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	)
Complainants	)

COMPLAINANTS' PETITION FOR RECONSIDERATION

COME NOW Complainants, Circle H Farms, LLC, Rome Farms, LLC and Stegman Farms Partnership, irrigation gas customers (hereafter, the "Irrigators") and Richard Hanson, a residential customer ("Hanson") (collectively "Complainants"), customers of Texas-Kansas Oklahoma Gas, LLC, (hereafter, "TKO") and pursuant to K.S.A. 66-118b, K.S.A. 77-529 and K.A.R. 82-1-235, file their Petition for Reconsideration of the April 20, 2017 Final Order (hereafter the "Order") of the Corporation Commission of the State of Kansas (hereafter the "KCC" or the "Commission") and allege, state and submit the following.

I. INTRODUCTION AND SUMMARY OF THE PETITION

1. The Commission's Order permits a regulated gas utility to manipulate and overstate the Btu value of gas without any physical change in its properties and with immunity from oversight by the Commission. With this order, the Commission fails to fulfill its statutory duty to regulate not only rates but also practices, charges, exactions and all aspects of a utility's service, including measurement. The Order gives free reign to such a practice; presumably not only to TKO but any other gas utility wishing to increase its charges to customers without review.

2. The Order allowing such billings is based on a patently erroneous premise that the gravamen of the Complaint is the reasonableness of TKO's "rate" – set by private contracts. The Complainants do not seek abrogation of their contracts with TKO which provide for a charge based on a price per MMBtu. The Complaint specifically seeks investigation and enforcement of TKO's practices and measurement of MMBtu's by the Commission in the exercise of its duty to regulate practices, charges and exactions of the utility.

3. The contract rate provides for sales of natural gas at a price per MMBtu. The Complaint is explicit in pleading as the factual basis for the allegation that TKO's **practices and billings under the contracts** are unfair and unjust. Following a thorough review and investigation of these claims the Utility Division reported that TKO's billing practices result from:

> 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%. [1]

4. The Commission's Order is based on a finding that Complainants fail to meet their burden of proof that TKO's rates are unreasonable. By doing so the Order confuses a "rate" with

[1] Report and Recommendation - Utilities Division, November 10, 2016, p. 4.

a billing under the rate and approves a charge based on a unilateral and undisclosed alteration of the measurement of MMBtu's. The Order as written completely fails to address that complaint.

5. It is the Commission's duty and responsibility to investigate and regulate a utility's billing practice particularly when that practice is proven by unrebutted evidence to be the result of artificial measurement devices – most assuredly an unfair and unjust practice.

6. The Order is arbitrary and capricious, completely begs the question presented and abdicates the duty of the Commission to regulate the practices, charges and exactions of gas utilities.

II. GROUNDS FOR RECONSIDERATION

7. All Complainants state the following Grounds for Reconsideration. Hanson as a residential customer joins in the Petition in general but also specifies an additional and separate Ground for Reconsideration arising out of the nature of the relief afforded him.

(1) The Commission's Order is arbitrary and capricious in that it erroneously construes the scope of the Complaint thereby failing to decide an issue requiring resolution, in that it:

   a. Erroneously misstates and frames the factual basis of the Complaint which at all times alleged and specified that the TKO's practices, charges and exactions arise out of a manipulation of contract billing terms;

   b. Erroneously limited the scope of the Complaint in contravention of its own Order on Jurisdiction and prior rulings.

   c. Fails to consider the evidence of factual findings resulting from investigation of the Complaint by the Utilities Division.

(2) The Commission erred as a matter of law by basing its decision on irrelevant legal precedents.

(3) The Commission's Order is legally erroneous in deviating from Kansas law regarding interpretation of terms of contracts.

(4) The Commission's Order is legally and factually erroneous in that it permits retroactive rate making at the discretion of a regulated utility.

(5) The Commission's Order erroneously holds that there is no evidence the billing parameters were manipulated in any way by ignoring and failing to consider the uncontroverted evidence that TKO artificially inflated the MMBtu's invoiced to its customers without any change in the physical molecules, thereby unilaterally increasing its revenues.

(6) The Order erroneously interpreted the Commission's statutory authority and erroneously construed the plain language of K.S.A. 66-1,205 as a matter of law.

(7) The Order improperly limits the time during which it may exercise jurisdiction over TKO's practices.

(8) The Commission's Order is unclear as to the scope of the relief afforded Residential Customers.

(9) The Commission's Order is antithetical to the public interest by permitting TKO to misrepresent the measurement of MMBtu's in contravention of common usage, scientific facts, industry practice, and basic principles of good faith and honesty.

III. DISCUSSION OF FACTUAL AND LEGAL SUPPORTING THE GROUNDS FOR RECONSIDERATION

8. This Petition does not reiterate the procedural background which has been previously catalogued by all parties. However, because Complainants seek reconsideration of the Order which erroneously characterizes and frames the scope of the issue presented, portions of the docket filings and evidence will be detailed in the context of this discussion of the grounds for reconsideration.

(1). <u>The Commission's Order is arbitrary and capricious in that it erroneously construes the scope of the Complaint thereby failing to decide an issue requiring resolution.</u>

9. The Oder is arbitrary and capricious because it is without foundation in fact. *Sokol v. Kansas Dept. of SRS*, 267 Kan. 740, 746, 981 P.2d 1172 (1999). The Order is based entirely upon erroneous factual and legal conclusions which undergird the ruling that Complainants "have not met the burden of proving that TKO's rates or practices with regard to them are unreasonable."[2] It reaches this conclusion, construing only rates rather than practices, citing precedent that an "express finding of the unreasonableness of existing contract rates [is] a *prerequisite* to their abrogation."[3] This section addresses the factual errors relating to that holding. The following section discusses why the law cited in support of this holding is neither controlling nor relevant.

10. The Order which erroneously assumes Complainants seek to abrogate jurisdictional contracts is wholly without factual support or evidence in the record. The Complaint neither questions the reasonableness of the contract rate, a set price per MMBtu, nor seeks abrogation of the contracts establishing such rates. The use of this erroneous factual postulate as the *ratio decedendi* for the Commission's Order simply begs the question posed and fails to decide the single issue in the Complaint requiring resolution.

11. The lack of any factual foundation for the Commission's statement of the scope of the Complaint is shown by: (a) review of the entire record, including Complainants' filings; (b) the Commission's own filings and orders; and (c) the report submitted pursuant to the investigation undertaken as a result of the Complaint by the Utilities Division and Respondent's admissions and interpretations in Response thereto.

a. <u>The Order erroneously misstates and frames the factual basis of the Complaint which, at all stages of the docket, was that the conduct complained of was</u>

[2] Order, ¶ 23, *p.* 6.
[3] Order, ¶ 32, p. 9, citing *Cent. Kansas Power Co*. v. State Corp. Com'n, 181 Kan. 817, 826-27(1957).

misleading and false practices and acts arising out of manipulation of contract billing terms, rather than the contract terms.

12. The Order in its statement of the scope of the Complaint refers to one isolated jurisdictional reference in the Complaint, and states: [t]he Complaint frames the issue as one concerning just and reasonable rates" although the Order simultaneously states that "[t\he crux of the complaint is that TKO employed an invalid methodology for calculating the BTU of the natural gas it sold to Complainants and therefore overcharged them by 9.5%.[4] The truncated characterization of the Complaint as one limited to just and reasonable rates is, ironically, also contradicted in language found in the same Order which states "[*t]*he Complainants have framed the issue as one wholly outside of the rate making process."[5] The Order, on the face, contains inherently contradictory statements purporting to state the scope of this Complaint.

13. The Complaint first invokes K.S.A. 66-1,201 which establishes the Commission's jurisdiction "to do those things necessary and convenient for the exercise of its authority to supervise and control natural gas utilities".[6] The Complaint also invokes the authority of K.S.A. 66-1,203 which decrees that "[e]very unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited, unlawful and void." The Complaint then specifies that it is submitted pursuant to Kansas law as specified in K.S.A. § 66-1,205 which does not limit the authority of the Commission to an investigation of "rates."[7]

14. K.S.A. 66-1,205 extends, *inter alia*, to investigation of "any rule, 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,

[4] Order, ¶ 41.
[5] Order, ¶ 50.
[6] Complaint, ¶ 2
[7] Complaint, ¶ 5.

unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential". (emphasis added). The Order concedes that Complainants "cite K.S.A. 66-1-205 and K.A.R. 82-1-220 as the basis for the Complaint."[8] On its face, then, the scope of the Complaint pled in this docket invokes the Commission's authority to investigate specific practices and acts arising out of TKO's implementation of "contract rates" not just the "rate" itself.

15. The Order also cites language in the Complaint that the "rates charged" by TKO are unreasonable, unfair and unjust, etc.[9] The Complaint references TKO's practices in the context of "rates charged" rather than "rates approved" or "rates as certified." There can be no reasonable reading of the scope of the Complaint as implicating anything other than TKO's charges and billings based very detailed practices cited in paragraphs 7 through 14 which provide an explicit factual basis for the allegations relating to false or erroneous practices of TKO.

16. It strains credulity for the Commission, assigned the statutory duty to regulate the acts and practices of a utility, can construe the language of the Complaint as one seeking to abrogate the terms of contracts which, in contradistinction to such an allegation, alleges not that that the contracts should be abrogated, but that TKO misrepresents of the charges invoiced under the terms of the certificated contract rates.

17. Complainants respectfully submit that there is no pleading, filing or other argument made to this Commission in this Docket which seeks the abrogation of the rates set by the contracts under which TKO operates as a certified utility. Indeed, the explicit terms of the contracts, which charge customers based on a price per MMBtu, are the very components which the Complaint alleges to be manipulated and misstated in billings. Complainants ask the Commission to enforce the rates, not abrogate them. If TKO's billing practices are not transparent and contain

[8] Order, ¶ 2, p. 2.
[9] *Id*., citing Complaint, ¶ 6.

misrepresented calculations, a party entering such a contract would not even be able to understand or discern that contract's terms.

b. The Order erroneously limited the scope of the Complaint in contravention of its own Order on Jurisdiction

18. The nature and scope of the Complaint as framed by Complainants, as explained in the preceding section, is also reflected in the Commission's Order on Jurisdiction. Complainants' Request for Trial of Issues of Law distinctly defines the offending conduct by seeking "refunds of any amounts of unfair excess rates based on erroneous or false pressure base factors affecting volumes."[10] The issues presented by the Motion neither seek nor mention abrogation of the certificated contracts.

19. This construction of the scope of the complaint as presented from the outset is not based rhetorical advocacy or some evolving theory, as the Order would imply. It is the Commission, in its own Order on Jurisdiction, which summarized the allegations made in this docket as follows: **"The Complainants allege that an improper calculation made by TKO has resulted in the Complainants being overcharged for the natural gas sold to the Complainants.**"[11] Thus when the Commission held it would "exercise jurisdiction over the issues of this complaint" during the specified time period it in no manner signaled or gave notice that the Commission would transform the Complaint so described into a rate case.

20. The Complainants respectfully submit that the limitation and/or erroneous limitation placed on the issues, not by the Complaint, but by Commission error, raises additional even more serious errors and questions. If, prior to the issuance of a final order, notice had been given that the Commission intended to narrow the scope of the complaint, or believed that it did

[10] Complainants' Request for Trial of Issues of Law, December 7, 2015, pp. 1-2.
[11] Order on Jurisdiction, April 14, 2016, pp. 2-3 (emphasis added).

not implicate anything but a request to abrogate contracts, Complainants could have and would have filed a Motion to establish the Scope of Complaint and requested a specific Pre-Hearing Conference. No notice of any approach to construction of the Complaint beyond the very clear and accurate statement on the scope of the Complaint in the Order on Jurisdiction was ever provided and this error deprived Complainants of due process.

c. The Order erroneously fails to consider the of factual findings resulting from investigation of the Complaint which as framed by the Utilities Division and as admitted by Respondent in response to the Division's Report.

21. The Order accurately cites law which references the discretion which may be given by courts to the methodology used by a regulatory agency in approaching complex problems. It notes that public utility regulation is highly complex and requires a great amount of expertise in arriving at fair results for all parties.[12] Paradoxically, the Order disregards the understanding of the Complaint and the framing of the issues by the technical experts and staff of the Utilities Division. Both the initial report and the final Report and Recommendation of the Utility Division, following investigation, understood the issue and scope of the complaint as follows:

> 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. [13]

There is simply no factual basis from which anyone could conclude that the Complaint asked for a change of or abrogation of the terms of the jurisdictional contracts.

22. The Respondent in its initial response to the Report and Recommendation of the Utility Division recites a history of trying to change the price in contracts with its customers due to market conditions.[14] Having been unsuccessful in efforts to change the contract terms, notably

[12] See Order, ¶ 29.
[13] Report, May 14, 2015, p. 1; Report, November 10, 2016, p. 1
[14] Texas-Kansas-Oklahoma Gas, L.L.C. Response to Staff's Report and Recommendation, May 26, 2016, pp. 4-6.

the price, the evidence before this Commission shows that TKO, not the Commission, set "its rates, given our billing methods, to earn the revenues that we did."[15]

23. The Order totally ignores the facts as determined by its professional staff which address the billing practices, not contract rates. Similarly, TKO's Response to the initial Report and Recommendations by the Utilities division construed the scope of this matter by noting that "Staff has not expressed an issue with the underlying contracts." TKO explicitly represented to the Commission that it would amend its billing calculations to account for the amount of heat energy delivered to its irrigation customers; file a summary of the MMBtu value and price for each billing since March 16, 2012; provide notices to customers regarding the overcharge along with the amount of refund that each customer can expect; refund the overcharges due to inaccurate billing calculations; and revise all existing contracts to reflect those changes.[16] Parenthetically, those representations also legally should estop TKO from its later contradictory positions based on the doctrine of estoppel by pleading as stated in Complainants'' briefing.

24. It is surely unprecedented for a regulated utility to admit the factual basis of a complaint, represent to the Commission that it would alter its billing practices and pay refunds, to do so in a filing attested as true, and for the Commission to neither note nor enforce those representations and to disregard that evidence in its Order. This failing is an error of law and clearly violates the historic doctrine of estoppel by pleadings.

25. The Order also represents a change in policy whereby the Commission divests itself of any responsibility for the regulation of measurement practices without a fully citing evidence in support of and by failing to explain the reasons for its change.[17]

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[15] DT, McEvers, p. 6, 9-11 and p. 8, 7-13.
[16] TKO Response, May 26, 2016, pp. 14-15.
[17] *See, Unified Sch. Dist. No. 259 v. State Corp. Comm'n of Kan*., 176 P.3d 250 (Kan. Ct. App. 2008) (change in policy must be explained and supported by substantial evidence).

(2). <u>The Commission erroneously construed and applied irrelevant legal precedents as a matter of law</u>.

26. The Order is based on two fifty-year-old precedents neither of which interpret or involve application of current statutory authority and both of which arise out of facts wholly distinguishable from the matters placed in issue by the Complaint and the facts put in evidence at the hearing.

27. The Order cites these two cases in support of the postulate that a utility's rate established by a private contract may not be abrogated without a finding of unreasonableness. As detailed above, the record before the Commission, as interpreted by the Commission and the Staff before the final Order, is that Complainants never sought new contracts, revision of existing contracts or abrogation of contracts. Complainants simply asked for honesty in billing under the terms of the existing contracts.

28. The Order cites *Central Kansas Power Co. v. State Corp. Com*.,181 Kan. 817, 316 P.2d 277 (1957) and *Kansas Power & Light Co. vs. Mobil Oil Co*.,198 Kan. 556, 426 P.2d 60 (1967), Both cases held that a regulated utility could not unilaterally change the contract terms under which it operated to increase revenues to the disadvantage of the customer without Commission approval. Both cases fully support, rather than undercut, Complainants' position that TKO may not unilaterally invoice its customers in a manner admittedly designed to increase its revenues by manipulating its billings ostensibly made under the terms of the contracts.

29. In *Central Kansas,* the Commission had approved new contracts governing sales of natural gas by Kansas Nebraska to Central Kansas. The new contracts replaced and abrogated

prior approved contracts and, specifically changed the price per Mcf which Central was required to pay for the gas. The Commission subsequently approved a new contract based only on a showing by KN which recited its revenue needs. The Commission's order was invalidated by the Supreme Court because it abrogated prior approved contracts without proper notice to Central. See *Central Kansas, passim.*

30. *Central Kansas* is wholly inapplicable and irrelevant to the issues raised by this Complaint. The rates set in contracts between TKO and its customers, whether in writing or verbal, all establish a contract rate of a **price per MMBtu**. In *Central Kansas,* the seller unilaterally increased the price without Commission approval thereby abrogating a prior contract. There is nothing in this Complaint, the facts, or any testimony which demonstrates that the Complainants want to re-write, re-negotiate or abrogate the terms of the contracts. The holding, logic and policy enunciated in *Central Kansas* militates in favor of the issues raised by the Complaint. In this case, it is TKO which is unilaterally abrogating the terms of the approved contract by manipulating the MMBtu quantities purporting to be sold under the contract terms. The contract "rate" which the Commission anoints with sanctity, is in all cases based on published indices of prices, relied on by the natural gas industry, and published on the basis of a price per MMBtu.

31. The irrationality inherent in the Commission's order is that a party to a contract incorporating published index prices may unilaterally define and adjust, not the price, but the meaning of a MMBtu to increase its revenues. That is precisely the same sort of conduct unilaterally initiated by Kansas Nebraska and invalidated in *Central Kansas*. The Order allows TKO to abrogate the approved contract by unilaterally adopting a definition of MMBtu contrary to established industry standards, scientific knowledge, and historic practices of the Commission

which have deemed it appropriate to regulate natural gas under a uniform system of measurements. As demonstrated in section (5) below, those facts are unrefuted in this record.

32. The *KP&L* case is also inapposite in that it invalidates an action specifically designed to abrogate a contract. The Order quotes language from *KP&L* that "[a]bsent this public interest, abrogation of contracts may not be effected merely to relieve one or the other of the parties from unprofitable or injudicious undertakings.[18] *KP&L,* like *Central Kansas*, involved contracts which charged gas at a price per MCF. A filing by KP&L, albeit reflecting certain actions of the Commission, which changed the price per MCF, could not be approved without a finding of reasonableness. Both cited cases rejected changes in the price per MCF which had been established as a "contract rate" in Commission approved proceedings. As detailed above, there is nothing in this case which complains about the "contract rate" in isolation from the manipulation of billings.

33. The Complaint addresses a manipulation of measurement (here a MMBtu rather than an Mcf). Neither cited case involved the regulated utility unilaterally changing the common, scientific or industry standard of an Mcf in order to arbitrarily increase its revenues, as the undisputed evidence in this case shows was done by TKO. It is TKO which manipulates the contracts to increase revenue without approval from the Commission.

(3). <u>The Order is legally erroneous as inconsistent with and Kansas law regarding interpretation of terms of contracts.</u>

34. The Commission's order construes contracts between TKO and the Irrigators as establishing the "rate" as to the natural gas sales. In construing the "rate" the Commission's Order clearly treats the unit of the commodity being regulated, MMBtu's, as a flexible and arbitrary

[18] See Order, p. 10, citing *KP &L* at 826-27.

measuring device which can be manipulated by the seller to increase revenues as desired. This construction is not only refuted by the very cases cited as legal authority but also by long standing legal principles governing the construction of contracts.

35. "The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Anderson v. Dillard's, Inc*., 283 Kan. 432, 436 (Kan.2007). "Plain language forecloses speculation about intent of the parties*." Kopp v. State Farm Fire and Cas. Co.*, 103 P.3d 993, 3 (Kan.App.2005). Whether a written contract is ambiguous is a question of law. *Coble v. Scherer*, 3 Kan.App.2d 572, 575 (1979). "To be ambiguous the contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language." *Clark v. Prudential Ins. Co. of America,* 204 Kan. 487, 491 (1970). "When ambiguity appears, the language is interpreted against the party who prepared the instrument". *Thoroughbred Assocs., L.L.C. v. Kan. City Royalty Co.*, L.L.C., 297 Kan. 1193, 1194, 308 P.3d 1238, 1241 (2013).

36. In its Order, the Commission treats the contract term "MMBtu" as an ambiguous term. The Order further suggests that the lack of specification of the scientific or standard meaning of the term frees TKO to adjust the measurements of MMBtu's to arbitrarily increase the volume of that unit it purchased and resold without alteration.

37. All of the evidence before this Commission and the technical expertise evidenced by its Staff confirms that MMBtu is a common and universally understood unit in the natural gas industry. In fact, the "contract rate" is not explicit but rather incorporates industry index prices, all based on MMBtu's. The Commission wholly failed to consider this uncontroverted evidence as discussed in Section (5) below.

38. Even if MMBtu were to be construed as an "ambiguous" component of the contract rate, doing so would contravene accepted legal doctrine that trade and usage or custom is appropriate to explain technical terms if otherwise indefinite or ambiguous or to supply terms if the contract is silent. *See Branner v. Crooks*, 6 Kan. App. 2d 13, 815-16, 635 P.2d 1265, 1267-68 (1981), citing *McSherry v. Blanchfield*, 68 Kan. 310, Syl. paras. 2, 3, 75 Pac. 121(1904) and *Wendling v. Puls*, 227 Kan. 780, 786, 610 P.2d 580 (1980).

39. By treating MMBtu's as though they are subject to unilateral manipulation by a utility, the Commission sets a dangerous precedent by allowing utilities which enter into contracts on the basis of a price per MMBtu to measure the MMBtu as they see fit to adjust their rate of return without Commission approval. If TKO can circumvent scientific, industry-standard weights and measures, it opens the door for any industry to do the same.

(4). The Commission's Order is legally and factually erroneous in that it permits retroactive rate making at the discretion of a regulated utility fails to consider evidence that this proceeding has none of the components of a rate case.

40. The undisputed evidence in this docket is that TKO unilaterally altered its billing practices to increase revenues as it deemed necessary.[19] The Order approves such a practice with the statement that "TKO's calculation is the basis for the rate it bills Complainants. It is a rate setting mechanism".[20] The only way to interpret that language is that billing invoices may be arbitrarily changed to change a rate, without Commission approval. This holding, on its face, cedes to the utility the unilateral ability to set its rates by manipulating the measurement unit to increase revenues. That unilateral conduct was never approved by the Commission and the proposition that doing so is a "rate setting mechanism" gives TKO the power to retroactively adjust its "rates" by

[19] DT, McEvers, p. 6, 9-11 and p. 8, 7-13.
[20] Order at ¶ 42.

measuring a commodity in a fashion contrary to all accepted scientific and regulatory rules and regulations.

41. As noted in the detailed testimony of Michael Brosch, billing disputes are not rate cases; and as confirmed by the testimony of the Chief Engineer of the Utility Division, the approval of the contracts (many of which were never filed) did not involve a revenue analysis. There has been no systematic study or quantification of TKO's revenue requirement." [21]

42. The approval of TKO's Certificate was never predicated upon some adequacy of revenue or any calculation of any of the elements traditionally considered in a rate case. Allowing a change in the "contract rate" to adjust for revenue needs, is nothing more than retroactive rate making by TKO, without approval of the KCC.

43. The uncertainty, if not chaos, created by this ruling and practice was appropriately noted in the testimony of the Chief Engineer of the Utility Division who testified that a rate case should be opened as to TKO for two reasons: Mr. Haynos testified:

> One, I think the Commission needs to understand exactly what is regulated, what revenue it generates and how TKO takes care of these customers from a regulated perspective so we really understand exactly what our oversight role is. It's confusing to me right now.[22]

44. The Order on its face, invests TKO with the unilateral ability to set its rates by a process which TKO admits has been put in place to increase revenues. By labeling TKO's calculations as a "rate setting mechanism" the Commission errors as a matter of law and in fact establishes a precedent which stands for a proposition contrary to that which the Order purports to endorse: that private contracts approved by the Commission may not be abrogated.

[21] Brosch, RT, pp. 3, et seq.; Haynos,
[22] Haynos, DT, p. 323, lines 16-22.

45. By any reasonable interpretation of this Complaint, it does not address a rate-setting mechanism: the rate is set by the language in the contract, which is based on an industry-standard price for an industry-standard, scientific quantity based on uniform terms. Allowing a charge per MMBtu clearly should not signal a utility's authority to change its revenues by changing its analysis of MMBtu's. But that is just what this Order does.

(5). The Commission failed to consider the uncontroverted evidence that TKO artificially inflated the MMBtu's invoiced to its customers without any change in the physical molecules, thereby increasing its revenues, contrary to the unrefuted evidence that the entire natural gas industry relies on usage of MMBtu's as a unit of measurement essential in contracting for natural gas as a fungible unit.

46. The Commission's order rests upon a construction of the reasonableness of the "contract rate" and holds that if the stated rate is reasonable, it doesn't matter how the utility implements or measures that rate.

47. In this case, as noted above, the "contract rate" is a price per MMBtu. TKO and any other utility is under this order will be permitted to enter contracts for the sale of natural gas at a price per MMBtu and then adopt a measurement of the MMBtu which is universally considered to be a fungible commodity with common understanding in the industry. The Commission's order wholly fails to consider the uncontroverted evidence of this central fact.

48. Some of the most significant portions of the evidence not considered are listed below, and a more complete recitation is set forth in Complainant's' Post Hearing Brief which is incorporated herein as if set forth fully. Evidence which the Commission failed to consider includes evidence proving that:

- Sales of natural gas on the basis of MMBtu is virtually universal in the natural gas industry.[23]
- It is scientifically proven that volumetric units and Btu's per cubic foot of natural gas must be measured at the same pressure base if the statement of MMBtu's is accurate when the molecules have undergone no change in molecular make up must be measured at the same pressure base.[24]
- The gas which TKO and sells to its customers has the same btu content as the gas it purchases from its supplier. TKO does not process, remove inerts, or increase the heating value of the gas stream it purchases.[25]
- In order to treat natural gas as a fungible commodity, a pressure base provides a reference point and if two different pressure bases are used "you can't get [the]gas] to be fungible.[26] .

49. The Commission's order summarily deals with the issue of conflicting pressure bases in a single reference to McEver's testimony that companies use different pressure bases. That is wholly irrelevant to the proven and scientific fact that when comparing identical molecules which are mechanically measured, it is scientifically necessary to use the same pressure base in both calculations. That is the fundamental evidence which the Commission ignores and fails to consider.

(6). <u>The Order erroneously interprets the Commission's statutory authority and erroneously construes the plain language of K.S.A. 66-1,205 as a matter of law</u>.

[23] DT Hanson, p. 7, 3-15;
[24] Hanson, DT, p. 8, 8-19; and TR, Haynos, pp. 274, 7-25 – p. 275, 1-4; See also Hanson Ex. E and 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.")
[25] See Complainants' Post-Hearing Brief, ¶ 34.
[26] Haynos, TR, pp. 274, 7-25 – 275, 1-4

50. The Order gives lip service to the Commission's statutory authority to substitute rates, rules, regulations, practices or acts, only after it has found such "rates, rules, regulations, practices or acts" to be unjust unreasonable, etc. The Order then proceeds to discuss only precedents and regulations dealing with rates. The Order contains no discussion and cites no authority for what ought to be or is considered to be an unjust or unreasonable act or practice.

51. As noted previously, the Complaint was filed pursuant to K.S.A. 66-1,201 and K.S.A. 66-1,205, which endow the Commission with plenary authority over a utilities practices and authority to do whatever is necessary "[i]f after investigation and hearing it is found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient or insufficient, unduly preferential, unjustly discriminatory". K.S.A. 66-1,204.

52. The Order wholly abdicates that legal duty, as a matter of law, and as written stands for the proposition that a regulated utility whose "rates" are defined by contracts which charge for natural gas on the basis of dollars and cents per MMBtu, may misrepresent the a charge set by contract with impunity and, more outrageously, provide approval to a practice whereby a utility may inflate the volumes charged to its customers through what the KCC's own professional staff labels a manipulation of such volumes. Indeed, in order to properly exercise its duty and obligation, the Utility Division, in another recommendation rejected by the Commission, cited the need for a traditional rate case in order to permit the Commission to meet a demonstrated need for investigation and regulatory control so can understand what rate TKO is actually charging.[27]

[27] Haynos, DT, p. 323, lines 16-22.

53. As it stands now, the Final Order permits TKO to unilaterally define its rate and adjust its revenues by a previously undisclosed practice. The Commission remarkably holds that doing so is not unjust or unfair or unreasonable, because TKO has always done it that way. There is simply no rule of law or equity or regulatory precedent which suggests that repeated or consistent misrepresentation of billings will convert misrepresentations into reasonable conduct.

(7). <u>The Order improperly limits the time during which it may exercise jurisdiction</u>.

54. The Commission previously limited the time frame within which the Complaint would be considered to a period commencing with the issuance of the Certificate of Necessity and Public Convenience. It did so in an Order which made no mention that the issue presented would be based on the reasonableness of rates as divined solely from the face and the terms of the contract.

55. Ironically, the same order recognizes that TKO operated wholly without filing jurisdictional contracts which would establish the rates. It is this inconsistency which now transforms the prior Jurisdictional Ruling to one which is not supported by evidence or the law. The Commission cannot both invoke the sanctity of private contracts as the basis for its decision here and completely ignore the absence of such properly filed contracts for a substantial period of time. To do so is legally erroneous.

(8). <u>The Order needs clarification as to the relief afforded to residential customers.</u>

56. The Order grants relief to residential customers such as Mr. Hanson due to TKO's practice of billing in excess of the tariff rate. The Order grants partial relief to Mr. Hanson. However, Hanson seeks rehearing of the order to the extent it ignores and fails to consider the

impact of the MMBtu measurement practices which further inflate his billings improperly by 9.5%. The reasons for that position are the same as those detailed in this Petition in its entirety.

(9). <u>The Commission's Order is antithetical to the public interest by signaling that natural gas utilities may arbitrarily and unilaterally define the meaning of a MMBtu contrary to common usage, scientific facts and knowledge, industry practice, and basic rules of good faith and honesty.</u>

57. The power, authority and jurisdiction of the state corporation commission is specified at K.S.A. 66-1,201. The scope of this power and authority is indeed broad and is certainly not limited to matters involving the "rates" approved for utilities. K.S.A. 66-1202. Moreover, in discharge of its duties, the Commission is empowered to do whatever is necessary to insure fair and just treatment of customers by a utility. It has the power to investigate, even on its own volition: any regulation, **measurement, practice, act or service** complained of is unjust, unreasonable, unreasonably inefficient or insufficient, unduly preferential, unjustly discriminatory".[28]

58. In this case, the Complaint sought not only a refund of excess charges but an investigation by the Commission. The Order cites the importance of technical expertise in the context of invoking deference which it should be given by the Courts.

59. Following the filing of the Complaint, the Utilities Division of the Commission instituted and conducted just such an investigation which on its face clearly recognized the issue presented by the complaint as "alleging that TKO "inaccurately calculated the thermal content of natural gas (Btu value) contained in the volume of gas (MCF) sold to the Complainants."[29]

[28] K.S.A. 66-1,204 (emphasis added).
[29] Report, May 14, 2015, p. 1; Report, November 10, 2016, p. 1.

60. In both reports from the Chief Engineer and the Director of Utilities, the conclusion completely confirmed the accuracy and factual basis of the Complaint. Included in the comprehensive, detailed and technically crafted Report concluded, inter alia, that:

> As stated by the Complainants and confirmed by Staff in its May 2015 R&R, this 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 TKO's contracts with its customers state a price in $/MMBTU, overstating the amount of Btu's purchased results in overcharging the customer by 9.5%.[30]

The testimony of Mr. Haynos quite simply analogies TKO's practice to a "fast meter" which would incorrectly bill the quantities of gas, even if the price is as set by the rate. He stated:

> 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 road 9.5 percent faster than the amount of Btu's moving through there by making that type of calculation.[31]

61. The Order rests on the conclusion that non-residential Complainants failed to meet "the burden of proving that TKO's rates or practices with regard to them are "unreasonable." [32] However, the entire Order limits its analysis to "rates" thereby conflating "rates" with "practices".

62. The Order which erroneously treats this matter as a rate case, if upheld, would give gas utilities immunity from regulatory oversight as to their billing practices including a basic misrepresentation of volumes charged – a fact established by uncontroverted evidence in this record and investigated and reported by the professional staff of the Commission possessing the technical knowledge and expertise necessary to fulfill its public duties.

[30] Report and Recommendation, November 10, 2016, p.4.
[31] TR, Haynos, p. 282, 13-19.
[32] Order, ¶ 23.

63. The question then is rather the billing practices misrepresenting MMBtu's are "unfair, unjust, unreasonable." In discussing what is "unreasonable" in terms of statutes governing the Commission, the Supreme Court has held that the term is not necessarily precise.

> In Soule's Dictionary of English Synonyms, 'unreasonable' is set down as conveying the same idea as 'irrational, foolish, unwise, absurd, silly, preposterous, senseless, stupid, injudicious, nonsensical, unphilosophical, ill-judged, exorbitant, extravagant, unfair, unjust, extortionate, excessive.

Sw. Bell Tel. Co. v. State Corp. Com., 192 Kan. 39, 85, 386 P.2d 515, 554 (1963). In this case, Order which approves misrepresentation of practices under a contract, namely the measurement of units of natural gas is certainly injudicious, nonsensical and unphilosophical and unjust.

CONCLUSION

Ultimately, it is respectfully submitted, that the Commission has entered an unprecedented realm of utility regulation with this Order: one which accepts and defines fairness and justice as approving manipulation of billing volumes without notice, approval or consideration by either the Commission or customers. The Order's attempt to avoid that determination by paying homage to rate making principles flies in the face of uncontroverted evidence to the contrary and of uncontroverted evidence of a misstatement of accepted scientific and industry principles. In sum, the Order is factually, logically and legally erroneous, not supported by the record or the evidence and arbitrary and capricious.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May 2017, Complainants' Petition for Reconsideration 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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