

BEFORE THE STATE CORPORATION COMMISSION
 OF THE STATE OF KANSAS

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

STAFF’S REPLY BRIEF

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

Table of Contents

I.	Issues/Questions.....	1
II.	Analysis of Questions/Issues	2
III.	Conclusion	13

I. Issues

Commission's Legal Questions for Briefing

- A. Was the 1961 Order, Docket No. 34,856-U, or K.A.R. 82-3-3a ever codified in relevant part into current regulations and are those regulations applicable to this situation? Why or why not? (See K.A.R. 82-3-101(a)(36), (b) as raised at the hearing).¹
- B. Does the statute of limitations apply to this action; and if so, which one and why?
- C. Does the Commission have the authority to hear and determine issues of contract law?
- D. Does the Commission have the jurisdiction to consider remedies in equity?

Staff Issues

- E. Whether TKO misapplied a BTU factor to the Complainants' natural gas invoices which resulted in an overcharge of approximately 9.5%.²
- F. Whether TKO should be required to refund the alleged overcharge to the Complainants and to all TKO customers that are served under the Commission's jurisdiction.³
- G. Whether TKO should be assessed a civil penalty for failing to follow directives from Commission Orders regarding service supplied to residential customers.⁴

¹ Tr. Vol. 1, p.33-34 (Jan. 10-11, 2017).

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

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

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

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

III. Analysis

Commission Legal Question A: Was the 1961 Order, Docket No. 34,856-U, or K.A.R. 82-3-3a ever codified in relevant part into current regulations and are those regulations applicable to this situation? Why or why not? (See K.A.R. 82-3-101(a)(36), (b) as raised at the hearing).⁶

1. Docket number 34,856-U applied the Commission's Rules and Regulations Relating to Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas.⁷ Under Section 3 (Units of Measure), Subsection 302 (Psia), the rules and regulations state, "[a] pressure base of 14.65 psia shall be used in reporting volumes and heating values as a basis of tariffs and in complying with the Rules and Regulations of the Commission."⁸ As previously stated by Staff, while these rules and regulations are not published with current Kansas Administrative Regulations, an exhaustive search revealed no docket or Commission order revoking or rescinding the Standards of Quality, Pressure, Accuracy of Measurement, Safety and Service of Natural Gas in the State of Kansas. Therefore, Staff stands by its assertion that these standards continue to be effective as an order of the Commission, and therefore apply to the practices of regulated natural gas utilities in Kansas. Staff asserts that K.A.R. 82-3-101(a)(36) is applicable as it provides a definition equivalent to docket number

⁵ *Id.* at p. 7.

⁶ Tr. Vol. 1, p.33-34 (Jan. 10-11, 2017).

⁷ Docket No. 34,856-U; First Supplemental Order (Jan. 16, 1961).

⁸ Docket No. 34,856-U; First Supplemental Order §302 (Jan. 16, 1961).

34,856-U. K.A.R. 82-3-101(a)(36) defines “Gas (cubic foot)” as “the volume of gas contained in one cubic foot of space at a standard pressure base and at a standard temperature base. The standard pressure base shall be 14.65 pounds per square inch absolute, and the standard temperature base shall be 60 degrees Fahrenheit.” K.A.R. 82-3-101(b) states “Any term not defined in the regulation or in any applicable commission rule, regulation, or order shall be interpreted to be consistent with its common use in the industry.” As stated previously in Staff’s Closing Brief, Staff has no objection to applying K.A.R. 82-3-101(a)(36), which states the same standard pressure base of 14.65 psia as docket number 34,856-U. Under the Commission’s broad authority granted in K.S.A. 66-1,201 et seq., the Commission may apply either the 34,856-U docket, K.A.R. 82-3-101(a)(36), or (b) to this complaint.

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

2. Both Staff and Complainants set forth in their respective post-hearing briefs that the statute of limitations does not apply in this matter. Both Staff and Complainants agree that the power and authority of the Commission is established by statute and no specific time limitation is placed on complaints filed with the Commission. TKO argues in both its pre-hearing brief and post-hearing brief that the complaint is limited as “[u]nder K.S.A. 66-154c, complaints seeking certificates under K.S.A. 66-154a must be filed within three years after the payment complained of. Highly summarized, K.S.A. 66-154a states that common carriers shall not charge unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rates or charges. TKO is a common carrier transporting goods.”⁹ Staff agrees with the argument of Complainants that TKO is not operating as a common carrier, but as a public utility. Further, the

⁹ Respondent’s Pretrial Brief, p.13, ¶ 42 (Jan. 3, 2017).

Commission previously stated in the SWBT docket that it has not adopted Article 5 of the Code of Civil Procedure, Limitations of Actions, and that “Article 5 demonstrates that its applicability is limited to actions in court.”¹⁰ Therefore, K.S.A. Chapter 60, Article 5 only applies to actions filed in court, not administrative proceedings such as this complaint before the Commission.

3. As stated in Staff’s Closing Brief, the Commission in the SWBT docket concluded that complaints alleging that a customer has been overcharged are not limited to “complaints that are brought within a specific period of time.”¹¹ The primary authorizing statute in the current complaint before the Commission is K.S.A. 66-1,201, which states “[t]he commission is given full power, authority and jurisdiction to supervise and control the natural gas public utilities...doing business in Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”

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

4. The Commission has the authority to hear and determine issues of contract law in the context of its statutorily authorized role of supervising and controlling natural gas public utilities, doing all things necessary and proper to supervise and control public utilities,¹² and overseeing the form and filing of contracts of natural gas public utilities.¹³ Staff does not agree with the narrow interpretation of TKO, as set forth in their post-hearing brief, as to the Commission’s authority over issues of contract law. Pursuant to K.S.A. 66-1,201, the Commission has the “full power, authority and jurisdiction to supervise and control the natural

¹⁰ 2004 WL 7075680 (Kan.S.C.C.), Docket No. 04-SWBT-879-COM, p.5 (December 13, 2004).

¹¹ 2004 WL 7075680 (Kan.S.C.C.), Docket No. 04-SWBT-879-COM, p.3 (December 13, 2004).

¹² K.S.A. 66-1,201.

¹³ K.S.A. 66-1,203.

gas public utilities as defined in K.S.A. 66-1,200, doing business in Kansas, *and is empowered to do all things necessary and convenient* for the exercise of such power, authority and jurisdiction.” (emphasis added). Pursuant to K.S.A. 66-1,203, “[e]very natural gas public utility doing business in Kansas over which the commission has control shall publish and file with the commission copies of all schedules of rates and shall furnish the commission copies of all rules and regulations and contracts between natural gas public utilities pertaining to any and all jurisdictional services to be rendered by such natural gas public utilities.” Conversely, if the Commission did not have the authority to hear issues regarding contract law, what meaningful review or decision could actually occur regarding these contracts that are required to be filed with the Commission under K.S.A. 66-1,203? Therefore, Staff’s position remains firm that the statutory language in K.S.A. 66-1,201 and 66-1,203 gives the Commission the authority to hear and determine issues of contract law in the public utility context.

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

5. One of the remedies requested of the Commission in this complaint is a refund of any overcharges by TKO. As TKO is a natural gas public utility under the jurisdiction of the Commission, the Commission has the “**full** power, authority and jurisdiction to supervise and control the natural gas public utilities as defined in K.S.A. 66-1,200, doing business in Kansas, and is empowered to do **all** things necessary and convenient for the exercise of such power, authority and jurisdiction”¹⁴ (emphasis added). K.S.A. 66-1,202 states:

Every natural gas public utility governed by this act shall be required to furnish reasonably efficient and sufficient service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such natural gas public utility, to

¹⁴ K.S.A. 66-1,201.

establish just and reasonable rates, charges and exactions and to make just and reasonable rules, classifications and regulations. Every unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited, unlawful and void. The commission shall have the power, after notice and hearing in accordance with the provisions of the Kansas administrative procedure act, to require all natural gas public utilities governed by this act to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such natural gas public utilities.

K.S.A. 66-1,205(b) states “The commission shall have 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.” The Commission has the authority and jurisdiction over TKO to order refunds of any overcharges that are deemed unjust or unreasonable. Therefore, the plain meaning of the statutory language confers clear, unambiguous authority and jurisdiction upon the Commission to regulate public utilities, including TKO, if the Commission determines that an equitable remedy is necessary and convenient.

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

6. Staff and Complainants agree that the miscalculations by TKO have resulted in an overcharge of the Complainants. Both Richard Hanson and Leo Haynos testified that a consistent pressure base must be used when measuring natural gas volumes and the failure to do so caused the miscalculation and the subsequent overcharges to the Complainants. Further, by way of testimony, all parties agree that this issue was not caused by a faulty meter. At the evidentiary hearing, Mr. Michael McEvers, managing member of TKO, confirmed that TKO has used a pressure base of 13.45 psia when calculating the bills for customers in Kansas since

2007.¹⁵ Complainant Richard Hanson testified that “the basis of the Complaint is there is a discrepancy between the pressure base used for calculation of volumes and the pressure base used for measuring the Btu. A pressure base has to use the same pressure for calculation of volumes and for the application of the MMBtu factor.”¹⁶

7. When Mr. Hanson was asked why the base pressure for volume and MMBtu calculations should be the same, he responded that “you are measuring a certain number of cubic feet at a certain pressure. And when you vary the pressure, the Btu of that gas changes per cubic foot. So you have to have the same pressure base, if you will. That is where the pressure base term comes from. It’s a base pressure used for volumetric measurement and for Btu per cubic foot determination.”¹⁷ When asked about methods of calculation, Mr. Hanson testified “if the pressure base goes up, you are packing more molecules into a cubic foot, so you’ve got more Btu value. Likewise if the pressure goes down, you get less molecules packed into a cubic foot, and the Btu drops. And that’s why it is imperative to use the same pressure base for the volumetric calculations as for the Btu per cubic foot.”¹⁸

8. Staff witness Leo Haynos, when asked about the calculations being made by TKO to a pressure of 13.45, responded “When you use a pressure base as a reference point, if you are going to use 13.45, fine, you can use whatever you want for a reference point provided you use the same data or reference points throughout all of your calculation. If you don’t, you have two different reference points, you can’t get it to be fungible.”¹⁹ Mr. Haynos was also asked “if the contract between TKO and its customers had a pressure base of 13.45, would we have a

¹⁵ Tr. Vol. 1, p.150-151 (Jan. 10-11, 2017).

¹⁶ Tr. Vol. 1, p.52 (Jan. 10-11, 2017).

¹⁷ Tr. Vol. 1, p.70 (Jan. 10-11, 2017).

¹⁸ Tr. Vol. 1, p.72 (Jan. 10-11, 2017).

¹⁹ Tr. Vol. 2, p.274-275 (Jan. 10-11, 2017).

dispute?”²⁰ He responded “Not necessarily, provided that he uses... 13.45 as a reference point. So yes, you can’t just apply it to your volume. You have to apply it to your Btu value as well. That’s the problem. We have a 13.45 reference point applied to the volume and the 14.73 applied to the Btu calculation.”²¹ Mr. Haynos was then asked if TKO is required to use 14.65 or 14.73 for calculating volume. “If they state it in their... contract, they can use whatever the parties agree to. That’s the way we have done it before with other gas companies. If you have no mention of a pressure base in your...contract or your tariff, we believe it goes back to the only requirement that would be there, the standard, which would be the old 1961 docket.”²²

9. While the agreement between the Complainants and TKO may be silent with specific respect to establishing a BTU value, Commission Docket 34,856-U prescribes the acceptable methodology for establishing the BTU value for a given volume of gas.²³ Further, though there are multiple contracts at issue due to contract renewals and more than one meter/account per complainant, Section 7.1 of several of the contracts entered between the parties in this complaint states:

This agreement is subject to all applicable and valid orders, law, rules and regulations of all duly constituted governmental authorities having jurisdiction or control over the parties or the subject matter of this Agreement. If any provision of this Agreement is determined to be invalid or unenforceable in any jurisdiction, then to the fullest extent permitted by law, the other provisions hereof shall remain in full force and effect in such jurisdiction and shall be construed in order to carry out the intention of the parties as nearly as possible. The invalidity or unenforceability of any provision hereof in any jurisdiction shall not affect the validity or enforceability of any provision in any other jurisdiction.

²⁰ Tr. Vol. 2, p.305 (Jan. 10-11, 2017).

²¹ Tr. Vol. 2, p.305 (Jan. 10-11, 2017).

²² Tr. Vol. 2, p.306 (Jan. 10-11, 2017).

²³ Docket No. 34,856-U, First Supplemental Order §302 (Jan. 16, 1961).

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

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

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

11. The Commission's Order Granting Applications with Conditions issued on April 12, 2010, was the first instance of the Commission authorizing TKO to conduct the business of a public utility in Kansas by granting Anadarko's request to transfer to TKO its rights and obligations to provide natural gas service to the customers listed in Anadarko's and TKO's applications. Based on the documents reviewed by Staff, the discovery received and the testimony provided in the evidentiary hearing, Staff stands by its recommendation that the irrigator Complainants are due a refund from TKO from April 12, 2010 to the present. Further, based on the statements by TKO in its post-hearing brief on page 30, Staff would agree with TKO that all its residential customers are also entitled to a refund as they were charged a rate in excess of its Certificate since January 1, 2014.

12. If the Commission determines that TKO did in fact overbill the Complainants in this matter then, based on the statutory authority and the case law as outlined above, it is well-settled that the Commission has the authority to issue refunds for amounts charged in excess of a Commission-approved rate for the residential customers and the contract rate for the irrigation customers. The Commission's authority to issue refunds is derived from K.S.A. 66-1,201, 66-1,202 and 66-1,207.

13. While the Commission has the authority to issue refunds to all TKO customers, will it be in the public interest? While the Complainants content that the Commission should order TKO to provide refunds to all customers due to overbilling, upon further review and consideration, Staff believes that only the Complainants and the residential customers should be provided refunds at this time. The only contracts and billing statements in the record at this time are those of the irrigator Complainants. As their contracts are customer specific, the Commission is not in a position to order refunds based on contracts and billing statements not in the record. Further, as has been stated previously, TKO agrees that their residential customers are entitled to a refund. The financial viability of TKO in light of any refunds ordered is discussed further under Staff Issue H of this brief.

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

14. The Commission is authorized under K.S.A. 66-138(a)(2) to asses a civil penalty for violations under this act. Staff still believes a civil penalty is warranted in this matter, but would agree with TKO's position that \$2,550 of the originally requested \$7,100 could be viewed as duplicitous and would have no objection to a final civil penalty of \$4,550. Further, Staff believes the civil penalty is warranted as TKO agreed in its post-hearing brief, on page 30, that it

has been charging its residential customers a rate in excess of its Certificate. Staff recommends a civil penalty, as first set forth in Staff's Report and Recommendation of May 14, 2015, for failure to comply with Commission Orders, for violating K.S.A. 66-117, and filing inaccurate compliance reports regarding service provided to its residential customer.²⁴ Mr. Haynos testified at the evidentiary hearing and in his Report and Recommendation of November 10, 2016, that the recommended civil penalty is within the range set forth in K.S.A. 66-138(a)(2).²⁵ Staff would also point out that if any future complaints against TKO for the same or similar violations were to come before the Commission, Staff would likely recommend increased penalties.

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

15. In the Order Granting Application with Conditions of April 12, 2010, TKO was granted the status of a public utility, limited to serving a defined list of customers under individual gas purchase contracts.²⁶ This provided Commission oversight to "review customer contracts to ensure the terms, conditions, and gas sales price are reasonable." The Order further states that "if the contracts are found to be discriminatory or unreasonable, then the Commission will have authority to set rates using any available rate-making policies."

16. In Staff's review of TKO's annual reports filed with the Commission, which indicate TKO lost approximately \$400,000 in its Kanas operations for 2014 and 2015, Staff is concerned with the financial viability of TKO.²⁷ Mr. McEvers testified at the evidentiary hearing

²⁴ Staff Report and Recommendation, p. 7 (May 15, 2015).

²⁵ Staff Report and Recommendation, p. 7 (November 10, 2016) and Tr. Vol. 2, p.325 (Jan. 10-11, 2017).

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

²⁷ Staff Report and Recommendation, p. 2 (November 10, 2016).

that if the Commission ordered a refund to the Complainants in the amount of \$70,000, as calculated by Mr. Hanson, he could pay and it would not bankrupt TKO.²⁸ But, Mr. McEvers also testified that if the Commission ordered a refund to all customers of TKO, then it could end his business in Kansas.²⁹ In the Report and Recommendation of Mr. Haynos, he stated “in the interests of TKO and its customers, Staff recommends TKO be required to file for a rate case to set rates, gas tariffs and service requirements. This approach will standardize rates and practices for all of TKO customers and assure TKO receives the appropriate compensation for its operations.”³⁰

17. While Staff believes a rate case may still be the ultimate outcome in this matter, Staff has no objection to TKO’s request, as set forth in section D on page 34 of its post hearing brief, that Staff and TKO meet regarding the issues in TKO’s compliance filings and provide an update to the Commission within 120 days following the Order in this matter. Staff has serious concerns that TKO’s irrigation customers may be subsidizing the few residential customers as the residential rates set out in the Certificate appear too low to adequately cover the costs of providing service. Further, Staff wants to insure that no future harm befalls TKO or its customers. If no agreement can be reached between the parties, Staff will then make a recommendation(s) to the Commission that may include requesting the Commission require TKO to file a rate case to set rates, gas tariffs, and service requirements for all of TKO’s customers using traditional rate making methods.

²⁸ Tr. Vol. 1, p.162 (Jan. 10-11, 2017).

²⁹ Tr. Vol. 1, p.162-163 (Jan. 10-11, 2017).

³⁰ Staff Report and Recommendation, p. 8 (November 10, 2016).

V. Conclusion

18. WHEREFORE, as set forth and analyzed above, Staff respectfully submits its Reply Brief asserting the Commission has the jurisdiction and authority to:

A) Apply the 34,856-U docket with the definitions provided in K.A.R. 82-3-101(a)(36), or (b) to this situation as the standard pressure base under Commission's broad authority granted under K.S.A. 66-1,201 et seq.;

B) Deny the statute of limitations argument by TKO due to the precedence set in the SWBT docket and its authority under K.S.A. 66-1,201;

C) Determine issues of contract law pursuant to K.S.A. 66-1,201, and 66-1,203;

D) To consider remedies in equity as it pertains to refunds to the Complainants pursuant to Commission authority as set forth in K.S.A. 66-1,201, 66-1,202, and 66-1,205(b);

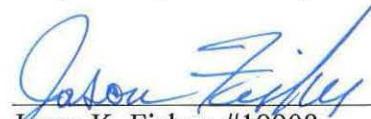
E) Determine that TKO did misapply the BTU factor to Complainants' invoices, resulting in an overcharge to the residential customers of TKO and the Complainants;

F) Authorize refunds by TKO of the excess rates paid based on erroneous or false pressure base factors from the time period of April 12, 2010, to the date of the final order for all residential customers and the Complainants in this matter;

G) Assess a civil penalty against TKO under K.S.A. 66-138(a)(2); and

H) Order TKO and Staff to meet regarding the compliance filings and other regulatory matters of TKO and to present an agreement or report within 120 days after the issuance of an Order in this matter. If an agreement cannot be reached or if the agreement is not approved by the Commission, an order requiring TKO to file a rate case to stabilize its financial situation, to "furnish reasonably efficient and sufficient service" and "to establish just and reasonable rates" as set forth in K.S.A. 66-1,202 may be issued.

Respectfully submitted,



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15-TKOG-236-COM

I, the undersigned, certify that a true and correct copy of the above and foregoing Staff's Reply Brief was served by electronic service on this 13th day of March, 2017, to the following:

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