

**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' REPLY BRIEF

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INTRODUCTION

1. Despite thirty-four pages of verbiage, Respondent's Post-Hearing Memorandum ("TKO Brief") never denies, and in fact admits, that TKO has intentionally, artificially and unilaterally inflated the volumes of MMBtu's which it has sold to all of its Kansas customers since 2007. Complainants' and Staff's Post-Hearing Memoranda both recite the overwhelming evidence proving that practice to be unreasonable, unjust and unfair.
2. TKO's defense is premised on the argument that its contracts with its customers set a "fair" price per MMBtu; thus, they charge a reasonable "rate." TKO makes this argument even though for every 1 MMBtu which TKO purchases it sells the same unaltered molecules of natural gas to its customers and charges them for 1.095 MMBtu's.
3. TKO argues that Complainants must show that TKO's rates are unfair, unjust and discriminatory. However, TKO totally ignores that the "rate" charged is a price per commodity unit: i.e. MMBtu. All of the natural gas bought and sold by TKO on the basis of a dollar amount per MMBtu. As proven, TKO bills for an erroneous or false quantity of MMBtu's. Thus, it's conduct is unreasonable, unfair or unjust.
4. The Commission has authority to deem as unlawful and void "[e]very unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction" K.S.A. 66-1,202. This authority mandates a review of a broad range of misconduct encompassing:

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, [that] is in any respect unreasonable, unfair, unjust, unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential"

K.S.A. 66-1,205(a). The Commission's authority is not confined to the dollar amount of the price in the contract.

5. The evidence introduced in this proceeding by both Complainants and Staff overwhelmingly proves that TKO's billings come within its jurisdiction and compels a remedy. This Reply Brief does not repeat all of the evidence; but rather seeks to reply to the most egregious misstatements of law or evidence in TKO's Brief.

REPLY TO ARGUMENTS RESPECTING COMMISSION'S QUESTIONS

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)?
6. Both Staff and Complainants fully and properly respond to this question. Their Briefs prove that the referenced regulations are relevant and admissible to prove the universal proposition that accurate measurement of MMBtu's requires application of consistent pressure base when converting Mcf's to MMBtu's.
7. TKO argues the regulations are irrelevant, however, because the Complaint is not based on violation of a specific regulation and complains that it has confronted a moving target. That is false.
8. The factual basis of this Complaint has been consistent and fully detailed at every stage of the proceeding: TKO employed an improper, unfair and unjust overbilling based on inaccurate, improper and/or false pressure factors. *See* Complaint, ¶¶ 8-14.
9. Complainants' Response to TKO's Information Request No. 1 details each and every reason why the MMBtu billings are wholly inaccurate, and is based on the formulas required to obtain equivalent measurements of Mcf's and Btu's. It cites regulations,

standards, science and engineering. *See* Hanson Ex. E, Addendum. Mr. Hanson's Direct Testimony also spelled out the same theories, facts and principles. *See* DT, Hanson, p. 13, 6-17. There is no moving target.

10. TKO attempts to gain some traction from the evidence which shows that the pressure base used by Anadarko has changed from 14.65 to 14.73 and from Mr. Hanson's testimony that using 14.65 as a pressure base would have no impact on his refund calculations apparently for proof of an inconsistent barometer.
11. Mr. Hanson's calculations were explicitly based on a comparison of the pressure base used by TKO's suppliers and the pressure base TKO used to bill its customers. He testified that both Anadarko and Black Hills use 14.73 psia. RT, Hanson, p. 6, 7-10. His direct testimony explained that he used 14.65 to calculate the overcharges caused by TKO's use of 13.45 psia when Anadarko used 14.65; and then used 14.73 for the period that Anadarko used that as its pressure base. DT, Hanson, p. 13, 1-3. Thus Mr. Hanson properly applied a uniform pressure base in making his calculations. To do so does not impose some ethereal measure of undefined "precision." Rather it simply demonstrates how a use of disparate pressure bases results in erroneous and dishonest billings. *See* Complainants Brief, ¶¶ 16-20.
12. TKO has not offered a single exhibit or word of testimony which establishes that using different pressure bases to measure the volumes of Mcf's and MMBtu's does not artificially inflate the volumes of MMBtu's it charged to customers. As Mr. Haynos testified there is always a volume component to MMBtu's and that you have to use the same pressure base throughout in order to get a fungible product. TR, Haynos, p. 264.

13. It is elementary that the molecules of natural gas are fungible goods. Fungible goods are “(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or (B) goods that by agreement are treated as equivalent. K.S.A. § 84-1,20(b)(18). TKO does nothing to change the molecules which it purchases. The entire natural gas industry prices natural gas based on a dollar and cents value per MMBtu. *See* Complainants’ Post-Hearing Brief, ¶¶ 17, 18 & 24-26. That is why regulations, industry standards, and scientific principles are all relevant.
14. TKO’s attempt to refute the need for proper measurement of fungible goods is astounding. Paragraph 57 of TKO’s Post-Hearing Brief argues that unlike Mcf’s, MMBtu’s may differ. That, of course, is not even true since measurement of Mcf’s also reflect certain pressures. However, TKO is not paying for the gas it buys by the Mcf. It pays for the gas it buys, like everyone else, by the MMBtu. The volume of MMBtu’s sold by TKO’s suppliers is measured based on a pressure base of 14.73 or 14.65 psia. The volume of the same MMBtu’s sold by TKO is measured with a pressure base of 13.45psia. Each unit is not being measured the same, thus making remarkable TKO’s concession that “the key is whether each volume unit is being measured the same.” *See* TKO Brief, p. 57. TKO measures the volumes of units of MMBtu’s it sells differently than the volume of units of MMBtu’s it purchases. 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. *See* Complainants’ Post-Hearing Brief, ¶ 34.
15. The evidence on this crucial point is worth repeating verbatim from Mr. Hanson’s direct testimony on lines 2-17 at page 13:

From the date it first started selling gas in Kansas, August 1, 2007 to the present, TKO has used different pressures to measure volume and BTU content. They did not use a legitimate pressure base. This resulted in a calculation of units of the gas being altered and, this results in an artificial inflation of the volumes and MMBtu's of gas that TKO is charging the customers its serves pursuant to its KCC Certificate. This results in false overcharges for natural gas to all of the Complainants as well as the rest of TKO's customers in the magnitude of 9.5%. In other words, TKO has been purchasing a specified volume of natural gas from Anadarko based on a MMBtu measurement at 14.73 psia and charging its customers for volumes of natural gas and MMBtu's inflated by 9.5% solely by altering the pressure base for its volumetric calculations to 13.45 psia.

(Emphasis Added).

12. TKO's position is that it may unilaterally alter the volume of MMBtu's to meet its revenue requirements without any approval by the Commission, notice to its customers or evidence that such a practice has any logical, legal, rational or scientific basis. That is why the standards and regulations have relevance to this Complaint.

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

13. Complainants' and Staff's Post-Hearing Memoranda correctly answer that a statute of limitations does not apply. Staff also correctly notes that a three-year statute of limitations of K.S.A. 66-154a would not apply even if TKO were certificated as a common carrier.
14. Complainants disagree that TKO is a common carrier; thus, TKO's argument that a three-year statute of limitations should apply based on K.S.A. 66-154c is legally incorrect. There is no evidence before this Commission that TKO transports natural gas. It bought gas sales meters and customer contracts from Anadarko, not a delivery system. *See* 2010 Order, Hanson Ex. C, pp. 3-4.
15. TKO's abuse of logical principles is again demonstrated in this argument. TKO argues that the Commission's authority to regulate a "utility" is broad enough to encompass a "common carrier". *See TKO Brief* p. 27, citing *Mapco Intrastate Pipeline Co. v. State*

Corp. Comm'n 10 Kan. App.2 527, 529 (1985). However, the fact that the term utility is broad enough to encompass common carrier as held by *Mapco* does not logically translate into a finding that every utility is a common carrier. The statute of limitations which TKO wants the Commission to employ is specifically limited to those seeking certificates as common carriers; and is not repeated or incorporated in any statute generally applicable to “utilities”.

16. The Certificates issued to TKO are limited to service provided by the contracts. *See* Hanson, Exs. C, D & P. The invoices to TKO’s customers are based solely on the MMBtu’s of natural gas sold.
17. There is no legal or factual basis to categorize TKO as a common carrier. Even it was, there is no applicable statute of limitation relevant to TKO’s misrepresentation of billing quantities.

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

18. Complainants and Staff both properly note that the Commission does not have authority to rule on legal claims for breach of contract; but that when a contract is the basis for a utility’s certificate, construction and performance under the contract is relevant to this Complaint.
19. TKO’s “answer” to this question is that Complainants are presenting a contract claim which is outside the rubric of Commission authority. TKO attempts to reach that fanciful conclusion on the basis that the legal principle behind the Complaint has been a moving target based on differing standards. The target has never moved. It is TKO’s desperate search for a defense which leads it to mischaracterize the nature of the Complaint and the supporting evidence.

20. The Complaint alleges that TKO has improperly, unfairly and unjustly overbilled in its sales of irrigation and residential natural gas. Complaint, ¶ 8. The overbilling is “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”. The nature of the improper calculations is detailed in factual specifics in paragraphs 11 & 12 which cite not only commonly accepted industry standards, but the sale of gas by TKO which is inflated over the volumes sold to it by its supplier.

21. A detailed and consistent factual basis for the Complaint was also stated in Complainants’ Response to TKO’s Information Request No. 1. Hanson Ex. E. That document provides a four-page detailed explanation of TKO’s improper, unscientific, misleading billings, summarized, in part, as follows:

TKO is free to choose what pressure base they want to use in their calculation of MMBtu’s sold: however, the pressure at which the btu value of the gas is determined (i.e., used in their MMBTU Factor) **MUST BE IDENTICAL** with the pressure which they use in their volumetric calculation (i.e. , used in the pressure factor.

Hanson, Ex. E, Attachment, p. 4. That is Complainants’ position. They have proved it. TKO’s conduct is unfair, unreasonable, improper and at odds with every piece of expert and scientific evidence before the Commission. That conduct comes squarely under the statutory authority of this Commission. TKO bemoans a requirement that its calculations be precise; but precision is necessary to measure fungible goods. Any merchant that knowingly and intentionally alters the measurement scales in such a fashion acts in an alone unfair, unjust and improper manner.

22. The foregoing discussion also refutes the argument that Complainants have not proven that TKO violates its certificates. TKO’s certificates grant it authority to sell gas pursuant

to contracts. Its management and billing under those contracts has been proven to be unfair and unjust. *Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n*, 28 Kan. App. 2d 313 (2000) provides no precedent for a different result. *CURB* dealt with a challenge to a "flexible rate tariff and specials contracts." was when they were originally submitted. Thus, TKO contends, there can be no challenge here to TKO's practices because the underlying contracts are "prima facie reasonable." See TKO Brief, ¶ 35. Both the decision of the Court of Appeals and CURB's arguments related to actual tariff's previously set and terms of contracts giving individualized prices to certain categories of customers. No one in this case is saying that TKO's contracts, on their face, are improper. The complaint is that TKO's billings are in the performance of those contracts are misleading, if not dishonest, because the contracts which require that charges be made on the basis of volumes per MMBtu – not volumes artificially inflated to adjust revenues at the whim of TKO.

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

23. All parties agree that the Commission does not have jurisdiction to impose "remedies in equity." The Commission has jurisdiction to order refunds. TKO argues, however, that it may consider equitable defenses.

24. The only putative basis TKO offers for its so called equitable defenses is that Complainants' paid their bills for seven years before filing a complaint and "slumbered on their rights". This, presumably, TKO contends, would create some kind of estoppel, waiver or laches. As to all such equitable defenses:

The party raising the defense of estoppel is himself bound to exercise good faith in the transaction. Thus, a party may not properly base a claim of estoppel in his favor on his own wrongful act or dereliction of duty, or fraud

committed or participated in by him, or on acts or omissions induced by his own conduct, concealment or representations.”

Newton v. Hornblower, Inc., 224 Kan. 506, 508, 582 P.2d 1136, 1139 (1978). TKO simply lacks clean hands.

24. Moreover, TKO bears the burden of proof on any such affirmative defenses. It must prove that there was a knowing failure to take action, awareness of the wrongdoing, and reliance by the defendant on the inactions. Also, the defenses are unavailable to a party whose own actions cause the action (or inaction) complained of. *See Mohr v. State Bank of Stanley*, 241 Kan. 42, 43, 734 P.2d 1071, 1074 (1987) (Equitable estoppel exists when a party, by its acts, representations, admissions, or silence, induced another party to believe certain facts existed upon which it detrimentally relied and acted).
25. There is no evidence that TKO relied on any action by Complainants, that TKO disclosed its billing practices, or that it would suffer any damage other than being held to account for its wrongdoing. There are no applicable equitable defenses.

REPLY TO TKO ARGUMENTS

26. Complainants’ evidence, prior briefing and the reply relating to the Commission’s questions fully satisfy their burden of proof and establish the factual basis for the Complaint. This section of the Reply is limited a few additional specific TKO arguments which are largely irrelevant to the scope of the Complaint.
27. TKO’s complaint that it has confronted a moving target is addressed in the preceding paragraphs. In this connection, however, TKO also asserts that Complainants did not submit a single invoice from TKO’s supplier concerning gas volumes ultimately purchased by Complainants. *See* TKO Brief, ¶ 5. However, the evidence proves that all of the natural

gas sold to TKO on the basis of MMBtu's was measured in a fashion divergent from the manner in which every single MMBtu sold by TKO to its customers. *See* Complainants' Post Hearing Brief, ¶¶ 27-29. The only calculation necessary is to compare the MMBtu's for which customers were improperly charged with the MMBtu's for which they should have been charged if measured correctly. Mr. Hanson has done that calculation based on all of the customer invoices available to him.

28. In numerous paragraphs TKO seeks cover from the fact that Complainants express no complaints about the monetary component of their contracts. In fact, TKO posits, Complainants testified they would be willing to pay more and poses the question "[w]hy would a reasonable customer be willing to pay more unless they had some other motive?" The appropriate rhetorical answer to this rhetorical question is why would customers want to continue to pay a supplier which has billed them for false volumes of MMBtu's for more than ten years?
29. In paragraphs 31-38, TKO argues that its Certificate did not require a specific pressure base and that TKO's "contracts and billing methodology are prima facie reasonable". The fact that the Commission may have approved TKO's "contracts" in no way proves that its "billing methodology" which, as Staff concluded, "misrepresents" the units of gas it is charging for can be considered to comply with the Commissions' certificate.
30. TKO continues its question begging theory that its "rates" are reasonable and proffered evidence based on traditional rate making principles. Complainants rely upon and incorporate their Pre-Hearing Memorandum, their Post-Hearing Memorandum and the testimony of Michael Brosch to demonstrate that those arguments are both irrelevant and wrong.

REPLY TO STAFF ISSUE F

31. Staff agrees that Complainants are due a refund from TKO from April 12, 2010 to the present and that the Commission has the authority to do so. There is no evidence that TKO is unable to make immediate refunds to these Complainants for that time period. The evidence supports a finding that TKO has the resources adequate to do so. It makes no sense and would be wholly unfair and inequitable to permit TKO to defer such a refund and, more significantly, to fund such an obligation in a future rate case in which the Complainants are assessed an increased cost of gas to fund their own recovery. *See also*, RT, Brosch, pp. 232-33.
32. Complainants continue to reassert their position that refunds should be paid from the first date TKO began to operate as a utility. Otherwise, it would have been acting as a utility without any authorization or authority and the Commission would be placed in a position of having failed to act during the entire period from 2007 until 2010.
33. Staff appears to answer the question of how to assess TKO for refunds for all of its customers by questioning TKO's financial ability and express concern that would impinge on TKO's ability to serve its customers. However, the evidence available to the Commission does not justify such a conclusion. At a minimum, and even as TKO admits, the Commission should investigate the financial status of TKO, including its corporate finances and expenditures before reaching any conclusion.
34. The recommendation that a rate case be undertaken would seem to be appropriate in light of TKO's inability to perform its obligations under the current structure of its Certificate. However, it would be improper and contrary to the law to allow TKO to structure a rate base which would retroactively alter the charges it was authorized to make in its contracts

and build in revenues to be derived from future billings of its customers which would provide the resources to fund a pre-existing liability. *See* DT, Brosch, pp. 10-11.

CONCLUSION

35. Complainants again respectfully submit that they have proven the allegations of the Complaint, that TKO has failed to refute those allegations, and that the conduct of TKO merits and demands the remedies sought.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2017, Complainants' Reply 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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