

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

AUG 27 2013

In the Matter of the Complaint of SWKI-Seward )  
West Central, Inc., and SWKI-Stevens Southeast, )  
Inc. Against Anadarko Natural Gas Company. )

by  
State Corporation Commission  
of Kansas

Docket No. 14-**ANGG-119-COM**

**COMPLAINT OF SWKI-SEWARD WEST CENTRAL, INC. AND SWKI-STEVEN  
SOUTHEAST, INC. AGAINST ANADARKO NATURAL GAS COMPANY**

COME NOW, SWKI-Seward West Central, Inc. ("SWKI-SWC"), and SWKI-Stevens Southeast, Inc. ("SWKI-SE"), (collectively, the "NPU") and pursuant to K.A.R. 82-1-220, K.S.A. §§ 66-1,202, 66-1,203, 66-1,205, 66-1,206, 66-109, and K.S.A. 66-117, hereby file this Complaint with the State Corporation Commission of the State of Kansas ("KCC" or "Commission") against Anadarko Natural Gas Company ("ANGC"). In support of its Complaint, the NPUs allege and state as follows:

**I. PARTIES TO THE COMPLAINT**

1. SWKI-SWC is a customer-owned Kansas nonprofit corporation, in good standing, that operates as a certificated nonprofit natural gas public utility in portions of Stevens and Seward Counties, Kansas. On April 2, 2002, SWKI-SWC was granted its Certificate of Convenience and Necessity, pursuant to K.S.A. 66-104c, to provide natural gas service as a nonprofit public utility in Docket No. 02-SSWG-611-COC.

2. SWKI-SE is a customer-owned Kansas nonprofit corporation, in good standing, that operates as a certificated nonprofit natural gas public utility in a portion of Stevens County, Kansas. On April 24, 1998, SWKI-SE was granted its Certificate of Convenience and Necessity, pursuant to K.S.A. 66-104c, to provide natural gas service as a nonprofit public utility in Docket No. 98-SWKG-644-COC.

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3. ANGC is a corporation organized and existing under the laws of the State of Delaware, and is authorized to do business within the State of Kansas. ANGC's principal offices are located in Houston, Texas, and it maintains an office in Liberal, Kansas. ANGC is a natural gas public utility subject to the jurisdiction of the Commission. Pursuant to customer-specific certificates issued by the Commission, ANGC provides natural gas service to seven customers on a contract basis. SWKI-SE and SWKI-SWC are two of the seven customers to whom ANGC provides natural gas service on a contract basis.

**II. FACTUAL AND LEGAL BASIS FOR THE NPUS' COMPLAINT AGAINST ANGC**

4. ANGC provides natural gas to SWKI-SE pursuant to a Gas Sales Agreement dated July 1, 1998. ANGC provides natural gas to SWKI-SWC pursuant to a nearly identical Gas Sales Agreement dated June 1, 2002.<sup>1</sup>

5. On July 11, 2013, the Commission Staff filed a Report and Recommendation in Docket No. 13-BHCG-509-ACQ the ("509 docket.") As the Commission is aware, the 509 docket is a Joint Application filed by ANGC and Black Hills/Kansas Gas Utility Company ("Black Hills") requesting Commission approval of the transfer of ANGC's Certificates of Convenience and Necessity with respect to ANGC's Kansas natural gas utility business and operations to Black Hills. Staff's July 11, 2013 Report and Recommendation noted that ANGC provides natural gas service pursuant to customer-specific certificates that were first granted to an ANGC predecessor company in Docket No. 191,218-U. In a later application for a name change and update of the certificate, ANGC reaffirmed the customer-specific list from Docket No. 191,218-U as the list of customers being served by its Certificate. In its Order dated May

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<sup>1</sup> The Gas Sales Agreements are attached hereto as **Confidential Exhibits A and B**.

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19, 2000, the Commission approved the transfer of the certificated customers to the newly named company and provided two significant requirements for future modifications of the Certificate.<sup>2</sup>

6. These two requirements are as follows:

-If at any future time gas service is no longer being provided or requested, the corresponding Contract Rate Schedules may be cancelled on a case-by-case basis, upon review and concurrence by Staff.

-In connection with providing gas service to future customers, Anadarko Natural Gas Company shall file all Customer Specific Certificates and Contract Rate Schedules for review by and approval of the Commission consistent with applicable Kansas statutes and regulations.<sup>3</sup>

7. Notably, in its report and recommendation, Staff stated that “[o]ther than the Commission Order authorizing ANGCO to serve BHE for the City of Liberal, Staff is unable to locate any Orders approving the gas sales contracts for the customers listed in Exhibit 1 of the Application.”<sup>4</sup> Staff further noted that “Staff believes the failure of Anadarko to file its customer contracts with the Commission has no bearing on this Application. Should the Commission wish to address Anadarko’s compliance with K.S.A. 66-131 and its Order in Docket No. 00-ANGC-218-COC, Staff recommends it do so in an additional proceeding.”<sup>5</sup>

8. Pursuant to K.S.A. 66-1,202, every natural gas public utility doing business in Kansas shall be required to furnish reasonably efficient and sufficient service at just and reasonable rates. Every unjust or unreasonably discriminatory or unduly preferential rule, rate,

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<sup>2</sup> Docket No. 13-BHCG-509-ACQ, July 11, 2013 Staff Report and Recommendation at p. 3.

<sup>3</sup> Docket No. 13-BHCG-509-ACQ, July 11, 2013 Staff Report and Recommendation at p. 3. (Emphasis in original.)

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at p. 4.

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charge or exaction is prohibited, unlawful and void. Pursuant to K.S.A. 66-1,203, every natural gas public utility doing business in Kansas 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.

9. Further, in accordance with K.S.A. 66-109, no public utility shall knowingly or willfully charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state. Similarly, K.S.A. 66-117 provides that, “unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges... except by filing the same with the commission at least 30 days prior to the proposed effective date.”

10. K.S.A. 66-1,205 provides that “upon a complaint in writing made against any natural gas public utility governed by this act that any rates or rules and regulations of such natural gas public utility are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both...the commission may proceed, with or without notice, to make such investigation as it deems necessary.”

11. Pursuant to the above-referenced Gas Sales Agreements, the NPUs have been buying natural gas from Anadarko off the Hugoton Residue Delivery System (“HRDS”) at a contract rate of \*\*.<sup>6</sup> As part of the NPUs analysis of the issues pending in Docket No. 13-BHCG-509-ACQ, the NPUs can demonstrate that cost-based rates for service to the NPUs on the HRDS should have been significantly less than that amount. Contract rates for other Anadarko

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<sup>6</sup> See Section 4.1 of **Confidential Exhibits A and B**, attached hereto.

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customers for service on the HRDS range from \*\* to \*\*. <sup>7</sup> To the NPU's knowledge, and in direct contravention of Kansas law and the Order in Docket No. 00-ANGC-218-COC, which required all contracts to be filed with and approved by the Commission, the NPU's Gas Sales Agreements have not been filed with or approved by the Commission.

12. In accordance with the above-referenced statutes, and the Kansas Court of Appeals in *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*<sup>8</sup> (hereafter, "Sunflower Pipeline"), where a natural gas public utility charges a contract rate in excess of its last authorized or filed rate, the Commission has the power and authority to establish a lawful rate and order refunds for any overcharges.<sup>9</sup> In Sunflower Pipeline, Sunflower sold irrigation gas to approximately 35 farmers in Finney and Scott Counties, Kansas. The rate on file and approved by the KCC for that service from mid-1976 to 1978 was \$.25 per Mcf. Sunflower's previous management implemented a limited \$.65 per Mcf rate for its irrigation service, and Sunflower entered into contract rates of \$.65 per Mcf with all of its customers who were willing to sign said contract. Sunflower did not file this contract with the KCC, nor did it file for an increase in rates.

13. In response to a complaint from one of Sunflower's customers, the KCC issued an Order to Sunflower to show cause why it should not be required to make refund to customers for any unauthorized rates or charges collected. The Commission concluded that Sunflower had failed to conform with the provisions of K.S.A. 66-117 in that it did not file for changes in its charges with the Commission. Sunflower was directed to refund to all retail customers the amount actually received by Sunflower over the previously approved rate of \$.35 per Mcf plus

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<sup>7</sup> See **Confidential** Exhibit 5 to the Joint Application in Docket No. 13-BHCG-509-ACQ, attached hereto as **Confidential Exhibit C**.

<sup>8</sup> A copy of Sunflower Pipeline is attached hereto as **Exhibit D**.

<sup>9</sup> *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 5 Kan.App.2d 715, 719-720, 624 P.2d 466 (1981) (rev. denied.)

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interest at 8 percent per year. The Court of Appeals concluded that the KCC has the power to order refunds for charges made in excess of published rates and concluded that K.S.A. 66-109 does not allow deviation from approved rates without filing with the KCC.

**IV. RELIEF SOUGHT BY THE NPUS AGAINST ANGC**

14. The NPUs seek a Commission finding that ANGC has failed to file certain contracts with the Commission for approval, in violation of K.S.A. 66-109, K.S.A. 66-117 and other Kansas law. The NPUs further seek a Commission Order finding that any and all rates charged by ANGC in excess of the latest lawfully established, Commission-approved rate are unlawful, void, and subject to refund, with interest.

WHEREFORE, for the foregoing reasons, the NPUs respectfully request that the Commission issue an Order finding that ANGC is in violation of K.S.A. 66-109 and K.S.A. 66-117, that any and all rates charged by ANGC in excess of its latest lawfully established rate are subject to refund, with interest, and for any such further relief that the Commission may deem just and appropriate.

Respectfully submitted,

POLSINELLI PC

By: 

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ATTORNEYS FOR SWKI-SEWARD WEST  
CENTRAL, INC. AND SWKI-STEVEN  
SOUTHEAST, INC.

VERIFICATION

STATE OF Kansas )  
 ) ss.  
COUNTY OF Johnson )

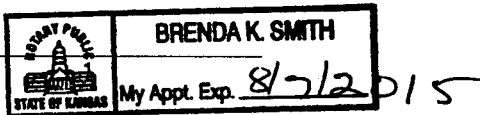
I, Anne E. Callenbach., being duly sworn, on oath state that I am counsel to SWKI-Seward West Central, Inc., and SWKI-Stevens Southeast, Inc., that I have read the foregoing pleading and know the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge and belief.

By: *A. Callenbach*  
Anne E. Callenbach

The foregoing pleading was subscribed and sworn to before me this August 27, 2013.

*Brenda K. Smith*  
Notary Public

My Commission Expires:





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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading has been \_\_\_ emailed, \_\_\_ faxed, X hand-delivered and/or mailed First Class, postage prepaid, this August 27, 2013, to:

Sam Feather  
Litigation Counsel  
Kansas Corporation Commission  
1500 SW Arrowhead Road  
Topeka, KS 66604

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\_\_\_\_\_  
Anne E. Callenbach

**PUBLIC VERSION**  
**EXHIBIT A**

**PUBLIC VERSION**  
**EXHIBIT B**

**PUBLIC VERSION**  
**EXHIBIT C**

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Court of Appeals of Kansas.  
 SUNFLOWER PIPELINE COMPANY, Appellant,  
 v.  
 The STATE CORPORATION COMMISSION, of the  
 State of Kansas, Appellee.

No. 51260.  
 March 6, 1981.  
 Review Denied April 29, 1981.

Kansas Corporation Commission entered order requiring pipeline company to make full refund to certain of its irrigation gas customers, and appeal was taken. The Finney District Court, Bert J. Vance, J., affirmed, and pipeline company appealed. The Court of Appeals, Meyer, J., held that: (1) where last authorized utility rate was 25¢ per MCF and utility contracts with some of customers were for a rate of 65¢ per MCF, without Commission authority and without requesting an approval of such contract, Commission was correct in ordering full restitution of all monies collected pursuant to such contracts in excess of 25¢ per MCF, and (2) where the Commission made no findings or conclusions relative to effect of such restitution on the utility, after utility had claimed said restitution would impair capital structure of the utility, case would be remanded for findings by the Commission as to effect of refund on utility's continuing ability to carry on its operations and service to its customers and to reevaluate the time frame within which restitution must take place.

Affirmed in part and remanded with instructions.

West Headnotes

**[1] Public Utilities 317A ↪123**

**317A Public Utilities**  
**317AII Regulation**  
**317Ak119 Regulation of Charges**  
**317Ak123 k. Reasonableness of Charges in**  
**General. Most Cited Cases**  
 (Formerly 317Ak7.4)

Each public utility governed by act must establish just and reasonable rates and must file with commission schedules of rates charged, and all contracts between utilities pertaining to any and all services rendered. K.S.A. 66-107 to 66-109.

**[2] Public Utilities 317A ↪120**

**317A Public Utilities**  
**317AII Regulation**  
**317Ak119 Regulation of Charges**  
**317Ak120 k. Nature and Extent in General.**  
**Most Cited Cases**  
 (Formerly 317Ak7.1)

Special contracts which provide for rates different than legal rates published and filed with the Kansas Corporation Commission are in violation of statute, and therefore, void and illegal. K.S.A. 66-107 to 66-109.

**[3] Public Utilities 317A ↪120**

**317A Public Utilities**  
**317AII Regulation**  
**317Ak119 Regulation of Charges**  
**317Ak120 k. Nature and Extent in General.**  
**Most Cited Cases**  
 (Formerly 317Ak7.1)

Power of the Kansas Corporation Commission to

order refunds for overcharges in violation of the act is implied from applicable statute, which grants State Corporation Commission "full power, authority and jurisdiction to supervise and control the public utilities \* \* \* doing business in the state" and "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction," and by statute which confers upon the Commission "all incidental powers necessary to carry into effect the provisions of this act \* \* \*." K.S.A. 66-101, 66-141.

14 Gas 190 ↪ 14.6

190 Gas

190k14 Charges

190k14.6 k. Payment, Collection, and Recovery Back. Most Cited Cases

Where last authorized utility rate was 25¢ per MCF, and utility contracts with some of its customers were for a rate of 65¢ per MCF, without Kansas Corporation Commission authority and without requesting an approval of such contracts, the Commission was correct in ordering full restitution of all monies collected pursuant to such contract in excess of 25¢ per MCF. K.S.A. 66-101, 66-109, 66-117, 66-141.

15 Public Utilities 317A ↪ 196

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission

317Ak196 k. Remand of Cause to Commission. Most Cited Cases  
(Formerly 317Ak34)

Where the Kansas Corporation Commission made no findings or conclusions relative to effect of such restitution on utility, after utility has claimed that

restitution would impair the capital structure of the utility, case would be remanded for findings of the Commission as to effect of refund on utility's continuing ability to carry out its operation and service to its customers and to reevaluate the time frame within which restitution must take place.

**\*715 \*\*467** Syllabus by the Court

1. K.S.A. 66-107 requires each public utility governed by the act to establish just and reasonable rates. K.S.A. 66-108 requires the utility to file with the commission schedules of rates charged, and all contracts between utilities pertaining to any and all services rendered. K.S.A. 66-109 prohibits charging rates greater or less than those shown by schedules approved by the KCC.

2. Special contracts which provide for rates different than legal rates published and filed with the KCC are in violation of statute, and therefore, void and illegal.

3. The power of the KCC to order refunds for overcharges in violation of the act is implied from K.S.A. 66-101, which grants the state corporation commission "full power, authority and jurisdiction to supervise and control the public utilities ... doing business in the state" and "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction," and by K.S.A. 66-141 which confers upon the KCC "all incidental powers necessary to carry into effect the provisions of this act ...."

4. Where, as here, the last authorized utility rate was 25¢ per MCF, and the utility contracts with some of its customers were for a rate of 65¢ per MCF, without KCC authority and without requesting an approval of such contracts, it is held: The **\*\*468** KCC was correct in ordering full restitution of all monies collected pursuant to such contracts in excess of 25¢ per MCF.

5. Where the KCC made no findings or conclusions relative to the effect of such restitution on the utility, after the utility has claimed said restitution will impair the capital structure of the utility, it is held : The case must be remanded for findings by the KCC as to the effect of the refund on the utility's continuing ability to carry on its operations and service to its customers and to reevaluate the time frame within which restitution must take place.

Robert J. O'Connor, of Hershberger, Patterson, Jones & Roth, Wichita, for appellant.

Donald A. Low, Asst. General Counsel, Topeka, for appellee.

Before MEYER, P. J., and ABBOTT and SWINEHART, JJ.

\*716 MEYER, Judge:

This is an appeal from the Finney County District Court's affirmance of a Kansas Corporation Commission order requiring Sunflower Pipeline Company to make full refunds to certain of its irrigation gas customers.

The facts are undisputed. Sunflower Pipeline Company (Sunflower) sells irrigation gas to approximately 35 farmers in Finney and Scott Counties, Kansas. The rate on file and approved by the Kansas Corporation Commission (KCC) for that service from mid-1976 to 1978 was 25¢ per Mcf. Effective August 1, 1976, Sunflower's previous management implemented a limited 65¢ per Mcf rate for its irrigation service. In doing so, Sunflower entered into contract rates of 65¢ per Mcf with all of its customers who were willing to sign said contract. Sunflower did not file this contract with the KCC, however, nor did it apply for an increase in rates.

At the time the private contracts were negotiated, the average gas cost to the utility was 35.64¢ per Mcf. By November 1, 1977, the cost of gas escalated to

52.69¢ per Mcf. Effective April 1, 1978, the cost of gas increased to 54.59¢ per Mcf.

In response to a complaint from one of the customers being charged 65¢ per Mcf, the KCC issued an order to Sunflower to show cause why it should not be ordered to make refunds to customers for any unauthorized rates or charges collected. After a hearing, the commission made findings of fact and conclusions of law. The commission concluded that Sunflower had failed to conform with the provisions of K.S.A. 66-117 in that it did not file for changes in its charges with the commission. Sunflower was, therefore, directed to refund to all retail customers the amount actually received by Sunflower over the previously approved rate of 25¢ per Mcf plus interest at eight percent per annum. Such refunds were to be made by Sunflower for its excess charges up to the effective date of new gas rates which were approved August 25, 1978, at 76.26¢ per Mcf and effective for billings after November 1, 1978. See Sunflower Pipeline Co. v. Kansas Corporation Commission, 3 Kan.App.2d 683, 600 P.2d 794 (1979). The accounting by Sunflower indicated the refunds totalled \$136,375.00. The order indicated the refunds should be credited to customers over a two-year period. After a motion for rehearing was denied by the KCC, Sunflower appealed to the Finney County District Court, which approved the order. Sunflower now brings this appeal to this court.

\*717 Sunflower claims the KCC order of refunds was unreasonable in that the making of such refunds would impair Sunflower's capital structure.

Sunflower alleges that by the end of the fifteenth month of the reparation period, it will have accumulated a \$27,000 cash flow deficit, thus lacking by some \$60,000 the working capital necessary to remain viable. (The company claims an annual need for approximately \$30,000 working capital to remain viable.)

Sunflower further argues that the 25¢ per Mcf was an unreasonable charge at the time the contracts in question were entered \*\*469 into, since the KCC in a later rate hearing using a 1976 test year determined a reasonable rate to be 76.26¢ per Mcf. The mere cost of gas to Sunflower, not counting other expenses, was 35.64¢ per Mcf in 1976 at the time the private contracts were entered into. According to Sunflower, the price was so low that the services were rendered to irrigators at a net loss of \$26,000, after taxes, over the 24-month period ending July 31, 1978.

Sunflower raised its contention concerning the economic impact on its capital structure in a motion for rehearing. The KCC summarily disposed of the motion for rehearing without making any additional findings of fact or conclusions of law. We must assume the KCC determined that the reasons set out in its first journal entry were sufficient even in light of the consequences of making the refunds alleged by Sunflower. The district court concluded that the commission did not have discretion to order less than full refunds in view of the statutory violations committed by Sunflower.

The recent case of Midwest Gas Users Ass'n v. Kansas Corporation Commission, 3 Kan.App.2d 376, 380-81, 595 P.2d 735, rev. denied 226 Kan. 792 (1979), thoroughly outlines the scope of judicial review of KCC orders.

"K.S.A. 1978 Supp. 66-118d limits judicial review of an order by the commission to determining whether the order is 'lawful' or 'reasonable.' Kansas Gas & Electric Co. v. State Corporation Commission, 218 Kan. 670, Syl. P 1, 544 P.2d 1396 (1976). A court has no power to set aside such an order unless it finds that the commission acted unlawfully or unreasonably. Jones v. Kansas Gas and Electric Co., 222 Kan. 390, 396-7, 565 P.2d 597 (1977). An order is 'lawful' if it is within the statutory authority of the commission, and if the prescribed statutory and procedural rules are followed in making the

der. Central Kansas Power Co. v. State Corporation Commission, 221 Kan. 505, Syl. P 1, 561 P.2d 779 (1977). An order is generally considered 'reasonable' if it is based on substantial competent evidence. Jones v. Kansas Gas and Electric Co., 222 Kan. 390, Syl. P 2 (565 P.2d 597).

\*718 "The legislature has vested the commission with wide discretion and its findings have a presumption of validity on review. Central Kansas Power Co. v. State Corporation Commission, 221 Kan. at 511, 561 P.2d 779. Since discretionary authority has been delegated to the commission, not to the courts, the power of review does not give the courts authority to substitute their judgment for that of the commission. Central Kansas Power Co. v. State Corporation Commission, 206 Kan. 670, 675, 482 P.2d 1 (1971). The commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into fixing utility rates. It is aided by a staff of assistants with experience as statisticians, accountants and engineers, while courts have no comparable facilities for making the necessary determinations. Southwestern Bell Tel. Co. v. State Corporation Commission, 192 Kan. 39, 48-9, 386 P.2d 515 (1963)."

It is not disputed that Sunflower failed to file with the commission the new contracts providing for a charge of 65¢ per Mcf, and charged the customers at a contract rate over and above the filed schedule of rates.

Kansas Statutes Annotated citations in this opinion refer to Volume 5 (Ensley 1980).

[1] K.S.A. 66-107 requires each public utility governed by the act to establish just and reasonable rates. K.S.A. 66-108 requires the utility to file with the commission schedules of rates charged, and all contracts between utilities pertaining to any and all services rendered. K.S.A. 66-109, as set out in part be-



low, prohibits charging rates greater or less than those shown by such schedules:

“No common carrier or public utility governed by the provisions of this act shall, knowingly or willfully, charge, demand, collect or receive a greater or less compensation for the same class of service\*\*470 performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates .... Provided, That rates different from those specified in the printed schedule or classification of rates may be charged by any public utility, street or interurban railway, by agreement with the customer, in cases of charity, emergency, festivity or public entertainment....”

[2] In Mollohan v. Railway Co., 97 Kan. 51, 154 P. 248 (1916), a special contract granting a privilege contrary to regular rates published and filed with the public utilities commission was held to be in violation of the utilities act, and therefore, void and illegal.

In Kansas Electric Power Co. v. Thomas, 123 Kan. 321, 255 P. 33 (1927), it was held that the lawful rate must be collected regardless of any error. The utility could not contract for a lesser rate than those published and filed with the commission. The \*719 utility was thus entitled to collect the full amount of a charge despite erroneous billing for less than the published rate.

Sunflower argues that it was in an emergency situation, justifying their contracting for a higher rate under the proviso of K.S.A. 66-109.

The proper response for a utility faced with net losses is to apply to the commission for a rate increase. The circumstances of this case do not present the type of emergency contemplated by the statute.

K.S.A. 66-117 provides for the methods for

making a change in an existing rate:

“(a) Unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of such public utility or common carrier except by filing the same with the commission at at least thirty (30) days prior to the proposed effective date thereof....

....

“(c) Except as provided in subsection (b), no change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission....” (Emphasis added.)

From the above, it is clear that Sunflower entered into contracts which were in violation of both K.S.A. 66-109 and K.S.A. 66-117. It charged customers at a rate in excess of the filed schedules without going through the proper procedures to change said rate. There is no statute expressly granting the KCC power to order refunds, nor is there case law which expressly determines whether such power exists.

[3] The power of the KCC to order refunds for overcharges in violation of the act is implied from K.S.A. 66-101, which grants the state corporation commission “full power, authority and jurisdiction to supervise and control the public utilities .... doing business in the state” and “to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.”

K.S.A. 66-141 states:

"The provisions of this act and all grants of power, authority and jurisdiction herein made to the commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the commissioners."

\*720 We conclude that KCC has power to order refunds for charges in excess of published rates.

Given that the commission has the power to order refunds of overcharges as a means of enforcing its power to regulate rates, the question is whether that power is limited and under what circumstances the power may be exercised.

In \*\*471 Chicago, M., St. P. & P. R. Co. v. Alouette Peat Products, 253 F.2d 449 (9th Cir. 1957), the full amount of charges gained under an illegal rate increase was restored, even though the increase was ruled to be just and reasonable by the commission. In Alouette, the change in rate was filed in violation of Paragraph 3 of Section 6 of the Interstate Commerce Act:

"No change shall be made in the rates, fares, and charges ... which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid...." 253 F.2d at 453.

The increase in rates was made on less than 30 days' notice in violation of the statute.

The Court of Appeals for the Ninth Circuit approved the award of a refund of the full amount collected over and above the rate established prior to the illegal increase. The court noted the increase "had not been, at the time the shipments in question were made, established as the legal rate in the manner provided by

law. The Court is without authority to establish rates. (Citation omitted.) A rate once fixed remains established until change in some manner allowed by law. (Citations omitted.) No change having been legally made in the rate which existed before ... that rate was the only existing, legally established rate and the Court was bound to apply it. (Citation omitted.)" 253 F.2d at 456.

In Socony Mobil Oil Company v. Brooklyn Union Gas Company, 299 F.2d 692 (5th Cir. 1962), distributors were able to recover all monies paid in excess of the last effective filed rate schedule, where the charges were collected under a new rate schedule which had not been filed with the commission.

"(T)he contract rates in effect ... were the only lawful rates which could be collected until changed by filing the proposed changes with the Federal Power Commission as required by statute. Any rate changes provided for in the contract ... constitute rate changes under the Natural Gas Act and are forbidden in the absence of compliance with the filing provisions of the Act and the regulations of the Commission." 299 F.2d at 694.

\*721 [4] We conclude that a full refund should be ordered when charges are not made pursuant to a rate legal at the time of the charge, regardless of whether the legal rate is unreasonably low.

Sunflower next contends that where payments are voluntarily made, the KCC is prevented from ordering refunds.

Sunflower argues that the irrigators should not be entitled to recover the amounts paid on said contracts because said payments were voluntarily made. According to Sunflower, the irrigators were not told that their irrigation gas would be cut off if they did not sign the contracts. They were simply asked to sign the contracts, and did so voluntarily. Testimony from one

of the irrigators, Mr. Sterling, was that he had asked the employee who negotiated the private contracts, what they would do if the irrigators didn't pay and the employee replied, "... I guess we would have to discontinue the use of the gas...." Another irrigator, Mr. Cheney, testified that the implication was that he wouldn't get gas service if he didn't sign the new contract. The KCC concluded that the fact that payments were voluntarily made was irrelevant.

Sunflower argues voluntary payment on the basis of the following law:

"It is elementary that the law does not recognize privilege to pay an illegal demand and then to sue for the money. It is only when, in an emergency for which he is not responsible, a person finds he has no choice except to pay in order to protect his business interests, that he may recover." Milling Co. v. Gas & Electric Co., 115 Kan. 712, 721, 225 P. 86 (1924).

In Milling Co., the test of whether the constraint was sufficient to destroy free agency to pay or not to pay according to one's own will was applied to find that some payments had been involuntarily made. In that case, it was noted that if plaintiff flatly refused to meet the demand, the defendant utility might discontinue service which would result in disaster to the \*\*472 milling company. Defendant utility had begun charging a rate in excess of what its contract had called for. These payments were found to be made under duress and were recoverable by plaintiff. There were other payments which were held to be voluntary payments. These payments were made only after considerable negotiation and after a full year of antagonism between the parties respecting the rate. It was stated, "An unjust or illegal demand must be resisted at the threshold, because payment under protest may not be \*722 employed by way of strategy in dealing with an adversary." 115 Kan. at 722, 225 P. 86. Whether the payments were voluntary in the case at bar is a question of fact that was not decided by the KCC, but such determination is not necessary herein

because the right of the KCC to order refunds is not shown by Sunflower to be derivative from the rights of the irrigators. Rather, the right is derived from the implied power to enforce rate orders. The KCC would have power to make such orders of refunds regardless of whether the irrigators would be able to bring such an action in their own right.

Sunflower argues strenuously that less than full restitution should be ordered herein, and cites a number of cases where courts have held the amount of restitution should be decided on the basis of what was equitable, just and reasonable under all the circumstances. The difficulty with the cases cited by Sunflower, however, is that those cases deal either with interim orders or with regular orders of a regulatory agency which were later found to be unlawful on procedural grounds. Such is not the case herein.

In the instant case, the utility took no steps whatever, formal or informal, to apply to the KCC for permission to charge the higher rates until applying for the increased rates which gave rise to Sunflower Pipeline Co. v. Kansas Corporation Commission. 3 Kan.App.2d 683, 600 P.2d 794. Instead, Sunflower, without KCC approval, entered into the contracts for 65¢ per Mcf hereinabove referred to with knowledge that the authorized rate was only 25¢ per Mcf. We emphasize that we are not dealing with a situation which involves a previous order of the corporation commission, whether interim or regular in nature, other than the last approved rate established by the commission of 25¢ per Mcf.

We conclude that K.S.A. 66-109 does not allow deviation from approved rates without filing with the KCC. Furthermore, partial refunds would amount to retroactive ratemaking by the commission. Sunflower, having previously failed to properly invoke commission jurisdiction to approve new rates, would have had the commission approve of new rates retrospectively by allowing Sunflower to retain some or all of the excess charges. Also, since we conclude the contracts

for 65¢ per Mcf were void as against public policy, any less than a full restitution to the user-contractors would be depriving them of their property (that portion of the \*723 restitution of less than 40¢ per Mcf), without due process of law. This is because any restitution ordered in an amount less than 40¢ per Mcf would be depriving them of property to the extent that they paid at an illegal rate in excess of 25¢ per Mcf.

As the court noted in State, ex rel. v. Public Service Comm., 135 Kan. 491, 500, 11 P.2d 999 (1932):

“ ‘If an act, whether general or special, public or private, operates retrospectively to take what is, by existing law, the property of one man, and, without his consent, transfer it to another, it is in violation of the guaranty of due process of law.’ ” (citing from Myer on Vested Rights, p. 19, n. 33 (1891))

[5] Sunflower also complains that the KCC orders were not supported by adequate findings and conclusions as required by law. The most notable example we find from the record is the absence of any KCC findings or conclusions whatever as to what effect the order of restitution had with regard to a possible insolvency of the utility. While, as we have said, we conclude the KCC was correct in regard to its order of full restitution, we do believe the commission\*\*473 should have considered the effect on the utility in determining that restitution be repaid within two years. Thus, while we affirm the KCC order insofar as requiring full restitution is concerned, we remand this case to the district court with instructions that that court remand the same to the KCC for findings and conclusions relative to the effect such restitution will have on the utility's ability to carry on its operations and service to its customers. The KCC should consider the effect the speed of repayment will have on the continuing ability of the utility to render its services, and whether same can be maintained with the two-year repayment, or whether an additional year or years should be added within which the utility must make restitution.

Affirmed in part and remanded with instructions.

Kan.App., 1981.  
Sunflower Pipeline Co. v. State Corp. Commission  
5 Kan.App.2d 715, 624 P.2d 466

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August 27, 2013

VIA FACSIMILE  
AND U.S. MAIL  
(785) 271-3303

Ms. Kim Christiansen  
Executive Director  
Kansas Corporation Commission  
1500 SW Arrowhead Road  
Topeka, KS 66604



AUG 27 2013

by  
State Corporation Commission  
of Kansas

**Re: In the Matter of the Complaint of SWKI-Seward West Central, Inc.,  
and SWKI-Stevens Southeast, Inc. Against Anadarko Natural Gas  
Company**

Dear Ms. Christiansen:

Please accept for filing this facsimile copy of the **Confidential and Redacted Complaint of SWKI-Seward West Central and SWKI-Stevens Southeast, Inc. (the "NPU") Against Anadarko Natural Gas Company** to be filed on behalf of **SWKI-Seward West Central and SWKI-Stevens Southeast, Inc.**

Certain information within the Complaint, notably portions of paragraph 11 and Confidential Exhibit C, was designated as confidential by Anadarko Natural Gas Company and Black Hills/Kansas Gas Utility Company in Docket No. 13-BHCG-509-ACQ. The NPUs request that the Commission maintain the confidentiality of the information in paragraph 11 and Confidential Exhibit C.

In addition, Confidential Exhibits A and B to the Complaint are Gas Sales Agreements to which the NPUs are a party and which have been designated by the NPUs as confidential, because Section 14.5 of the Agreements contains a confidentiality provision. Certain portions of Confidential Exhibits A and B are referenced in paragraph 11 of the Complaint. The NPUs request that the Commission maintain the confidential status of all such designated materials in accordance with K.S.A. 66-1220a and K.A.R. 82-1-221a.

The information designated as confidential is considered by the NPUs to be confidential commercial information. Such confidential commercial information includes specific customer natural gas volumes and pricing data.

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August 27, 2013

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Pursuant to K.A.R. 82-1-221a(a)(5), the NPUs submit that the information designated as Confidential Exhibits A and B is confidential commercial information that, if disclosed to the public, could result in competitive harm to the NPUs and place the NPUs at a competitive disadvantage with respect to other companies. The NPUs therefore request that this written explanation of the confidential nature of the documents filed with the Complaint apply to all information denoted by the NPUs as confidential.

We are forwarding by regular mail the original and eight copies of the Complaint (the confidential version) as well as the original and two copies of the public version for filing.

Please file stamp the extra copy of the Complaint and transmittal letter and return it to me in the self-addressed, stamped envelope. Thank you for your assistance and attention to this matter.

Sincerely

A handwritten signature in black ink, appearing to read "A. Callenbach", written in a cursive style.

Anne E. Callenbach

AEC:bks

Encl.

Cc: Montgomery Escue  
All Parties