

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

In the Matter of the Complaint Against)	
TEXAS-KANSAS-OKLAHOMA GAS, LLC)	
)	
Respondent,)	Docket No. 15-TKOG-236-COM
)	
For an Order for Adjustment and Refund of)	
Unfair, Unreasonable and Unjust rates for the)	
Sale of Natural Gas for Irrigation based on)	
inaccurate and/or false)	
pressure base measurements.)	
)	
By Circle H. Farms, LLC, Richard L. Hanson,)	
Rome Farms, LLC and Stegman Farms Partnership)	
)	
<u>Complainants</u>)	

COMPLAINANTS' POST-HEARING BRIEF

(PUBLIC VERSION)

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I. Introduction and Summary

1. The Commission heard evidence on January 10 and 11, 2017, on the Complaint against Texas-Kansas-Oklahoma, Gas, LLC (“TKO”), a Kansas public utility, filed pursuant to K.A. R. 66-1,205. The Complaint alleged that TKO has consistently billed the Complainants, irrigation and residential customers of TKO, for volumes of MMBtu’s of gas greater than the volumes TKO paid its suppliers purely by manipulating the formula it uses to measure the gas.
2. TKO has not offered any evidence that refutes the allegations of the Complaint. There is no evidence before this Commission that TKO processed, altered or in any way changed the molecules of gas which it purchased before selling the same molecules to its customers.
3. TKO’s manipulation of the gas volume sold to its customers resulted in billings which overstated the volume of Btu’s sold by approximately 9.5%. TKO justifies its manipulation of measurement as necessary to meet its revenue requirements and on the grounds that it bills all its customers in the same erroneous fashion.
4. TKO has, rather than denying the facts, admitted to its conduct in its Response to the 2015 Staff Report and Recommendations and by the testimony of its President at the hearing that he “agreed with” the 2016 Staff Report and Recommendation.
5. TKO’s defense is based on the false premise that this is a traditional rate case to be decided on the fairness of the monetary component of its bills to its customers. It argues that the dollar and cent amount charged per MMBtu is fair, a claim which ignores the ultimate issue presented by the Complaint; namely, that its billings falsely inflate the volume of MMBtu’s charged to its customers.

6. This Post-Hearing Brief: states the issues; summarizes the evidence proving the Complaint and the absence of any evidence refuting the allegations or supporting affirmative defenses; (3) answers the questions posed by the Commission; and (4) briefs the law which supports Complainants' position and the need for a full refund of overcharged volumes.

II. Issues Presented by the Complaint

7. Complainants believe that the first two contested issues identified by Staff in its pre-trial submission appropriately define the contested issues as to TKO's liability:
 - Did TKO misapply a Btu Factor to the Complainants' natural gas invoices which resulted in an overcharge of approximately 9.5%?
 - Should TKO be required to refund the alleged overcharge to the Complainants and to all TKO customers that are served under the Commission's jurisdiction?

Staff also identified two contested issues which focus on remedies:

- Should a civil penalty be assessed against TKO for its billing to residential customers?
 - Should the Commission order TKO to initiate a rate case using traditional rate making methods.
8. The foregoing issues appropriately define the scope of the complaint: i.e. the issues which the Commission should identify for decision thus also establishing the test for assessing the relevance of evidence. *See* Presiding Officer's Order on Aquila's Motion to Compel, Docket No. 06-PEKG-1274-COC, October 15, 2007, ¶14.

III. Evidence Proving the Complaint¹

A. TKO's Application for a limited Certificate and Orders issuing the Certificate

9. TKO first applied for a “*Limited Certificate of Public Convenience and Authority*” on October 2, 2007. Hanson Ex. K. The requested certificate was limited to specific contract customers identified in the Application. *Id.* at p. 2, ¶ 8.
10. TKO represented that it had “sufficient managerial, technical, and financial experience to provide efficient and sufficient service as contracted for in the natural gas sales/purchase agreements listed” in the application. *Id.*, ¶ 7.
11. The Commission issued an Order on April 12, 2010 granting TKO's Application with conditions, specifying that TKO sales of gas would be considered a “public utility function.” Hanson Ex. C, p. 4, ¶ 10-11. The Commission also determined that Staff had determined that TKO had “sufficient managerial, technical and financial experience to provide efficient and sufficient service if a limited certificate were to be granted. *Id.*, p. 6, ¶ 16.
12. The Commission issued an Order granting a “*Limited Certificate of Public Convenience and Authority*” to TKO on March 19, 2012 subject to certain conditions. Hanson Ex. D. The Certificate was limited to gas service for specific customers listed as an exhibit to TKO's Application. *Id.*, p. 2, ¶ 8.

¹ References to the record are in the following form: DT or RT (Pre-filed Direct or Rebuttal Testimony), name of Witness, page number, line number (e.g. DT, Hanson, p. 7, 17; TR (Transcript Testimony), name of Witness, page number, line number (e.g. TR, Haynos, p. 274, 21-15; Ex (Exhibit referenced by name of sponsor and exhibit number (e.g. Hanson Ex. K.). References to filings in this docket will identify the filing by name and date without repetitively citing the docket number of this matter.

13. Because TKO does not operate a gathering system, all customers purchased by TKO were considered to be Public Utility customers.” *Report and Recommendation – Utilities Division* (Public), May 14, 2015, p.3. (“May, 2015, R & R”)

B. The Complaint

14. The Complaint was filed on December 4, 2014 pursuant to K.S.A. § 66-1,205, the statutory authority describing and investing the Commission’s powers with respect to a complaint against a natural gas utility. *Complaint*, April 12, 2014, ¶5.

15. The Complainants alleged that they had been improperly, unfairly and unjustly overbilled for a substantial period of time” . . . “based on a consistent erroneous and/or false calculation utilized by TKO as the basis for the volumes of gas measured in MMBtu’s for which customers are charged.” *Complaint*, ¶¶ 8 & 9.

C. The evidence establishing valid measurement of quantities of MMBtu’s.

16. Natural gas was historically sold on the basis of cubic feet measured by positive displacement meters which measured the number of cubic feet which passed through a meter. Since natural gas is compressible, the number of molecules will vary with pressure. The unit of such measurement is normally stated per thousand cubic feet (Mcf). DT, Hanson, p. 7, 17 – p. 8, 6.

17. Currently natural gas is sold on the basis of its heating value, rather than simple volume. Natural gas with high methane contents, for example, has more heating value than one with larger quantities of nitrogen or helium which are inert gasses; i.e. non-flammable. This heating value is routinely determined by sampling and analysis with use of a

chromatograph. The unit of this measurement then is typically one million British thermal units (MMBtu). DT Hanson, p. 7, 3-15.

18. Because sales are made on the basis of heating value, it is necessary to measure both the Mcf and the MMBtu's at a given pressure. That is known as a pressure base. The same pressure base must be used to calculate both the Btu per cubic feet and the Mcf volume. If the pressure of a fixed quantity of gas increases, the volume decreases, and vice versa: if pressure decreases, the volume increases. DT, Hanson, p. 8, 8-19; and TR, Haynos, pp. 274, 7-25 – p. 275, 1-4. *See also* Hanson Ex. E.
19. For the conversion from Mcf to MMBtu to be accurate, the pressure base serves as a factor in the equation used to calculate the conversion. It is scientifically necessary in order to obtain equivalent values that the pressure base used for both be the same. Hanson Ex. R, p.2 (“When calculating the energy, value, it is of utmost importance to have the volume per cubic feet and the Btu per cubic foot at the same pressure base.”)
20. Stated another way, a pressure base serves as a reference point for calculating the conversion; and the pressure base utilized can vary, “provided you use the same data or reference point throughout all of your calculation. If you don't you have two different reference points, you can't get it to be fungible.” Haynos, TR. pp. 274, 7-25 -- 275, 1-4.

D. The nature of TKO's retail utility sales in Kansas.

21. TKO was certificated as a natural gas utility. Hanson Exs. C & D. TKO does not transport natural gas, but rather has a meter connected to other providers' lines for purposes of measuring retail sales to its customers. TR, Haynos, p. 320, 15-20. The assets of TKO are a meter. *Id.* at p. 326. TKO also maintains facilities and provides other services relating to the conduct of a “gas service business.” DT, McEvers, p. 3, 10-11.

22. TKO's Certificate allows it to serve contract customers, all of whom are public utility customers and have been considered as such since the Certificate because it does not operate a gathering system. 2015 R & R (Public), p. 3.
23. TKO has sold natural gas to irrigation customers since 2007 including those who have written contracts and those who do not. TR, McEvers, p. 159, 1-6. TKO has been providing gas to customers without contracts who have paid their bills. Staff considered those sales to be pursuant to verbal contracts. TR, Haynos, p. 300, 8 – p.301, 14.
24. All natural gas **purchased** by TKO for resale to its Kansas customers is bought and paid for on the basis of dollars and cents per MMBtu. TR, McEvers, p. 143, 25 – p. 145, 22.
25. All of the natural gas **sold** by TKO to its irrigation gas customers in Kansas is based on contract prices stated in terms of price per MMBtu. TR, McEvers, p. 157, 14-16. In all instances the price per MMBtu for irrigation customers is based on an accepted index plus a fixed amount as an additur. DT, Hanson, p. 6, 13-16.
- 26.** All invoices introduced in evidence in this matter reflect that on the face of the invoices, TKO disclosed a price, a heating value and a volume. They do not disclose TKO's use of divergent pressure bases. *See* Hanson Exs. Q-1 through Q-4; McEvers Exs. MM-4 & MM5; TR, McEvers' pp. 164, 12-25 – p. 166, 6.

E. TKO's measurements artificially inflate the volumes billed to Complainants

27. The natural gas which TKO sells to irrigation customers is purchased by TKO from third party suppliers. For most of the period in question, Anadarko was the primary supplier. In recent years, gas has been supplied by Black Hills Energy and Merit Energy Company. TR, McEvers, p. 143, 25 – p. 145, 17.

28. Sales to TKO by Anadarko were originally made [REDACTED]
[REDACTED]
[REDACTED] (Confidential). TKO also provided Staff with a response to a data request which stated that Anadarko currently uses 14.73 psia as a pressure base for calculating Btu values provided to TKO. TR, Haynos, p. 262, 12-23.
29. Black Hills Energy currently sells gas to TKO pursuant to a tariff which states that the unit of measurement should be 14.73 psia; and thus, the pressure base used by BHE in its billing to TKO is 14.73 psia. TR, Haynos, p. 261, 24 – p. 262, 11; Hanson RT, p.6, 5 – p. 7,3.
30. All the sales to TKO’s Kansas customers, those with contracts and those without contracts, are billed using TKO’s “billing method” which employs the use of 13.45 psia as a pressure base for volume. TR, McEvers, p. 159, 22-25 – p. 160 ,1. TKO has used this pressure base since TKO began servicing Kansas customers in 2007. DT, McEvers, p. 6 9-11 and p. 8, 7-13.
31. TKO admits that it set its “rates, given our billing methods, to earn the revenues that we did.” DT, McEvers, p. 18, 13-14.
32. TKO’s practice which uses different reference points for calculation of Mcf’s and MMBtu’s means that TKO is selling more gas than it bought – analogous to an improper reading on a fast meter. “You have got to have that reference pressure apply to both the energy and to the volumetric calculation.” TR, Haynos, p. 282, 8-25 – p. 283, 1.
33. The result of TKO’s use of a lower pressure for gas volume calculations artificially inflates the volumes of gas and MMBtu’s being sold by approximately 9.5%. DT,

Hanson, p. 10, 6-20 – p. 11, 1-8; Hanson Exs. H-1--H-4 and Q-1--Q-4; *Report and Recommendation Utilities Division*, November 10, 2016, pp. 3-5 (“2016 R & R”).

“[T]his manipulation of the gas volume sold without performing a corresponding modification of the BTU content for that volume overstates the BTU value of the gas sold by approximately 9.5%. Because contracts with its customers state a price in \$/MMBTU, overstating the amount of BTU’s purchased results in overcharging the customer by 9.5%.”

Id. p. 4.

34. The increase in volume occurs even though there is no increment in the actual molecules of gas or change in the physical nature of gas as between the gas purchased by TKO and the gas sold to its customers. DT, Hanson, p. 10, 9-18. *See also*, Hanson Ex. M.
35. The result of the artificial increase in volume, based on prices in effect at the times of the billing demonstrate that from 2007 through 2015 the irrigation Complainants were overbilled in the amount of \$100,982.32; and from April 12, 2010 through 2015 they were overbilled by \$72,411.63. *See* Hanson Exs. H-1—H-4.
36. TKO’s billings to its residential customers, such as Mr. Hanson, artificially inflated the volumes resulting overcharges above the applicable tariff. From the invoices, which Mr. Hanson was able to locate, he calculated the impact on him from 2014 through 2015 as \$211.21. *See* Hanson Ex. H-1.
37. The invoices available to Complaints were filed as Hanson Exhibits Q-1 through Q-4. His calculations were made through only the first month or two of 2015. However, TKO concedes it has the ability on its computer pricing program to easily calculate the difference in the amounts charged at 13.45 psia and amounts due at 14.73 psia. TR, McEvers, p.162, 8-19.

F. TKO’S Financial Ability to Pay Refunds

38. At the time, TKO’s application for a Certificate was considered by the Commission, Staff reviewed the contracts which were to be assumed by TKO but did not perform an analysis of factors normally undertaken in a rate case for a small utility. TR, Haynos, p. 298, 17 through p. 300, 7. TKO also told the Commission that it had adequate resources to meet unanticipated expenses. TR, McEvers, 160, 6-25 – 161, 1.
39. TKO has sufficient reserves to pay a refund to Complainants at least in the amount of \$70,000 without bankrupting the Company. TR, McEvers, p. 161, 4-25 – 162, 7.
40. TKO is not opposed to the recommendations of Staff in the R & R of May 15, 2015. TR. McEvers, p. 152, 14-21. In its Response to the May 15, 2015 R & R, TKO also represented to the Commission, that it would “refund or otherwise credit customers for the respective overcharge due to the inaccurate billing calculations.” *See* May 15, 2015 Response to R & R, p. 15. It also admits that it would be simple to do a calculation on its computer and billing program to do a computation from a given point in time forward using a pressure base of 14.73 for volume rather than 13.45. McEvers, TR p. 162, 8-19.
41. The only information Staff had available to it in assessing TKO’s financial capabilities was annual reports. TR, Haynos, p. 303, 17 – p. 304, 3. The limited information available to staff and to Complainants’ expert is insufficient to make a determination of TKO’s earnings or ability to pay refunds. TR, Brosch, p. 239, 4 – p. 240, 12.

IV. Argument and Authorities

A. Response to Commission's Legal Questions

Following the hearing on January 10 & 11, the Commission posed four questions to the parties and requested briefing. Each question is addressed in this section.

1. 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)?

ANSWER: K.A.R. 82-3-101 is codified and applicable to this situation. The referenced orders and regulations, along with overwhelming evidence of industry standards and scientific principles, are evidence establishing that a consistent pressure base must be used when measuring natural gas volumes.

K.S.A. 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.

That regulation states and demonstrates the need to have established and uniform standards relating to the measurement of natural gas. The regulation is relevant as evidence of the scientific and universally accepted principle that measurement of Mcf's and MMBtu's must use the same pressure base to provide accurate and comparable measurements. It is beyond purview that standard pressure bases must be used in measuring volumes of natural gas which are bought and sold: For example:

- In 1961 the Commission issued an order which prescribed basic measurement criteria for natural gas including a “pressure base of 14.65 psia in reporting volumes and heating values.”²

² Docket 34,856-U Rules and Regulations Relating to Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas, January 16, 1961.

- A standard pressure base is 60 degrees; and “typically referred to as 14.73 PSIA.” Hanson Ex. R, p. 2.
- K.S.A. 3-101(a)(36) defines a cubic foot of gas at a “standard pressure base as “14.65 pounds per square inch absolute, and the standard temperature base shall be 60 degrees Fahrenheit.”
- TKO’s suppliers all use a standard pressure base. For example, Anadarko uses GPA standard 2172-12 and calculating volumes currently on the basis of 14.73 psia. *See* November 10, 2016 R & R, p. 4. Anadarko previously used 14.65. DT Hanson, p. 11, 11-17.³
- “When calculating the energy value, it is of utmost importance to have the volume and the Btu per cubic foot on the same pressure base.” Hanson, Ex. R, p. 2. *See* also, Haynos, TR pp. 274, 7-25 -- 275, 1-4.

It is unrefuted that a consistent and uniform pressure base is an industry standard and must be employed to convert from an Mcf to a comparable MMBtu. Thus, K.S.A. 3-101(b) provides an additional measure of relevance because the pressure base term is seen as one having common use in the industry.

The only two witnesses who demonstrated technical knowledge, experience and qualifications, Mr. Hanson and Mr. Haynos, testified, TKO’s practice of using 13.45 psia as a pressure base for volume calculations of heating content when a different pressure base (whether 14.65 or 14.73) is used to calculate Btu’s is erroneous and artificially inflates the MMBtu’s for which TKO’s customers are and have been charged since 2007.

³ Hanson testified that he used 14.65 psia in calculating the overcharges for the periods that Anadarko used t14.65 and 14.73 after Anadarko adopted the more recent standard.

Even if TKO mistakenly or in good faith used a given pressure base, it still would be guilty of overbilling for volume to the disadvantage of its customers since 13.45 psia deviates from the pressure base used to calculate MMBtu's which it purchased. The evidence is overwhelming that such a "consistent" or common pressure, whether 13.45, 14.65 or 14.73 was not used by TKO.

Thus, the references regulations reflecting a common pressure base are significant evidence that consistent and uniform application of a pressure base is required to give consistent, uniform and honest billings for quantities of MMBtu's.

2. Does a statute of limitations apply to this action and if so which one and why?

Answer: There is no statute of limitations that applies to this action.

A statute of limitation is an enactment of the legislature which "governs the time for commencing civil actions." K.S.A. 60-501 et seq. A civil action is the only form of action in Kansas, and it is commenced when a petition is filed with a court. K.S.A. 60-202 & 203. This proceeding is an administrative proceeding and is not, therefore an "action" filed with a court nor is it governed by statutory limits on causes of action.

The Commission operates pursuant to statutory authority. This complaint was filed against TKO as a natural gas utility pursuant to K.S.A. 66-1,205. *Complaint*, ¶5. The Certificate issued to TKO was a certificate for the retail sale of gas as a public utility. Order, April 12, 2010, Hanson Ex. C, ¶ 10. There is no limitation prescribed for complaints against a natural gas utility.

TKO asserts that the complaint is governed by K.S.A. 66-154c which deals with complaints seeking certificates under K.S.A. 66-154a relating to common carriers.

However, TKO does not operate in Kansas as a common carrier. See Kan. Stat. Ann. § 66-105. TKO does not transport natural gas and is not a pipeline. It owns and operates a meter and its assets are contracts for the retail sale of natural gas. TKO's certificate is to operate as a public utility, not as a common carrier.

More significantly, TKO has offered no evidence in this case supporting such a specious claim. "The statute of limitations is an affirmative defense and the burden of pleading and proving its applicability rests on the defendant." *Admire Bank & Tr. v. Emporia*, 250 Kan. 688, 689, 829 P.2d 578, 580 (1992). TKO cites a prior Commission order holding that Anadarko was a common carrier. However there is no factual basis in this proceeding supporting any claim that TKO is a common carrier.

Even if statutes of limitations applicable to causes of action were examined for analogous guidance, they would not be applicable. Perhaps the Complaint could be compared to civil actions to enforce a covenant of fair dealing and good faith implied in every contract in Kansas. See *Kan. Baptist Convention v. Mesa Operating Ltd. Pshp.*, 253 Kan. 717, 717, 864 P.2d 204, 206 (1993). However, implied covenants are generally considered to be implied in fact thus governed under a five year statute of limitations for written contracts under K.S.A. 60-511. See *Smith v. Amoco Prod. Co.*, 272 Kan. 58, 75, 31 P.3d 255, 268 (2001). Similarly, one could perhaps compare the Complaint to a civil action seeking damages for injuries to the rights of others or for fraud; but the period of limitations for those actions does not commence "until the fact of injury becomes reasonably ascertainable." K.S.A. 60-513(b).

The undisputed evidence establishes that TKO did not disclose its misrepresentation of Btu computations on the face of its billings nor to the Commission.

None of the Complainants had any reason to believe or suspect that they were not being billed for an accurate and honest quantity of Btu's. All of their bills were priced based on quantities of MMBtu's. TKO's own testimony confirms that the invoices did not disclose the erroneous use of an inconsistent pressure base which could not be discovered without performing formulaic calculations showing that TKO's formula enabled it to bill for 9.5% more volume than it paid its supplier.

Statutes of limitation have no application in this matter.

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

Answer: The Commission does not have authority to determine actions at law for breach of contract; but it does have authority to receive and review evidence of in the performance of a contract which results in violation of a statutory prohibition against unjust charges or exactions.

The Commission does not have authority to act as a court to hear or determine to issues of contract law; but that truism is not relevant to the issues presented in this Complaint. The issue is not whether TKO has breached a contract; but whether it manipulates its measurement of the quantity of MMBtu's so as to sell and charge its customers for a volume of btu's in excess than the volume it purchases. This is like a merchant putting his finger on a scale for the purpose of increasing the weight of a commodity. The merchant may be charging the correct price per unit; but is erroneously or falsely changing the measurement of weight of the commodity being sold.

The Commission clearly has an interest in utilities subject to its regulation accurately measuring and billing its customers. It has absolute authority under K.S.A. 66-1,205 to investigate and rule on complaints that TKO charged or received an unreasonable, unfair unjust or charge or exaction. See also, K.S.A. 66-1,201 through 66-1,204.

TKO, as its President testified, did not obtain a certificate establishing a “rate” using traditional utility rate making authority. Its charges are defined by contract. This Commission is the legal entity to consider whether TKO’s performance under its certificated contracts is fair, unjust or unreasonable.

Every piece of scientific, technical and credible testimony and evidence in this case establishes that in order to measure equivalent quantities (as a fungible commodity) it is necessary to convert Mcf’s to a volume of Btu’s by using an identical pressure base. There is no evidence that TKO does so. There is no evidence that TKO’s improper measurement does not result in an artificial inflation of approximately 9.5% in the volumes of MMBtu’s it charges its customers above what it paid for the very same molecules of natural gas.

An adjudication in this case is not based on a “breach of contract” in the sense that TKO did not charge its customers at the prices established by contract, whether in formal documents or course of practice. All charges were based on prices per MMBtu as established by national indices plus an additur. TKO did not breach the pricing provision; but it clearly unilaterally adjusted the volume which it charged at the stated prices. There is no proof that any customer, or the Staff or the Commission ever approved this erroneous manipulation of the volume.

In any setting, such conduct would be held as unfair and unjust. Former Chief Justice Prager in a landmark decision captured the essence of this principle relating to contract law:

Kansas courts imply a duty of good faith and fair dealing in every contract. Parties shall not 'intentionally and purposely do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

Bonanza, Inc. v. McLean, 242 Kan. 209, 222, 747 P.2d 792 (1987). See also *Kan. Baptist Convention v. Mesa Operating Ltd. Pshp.*, 253 Kan. 717, 725, 864 P.2d 204, 211 (1993).

TKO's conduct, proven in this Complaint, directly violates such a duty of good faith and fair dealing. As Staff has confirmed, "TKP unilaterally defined the volume of gas to be sold as a cubic foot at 60° F and 13.45 psia." November 10, 2016 R & R p. 4. It knowingly manipulated a billing practice to increase its revenues which injured the rights of its customers to receive the fruits of their contract: i.e. the true and accurate measurement of MMBtu's for which they were being charged. This Commission absolutely has the power to adjudicate what is just and fair under the rubric of a doctrine of good faith and fair dealing in addition to its statutory mandate to do so.

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

ANSWER: The Commission has jurisdiction to impose a refund as a remedy for violation of conduct within its jurisdiction. TKO's liability which justifies that remedy in this case flows from facts which prove the unfair and unjust nature of TKO's charges not from equitable remedies.

The Complaint does not request an "equitable remedy." It requests refunds as the appropriate remedy for unlawfully collected charges. That remedy is clearly within the jurisdiction of the Commission. See *Sunflower Pipeline co. v. State Corporation Commission*, 5 Kan. App. 2d 715, 721 (624 P. 2d 466 (1981)(rev. denied).

The Commission's statutory authority in this matter is established by K.S.A. 66-1,201 et seq. It is empowered to hear complaints about any unjust charges or exactions (K.S.A. 66-1,203) and "any rule and regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such natural gas public utility for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient or

insufficient, unjustly discriminatory or unduly preferential . . .” K.S.A. 66-1,205(a). It also has “the power to require natural gas public utilities to make such improvements and do such acts as are or may be required by law to be done by any such natural gas public utility.” K.S.A. 60-1,205(b).

The Commission is not granted the authority to act as a district court or otherwise decide or adjudicate civil disputes, whether stated in law or in equity. Equitable defenses, as such, then are not statutorily established for the quasi-judicial function which the Commission performs.

In this matter, the Complaint makes a very specific allegation that TKO’s billing practices are unjust, unfair and improper due consistent erroneous and/or false calculations utilized by TKO as the basis for the volumes of gas measured in MMBtu’s for which customers are charged.” *Complaint*, ¶ 10.

As demonstrated throughout, there is no evidence that TKO did not utilize the improper calculations as alleged; namely that such measurement practices artificially inflate volumes of MMBtu’s charged to its customers, and that its practices have been consistent and/or false. These factors also disqualify TKO’s attempt to invoke affirmative equitable defenses such as laches, waiver or estoppel.

Boiled down to its essence, TKO argues that the Commission, Staff and Complainants all should have caught its erroneous/false billing practices sooner than they did; and their failure to do so excuses TKO’s culpability even though the evidence proves:

- All existing industry standards and Commission rules recognize and impose the need for consistent and uniform pressure bases in measuring quantities of natural gas;
- TKO never disclosed in any invoice to its customers or reports to the Commission that it deviated from those standards and practices;
- TKO never disclosed that it was uniformly inflating volumes of gas sold even though there was no concurrent physical alteration or change of the molecules; and
- TKO admitted through testimony that its billing practices were implemented to achieve revenues which it thought it needed.

Just as with the statute of limitations argument, TKO bears the burden of proof on its so called affirmative defenses. To carry any of these “equitable” defenses, TKO would need to prove that it relied on the absence of action by its customers induced by its own conduct to its own damage. It has not proven that it either relied on this putative delay or suffered damages as a result. The only damage TKO can possibly assert would be the result of an order to pay refunds, a remedy lawfully imposed by the Commission.

In order to invoke equity, a party must do equity. A party cannot come to equity lacking clean hands. “The clean hands doctrine in substance provides that no person can obtain affirmative relief in equity with respect to a transaction in which he has, himself, been guilty of inequitable conduct.” *Green v. Higgins*, 217 Kan. 217, 220, 535 P.2d 446, 449 (1975). That is the precise reason why equitable defenses are not open to TKO.

Ultimately then, the Commission clearly has the power to impose remedies to address unfair, unjust or unreasonable charges, exactions, practices or conduct. The

Commission has the power to remedy such conduct by refunds, irrespective of what label might be attached to such a remedy. Equally important, TKO has neither proven nor can it establish legally that it would be entitled to any of the equitable defenses it alleges.

B. Complaints Have Proven that TKO Unfairly and Unjustly Billed its Kansas Utility Customers

Complainants respectfully submit that the review of evidence supporting the Complaint set out above in Section II and in the answers to the Commission's questions fully sustains the burden of proving the factual basis of the Complaint. The evidence introduced by the Complainants, the Staff, and cross examination of Mr. McEvers all prove and fully sustain a finding that TKO's billing practices are improper, unfair, misleading and unjust. The Commission has plenary power to take action to remedy those wrongs.

C. TKO's Defense Begg the Ultimate Question posed by the Scope of the Complaint

TKO is confronted in this matter with a set of facts which it cannot and does not deny. Thus, it is not surprising that its closing argument, and its entire case, avoid the fact question of whether TKO improperly billed its customers due to use of conflicting pressure bases which resulted in overcharges of 9.5% in volume. TKO's President, Michael McEvers testified under oath that he "agreed with the Staff's Report" when questioned about the initial R & R issued in 2015 which set forth the factual basis for TKO's liability.

Given these facts it is not surprising that TKO has chosen to define and defend this matter by re-framing, albeit incorrectly, the scope of the Complaint. Its closing argument portrayed this as chose to frame the question before this Commission as whether the "rates" charged by TKO were reasonable. This was justified by the metaphor of "looking at the forest instead of the trees."

But the “forest” placed before the Commission by this Complaint is not a traditional utility rate case. Yet that is the focus of TKO’s defense and evidence. The only evidence which TKO offered other than Mr. McEvers, came from a utility rate “expert” witness whose entire testimony was premised on rate making theories and concepts; principally the rate of return or revenues to which TKO would be entitled in a rate case. *See* TR, Ankum, p. 196, 2-23.

The scope of the Complaint, the nature of relevant evidence, and the irrelevance of the testimony of Mr. Ankum, was fully briefed in *Complainants’ Pre-Hearing Brief*, filed January 3, 2017. The arguments and factual recitations set forth there are incorporated in their entirety in this submission.

This is not a rate case. TKO’s President testified that “TKO’s certificate is limited in that its customers are those filed with the Commission with the terms set forth on the individual customer contracts, as opposed to a more common tariff.” DT, McEvers p. 4, 3-5. “TKO had no active general rate case proceeding pending during the periods when the contested gas volumes were billed to the Complainants.” TR, Brosch, p. 4, 8-11.

TKO desperately wants this case to be adjudicated as a rate case, even though, paradoxically it submitted pleadings in this matter arguing that a rate case is not necessary. The Certificate issued to TKO was, based on an identification of the contracts. The Staff did not undertake any of the analysis which might normally be involved in a rate case for smaller operates, such as setting a margin, analyzing costs vs a rate of return based on plant investment. Haynos, TR. p. 299, 2 – p. 300, 7. This dispute over utility billings cannot be treated or result in a retroactive rate case. TR, Brosch, p. 7, 1-12.

TKO repeatedly argues that the price per MMBtu in its contracts and billings is reasonable; but that is only one component of the basis on which the customers are billed. The number of the units of the commodity being sold and consumed is the other factor. TKO asks this Commission to approve its sleight of hand: i.e. the magic act of using a billing practice to increase the volumes of gas which goes through a meter without any physical change, treatment or alteration. Staff very appropriately labeled this conduct as an arbitrary manipulation of the pressure base.

The argument that the price is a “fair rate” totally begs the question. Question begging is a logical fallacy in which in which the premise under examination is assumed to be true. In other words, begging the question involves using a premise to support itself. In this case TKO argues that their price is fair because their price is a “rate” and the rate is fair. The price charged is not a rate: there was no “rate” established. A price per unit was established in the contracts which comprise the universe of TKO’s certificated operation. The unit component of TKO’s bills is not fair, just or reasonable. The unit component is erroneously measured and billed – intentionally to increase revenues. It unjustly increases the volumes billed by TKO by 9.5%. There is no evidence disputing or denying that fact. Arguing that the price, dollars and cents, is comparable or “fair” or “reasonable” is entirely irrelevant. It might be pertinent in a forward-looking rate case; but is wholly irrelevant to the conduct at issue here which is based on a Certificate limited to contract sales of natural gas.

TKO is asking this Commission to adjudicate and approve a practice which misleads and mischarges its customers for a commodity which is universally and scientifically established. Under any definition that would approve an unfair and unjust practice and make a mockery of the Commission’s Orders and Certificates. “Said differently, if the utility were free to deviate from

Commission-approved billing standards and prices in the absence of or between rate cases, there could be no meaningful regulation of public utilities.” DT, Brosch, p. 7, 14-16.

D. TKO Should be Order to Make Refunds to all Customers

The Complaint was filed in 2015. The irrigation customers have now gone through two irrigation cycles and paying TKO for volumes of natural gas which have been artificially inflated by 9.5%. These inflated volumes have resulted in excess payments of more than one hundred thousand dollars since 2007 and more than \$70,000 since 2010. These calculations were based on invoices received through 2015, the invoices available to Mr. Hanson at the time he submitted his pre-filed testimony. There is no reason or evidence suggesting that TKO would be unable to pay all of the overcharges from at least 2010 to the present date. TKO also has the ability to easily calculate the amount of refunds which are owed through the most recent current billing cycle. Mr. McEvers testified that TKO has maintained data on its computers since at least 2013 which would enable it to do a simple conversion on his computer billing program to calculate the difference in billings between volumes measured at 13.45 pressure base and a pressure base identical to that used to calculate Mcf’s. TR, McEvers, p. 162, 8-19.

Complainants submit that the evidence before the Commission now justifies an order of refunds to all of TKO’s customers since it was first certified as a public utility in Kansas. Any question of TKO’s financial ability relates to the nature and timing of a remedy; not the fact of TKO’s liability. As testified to by Mr. Brosch and Mr. Haynos, the Commission does not have appropriate or adequate information at this time to justify an order excusing the remedy based on any financial impact on TKO. Before doing so, a full and complete investigation of TKO’s finances, encompassing the entire company, not just its Kansas operations, should be undertaken.

V. CONCLUSION

Based on uncontroverted evidence, the arguments and evidence expressed in Complainants' Pre-hearing Brief, evidence introduced at the Hearing, Complainants' Closing Argument and this Post-Hearing Brief, the Commission should enter an order that:

1. Finds that TKO has improperly overbilled its Kansas utility customers for inflated volumes of approximately 9.5% as a direct result of a knowing, unilateral manipulation of volume calculations since 2007.
2. Order TKO to make an immediate refund to Complainants for all charges incurred due to the overbilling since 2007 to present date; and
3. Order TKO to make refunds to all of its Customers for charges incurred due to the overbilling since 2007; undertaking only if necessary, an investigation into a complete financial picture of TKO on a company wide basis.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2017, Complainants' Poste-Hearing Brief was filed with the Kansas Corporation Commission by electronic filing using the e-filing EXPRESS System; and copies were served as email attachments upon:

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