

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Complaint of SWKI-Seward)
West Central, Inc., and SWKI-Stevens Southeast,) Docket No. 14-ANGG-119-COM
Inc. Against Anadarko Natural Gas Company.)

**REPLY TO ANADARKO NATURAL GAS COMPANY’S RESPONSE TO SWKI
PETITION FOR RECONSIDERATION
OF ORDER DENYING COMPLAINT**

SWKI-Seward West Central, Inc. (“SWKI-SWC”), and SWKI-Stevens Southeast, Inc. (“SWKI-SE”), (collectively, the “SWKIs”), pursuant to K.A.R. 82-1-218(d), hereby file with the State Corporation Commission of the State of Kansas (“KCC” or “Commission”) this Reply to Anadarko Natural Gas Company’s (“ANGC”) December 2, 2024 Response¹ (“Response”) to the SWKI Petition for Reconsideration (“Petition”) of the Commission’s Order Denying Complaint.

In support of its Reply, the SWKIs state as follows:

I. ANGC Still Attempts to Relitigate Issues that Have Long Been Moot

1. Out of consideration for all parties, the SWKIs will not reiterate the long and tortured history of this Complaint. The SWKIs are compelled, however, to once again address the factual and legal inaccuracies in ANGC’s Response.

2. SWKIs note at the outset that ANGC persists in attempting to relitigate issues that have long been resolved and are now considered moot. ANGC asserts that the SWKIs’ reference to the “unfiled and unapproved rates” is somehow both “inaccurate” and “untrue.”² This Commission addressed the issue of filing and approval of the GSAs in its August 6, 2019 Order on Contract Status, and specifically made the following findings: (1) “[h]aving found Anadarko

¹ Although called a Response, ANGC’s pleading is in essence a Reply Brief in that it attempts to re-assert arguments already propounded.

² ANGC Response at p. 2; 3.

failed to timely file the 1998 and 2002 GSAs...”³;(2) “[w]hile the Commission has found the GSAs were not properly filed...”⁴; (3) “[o]n its face, it appears that Anadarko failed to comply with K.S.A. 66-117(a)’s requirement to file the proposed GSA at least 30 days before its effective date...”⁵;(4) “[b]ased on Anadarko’s admission that the 2002 GSA has not been found, the Commission concludes it was not filed”⁶; and (5) “the \$50,000 fine assessed against Anadarko on January 15, 2015 is an appropriate sanction for Anadarko’s violation of public utility statutes regarding the sale and transportation of natural gas to the SWKIs from July 1998 through November 2013....”⁷

3. Contracts that have not been filed cannot be approved by the Commission because there is nothing to approve. The SWKIs’ references to the “unfiled and unapproved” contracts is factually accurate and has already been legally established by the Commission and the courts many years prior to the date of this Reply. ANGC’s continued efforts to bend the record to reflect otherwise should fall on deaf ears.

4. Likewise, ANGC’s anemic references to file-stamped copies of the GSAs, phantom Commission approvals “years prior” to when gas flowed, and other attempts to prove that the GSAs were filed with and approved by the Commission⁸ should be disregarded. Anadarko did not appeal these issues after the Commission’s ruling in 2019 and these issues are no longer before the Commission.

³ ANGC Response at p. 6.

⁴ Id. at p. 8.

⁵ Id.

⁶ Order on Contract Status at p. 5.

⁷ ANGC Response at p .9.

⁸ ANGC Response at p. 3, 4, 5, 6.

II. ANGC's Assertion that the Commission "Faithfully Followed" the Appellate Mandate is Laughable

5. ANGC claims throughout its Response that the Commission "faithfully followed"⁹ the appellate mandate, "fully complied with the mandate of the Court of Appeals,"¹⁰ and "properly complied with the mandate of the Court of Appeals."¹¹ ANGC's apparent confusion as to what the appellate mandates are and its insistence that they were faithfully followed begs the question: what are the appellate mandates the Commission is legally bound to follow?

6. In this matter, the appellate mandates are found in all three appellate opinions¹² that arose from the Commission's erroneous decisions in this Complaint proceeding. In *Court of Appeals I*, the Court found that the Commission erred and remanded the Complaint to the Commission for additional proceedings to determine: (i) if the contracts were ever filed with and approved by the Commission; and (ii) if not, to determine if the SWKIs were entitled to a remedy for Anadarko's violations. The panel in *Court of Appeals I* noted that the filed rate doctrine forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate regulatory agency.¹³

7. In summarizing several cases analyzing the filed rate doctrine,¹⁴ the Court of Appeals stated:

⁹ ANGC Response at p. 2.

¹⁰ *Id.*

¹¹ ANGC Response at p. 6.

¹² *SWKI-Seward W. Cent., Inc. v. Kansas Corp. Comm'n*, 408 P.3d 1006, 2018 WL 385692 (Kan.App. 2018) ("*Court of Appeals I*"); September 25, 2020 *Memorandum Decision and Order*, Case No. 2019-CV-000757 (opinion rendered by the Hon. Mary E. Christopher, District Judge); *SWKI-Seward West Central v. Kansas Corp. Comm'n*, 408 P.3d 1006, 2022 WL 1052231 (Kan.App. 2022) ("*Court of Appeals II*").

¹³ *Court of Appeals I* at *9.

¹⁴ Referred to by ANGC as an "odd and limited compendia," *infra*.

These cases support the proposition that in the absence of a filed rate, should the appropriate regulatory agency deem the rate reasonable, **the time value of the money collected from the unfiled rate is a permissible remedy available under a regulatory agency's broad powers to set and approve rates.**¹⁵

8. The Court of Appeals stated that “where a reasonable rate goes unfiled, the Commission has the statutory authority to order a remedy, a remedy that may include the time value of money paid by the customer pursuant to an unfiled rate.”¹⁶

9. Thus, the appellate mandate in *Court of Appeals I* was to determine if the contracts were filed with and approved by the Commission, and, if not, to determine whether the SWKIs were entitled to a remedy for Anadarko's violations. Inherent in this appellate mandate, and thus a requirement of the Commission on remand, was to evaluate a permissible remedy pursuant to the filed rate doctrine.

10. This appellate mandate was confirmed on appeal to the District Court, wherein the District Court stated:

This Court concludes the Court of Appeals held the filed rate doctrine applied under the circumstances presented in this manner. The panel specifically noted: Kansas has long followed the filed rate doctrine when utilities vary their charges or services from the rates and standards approved by the Commission.¹⁷ [Emphasis supplied.]

9. The District Court went on to discuss the Court of Appeals' specific analysis of the filed rate doctrine's application when the utility fails to file the contracts and fails to obtain approval of rates by the regulatory agency.¹⁸

10. After quoting several passages from *Court of Appeals I*, the District Court held that:

¹⁵ *Court of Appeals I* at *13 (Emphasis supplied).

¹⁶ *Id.*

¹⁷ District Court *Memorandum Decision and Order* at p. 23, quoting *Court of Appeals I* at *9.

¹⁸ *Id.* at pp. 23-24.

These passages indicate the Court of Appeals found the filed rate doctrine applied even in cases where the regulated entity allegedly had failed to file the contracts. Thus, the Court of Appeals extended the filed rate doctrine to circumstances like these where there is no claim of unreasonable or unjust rates, but the contracts were not filed. The Commission erred to the extent it concluded otherwise. The panel recognized a legal remedy existed for customers such as the SWKIs. Because the Commission failed to consider or apply the filed rate doctrine on remand, it did not decide an issue requiring resolution.¹⁹ [Emphasis supplied.]

11. The District Court went on to state that “[t]he Court of Appeals outlined the scope of an alternative potential remedy available to the SWKIs—a sort of modified application of the filed rate doctrine, as discussed previously.” The Court further stated that “[despite finding the SWKIs were not harmed], the Court of Appeals still held the filed rate doctrine applied, and in the event it found the contracts were not filed, the Commission was to exercise its discretion and determine the appropriate remedy under the filed rate doctrine.”²⁰

12. The District Court ordered that:

This matter is remanded to the Commission for additional proceedings consistent with this opinion. The Commission is to make an independent determination as to whether the rate(s) paid by the SWKIs were reasonable. In addition, **the Commission is to exercise its discretion and determine the appropriate remedy under the filed rate doctrine consistent with the mandate of the Court of Appeals.** [Emphasis supplied.]

13. The Order from the District Court was yet another appellate mandate that the Commission failed to follow.²¹

¹⁹ Id. at p. 25.

²⁰ Id. at p. 26.

²¹ “The Commission’s refusal to exercise its discretion in determining whether a remedy was warranted and instead take the position that it could not order a remedy violated the appellate mandate....[w]e thus affirm the district court’s conclusion that the Commission failed to comply with the mandate.” *Court of Appeals II* at *8.

14. The Commission and ANGC appealed the decision of the District Court to the Court of Appeals. On April 8, 2022, the Court of Appeals in *Court of Appeals II* affirmed the decision of the District Court and remanded the Complaint to the Commission with directions—for a second time. The Commission ignored the appellate mandate from *Court of Appeals I*, as affirmed in the District Court’s *Memorandum Decision and Order*, and as further affirmed in *Court of Appeals II*.

15. The Court of Appeals (in *Court of Appeals II*), in affirming the District Court and reversing the Commission (again), stated:

The district court found the filed rate doctrine applied. . . . While the [prior Court of Appeals] panel did not specifically require the Commission to apply the filed rate doctrine, it did hold that where no filed rate existed, if the rate used by the parties is deemed reasonable, the time value of money collected from the unfiled rate is a permissible remedy. [citation omitted] The Commission found the rate was reasonable but did not address the appropriateness of a remedy based on the time value of money. The Commission’s failure to address the possible remedy violated the [prior Court of Appeals] panel mandate. . . . **On remand, the Commission should address the filed rate doctrine and consider to what extent the time value of money may be an appropriate remedy.** . . . On remand, we order the Commission to address the [prior Court of Appeals] panel’s second direction under the Commission’s inherent authority to regulate under K.S.A. 66-101. If it determines a remedy is appropriate, the Commission should apply the time value of money. *Court of Appeals II*, 2022 WL 1052231 at *8-9. **[Emphasis supplied.]**

16. Unless ANGC would like to disagree with the legal conclusions of the District Court and the Kansas Court of Appeals (twice), ANGC’s assertions that the Commission “faithfully complied with the appellate mandates” are clearly false and should be rejected outright.

III. ANGC’s Argument that the Court of Appeals “Never Held That the Filed Rate Doctrine Should be Applied” is a Blatant Misreading of the Appellate Mandates

17. In a bold and baffling move, particularly in light of the quotations directly above, ANGC claims in its Response that “the Kansas Court of Appeals’ panels never held that the filed

rate doctrine should be applied to the instant facts.”²² In an effort to justify this absurdity, ANGC states that the SWKIs support their filed rate doctrine position with “odd and limited compendia of FERC and lower court decisions from other jurisdictions.”²³ The quotations above from the District Court and the Kansas Court of Appeals cite directly to these FERC and lower court decisions, and in so citing, directly hold that the filed rate doctrine applies in this case. In holding that the filed rate doctrine applies to this case, the appellate courts ordered the Commission on remand to address the filed rate doctrine. By its reference to the SWKI’s support of the filed rate doctrine, ANGC is apparently including Kansas’ appellate courts within the “odd and limited compendia” of resources.

18. Despite acknowledging that K.S.A. 66-109 directly codifies the filed rate doctrine, ANGC goes so far as to say that imposition of the filed rate doctrine serves no purpose. ANGC now sets forth a new argument that the statute restricts utilization of the filed rate doctrine where a common carrier varies from a scheduled tariff “knowingly or willingly.” Not so.

19. Incredibly, ANGC further asserts that “[t]he filed rate doctrine of Kansas has only governed utility variances from filed rate schedules applicable to customer classes. The filed rate doctrine has not and should not govern individually negotiated contracts.”²⁴ In direct contravention of the appellate mandates, ANGC urges this Commission to not address or apply the filed rate doctrine in any manner.²⁵ ANGC’s suggestion similarly directly contravenes its own certificate Order that requires ALL contracts to be filed with and approved by the Commission.

²² ANGC Response at p. 10.

²³ Id.

²⁴ ANGC Response at p. 13.

²⁵ ANGC Response at p. 13.

20. ANGC's arguments and suggestions to the Commission not only misstate Kansas law but flout the holdings of the District Court and Court of Appeals in appeals specific to this proceeding. Notably, ANGC encourages the Commission to do the same. As the District Court noted in its Memorandum Decision and Order, "[t]he Court of Appeals concluded that the filed rate doctrine cases relied upon by the SWKIs supported the SWKIs' argument they were entitled to relief where a regulated entity failed to file the GSA contracts."²⁶ ANGC's arguments concerning applicability of the filed rate doctrine are in error.

21. ANGC suggests that if an Order on Reconsideration is generated by the Commission, "the order should clearly address this issue to state that the KCC has determined that under the circumstances presented in the briefs, testimony, and oral arguments of the parties, the Kansas filed rate doctrine should not apply. And, even if it could somehow be deemed to apply, there would still be no damages upon which to predicate a remedy."²⁷

22. The Commission possesses no option to determine that the filed rate doctrine does not apply. K.S.A. 66-109, K.S.A. 66-1,203, and the mandates of the District Court and the Court of Appeals all require the application of the filed rate doctrine to this case. The Commission's repeated refusal to apply the filed rate doctrine, despite multiple mandates from appellate tribunals, constitutes reversible error. Similarly, any Commission acceptance or endorsement of ANGC's *ad hoc* request for a declaratory ruling that the filed rate doctrine does not apply in this case would constitute reversible error on the part of the Commission.

23. During the 11 years this Complaint has been pending, the Commission has repeatedly declined to address the applicability of the Filed Rate Doctrine—despite having been

²⁶ District Court *Memorandum Decision and Order* at p. 10, citing *Court of Appeals I* at *11; *13.

²⁷ ANGC Response at p. 12.

ordered to do so by the Court of Appeals—twice—and the District Court—once. The Commission cannot justify its refusal to comply with appellate mandates and should not risk being told by the courts that it has abused its discretion for a fourth time.

WHEREFORE, the SWKIs respectfully request that the Commission (1) accept this Reply; (2) reject ANGC’s late-filed Reply Brief couched as a Response; (3) reconsider its *Order Denying Complaint*; (4) apply the Filed Rate Doctrine as it was directed to do multiple times on remand; (5) order all refunds, interest and time value of money requested by the SWKIs, and; (6) for any such further relief that the Commission may deem just and appropriate.

Respectfully submitted,

POLSINELLI PC

By: /s/ Anne E. Callenbach

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VERIFICATION

I, Anne E. Callenbach, do solemnly, sincerely and truly declare and affirm that I am counsel to SWKI-Seward West Central, Inc. and SWKI-Stevens Southeast In., I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief, and this I do under the pains and penalties of perjury.

By: /s/ Anne E. Callenbach
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December 11, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing has been e-mailed this December 11, 2024, to:

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