

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Complaint Against)	
TEXAS-KANSAS-OKLAHOMA GAS, LLC)	
Respondent)	
)	
For an Order for Adjustment and Refund of)	Docket No. 15-TKOG-236-COM
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 and Stegman Farms Partnership)	
Complainants)	

RESPONDENT'S POST-HEARING BRIEF

Respondent, Texas-Kansas-Oklahoma Gas, LLC ("TKO"), submits its Post-Hearing Brief as agreed to at the January 10-11, 2017 evidentiary hearing and pursuant to the Prehearing Officer's January 20, 2017 order.

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Glossary

TKO offers the following glossary of terms and citation conventions used in this Post-Hearing Brief.

2015 R&R: Commission Staff’s Report and Recommendation filed March 15, 2015.

2016 R&R: Commission Staff’s Report and Recommendation filed November 10, 2016.

Ankum Direct: Dr. August H. Ankum Prefiled Direct Testimony filed October 6, 2016, including any exhibits.

Brosch Rebuttal: Michael Brosch Prefiled Rebuttal Testimony filed October 21, 2016, including any exhibits.

Hanson Direct: Richard L. Hanson Prefiled Direct Testimony filed October 6, 2016, including any exhibits.

Hanson Rebuttal: Richard L. Hanson Prefiled Rebuttal Testimony filed October 21, 2016, including any exhibits.

Heger Direct: Kirk Heger Prefiled Direct Testimony filed October 6, 2016, including any exhibits.

McEvers Direct: Michael McEvers's Prefiled Direct Testimony originally filed October 6, 2016, including any exhibits, which was refiled January 31, 2017 to include line numbers. The January 31, 2017 version will be cited in this brief.

McEvers Rebuttal: Michael McEvers's Prefiled Rebuttal Testimony filed October 21, 2016, including any exhibits.

Rome Direct: Steve Rome Prefiled Direct Testimony filed October 6, 2016, including any exhibits.

Stegman Direct: Tron Stegman Prefiled Direct Testimony filed October 6, 2016, including any exhibits.

TKO's Certificate: means collectively the April 12, 2010 Order Granting Application with Conditions and the March 19, 2012 Order Granting Limited Certificate of Public Convenience and Authority in Docket 08-TKOG-214-COC.

Tr: Transcript of the January 10-11, 2017 evidentiary Hearing delineated by volume (Vol. 1 (January 10), and Vol. 2 (January 11)). Because TKO has not referenced any confidential information, it will not be filing any portion of this brief confidentially.

Introduction

Under the applicable law, TKO's billing methodology is prima facie reasonable. It is Complainants' burden to show that TKO's rates or billing methodology are "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential..." Complainants failed to meet their burden.

First, the evidence shows that (1) TKO's total price, calculated with the purportedly flawed billing methodology, was *cheaper* than two of the three other noted public utilities, and (2) TKO's other customers were satisfied with TKO's prices. The Complainants even admitted they would be willing to pay more for gas from another supplier than they are currently paying TKO, which raises the question of what they are actually seeking to accomplish with this proceeding.

Second, the undisputed evidence shows that TKO has billed all of its customers in the same manner; thus, TKO's billing methods were non-discriminatory. In fact, TKO has utilized the same billing practice since commencing operations in Kansas and is the same billing practice as when the Commission approved TKO's Certificate.

TKO's Certificate explicitly grants TKO the authority to enter into individual contracts with its customers. Other than the identified rates for residential customers, the Commission did not require anything specific with respect to the terms of the individual contracts. The Complainants acknowledge this and do not contend that TKO has failed to follow its Certificate or the rates in the individual contracts. This too invalidates their claim.

In short, Complainants failed to meet their burden to show TKO's charges were "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential..." Accordingly, the complaint must be denied.

I. Background

1. On December 4, 2015, the Complainants filed their complaint asserting TKO's rates are "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential...." Complaint ¶6. They claim TKO overcharged them by deviating from standard industry practice when calculating volumes and BTUs. Complaint ¶¶ 8, 12, 16.d.

2. The parties filed their lists of contested issues and prefiled testimony in accordance with the procedural schedule. On January 3, 2017, TKO filed its Pretrial Brief raising several issues, some of which will be addressed further in this Post-Hearing Brief. To avoid repetition, TKO incorporates its Pretrial Brief by reference into this brief for the issues stated therein, as supplemented by this brief. Notwithstanding the testimony at the hearing, which did not bolster the Complainants' position, the Pretrial Brief shows the complaint should be dismissed.

3. The Commission heard the evidence and argument at the evidentiary hearing on January 10-11, 2017, and issued four supplemental questions for briefing. *See* Prehearing Officer's January 20, 2017 Order. TKO responds to the Commission's questions in its analysis below.

4. Boiled down, Complainants contend TKO's use of a 13.45 pressure base for volume calculations caused a billing error.

5. Throughout these proceedings, Complainants' contentions have been a moving target. It seems their primary contention is that TKO miscalculates the volume of gas sold compared to the BTU of the gas. According to Mr. Hanson, the pressure base for volumes must match the pressure base for BTUs.¹ Importantly, the Complainants did not admit a single invoice

¹ Tr. Vol. 1, 52:6-22; 75:9-16.

or bill from any of TKO's suppliers concerning the gas volumes sold to TKO or the components of such gas, which were ultimately purchased by the Complainants. As such, there is no evidence in this record from which the Commission can conclude that TKO's volumetric and energy calculations were faulty.

6. The complaint itself alleges a violation of industry standard, but Mr. Hanson, the witness speaking for all the Complainants on technical matters, testified their claim is *not* based on violation of industry standard.² Further, Commissioner Feist-Albrecht directly questioned Mr. Hanson on this issue:

Commissioner Feist Albrecht: I'm trying to understand. Is it an industry standard? Is it a scientific rule?

Mr. Hanson: It's scientific. You will learn that in chemistry.

[...]

Commissioner Feist Albrecht: Is there any requirement or standard for TKO to use the same pressure base as the supplier?

Mr. Hanson: No, there is no requirement.³

7. TKO's Certificate permits it to sell gas to those customers it has contracts with, and TKO must file annual notices with the Commission concerning its customer contracts. Nothing in TKO's Certificate requires a specific pressure base or matching of TKO's pressure base to that of its suppliers. There is no dispute that TKO has been using a pressure base of 13.45 to calculate volumes since it first began operations in Kansas, without change.⁴

8. The Complainants have not asserted TKO is violating its Certificate or that TKO failed to follow the contracts between TKO and the Complainants. Complainants agree this case

² Hanson Rebuttal 5:15-6:7.

³ Tr. Vol. 1, 71:12-16; 73:25-74:4.

⁴ Tr. Vol. 1, 86:19-23.

is not about a faulty meter⁵ or about an improper rate charged per unit of gas.⁶ Further, on questioning from Commissioner Apple, Mr. Hanson failed to address whether the question at issue here concerned the volume or quality of gas being bought and sold.⁷ Instead, Mr. Hanson discussed the matching concept. Thus, gas volume or gas quality is not the issue at all.

9. Complainants presented no evidence that the total price⁸ they paid for the gas they consumed (regardless of the measurement) was unreasonable or excessive. In fact, the Complainants testified they would be willing to pay more for the gas.⁹

10. Complainants admitted no evidence to show TKO was overcharging or overearning. Likewise, there was no evidence of manipulation of the calculation because TKO used the same pressure base throughout the entire term at issue in this case.

11. Mr. Haynos and Mr. McEvers both testified that other TKO customers have expressed satisfaction with TKO's rates, even with the purportedly flawed billing methodology.¹⁰ And none of TKO's other customers with whom Complainants spoke concerning the billing filed a complaint or joined in this proceeding.¹¹

⁵ Tr. Vol. 1, 78:3-5; Vol. 2, 280:9-12.

⁶ Tr. Vol. 1, 11:5-12.

⁷ Tr. Vol. 1, 76:17-77:16.

⁸ TKO's use of the term "price," "total bill," or similar term in this brief is intended to be the entirety of the amount TKO invoiced the Complainant for gas delivery and is not limited solely to the rate. As noted below, Complainants have not asserted TKO charged a rate different from that in the applicable contract between the parties.

⁹ Hanson Rebuttal, 5:11-14; Tr. Vol. 1, 53:24-54:2.

¹⁰ Tr. Vol. 2, 309:1-16; Vol. 1, 183:7-15.

¹¹ Tr. Vol. 1, 104:13-106:4; 117:25-118:19.

12. The testimony concerning other TKO customers comports with Commission Staff's summary of other public utility rates in the region. According to Commission Staff, TKO's total price charged was cheaper than two of the three other utilities, even with its purportedly 9.5% overcharge.¹²

13. The Complainants request a refund of 9.5% of all of TKO's *revenues* beginning when TKO commenced Kansas operations for *all* of TKO's Kansas public utility customers. Neither of the parties' experts, with a combined 65 years of experience, nor Mr. Haynos with 18 years of experience at the Commission has ever seen a case where the alleged billing error affected the entirety of a utility's customer base.¹³

14. TKO's consistent use of 13.45 to calculate volume has not resulted in unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential prices. The Complainants presented no evidence that TKO's billing methods or rates are unreasonable, the standard governing this case. Nor have they shown TKO's billing methods or rates are contrary to TKO's Certificate or contracts between TKO and the Complainants. Because the Complainants' have not shown their bills are unreasonable or that TKO violated the Certificate or their contracts, the complaint must be dismissed.

II. Analysis

A. Complainants failed to show TKO's prices and billing method are unreasonable as required by K.S.A. 66-1,205.

15. The proper standard to evaluate the complaint in this case is reasonableness pursuant to K.S.A. 66-1,205—the statutory provision on which the complaint rests. Complaint ¶¶ 5-6. Based on the plain language of the complaint, Complainants must show TKO's rates are

¹² 2016 R&R at p. 6.

¹³ Tr. Vol. 1, 212:5-22 (Ankum); 219:6-11 (Brosch); Tr. Vol. 2, 316:5-14 (Haynos).

“unfair, unjust and discriminatory,” and if so, the Commission must substitute “such rates or rules and regulations as the Commission determines to be just, reasonable and necessary”. *See* Complaint, Prayer for Relief, paragraph (a).

16. However, Complainants failed to show TKO’s billing methodology is “unfair, unjust and discriminatory” or otherwise unreasonable.

17. According to Mr. Hanson, the Complainants’ claims for exact precision and matching are not based on violating industry standard.¹⁴

18. On direct questioning, Commissioner Feist-Albrecht asked Mr. Hanson: “Is there any requirement or standard for TKO to use the same pressure base as the supplier?” Mr. Hanson answered: “No, there is no requirement.”¹⁵

19. Contrary to the reasonableness and fairness standard set forth in their complaint and in the statute, the Complainants demand exact precision. Exact precision, however, is not required by law. The hearing testimony confirmed their complaint lacks legal merit.

20. Further, by withdrawing their reliance on a violation of this amorphous industry standard (and failure to show any such violation), Complainants’ claim fails as a matter of law.

21. Contrary to Complainants’ attempts to narrow the focus in this case, the primary issue is whether the total price TKO charged its customers was fair and reasonable. As Mr. Haynos testified, “it’s the final price being contested, not the price of gas.”¹⁶ This comports with the statutory standard and the underlying case law concerning just and reasonable rates. The

¹⁴ Hanson Rebuttal, 5:15-6:7.

¹⁵ Tr. Vol. 1, 73:25-74:4.

¹⁶ Tr. Vol. 2, 328:12-13.

focus of inquiry on “‘just and reasonable’ rates...is properly upon the end result,” not the method employed.¹⁷

22. The Complainants failed to show TKO’s total prices were unreasonable, and more to the point, the only evidence regarding prices shows TKO’s total prices were reasonable.

23. In the 2016 R&R, Commission Staff notes that TKO’s total prices are less than two of the three other public utilities providing gas in the region, even with TKO’s purported overcharging.¹⁸

24. Mr. Haynos provided additional support for this proposition when he testified that he had spoken with another TKO customer more than a year prior to the proceeding and in that conversation Mr. Haynos mentioned the complaint and its allegations to the customer. The customer’s response was TKO is “still cheaper than anybody else,” even with TKO’s purported erroneous billing practice.¹⁹

25. Mr. McEvers further testified that he was recently in a meeting with TKO customers, who told Mr. McEvers that TKO saved them money over the NPU they were buying gas from.²⁰

26. Other customers who Complainants discussed the alleged overbilling with did not join in the complaint. The only customers raising issues about TKO’s prices are these four Complainants.²¹

¹⁷ *Kansas Gas & Elec. Co. v. Kansas Corp. Comm’n*, 239 Kan. 483, 488-89 (1986).

¹⁸ 2016 R&R at p. 6; Tr. Vol. 2, 308:12-25.

¹⁹ Tr. Vol. 2, 309:1-13.

²⁰ Tr. Vol. 1, 183:7-15.

²¹ Tr. Vol. 1, 104:13-106:4; 117:25-118:19.

27. In his prefiled rebuttal testimony, Mr. Hanson testified that he and any of the Complainants would have paid higher prices to change gas suppliers.²² At the hearing, Mr. Hanson did not backtrack. He agreed that he would pay more to get gas from a supplier other than TKO.²³ The only customers complaining about TKO's prices are willing to pay more. Why would a reasonable customer be willing to pay more unless they had some other motive?

28. How can the total price TKO charged be unfair if the Complainants admittedly would pay more? Common sense and the governing standard show the Complainants were not overcharged or paid an unreasonable price.

29. The evidence and testimony from Commission Staff and Mr. McEvers proved TKO's prices were reasonable and fair. The Complainants are willing to pay more for the same commodity. Nothing suggests TKO's prices, rates, or billing methodology is unreasonable or unfair.

B. There is no claim that TKO violated its Certificate. And given TKO's unique Certificate, Complainants' claim fails as a matter of law.

30. The Complainants demand precision, even though this purported precision requirement cannot be found in either TKO's Certificate or in its contracts.²⁴

31. In granting TKO's Certificate, the Commission placed certain conditions on TKO for operating in Kansas. None of those conditions included an obligation to use a specific pressure base in its billing. Similarly, TKO was not required to file a rate schedule or tariff.

²² Hanson Rebuttal, 5:11-14.

²³ Tr. Vol. 1, 53:24-54:2.

²⁴ Nor does the governing law require precision as referenced in the preceding section.

Instead, TKO was obligated to enter into written contracts with its customers, which would contain the various billing items that might otherwise be found on a rate schedule or tariff.

32. More than four years after granting of the 2010 Provisional Order and seven years after paying TKO's invoices, the Complainants claims TKO had done something wrong in its billing, even though TKO has used this same billing methodology the entire time. But the Complainants have not alleged TKO violated its Certificate or their individually-negotiated contracts. They have not alleged there is a faulty meter. Their claim now appears to hinge on what is "common" in the industry, even though they withdrew that claim in their written testimony²⁵ and could never pinpoint on cross-examination what industry standard they were actually relying on.²⁶

33. The time to challenge TKO's billing methodology has long passed. The Commission approved the contract-based "tariff" in TKO's Certificate. The Complainants were required to challenge TKO's contracts (and the billing methodology) at the time the Commission granted the Certificate. In fact, one Complainant, Mr. Heger, was involved in TKO's certificate-granting process, and did not object to the contract-based approach or TKO's billing methodology at that time.²⁷

34. Under K.S.A. 66-115, TKO's contracts and billing methodology are prima facie reasonable unless or until changed by Commission order. Kansas case law supports this result as well.

²⁵ Hanson Rebuttal, 6:5-7. "Q: Is the complaint based on a claim that TKO's use of 13.45 Psia violates industry practices? A: No."

²⁶ Tr. Vol. 1, 71:12-16, 73:25-74:4.

²⁷ Tr. Vol. 1, 99:1-23; 102:24.

35. In *Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n*,²⁸ the Court considered an issue similar to that presented here. In that case, the Commission had previously approved the utility's flexible rate contracts that were individually negotiated. During a later proceeding to set rates, the Commission rejected CURB's attempts to impute revenue based on the individual contracts because they were previously approved and in compliance with the utility's tariff. The Commission "went on to say that *the time to challenge the flexible rate tariffs and special contracts was when they were initially filed for review.*"²⁹ Because they had been previously approved, they were prima facie reasonable under K.S.A. 66-115. As such, CURB, the party challenging the prudence of the agreement, bore the burden of overcoming that presumption of reasonableness.³⁰ In that case, the Commission held (which the Court of Appeals affirmed) that CURB had not carried its burden to come forward with evidence to show the flexible contracts were not reasonable.³¹

36. In this case, the Commission previously approved TKO's contract-based approach. Thus, the contracts and TKO's methods are prima facie reasonable. The Complainants are not alleging that TKO is failing to follow its Certificate. Instead, they are directly attacking TKO's billing methods. Like CURB in the case above, the time to challenge TKO's billing methods has long passed. Since the individual contract method was approved, and at least one of the Complainants was a party to the Certification Docket, the Complainants must overcome the

²⁸ 28 Kan. App. 2d 313 (2000).

²⁹ *Id.* at 320 (emphasis in original).

³⁰ *Id.*

³¹ *Id.* at 322.

presumption of reasonableness to prevail. Like CURB in the case above, the Complainants here failed to carry their burden to show TKO's methods were not reasonable.

37. Without belaboring the point, the Complainants have not alleged TKO violated its Certificate—the Complainants' claim is that TKO does not calculate their bills like other gas suppliers. This is not sufficient grounds, even if true, to order refunds. Their claim is akin to a breach of contract, not a public utility issue. But Complainants have not made a contract claim (discussed below in Section II.E).

38. Unless the Complainants can show TKO violated its Certificate or its total prices are unreasonable, their claims for refunds are barred as a matter of law.

C. Complainants failed to show TKO was overearning or overselling gas.

i. Complainants failed to show TKO overearned, a necessary component of an overbilling (or billing error) claim.

39. In order to prevail on a claim of overbilling, Complainants must show that TKO's billing methodology resulted in TKO overearning. Unless TKO is overearning (i.e., exceeding its revenue requirement), it cannot be overbilling. TKO's revenue requirement is set, informally, through its individually negotiated contracts.

40. TKO's Certificate grants it flexibility to set prices and the billing terms with its customers. As Dr. Ankum testified, TKO has a degree of pricing flexibility that other utilities do not have.³² On cross-examination, Complainants' expert, Mr. Brosch, agreed that TKO had pricing flexibility, which was contrary to his prefiled testimony.³³

³² Tr. Vol. 1, 205:2-11.

³³ Compare Tr. Vol. 1, 223:10-15, with Brosch Direct, 11:6-10.

41. Dr. Ankum testified that the Complainants fail to differentiate *cost causation* with *cost allocation*.³⁴ Because TKO's customers are all billed in the same manner, they all paid the same proportionate share of TKO's costs based on their individually negotiated contracts. Based on the prices in the individual contracts, they also all paid their proportionate share of TKO's revenue requirement, regardless whether TKO actually generated a net revenue or loss. Thus, even with Complainants' purported adjustment to the pressure base, their invoices (and all of TKO's customers) should be the same to reasonably and fairly allocate TKO's costs.³⁵

42. Because TKO treats all of its customers the same, TKO has properly allocated its costs and revenue requirement across all its customers. Using the statutory terminology, TKO's actions were reasonable and fair.

43. Mr. Haynos testified similarly to Dr. Ankum, although using different parlance. On inquiry from Commissioner Feist-Albrecht concerning why volume matters, Mr. Haynos answered that "It matters because it's the surrogate way of measuring energy."³⁶ Exactly. Volume is the surrogate way to allocate cost across the customers in a fungible manner. "It is a cost allocator" under Dr. Ankum's terminology.³⁷ TKO's volume calculation (i.e., the surrogate as Mr. Haynos testified) is identical across all of TKO's customers. Therefore, all TKO customers are treated identically with regard to the billing methodology, and there is no manipulation or deceit as Complainants intimated.

³⁴ Ankum Direct, 13:8-14:13.

³⁵ Ankum Direct, 12:12-13:6.

³⁶ Tr. Vol. 2, 283:16-21.

³⁷ Ankum Direct, 17:5.

44. All parties agree that this dispute is not about a volume measurement/faulty meter issue.³⁸

45. If the surrogate measurement (volume at 13.45) does not vary by customer and has not changed since TKO commenced Kansas operations, how is there an overbilling? And there was no evidence of overearning to reflect a charge of overbilling. Likewise, if the surrogate measurement has not changed *and* TKO is following the terms of the contracts, how is there a viable complaint? Using Dr. Ankum's phrasing, the costs were *not* improperly allocated.

46. Further, TKO and Commission Staff both testified that TKO did not overearn. Moreover, Mr. McEvers testified that a refund of 9.5% might put TKO out of business.³⁹ And he also testified that he was being squeezed by his suppliers' rates.⁴⁰ Finally, Mr. Haynos also expressed a similar concern about TKO's financial viability in the 2016 R&R and in his cross-examination.⁴¹

47. Complainants' argue that TKO should use a different billing methodology. If the Commission determines a different billing methodology is appropriate, the Commission should order any change only on a go-forward basis. To order refunds would be illegal and violate the prohibition against retroactive rate-making⁴² because TKO has not violated its published rates—i.e., those set forth in its contracts.⁴³

³⁸ Tr. Vol. 1, 78:3-5; Vol. 2, 280:9-12.

³⁹ McEvers Direct, 18:4-16.

⁴⁰ Tr. Vol. 1, 145:13-17; 184:22-185:4.

⁴¹ Tr. Vol. 2, 322:20-323:12.

⁴² *Sunflower Pipeline Co. v. State Corp. Comm'n*, 5 Kan. App. 2d 715, 722 (1981).

⁴³ TKO does admit that it failed to follow its certificated rates for its residential customers as discussed in Section II.J below.

48. By the terms of the Commission's regulation of TKO, overbilling requires overearning.⁴⁴ However, if TKO is struggling financially, even with its purported 9.5% overcharge, it is not by definition overearning. And if TKO is not overearning, it cannot be overbilling. The two are incompatible.⁴⁵

ii. Complainants have failed to show TKO is selling more gas than it purchases or that the gas they received had a heat content (i.e., BTU) less than that set forth in their invoices.

49. The crux of Complainants' claim is that to accurately invoice its customers, TKO must precisely match the pressure base for BTU and volume in its billing calculation. They claim TKO's suppliers all use 14.73 as the pressure base for BTU. But there was no admissible evidence set forth in the written testimony or presented at the hearing that showed: (1) the pressure base of each of TKO's suppliers, and (2) the volume of gas TKO purchased for sale to these Complainants. Thus, the complaint fails for these reasons alone.

50. Other factors influence the volume calculation, including the atmospheric pressure. For example, TKO uses 13.2 for its atmospheric pressure.⁴⁶ Other gas utilities—Kansas Gas Service and Atmos—use 14.4.⁴⁷ This information is important because using 14.4 (as opposed to 13.2) would *increase* the volume sold and cause a mismatch of the volume. Thus, Complainants' laser-focused attention on one billing component diverts attention from the seminal inquiry—reasonableness of the Complainants' total bill.

⁴⁴ Ankum Direct, 6:4-8.

⁴⁵ Tr. Vol. 1, 208:21-23.

⁴⁶ McEvers Direct, 15:11-20.

⁴⁷ McEvers Direct, 15:11-14. Vol. 2, 291:6-292:17.

51. As Mr. Haynos testified, the increased volume would cause an increased cost—the bottom line—to TKO’s customers, including the Complainants.⁴⁸ By using 13.2 instead of 14.4, TKO actually benefits its customers.⁴⁹ Without the atmospheric pressure (and any other billing metrics of TKO’s suppliers), the Commission cannot determine with any certainty whether TKO actually sold more volume than it purchased, or if it did, how much more as a basis to order any refunds under Complainants’ theory.

52. TKO objected at the hearing and renews its objections here that the testimony concerning TKO’s suppliers’ pressure base is not admissible. The Commission received third-hand hearsay testimony about the pressure base Anadarko purportedly utilized.⁵⁰ But an Anadarko representative was not at the hearing and subject to cross-examination from TKO’s counsel on these points. How does Anadarko calculate BTUs, and how are they reported on TKO’s bills? What atmospheric pressure does Anadarko use? Mr. Haynos testified that using varying atmospheric pressures could cause varying volumes as well.⁵¹ Where are all of the TKO’s suppliers’ various billing metrics?

53. Mr. Hanson testified Anadarko changed pressure bases from 14.65 to 14.73 in 2011 (or was it 2012, he could not recall).⁵² He only speculates that Anadarko made this switch

⁴⁸ Tr. Vol. 2, 290:5-21.

⁴⁹ McEvers Direct, 15:18-16:2; Ankum Direct, 19:1-6.

⁵⁰ The Commission also received similar hearsay testimony concerning Black Hills. Hanson Rebuttal, 6:18-7:3.

⁵¹ Tr. Vol. 2, 289:21-290:11.

⁵² Tr. Vol. 1, 48:5-8.

for TKO based on bills Anadarko sent to a SWKI entity.⁵³ Mr. Hanson never saw TKO's invoices from Anadarko.⁵⁴

54. To satisfy their theory, the Complainants must show the specific TKO supplier that ultimately supplied the Complainants was not using 13.45 for the entire period. There was no testimony that during the entire period at issue that TKO's sole supplier of gas that the Complainants ultimately consumed was from Anadarko. What if Black Hills, Merit, or West Texas Gas had utilized 13.45? Or were they using 14.65? And for what periods? Anadarko purportedly changed its methodology in the middle of the period at issue here. What about TKO's other suppliers? Precise matching is an essential element of their refund claim, yet, Complainants failed to provide the information necessary to reach a precise outcome.

55. Where were TKO's sales volumes or bills it paid to its suppliers? Complainants offered no evidence that TKO even knew the pressure base of its suppliers. Mr. Hanson testified he never saw Anadarko's invoices to TKO.⁵⁵ This information would be necessary for TKO to make the correcting calculation to match the Seller's BTU pressure as suggested by the Complainants.

56. Likewise, there was no evidence that TKO was selling more volume than it was purchasing. The numerous analogies from the Complainants and Commission Staff concerning bushels of apples, wheat, bags of dog food, etc. simply miss the mark.

57. For wheat farmers, a bushel of wheat is the surrogate measurement to determine the final price paid to the farmer. Bushels dumped at the grain elevator are not necessarily

⁵³ Tr. Vol. 1, 47:19-48:4.

⁵⁴ Tr. Vol. 1, 88:1-3.

⁵⁵ Tr. Vol. 1, 88:1-3.

identical. They may vary given the test weight per bushel, moisture, and foreign matter (rye, weeds, etc.), which may affect the final price paid to the farmer. The key is whether all bushels being dumped are measured the same. In TKO's case, the volume unit (MCF) is the surrogate measurement. Each volume unit may not be identical because of the BTU and other factors, but like the bushel of wheat, the key is whether each volume unit is being *measured* the same. In TKO's case, the surrogate measurement for all customers is the same.

58. This case is about whether the final price paid for the gas the Complainants purchased was reasonable.⁵⁶ It is no different than the wheat farmer, apple picker, or dog food purchaser. Was the total price for the product reasonable?

59. As discussed above, Mr. Haynos testified the gas volume matters because volume is a surrogate way to measure the energy.⁵⁷ The energy (BTUs) in each volume unit (MCF) varies, but the volume is necessary because "there is no good way to measure" BTUs.⁵⁸ As Mr. Hanson testified, the gas the Complainants purchased was primarily wellhead gas. As compared to refined gas, wellhead gas has higher concentrations of other components, which all affect the heat content (BTU) of the gas.⁵⁹

60. Many components determine the final price on TKO's customer's gas bills. Focusing on one component (or the issue of selling more volume than purchasing) obscures the relevant issue. And Complainants have identified no rule or regulation (or contractual or Certificate provision) that states the volume TKO's purchases must match its sales. Thus, their claim fails.

⁵⁶ Tr. Vol. 2, 328:12-13.

⁵⁷ Tr. Vol. 2, 283:17-21.

⁵⁸ Tr. Vol. 2, 283:20-284:1.

⁵⁹ Tr. Vol. 1, 60:16-61:10; Exhibit E-1 (Thurmond-McLothlin Tests).

D. Complainants have failed to show the reasonable rate that should be substituted if TKO's rate is found to be unreasonable.

61. Even if the Complainants have shown TKO's rates are "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential," the Complainants are not automatically entitled to a refund. Instead, they must affirmatively show the just, reasonable and necessary rate the Commission should impose. *See* Complaint, Prayer for Relief, paragraph (a); *see also* K.S.A. 66-1,206.

62. Other than the requested across the board refund of 9.5% of all of TKO's revenues for all of TKO's customers for the last decade, the Complainants failed to identify what just or reasonable rate may be appropriate for a refund.

63. To determine just and reasonable rates, as required under K.S.A. 66-1,206, the Commission considers and balances: (1) the interests of the investors (here, TKO), (2) present *and future* ratepayers, and (3) the public interest to find a rate within the zone of reasonableness.⁶⁰

64. Dr. Ankum testified that in order to reasonably calculate any refunds, the Commission would have to engage in an analysis similar to a rate case, which is inherently forward-looking.⁶¹ Of course, retroactive ratemaking is impermissible, but a rate case-type analysis would be necessary under the statute. His testimony comports with the statutory limitations as further defined by case law.

65. The Complainants have failed to show how their requested refund even remotely meets the required finding of just and reasonable.

⁶⁰ *Kansas Gas & Elec. Co. v. Kansas Corp. Comm'n*, 239 Kan. 483, 488-89 (1986).

⁶¹ Ankum Direct, 19:16-20:17.

66. Regarding the first inquiry—interests of the investors (TKO)—Commission Staff in the 2016 R&R identified TKO’s ability to continue as a going concern as a significant reason not to impose immediate refunds.⁶² Likewise, how is a refund that is simply recouped by TKO from its customers in the future a reasonable approach?⁶³ Particularly if such increased costs places TKO in financial peril?⁶⁴ Such a refund simply does not comport with the statutory requirements of just and reasonable for either the ratepayers or the investors.

67. Moreover, irreparably harming TKO would not be in the public interest. Competition in the area benefits the gas purchasers by keeping prices down. For irrigation farmers, which make up the bulk of TKO’s Kansas customers, higher gas prices could negatively affect their livelihood.

68. Further, Commissioner Feist-Albrecht correctly expressed concerns about imposing refunds for customers who are not before the Commission and whose contracts were not evaluated.⁶⁵ And imposing a refund for a small class of TKO’s customers (i.e., only the Complainants) would obviously be discriminatory, as recognized by Mr. Haynos.⁶⁶

69. Complicating the issue of refunds further, TKO’s total cost of doing business is not solely related to the volume of gas it sells, even though the requested refunds would be based almost entirely on the volumetric charge.

⁶² 2016 R&R at pp. 2, 6.

⁶³ Tr. Vol. 2, 302:22-323:11.

⁶⁴ Tr. Vol. 2, 322:20-323:12.

⁶⁵ Tr. Vol. 1, 30:18-31:6. Although relief for the residential customers could be provided for that are not before the Commission because their rates are set by the Certificate. Tr. Vol. 2, 316:21-318:9.

⁶⁶ Tr. Vol. 2, 322:15-19.

70. Commissioner Apple questioned Mr. Haynos about TKO's fixed costs. Mr. Haynos agreed that the volumetric charges make up for some of TKO's fixed costs.⁶⁷ This is consistent with Dr. Ankum's testimony that many of TKO's costs are not incurred or caused by usage, even though the refund requested is based almost entirely on a usage calculation.⁶⁸ In other words, the refund based on the volumetric calculation could actually cause TKO to refund amounts necessary to cover its past fixed expenses (i.e., the refund would not be solely related to the cost of gas it purchases for resale). Dr. Ankum indicates that TKO's fixed, non-volumetric charges, should be excluded from any refund because those are incurred independent of the gas volume the Complainants allege to have received (or not received).⁶⁹

71. Mr. Brosch agreed with the obvious conclusion that TKO's past expenses cannot be changed.⁷⁰

72. The Complainants request that the Commission strip 9.5% of TKO's past revenues, regardless of the costs these revenues were meant to cover, and give it to all of TKO's customers regardless of the effects on TKO, its future ratepayers, and the public generally. No evidence supports that such refunds would be "just, reasonable and necessary." In sum, even if TKO's past billing practices are unreasonable, Complainants have failed to show their requested refund comports with the statutory requirement of reasonableness.

⁶⁷ Tr. Vol. 2, 281:17-282:7.

⁶⁸ Ankum Direct, 14:14-16:25.

⁶⁹ Ankum Direct, 17:10-21.

⁷⁰ Vol. 1, 230:19-23.

E. If reasonableness under K.S.A. 66-1,205 is not the standard, the complaint must be dismissed for failure to state a claim. TKO's Certificate precludes the in-depth examination Complainants request, which would be proper for a breach of contract case in civil court (Commission Question No. 3).

73. TKO has repeatedly tried to determine the legal foundation of Complainants' allegations. During discovery, TKO tried to determine the purported industry standard that TKO allegedly violated. In response to TKO's data request No. 1, the Complainants claimed the American Gas Association set the standard.⁷¹ But in their prefiled direct testimony, the Complainants make no mention of industry standard, and in their rebuttal testimony, they claimed the basis of their complaint was not industry standard.⁷²

74. Further puzzled by Complainants' constantly shifting arguments, TKO argued in its Pretrial Brief that under general contract principles, Complainants' claim fails. Complainants forced TKO to guess that a contract-type standard may be the basis of their claim.

75. According to Complainants' counsel in his opening statement, however, TKO's guess was faulty again. Instead, Complainants' counsel contended the question for the Commission is now "whether or not that practice [TKO's billing practice] is fair."⁷³ TKO agrees. The question presented is whether TKO's billing practice: (1) that commenced upon TKO's entry into Kansas, (2) that applies to all of TKO's customers, without change, and (3) at the bottom line, ultimately results in a lower price than its competitors, fair?

76. Although the Complainants have attempted to twist their complaint of reasonableness and fairness into a contract-type of analysis of precision, the Complainants have not argued TKO breached their contracts.

⁷¹ Complainants' Response to TKO's request is attached to Hanson's Direct Testimony as Exhibit E.

⁷² Hanson Rebuttal, 5:15-6:7.

⁷³ Tr. Vol. 1, 18:9-10.

77. The fallacy of Complainants’ argument is shown by the method they used to calculate the purported overcharge. It is calculated on contractual principles of precision, not the statutory principles of K.S.A. 66-1,205 shown above in Section II.D. Further, Mr. Hanson testified “there is no logical or truthful way to analyze the proper refunds other than based on the price per MMBTU established in the contracts which have been approved by the Commission.”⁷⁴ This is clearly a claim about contract principles, not statutory principles.

78. But claims based on contractual principles are problematic, because ruling on contract principles will cause the Commission to overstep its boundaries of authority. The Commission’s specific question No. 3 is whether the Commission has the authority to hear and determine issues of contract law. The answer is no. That power is vested solely in the judicial branch pursuant to Article 3, Section 1 of the Kansas Constitution.

79. The Kansas Corporation Commission is a creature of statute with limited jurisdiction, and it possesses no powers not granted by statute.⁷⁵ This is consistent with general authorities that observe a state public service commission, like the Commission, “has no inherent power; all its power and jurisdiction, and the nature and extent of the same, must be found within the statutory or constitutional provisions creating it.”⁷⁶

80. Here, the Commission has “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.” K.S.A. 66-1,201. “As applied to regulation of natural gas public utilities, the provision of this

⁷⁴ Hanson Rebuttal, 2:4-6. Even though on cross-examination, Mr. Hanson conceded he did not review the contracts when making his refund calculations. Vol. 1, 46:11-14.

⁷⁵ See *Bennett v. Corporation Comm’n*, 157 Kan. 589, 596 (1943).

⁷⁶ 64 Am. Jur. 2d Public Utilities § 145 (2016).

act and all grants of power, authority and jurisdiction herein made to the commission shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission.” K.S.A. 66-1,207. Nothing suggests the Commission is authorized to determine contract law issues in carrying out its duties.

81. In *Citizens’ Utility Ratepayer Bd. v. Kansas Corp. Comm’n*,⁷⁷ the Kansas Court of Appeals held the Commission was authorized to review discount contracts established under the utility’s prior tariff in the broader context of evaluating the utility’s requested rate increase. Breach of the contracts was not at issue in that case. Accordingly, the precise issue raised by the Commission in Question No. 3 was not at issue in *Citizens’ Utility Ratepayer Bd.*

82. Because the Commission lacks the authority to adjudicate a breach of contract claim outside its power to examine contracts authorized pursuant to a certificate of service authority, this Commission cannot adjudicate Complainants’ claim of imprecision which is based on contractual analysis rather than reasonableness as required by the statute.

F. The 1961 Order has not been codified in relevant part by subsequent regulation, and even if it has, it is not relevant to the issues raised by the Complainant (Commission Question No. 1).⁷⁸

83. The Commission’s first question asks whether relevant parts of the 1961 Order (1) have been subsequently adopted into current Kansas Regulations (i.e., K.A.R. 82-3-101(a)(36)), and (2) if relevant parts of the 1961 Order have been adopted, is it relevant to this case?

i. Based on the plain language of K.A.R. 82-3-101(a) compared to the operative language of the 1961 Order, the answer to the first part of the Commission’s Question No. 1 is No.

⁷⁷ 28 Kan. App. 2d 313, 325 (2000).

⁷⁸ In its Pretrial Brief (Section II.C.), TKO contended that 1961 Order is not enforceable as to TKO. TKO specifically incorporates those arguments in this brief by reference.

84. K.A.R. 82-3-101(a) states: “As used in these regulations, the following definitions shall apply...” Subparagraph (36) defines “Gas (cubic foot)” as the volume of gas in one cubic foot at a standard pressure base of 14.65 and standard temperature base of 60 degrees Fahrenheit.

85. On its face, the *definitions* in 82-3-101(a) are applicable only to “these regulations,” meaning, the Commission’s Regulations under the Kansas Regulations. (K.A.R. 82-1-202 *et seq.*)

86. This defined term is used elsewhere in the Commission Regulations. For example, it is used in the definitional section when defining “Gas (sour)” (subsection 38), “Gas well” (subsection 81(E)(ii)), and “Oil well” (subsection 81(I)). In addition it is used under K.A.R. 82-3-307 concerning gas assessments and 82-3-1303 concerning gas allowables.

87. The remaining portion of subsection (b) of K.A.R. 82-3-101 merely states that any term *not defined* in the regulation or applicable commission rule, regulation, or order shall be interpreted to be consistent with its common use in the industry. This language does not resolve the Commission’s inquiry.

88. The applicable provision of the 1961 Order (section 302) differs from K.A.R. 82-3-101(a)(36) in a meaningful way. As opposed to being merely a definitional provision, section 302 states that: “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.” (emphasis added). K.A.R. 82-3-101(a) and (b) have no similar obligatory language ordering compliance.

89. In its Pretrial Brief, TKO identified a number of other provisions of the 1961 Order that have been codified into current regulations. However, TKO has been unable to identify and the Complainants have not presented any existing provision that *requires* public gas

utilities to use 14.65 for volumes and heating values like that found in the 1961 Order. Finally, if K.A.R. 82-3-101(a) required all utilities to use 14.65, then why do Anadarko and Black Hills use 14.73, according to Mr. Hanson's hearsay testimony?

90. Accordingly, the key component of the 1961 Order compelling action has not been adopted.

ii. Even if a portion of the 1961 Order was codified into current regulations, the current regulations do not address the issue raised by the Complainants.

91. The second part of the Commission's first question is easier to answer. Even if a relevant portion of the 1961 Order was codified, it is *not relevant* to this complaint case given Complainants' allegations and testimony at the hearing.

92. As stated ad nauseum, Complainants demand precise matching of the pressure base for calculating volumes and BTUs. Their complaint is not centered on violation of the 1961 Order or K.A.R. 82-3-101(a), which both reference 14.65.

93. Instead, Complainants contend that if the BTU is calculated using 14.73, TKO must use 14.73 when measuring volume. If TKO desires to use 13.45 when calculating volume, it must adjust the BTU, if necessary, to reflect a 13.45 pressure base. Complainants do not take issue with the pressure base number; they contend the matching must be exact.

94. If TKO was using 14.65 for volume under the Regulation and 14.73 for BTU, there would be an asymmetrical representation under Complainants' theory and a refund due.⁷⁹

95. Specifically, Commissioner Feist-Albrecht asked Mr. Hanson what impact would using 14.65 have on his refund calculations? His answer, "None."⁸⁰ Likewise, Mr. Haynos

⁷⁹ Tr. Vol. 1, 75:9-12. Of course, this is contrary to Complainants' arguments in their Reply to TKO's Response to Staff's 2016 R&R, that "If TKO had complied with that regulation, it would not be in this proceeding." at p. 4. This argument is simply contrary to Complainants' demand for exact matching.

testified TKO must use the same “reference point” (i.e., pressure base) for the volume and BTU. They must be consistent.⁸¹

96. Even if TKO was using 14.65 as stated in K.A.R. 82-3-101(a) or the 1961 Order, TKO would still be liable under Complainants’ theory.

97. Using reverse logic, if TKO would still owe a refund if it had been following the Regulations (i.e., using 14.65 for volume purposes), how would K.A.R. 82-3-101(a) be controlling in this complaint case? The short answer is that it would not because it does not comport with the Complainants’ theories.

98. Further, because Complainants bear the burden of proving their complaint allegations and do not contend TKO violated the 1961 Order or any current regulation, these regulations are simply not relevant to this case. The complaint and testimony is premised on exact matching of pressure bases. It is not based on industry standards or violation of Commission orders or Regulations. The 1961 Order and any similar regulations are simply not applicable to this proceeding.

G. Statute of Limitations bars a portion of Complainants’ claims (Commission Question No. 2).

99. A three-year statute of limitations applies to the claims raised by the Complainants. Because they claim unreasonable rates, K.S.A. 66-154c is the controlling statute.⁸²

⁸⁰ Tr. Vol. 1, 73:6-10.

⁸¹ Tr. Vol. 2, 305:16-306:19.

⁸² If the Commission determines it has jurisdiction to hear a breach of contract claim and also determines that is the basis of the Complainants’ claim despite TKO’s arguments to the contrary, then the proper statute of limitations would be five years for breach of a written contract (K.S.A. 60-511), and three years for breach of an oral contract (K.S.A. 60-512).

100. Under 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.

101. Common carriers are defined to include “all freight-line companies, equipment companies, pipe-line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state.”⁸³

102. As a transporter of property—natural gas—in the state of Kansas, TKO is a common carrier.⁸⁴ TKO can be both a public utility and common carrier. Under Kansas law, a public utility in its broad and general sense includes a common carrier.⁸⁵ Mr. Haynos also testified that a common carrier and public utility “are pretty much the same.”⁸⁶

103. The Complainants have filed a complaint seeking determination of unreasonable rates against TKO, a common carrier as defined. Under K.S.A. 66-154c, all payments made more than three years before the complaint was filed are time-barred.

104. Accordingly, based on the December 4, 2014 complaint filing, refunds for payments made before December 4, 2011 are barred.

⁸³ K.S.A. 66-105.

⁸⁴ See also the Commission’s January 15, 2015 Order in Docket No. 14-ANGG-119-COM, finding Anadarko Natural Gas Company was a common carrier for purposes of K.S.A. 66-154a.

⁸⁵ *Mapco Intrastate Pipeline Co. v. State Corp. Comm’n*, 10 Kan. App. 2d 527, 529 (1985), citing *Edwards County Comm’rs v. Simmons*, 159 Kan. 41, 51-52 (1944).

⁸⁶ Tr. Vol. 2, 318:24-319:7.

H. The Commission cannot consider remedies in equity, but it is permitted to determine equitable defenses. (Commission Question No. 4).

105. As stated in Section II.E, the Commission is a creature of statute with limited jurisdiction, and it possesses no powers not granted by statute. Although Kansas courts have not directly addressed whether the Commission has jurisdiction to consider equitable remedies, the Kansas Supreme Court has noted that the Commission “is cloaked with no equitable jurisdiction.”⁸⁷ Relatedly, Kansas courts have held that administrative agencies generally cannot hear and decide equitable claims in the absence of statutory language granting equity powers to the agency.⁸⁸ TKO is unaware of any specific statutory provision granting the Commission equitable powers.

106. The ability to hear and decide equitable claims is different, however, from considering equitable defenses. In this case, no party has raised an equitable *claim* (e.g., requesting damages from the other party on equitable grounds). Instead, TKO has raised laches, waiver, and estoppel as equitable *defenses* in its Pretrial Brief.⁸⁹ An equitable defense is merely justification of a party’s actions limiting recovery by the other party.

107. In *United Cities Gas Co. v. Brock Exploration Co.*,⁹⁰ the Kansas Federal District Court considered whether the defendant had raised equitable defenses before the Commission. The plaintiff insisted the defendant had already raised the equitable defenses, which if so, the defendant would have been precluded in the current action because it would be an impermissible

⁸⁷ *Mobil Oil Corp. v. State Corp. Comm’n*, 227 Kan. 594, 608 (1980).

⁸⁸ *Sage v. Williams*, 23 Kan. App. 2d 624, 627-628 (1997).

⁸⁹ To avoid redundancy, TKO has not restated these arguments here. Instead, they are being incorporated by reference.

⁹⁰ 995 F. Supp. 1284 (D. Kan. 1998).

collateral attack on the Commission's order.⁹¹ Without ruling whether the Commission had authority to determine equitable defenses, the court held that on the facts of the case, the defendant had not raised equitable defenses before the Commission in the prior action. Without deciding, the court indirectly confirmed the appropriateness of raising equitable defenses before the Commission.

108. As alluded to by the court, equitable defenses ***could*** have been raised before the Commission, drawing support from *Kansas-Nebraska Natural Gas Co.*⁹² which held that “a party wishing to challenge the validity of any part of a KCC Order on legal ***or equitable grounds must raise the arguments either before the Commission itself*** or before a state court...”⁹³ If the Commission cannot consider equitable defenses, why must the arguments be raised before the Commission itself? To suggest that the Commission could not then hear and decide equitable defenses would be nonsensical.

109. The Complainants paid TKO's invoices for seven years before filing their complaint. The Complainants had ample opportunities to clarify or contest TKO's billing methodology during the certificate process or prior to entering into the contracts. Instead of speaking up, they accepted the gas and paid TKO's invoices for over seven years before initiating this action. Now they demand a 9.5% refund of all amounts paid.

110. The Complainants slumbered on their rights and now seek a 9.5% windfall for sitting on the sidelines. Equity bars their inaction. The Commission has the authority to bar the complaint on equitable grounds (in addition to the other grounds set forth above).

⁹¹ *Id.* at 1295-96.

⁹² 176 Kan. 561 (1954).

⁹³ *Brock Exploration*, 995 F. Supp. at 1296, citing *Kansas-Nebraska Natural Gas Co.* (emphasis added).

111. Even if it does not have jurisdiction, the Commission should make sufficient findings of fact concerning the Complainants' unnecessary delay and prejudice TKO suffered to allow a reviewing court of law to determine based upon the record established in this case whether to bar the complaint on equitable grounds.

I. TKO will correct the residential rates upon the conclusion of this case.

112. Although the primary focus of this case has been on the irrigation customers, the complaint raises a second issue—the actual rate charged to the residential customers. TKO's Certificate sets the rate TKO must charge its residential customers. TKO only has 4 residential customers.

113. TKO has been charging its residential customers a rate in excess of that in its Certificate since January 1, 2014 following the approval of the Black Hills purchase of Anadarko's contracts, which caused TKO significantly higher gas costs.

114. TKO has agreed to adjust its rates for all of its residential customers and refund them the money owed.⁹⁴ However, due to the August 17, 2015 email from Commission Staff to TKO's counsel, TKO has not made this change.⁹⁵ Upon the conclusion of the proceeding or earlier date as agreed upon by the Commission Staff, TKO will refund the overcharge and adjust the rate going forward.

115. Although TKO acknowledges it violated its Certificate in this regard, it does not agree the proposed penalty of \$7,100 is warranted. Instead, TKO contends \$2,550 is duplicitous

⁹⁴ As noted previously, the rates for the residential customers are set in the Certificate. Accordingly, the Commission could order refunds for those residential customers not in this proceeding based on the difference in the rates charged compared to those in the Certificate. Tr. Vol. 2, 317:6-25.

⁹⁵ Exhibit MM-6, attached to McEvers Rebuttal Testimony.

as described in its November 23, 2016 response to the 2016 R&R. Therefore, TKO believes a proper civil penalty would not be in excess of \$4,550, if any.

J. Before initiating a rate case or any modification to TKO's certificate for future operations, the Commission should gather more information and order TKO and Commission Staff to propose a possible resolution on TKO's future practices and acts in Kansas.

116. In the 2016 R&R, Commission Staff recommended that TKO initiate a rate case within 120 days of the final order in this complaint case.

117. It seems TKO's billing practice at issue in this case and TKO's failure to timely and accurately complete paperwork form the basis of Staff's recommendation.⁹⁶

118. Although TKO may have a paperwork issue and difficultly "trying to get all the little pieces together," Mr. Haynos testified that TKO does "an excellent job" with regard to safety, and his staff is "impressed with the job they do."⁹⁷

119. In addition to TKO's financial condition with regard to refunds generally, Mr. Haynos discussed the impact a rate case may cause on TKO given its customer base. By causing TKO to raise its rates to pay for a refund or as required by a rate case, TKO could lose customers and cause a "spiral situation" which would hurt the business.⁹⁸

120. In southwest Kansas where TKO operates, there are numerous other pipeline operators, utilities, and non-profit utilities that could provide most of TKO's customers with alternative sources of gas. Mr. Haynos discussed the alternatives available numerous times during his testimony.⁹⁹ The Complainants indicated they have switched or are considering

⁹⁶ Tr. Vol. 2, 270:7-14.

⁹⁷ Tr. Vol. 2, 268:17-23.

⁹⁸ Tr. Vol. 2, 323:6-12.

switching to alternative sources.¹⁰⁰ This is consistent with Dr. Ankum's testimony that TKO's customers, including the Complainants, could have satisfied their needs by going to other suppliers if TKO's rates (and billing methodology) were unreasonable.¹⁰¹ They could have simply walked away.

121. A rate case could require TKO to charge higher prices, thereby causing TKO to lose customers, thereby causing the "spiral situation" Mr. Haynos expressed concern about.

122. Mr. Haynos summed it up succinctly in response to questions from Commissioner Feist-Albrecht: "If we raised his rates to get him to where we thought he was earning the right rate of return...the customers would simply leave for a different market if they thought they would get a better deal."¹⁰² Why run a safe, reasonably priced operation out of business?¹⁰³

123. Instead of a rate case, a better alternative for the Commission and TKO would be to determine the issues the Commission Staff has with TKO operations, including the paperwork issues and what customers are regulated or not regulated.¹⁰⁴

124. TKO has already met with Commission Staff following the hearing to identify and correct the issues they raised concerning TKO's compliance filing. TKO believes it can resolve the other concerns raised by Commission Staff and is committed to doing so.

⁹⁹ Tr. Vol. 2, 286:7-287:4, 293:3-9 ("majority of TKO's customers can leave at will"), 315:2-11, and 321:15-18 discussing Exhibit LMH-4, and noting "he's missed about 99 percent of the pipelines that are out in that area."

¹⁰⁰ Tr. Vol. 1, 123:3-11.

¹⁰¹ Ankum Direct, 11:12-12:4.

¹⁰² Tr. Vol. 2, 287:2-9.

¹⁰³ The answer to this question may also answer why the Complainants are willing to pay more for gas.

¹⁰⁴ Tr. Vol. 2, 323:17-22.

125. A rate case would not be beneficial to TKO, its customers, or the State of Kansas. TKO is a unique public utility, unlike any other public utility in the state.

126. TKO respectfully requests the Commission defer a decision on a rate case for a reasonable period of time for TKO and Commission Staff to reach a possible resolution that will not detrimentally affect TKO's operations in Kansas while properly protecting the interests of TKO's customers.

III. Conclusion

127. Complainants seek to portray this case as a matter of simple science. But their arguments ignore the nature of TKO's contractual-based Certificate and the applicable public utility laws. Applying the correct legal principles, there is no evidence that the Complainants were overcharged for the gas they consumed and willingly paid for. In fact, Commission Staff noted the reasonableness of TKO's rates compared to TKO's competitors in the 2016 Report and Recommendation. That is, the evidence did show that TKO's prices charged to the Complainants are well within the range of reasonableness.

128. There is no allegation that TKO is violating its Certificate and any other allegation of contract violations go beyond the Commission's statutory authority.

129. There is simply no support for ordering refunds of revenues collected for nearly a decade for every TKO customer. And providing refunds for only the Complainants is discriminatory on its face and therefore impermissible.

130. Accordingly, the Commission should find TKO's billing methods and rates are reasonable and deny the Complainants' claims as they relate to the billing methodology.

131. As a separate issue, TKO concedes it owes a refund to its residential customers and will pay such refund upon order from the Commission.

WHEREFORE, TKO requests the Commission:

- A. Deny any refunds owed to TKO's irrigation customers on the grounds of purported overbilling because Complainants failed to meet the statutory requirements, and the claims are barred by applicable law;
- B. Order TKO to refund TKO's residential customers based on the price in the Certificate compared to the price charged and modify the rate going forward to that in the Certificate;
- C. Order TKO pay a civil penalty not in excess of \$4,550;
- D. Order TKO and Commission Staff to meet and confer concerning TKO's compliance filings and other regulatory matters and propose an agreement or otherwise report to the Commission on their progress within 120 days following entry of the Order in this case;
- E. Order TKO to adjust its billing methodology going forward to match the volumetric pressure base and BTU pressure.

Respectfully submitted,

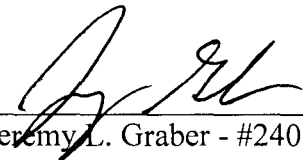
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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Jeremy L. Graber, of lawful age, being first duly sworn, on oath deposes and states:

I am an attorney for Texas-Kansas-Oklahoma Gas, L.L.C. in the above referenced matter. I have read the above and foregoing document, know and understand the contents thereof, and verify that the statements and allegations contained therein are true and correct, according to my knowledge, information and belief.



Jeremy L. Graber - #24064

Subscribed and sworn to before me this 27th day of February, 2017.





Notary Public

My appointment expires:

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of February, 2017, a true and correct copy of the above and foregoing was filed electronically with the Kansas Corporation Commission and a copy served via email to:

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