission, K.S.A. 66-117 states, in pertinent part:

² Docket 15-TKOG-236-COM Complaint ¶¶7-14 (Dec. 4, 2014); Direct Testimony of Richard L. Hanson, p. 9, ll. 12-20 through p. 11, ll. 1-8 (Oct. 7, 2016).

³ Complaint, p. 6 (Dec. 4, 2014); Direct Testimony of Steve Rome, pp. 7, l. 15 through p. 8, l. 2 (Oct. 7, 2016); Direct Testimony of Tron Stegman, p. 6, ll. 12-16 (Oct. 7, 2016); Direct Testimony of Kirk Heger p. 7, ll 16-19 (Oct. 7, 2016).

⁴ Staff Report and Recommendation, p. 7 (May 15, 2015).

⁵ *Id.* at p. 7.

“Unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of such public utility or common carrier except by filing the same with the commission at least 30 days prior to the proposed effective date.”

10. With respect to any public utility subject to the authority and regulation of the Commission, K.S.A. 66-136 states, in pertinent part:

“No franchise or certificate of convenience and necessity [...] shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right thereunder be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the commission.”⁶

11. With respect to any public utility subject to the authority and regulation of the Commission, K.S.A. 66-138(a)(2) states, in pertinent part:

“If any [...] public utility governed by the provisions of this act violates any of the provisions of this act, or shall do any act herein prohibited, or fails or refuses to perform any duty enjoined upon it in this act, or fails, neglects or refuses to obey any lawful requirement or order made by the commission, [...] it shall, for every such violation, failure or refusal, forfeit and pay to the state treasurer [...] (2) a sum not less than \$100 and not more than \$5,000 for such offense if the violator is any other common carrier or public utility.”

12. A “natural gas public utility” is defined by K.S.A. 66-1,200 as any public utility which supplies natural gas. Pursuant to K.S.A. 66-1,201, “The commission is given full power, authority and jurisdiction to supervise and control the natural gas public utilities...doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.” The word “full” is defined as “lacking restraint, check, or qualification” and “being as the highest or greatest degree”.⁷ Similarly, “all” is defined as “the

⁶ K.S.A. 66-136.

⁷ “Full” Def. 2b and 3a. *Merriam-Webster Online*, n.d. Web. 23 Jan. 2017.

whole amount, quantity, or extent of’ and “as much as possible”.⁸ Finally, Black’s Law Dictionary defines “full jurisdiction” as “complete jurisdiction over a given subject-matter or class of actions without any exceptions or reservations.”⁹ The plain meaning of the statutory language confers clear, unambiguous authority and jurisdiction upon the Commission to regulate public utilities, including Respondent TKO.

13. K.S.A. 66-1,202 requires every natural gas public utility subject to Commission regulation to “furnish reasonably efficient and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such natural gas public utility, to establish just and reasonable rates, charges and exactions and to make just and reasonable rules, classifications and regulations.”

14. Pursuant to K.S.A. 66-1,203, “[e]very natural gas public utility doing business in Kansas over which the commission has control shall publish and file with the commission copies of all schedules of rates and shall furnish the commission copies of all rules and regulations and contracts between natural gas public utilities pertaining to any and all jurisdictional services to be rendered by such natural gas public utilities.”

15. K.S.A. 66-1,205 gives the Commission the authority to make investigation into a natural gas public utility upon a written complaint relevant to rates, rules and regulations, practices or acts affecting or relating to services performed, or services performed or to be performed.

16. The Commission’s authority is further implied from K.S.A. 66-1,207, which states, “[a]s applied to regulation of natural gas public utilities, the provisions of this act and all

⁸ “All” Def. 1a and 1b *Merriam-Webster Online*, n.d. Web. 23 Jan. 2017.

⁹ *Black’s Law Dictionary* 342 (Abridged 5th ed. 1983).

grants of power, authority and jurisdiction herein made to the commission shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission.”

17. In *Moser v. State, Dept. of Revenue* the Supreme Court of Kansas held that “[s]tatutory interpretation begins with the language selected by the legislature. If that language is clear, if it is unambiguous, then statutory interpretation ends there as well.”¹⁰ Additionally, the Court held that, “[o]rdinary words should be given their ordinary meaning.”¹¹

18. In *Sunflower Pipeline Company v. State Corporation Commission*,¹² the Kansas Court of Appeals concluded the Commission has the power to order refunds for charges in excess of published rates.¹³ The Court of Appeals held the power of the Commission to order refunds for overcharges is implied from K.S.A. 66-101 which granted the Commission “full power, authority and jurisdiction to supervise and control the public utilities...doing business in the state” and “to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”¹⁴

19. In 1985, following the *Sunflower Pipeline* decision, statutes relevant to the powers of the Commission were amended, transferred, and reorganized such that language nearly identical to the provisions cited to and relied upon by the court in *Sunflower Pipeline* at K.S.A. 66-101 and 66-141 is presently located at K.S.A. 66-1,201 and K.S.A. 66-1,207, with the new provisions specifically applying to natural gas public utilities.

¹⁰ *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P.3d 938 (2008).

¹¹ *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007). See *Moser v. State, Dept. of Revenue*, 289 Kan. 513, 516, 213 P.3d 1061, 1064 (2009).

¹² *Sunflower Pipeline Co. v. State Corp. Comm’n*, 5 Kan. App. 2d 715 (1981).

¹³ 5 Kan. App. 2d 715 at 720.

¹⁴ *Id.* at 719.

20. *In the Matter of the Complaint Against Southwestern Bell Telephone Company* (SWBT) by *Black and Veatch*,¹⁵ the Commission concluded that the “statutes creating the Commission’s obligations to investigate allegations that a consumer has been overcharged does not limit those investigations to complaints that are brought within a specific period of time.” Additional case law relied up by the Commission in SWBT has held that “[a]dministrative agencies, such as the Commission, are creatures of statute and their power is dependent upon authorizing statutes.”¹⁶ Also, “in its procedural rules adopted to handle complaints, the Commission did not adopt a time limit for filing a complaint”¹⁷ in K.A.R. 82-1-220 or 220a. Further, the Commission stated it has not adopted Article 5 of the Code of Civil Procedure, Limitations of Actions, and that “Article 5 demonstrates that its applicability is limited to actions in court.”¹⁸

21. On January 16, 1961, the Commission issued its First Supplemental Order in docket no. 34,856-U which promulgated the Commission’s Rules and Regulations Relating to Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas.¹⁹ Under Section 3 (Units of Measure), Subsection 302 (Psia), the rules and regulations state, “[a] pressure base of 14.65 psia shall be used in reporting volumes and heating values as a basis of tariffs and in complying with the Rules and Regulations of the Commission.”²⁰

¹⁵ 2004 WL 7075680(Kan.S.C.C.), Docket No. 04-SWBT-879-COM (December 13, 2004).

¹⁶ *Pork Motel Corp. v. KDHE*, 234 Kan. 374, 378; *Mobil Oil Corp. v. State Corp. Commission*, 227 Kan. 594, 600.

¹⁷ 2004 WL 7075680(Kan.S.C.C.), Docket No. 04-SWBT-879-COM, p.4 (December 13, 2004).

¹⁸ 2004 WL 7075680(Kan.S.C.C.), Docket No. 04-SWBT-879-COM, p.5 (December 13, 2004).

¹⁹ Docket No. 34,856-U; First Supplemental Order (Jan. 16, 1961).

²⁰ Docket No. 34,856-U; First Supplemental Order §302 (Jan. 16, 1961).

22. While these rules and regulations are not published with current Kansas Administrative Regulations, an exhaustive search revealed no definitive docket or Commission order revoking or rescinding the Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas. Further, their issuance predates the Rules and Regulations Filing Act,²¹ indicating they followed the proper course for enacting rules and regulations at the time of their issuance. Therefore, Staff asserts these standards continue to be effective as an order of the Commission, and therefore apply to the practices of regulated natural gas utilities in Kansas.

23. Chapter 82, Article 3 of the Kansas Administrative Regulations pertains to the Production and Conservation of Oil and Gas by the Kansas Corporation Commission. K.A.R. 82-3-101(a)(35) states “Gas” means the gas obtained from gas or combination wells, regardless of its chemical analysis.” K.A.R. 82-3-101(a)(36) states “Gas (cubic foot)” means the volume of gas contained in one cubic foot of space at a standard pressure base and at a standard temperature base. The standard pressure base shall be 14.65 pounds per square inch absolute, and the standard temperature base shall be 60 degrees Fahrenheit.” K.A.R. 82-3-101(b) states “Any term not defined in the regulation or in any applicable commission rule, regulation, or order shall be interpreted to be consistent with its common use in the industry.” Although K.A.R. 82-3-101(a)(36) is listed under Article 3 which is titled “Production and Conservation of Oil and Gas”, it contains the same pressure base of 14.65 psia as the 1961 docket no. 34,856-U.

IV. Analysis

Commission Legal Question A: Was the 1961 Order, Docket No. 34,856-U, or K.A.R. 82-3-3a ever codified in relevant part into current regulations and are those regulations

²¹ K.S.A. 77-415 through 77-438, enacted in 1965.

applicable to this situation? Why or why not? (See K.A.R. 82-3-101(a)(36), (b) as raised at the hearing).²²

24. As discussed previously, an exhaustive search revealed no docket or Commission order revoking or rescinding the Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas as set forth in docket no. 34,856-U. While Staff believes the order in the 34,856-U docket is directly applicable to the matter now before the Commission, Staff has no objection to applying K.A.R. 82-3-101(a)(36), which states the same standard pressure base of 14.65 psia as docket no. 34,856-U. Further, K.A.R. 82-3-101(b) dictates that any term not defined shall be interpreted by the Commission to be consistent with its common use in the industry. When one also views this under the Commission's broad authority granted under K.S.A. 66-1,201 et seq., the Commission may apply either the 34,856-U docket, K.A.R. 82-3-101(a)(36), or (b) to this complaint.

Commission Legal Question B: Does the statute of limitations apply to this action and if so which one and why?

25. The statute of limitations does not apply. In the SWBT docket, the Complainant, Black and Veatch, alleged SWBT overcharged for services. SWBT contended that the claims by Black and Veatch were barred by the statute of limitations. The Commission concluded that complaints alleging that a customer has been overcharged are not limited to "complaints that are brought within a specific period of time."²³ The Commission went on to cite from the *Pork Motel Corp.*²⁴ case that "the Commission, as an administrative agency, are creatures of statute and their power is dependent upon authorizing statutes." The primary authorizing statute in the

²² Transcript of TKO Evidentiary Hearing, p.33-34 (Jan. 10-11, 2017).

²³ 2004 WL 7075680(Kan.S.C.C.), Docket No. 04-SWBT-879-COM, p.3 (December 13, 2004).

²⁴ *Pork Motel Corp. v. KDHE*, 234 Kan. 374, 378; *Mobil Oil Corp. v. State Corp. Commission*, 227 Kan. 594, 600.

current complaint before the Commission is K.S.A. 66-1,201, which states “[t]he commission is given full power, authority and jurisdiction to supervise and control the natural gas public utilities...doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”

26. TKO argued in their pre-trial brief that the complaint is limited as “[u]nder K.S.A. 66-154c, complaints seeking certificates under K.S.A. 66-154a must be filed within three years after the payment complained of. Highly summarized, K.S.A. 66-154a states that common carriers shall not charge unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rates or charges. TKO is a common carrier transporting goods.”²⁵ The complainants in this action are not “seeking certificates as described in K.S.A. 66-154a”²⁶ as setting a just and reasonable rate is not requested in the complaint before the Commission. Complainant Richard Hanson testified that he first became aware of the billing error by TKO on or about July 15, 2014.²⁷ Even if the statute of limitations in K.S.A. 66-154c were applied, the complaint before the Commission would not be barred. The complaint in this docket was filed on December 4, 2014, which was within the three year time-frame specified in K.S.A. 66-154c.

Commission Legal Question C: Does the Commission have the authority to hear and determine issues of contract law?

27. A contract, either written or oral, is an offer and acceptance, with consideration, to do or not do a particular thing or act. The consideration involved must be sufficient and lawful. Though not a court of equity, the Commission has the authority to hear and determine issues of contract law in the context of its statutorily authorized role of supervising and

²⁵ Respondent’s Pretrial Brief, p.13, ¶ 42 (Jan. 3, 2017).

²⁶ K.S.A. 66-154c

²⁷ Transcript of TKO Evidentiary Hearing, p.54 (Jan. 10-11, 2017).

controlling natural gas public utilities, doing all things necessary and proper to supervise and control public utilities,²⁸ and overseeing the form and filing of contracts of natural gas public utilities.²⁹ TKO is a natural gas public utility as defined by K.S.A. 66-1,200 as it meets the definition of a public utility under K.S.A. 66-104 and supplies natural gas. Pursuant to K.S.A. 66-1,201, the Commission has the “full power, authority and jurisdiction to supervise and control the natural gas public utilities as defined in K.S.A. 66-1,200, doing business in Kansas, *and is empowered to do all things necessary and convenient* for the exercise of such power, authority and jurisdiction.” (emphasis added). Pursuant to K.S.A. 66-1,203, “[e]very natural gas public utility doing business in Kansas over which the commission has control shall publish and file with the commission copies of all schedules of rates and shall furnish the commission copies of all rules and regulations and contracts between natural gas public utilities pertaining to any and all jurisdictional services to be rendered by such natural gas public utilities.” The statutory language in K.S.A. 66-1,201 and 66-1,203 gives the Commission the authority to hear and determine issues of contract law in the public utility context and is clear and unambiguous.

Commission Legal Question D: Does the Commission have the jurisdiction to consider remedies in equity?

28. A remedy is “the means by which the violation of a right is prevented, redressed, or compensated.”³⁰ An equitable remedy is defined as a “[c]ourt order forcing the defendant to complete a contract, instead of demanding a fine. This remedy occurs when a fine is not a fair result for the injured party. In a non-performance or breach of contract case, a fine lets the

²⁸ K.S.A. 66-1,201.

²⁹ K.S.A. 66-1,203.

³⁰ Black’s Law Dictionary, online, 2nd Ed.

defendant ‘buy’ out of the contract obligations.”³¹ The Commission has the jurisdiction to consider remedies in equity based on the authority set forth in K.S.A. 66-1,201, if it so chooses. As stated in the prior answer to Question C, TKO is a public utility under the jurisdiction of the Commission. Pursuant to K.S.A. 66-1,201, the Commission has the “**full** power, authority and jurisdiction to supervise and control the natural gas public utilities as defined in K.S.A. 66-1,200, doing business in Kansas, and is empowered to do **all** things necessary and convenient for the exercise of such power, authority and jurisdiction” (emphasis added). An order requiring TKO to charge the just and reasonable rate as approved by the Commission in its filed contracts, thereby requiring a refund of overcharged is equivalent to specific performance – a remedy in equity. Therefore, the plain meaning of the statutory language confers clear, unambiguous authority and jurisdiction upon the Commission to regulate public utilities, including TKO, if the Commission determines that an equitable remedy is necessary and convenient.

Staff Issue E: Whether TKO misapplied a BTU factor to the Complainants’ natural gas invoices which resulted in an overcharge of approximately 9.5%.

29. It is Staff’s position that TKO did misapply the BTU factor to Complainants’ invoices, resulting in an overcharge of approximately 9.5%. At the evidentiary hearing, Mr. Michael McEvers, managing member of TKO, confirmed that TKO has used a pressure base of 13.45 psia when calculating the bills for customers in Kansas since 2007.³² Complainant Richard Hanson testified that “the basis of the Complaint is there is a discrepancy between the pressure base used for calculation of volumes and the pressure base used for measuring the Btu.

³¹ Black’s Law Dictionary, online, 2nd Ed.

³² Transcript of TKO Evidentiary Hearing, p.150-151 (Jan. 10-11, 2017).

A pressure base has to use the same pressure for calculation of volumes and for the application of the MMBtu factor.”³³

30. When Mr. Hanson was asked why the base pressure for volume and MMBtu calculations should be the same, he responded that “you are measuring a certain number of cubic feet at a certain pressure. And when you vary the pressure, the Btu of that gas changes per cubic foot. So you have to have the same pressure base, if you will. That is where the pressure base term comes from. It’s a base pressure used for volumetric measurement and for Btu per cubic foot determination.”³⁴ When asked about methods of calculation, Mr. Hanson testified “if the pressure base goes up, you are packing more molecules into a cubic foot, so you’ve got more Btu value. Likewise if the pressure goes down, you get less molecules packed into a cubic foot, and the Btu drops. And that’s why it is imperative to use the same pressure base for the volumetric calculations as for the Btu per cubic foot.”³⁵

31. Staff witness Leo Haynos, when asked about the calculations being made by TKO to a pressure of 13.45, responded “When you use a pressure base as a reference point, if you are going to use 13.45, fine, you can use whatever you want for a reference point provided you use the same data or reference points throughout all of your calculation. If you don’t, you have two different reference points, you can’t get it to be fungible.”³⁶ Mr. Haynos went on to testify,

“If you change the volume and you don’t change the Btu calculation to the same reference point. You are selling more gas – then the problem with reading a fast meter, for example, is the same thing. You are making this meter read 9.5 percent faster than the amount of Btu’s moving through there by making that type of calculation. You have

³³ *Id* at p.52.

³⁴ *Id* at p.70.

³⁵ *Id* at p.72.

³⁶ *Id* at p.274-275.

got to have that reference pressure apply to both the energy and to the volumetric calculation.”³⁷

Mr. Haynos was also asked if the contract between TKO and its customers had a pressure base of 13.45, would we have a dispute?³⁸ He responded “Not necessarily, provided that he uses that, that 13.45 as a reference point. So yes, you can’t just apply it to your volume. You have to apply it to your Btu value as well. That’s the problem. We have a 13.45 reference point applied to the volume and the 14.73 applied to the Btu calculation.”³⁹ Mr. Haynos was then asked if TKO is required to use 14.65 or 14.73 for calculating volume. “If they state it in their,...in their contract, they can use whatever the parties agree to. That’s the way we have done it before with other gas companies. If you have no mention of a pressure base in your....contract or your tariff, we believe it goes back to the only requirement that would be there, the standard, which would be the old 1961 docket.”⁴⁰

32. While the agreement between the Complainants and TKO may be silent with specific respect to establishing a BTU value, Commission Docket 34,856-U and K.A.R. 82-3-101(a)(36) both prescribe the acceptable methodology for establishing the BTU value for a given volume of gas.⁴¹ Further, though there are multiple contracts at issue due to contract renewals and more than one meter/account per complainant, Section 7.1 of several of the contracts entered between the parties in this complaint states:

This agreement is subject to all applicable and valid orders, law, rules and regulations of all duly constituted governmental authorities having jurisdiction or control over the parties or the subject matter of this Agreement. If any provision of this Agreement is determined to be invalid or unenforceable in any jurisdiction,

³⁷ *Id* at p.282.

³⁸ *Id* at p.305.

³⁹ *Id* at p.305.

⁴⁰ *Id* at p.306.

⁴¹ Docket No. 34,856-U, First Supplemental Order §302 (Jan. 16, 1961).

then to the fullest extent permitted by law, the other provisions hereof shall remain in full force and effect in such jurisdiction and shall be construed in order to carry out the intention of the parties as nearly as possible. The invalidity or unenforceability of any provision hereof in any jurisdiction shall not affect the validity or enforceability of any provision in any other jurisdiction.

This section is used in what appears to be TKO's standard contract with its customers, and earlier agreements contain similar language, deferring to the laws of the jurisdiction in which the contract was entered and the applicable regulatory authority.

33. Therefore, in light of this provision as well as the general applicability of the Commission's 1961 First Supplemental Order and K.A.R. 82-3-101(a)(36) and (b), TKO's calculation of the BTU value is subject to the Commission's interpretation and any calculation contrary to these standards would constitute charging an unapproved or unauthorized rate subject to refund (or recovery, depending on the nature and direction of the miscalculation). Such industry standards should be applied in the subject contracts and used in the calculation of the Commission-approved rates relevant to the Complainants.

Staff Issue F: Whether TKO should be required to refund the alleged overcharge to the Complainants and to all TKO customers that are served under the Commission's jurisdiction.

34. The Commission's Order Granting Applications with Conditions issued on April 12, 2010, was the first instance of the Commission authorizing TKO to conduct the business of a public utility in Kansas by granting Anadarko's request to transfer to TKO its rights and obligations to provide natural gas service to the customers listed in Anadarko's and TKO's applications. Based on the documents reviewed by Staff, the discovery received and the testimony provided in the evidentiary hearing, Staff believes the Complainants are due a refund from TKO from April 12, 2010 to the present. If the Commission determines that TKO did in fact overbill the Complainant's in this matter then, based on the statutory authority and the case

law as outlined above, it is well-settled that the Commission has the authority to issue refunds for amounts charged in excess of a Commission-approved rate for the residential customers and the contract rate for the irrigation customers. The Commission's authority to issue refunds is derived from K.S.A. 66-1,201, 66-1,202 and 66-1,207.

35. While the Commission has the authority to issue refunds to all TKO customers, will it be in the public interest? Will a refund to all customers bankrupt TKO? Mr. Haynos stated in Staff's Report and Recommendation of November 10, 2016, "[a]lthough Staff still feels a refund of the overbilled amount is equitable, a refund that results in bankruptcy of a public utility is clearly not in the public interest. Therefore, Staff recommends TKO be required to conduct a rate case that includes an audit by Staff as to the accuracy of TKO's Annual Reports and the development of a payment plan that will allow TKO to refund the overbilled amount in such a way as to protect the financial viability of the public utility and provide just and reasonable rates to its customers."⁴² The financial viability of TKO in light of any refunds ordered is discussed further in paragraph 38 of this brief.

Staff Issue G: Whether TKO should be assessed a civil penalty for failing to follow directives from Commission Orders regarding service supplied to residential customers.

36. The Commission is authorized under K.S.A. 66-138(a)(2) to assess a civil penalty for violations under this act. Staff recommends a civil penalty in the amount of \$7,100 for failure to comply with Commission Orders, for violating K.S.A. 66-117, and filing inaccurate compliance reports regarding service provided to its residential customer.⁴³ Mr. Haynos testified

⁴² Staff Report and Recommendation, p. 6 (November 10, 2016).

⁴³ Staff Report and Recommendation, p. 7 (May 15, 2015).

at the evidentiary hearing and in his Report and Recommendation of November 10, 2016, that the recommended civil penalty is within the range set forth in K.S.A. 66-138(a)(2).⁴⁴

Staff Issue H: Whether the Commission should order TKO to initiate a rate case to set rates, gas tariffs, and service requirements for all of TKO jurisdictional customers using traditional rate making methods.

37. In the Order Granting Application with Conditions of April 12, 2010, TKO was granted the status of a public utility, limited to serving a defined list of customers under individual gas purchase contracts.⁴⁵ This provided Commission oversight to “review customer contracts to ensure the terms, conditions, and gas sales price are reasonable.” The Order further states that “if the contracts are found to be discriminatory or unreasonable, then the Commission will have authority to set rates using any available rate-making policies.”

38. In Staff’s review of TKO’s annual reports filed with the Commission, which indicate TKO lost approximately \$400,000 in its Kanas operations for 2014 and 2015, Staff is concerned with the financial viability of TKO.⁴⁶ Mr. McEvers testified at the evidentiary hearing that if the Commission ordered a refund to the Complainants in the amount of \$70,000, as calculated by Mr. Hanson, he could pay and it would not bankrupt TKO.⁴⁷ But, Mr. McEvers also testified that if the Commission ordered a refund to all customers of TKO, then it could end his business in Kansas.⁴⁸ In the Report and Recommendation of Mr. Haynos, he stated “in the interests of TKO and its customers, Staff recommends TKO be required to file for a rate case to

⁴⁴ Staff Report and Recommendation, p. 7 (November 10, 2016) and Transcript of TKO Evidentiary Hearing, p.325 (Jan. 10-11, 2017).

⁴⁵ Docket No. 08-TKOG-314-COC, Order Granting Application with Conditions, ¶26 (April 12, 2010).

⁴⁶ Staff Report and Recommendation, p. 2 (November 10, 2016).

⁴⁷ Transcript of TKO Evidentiary Hearing, p.162 (Jan. 10-11, 2017).

⁴⁸ *Id* at p.162-163.

set rates, gas tariffs and service requirements. This approach will standardize rates and practices for all of TKO customers and assure TKO receives the appropriate compensation for its operations.”⁴⁹ Therefore, Staff recommends the Commission require TKO to file a rate case to set rates, gas tariffs, and service requirements for all of TKO’s customers using traditional rate making methods based on TKO operating cost data in a 12 month test year that aligns with its most recent complete fiscal year and filed within 120 days after the final order in this docket.⁵⁰ This solution will address the overbilling to all customers while preserving the financial viability of TKO.

V. Conclusion

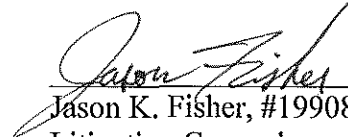
39. WHEREFORE, as set forth and analyzed above, Staff respectfully submits its Closing Brief asserting the Commission has the jurisdiction and authority to: A) apply either the 34,856-U docket, K.A.R. 82-3-101(a)(36), or (b) to this situation as the standard pressure base under Commission’s broad authority granted under K.S.A. 66-1,201 et seq.; B) deny the statute of limitations argument by TKO due to the precedence set in the SWBT docket and its authority under K.S.A. 66-1,201; C) determine issues of contract law pursuant to K.S.A. 66-1,201; D) to consider remedies in equity for the Complainants if “necessary and convenient for the exercise of such power, authority and jurisdiction” as set forth in K.S.A. 66-1,201; E) determine that TKO did misapply the BTU factor to Complainants’ invoices, resulting in an overcharge to the residential customers of TKO and the Complainants; F) authorize refunds by TKO of the excess rates paid based on erroneous or false pressure base factors from the time period of April 12, 2010, to the date of the final order in this matter; G) assess a civil penalty against TKO under

⁴⁹ Staff Report and Recommendation, p. 8 (November 10, 2016).

⁵⁰ *Id* at p. 2.

K.S.A. 66-138(a)(2); and H) require TKO to file a rate case to stabilize its financial situation, to “furnish reasonably efficient and sufficient service” and “to establish just and reasonable rates” as set forth in K.S.A. 66-1,202.

Respectfully submitted,



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I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Closing Brief Following Hearing Held January 10 & 11, 2017, was served via electronic service this 27th day of February, 2017, to the following:

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