ELECTRONICALLY FILED
2017 Apr 21 PM 2:23
CLERK OF THE APPELLATE COURT
CASE NUMBER: 116795

Case No. 16-116795-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SWKI-SEWARD WEST CENTRAL, INC.
AND SWKI-STEVENS SOUTHEAST, INC.
Petitioners/Appellants,

vs.

KANSAS CORPORATION COMMISSION
Respondent/Appellee.

BRIEF OF INTERVENOR ANADARKO NATURAL GAS COMPANY LLC

Appeal from the District Court of Shawnee County
Honorable Larry D. Hendricks, Judge
District Court Case No. 2016-CV-93

James P. Zakoura, 07644
Smithyman & Zakoura, Chartered
7400 West 110th Street, Suite 750
Overland Park, Kansas 66210
Telephone: (913) 661-9800
Facsimile: (913) 661-9863
Email: jim@smizak-law.com

Attorneys for Anadarko Natural Gas Company LLC

Oral Argument: 20 minutes

TABLE OF CONTENTS

Nature of Case

On August 27, 2013, the Petitioners/Appellants – SWKI-Seward West Central, Inc. ("SWKI-SWC") and SWKI-Stevens Southeast, Inc. ("SWKI-SE") (collectively, "the SWKIs") – filed a Complaint with the Respondent/Appellee – the State Corporation Commission of the State of Kansas ("KCC" or "Commission") – alleging that the SWKIs were charged an unlawful rate for natural gas received from the Intervenor – Anadarko Natural Gas Company LLC ("Anadarko" or "ANGC") – and demanding a full refund, plus interest. The sole basis for the SWKIs' Complaint was an allegation that two Gas Sales Agreements – one between ANGC and SWKI-SWC, and one between Anadarko Energy Services Company ("AESC") and SWKI-SE – were not filed for approval with the KCC. This alleged failure, the SWKIs contend, entitles them to 26 years of free natural gas and free natural gas delivery – a position correctly rejected by the KCC and the District Court.

Contrary to the SWKIs' claims, the filed rate doctrine is wholly inapplicable to their complaint. Rather, the primary issue before this Court is whether the Commission and the District Court correctly found that the SWKIs' Complaint failed to state a claim upon which the Commission could grant relief.

Statement of Issues

I. The Commission correctly interpreted and applied Kansas law and properly dismissed, with prejudice, the SWKIs' Complaint for failing to state a claim upon which relief could be granted; accordingly, the District Court correctly denied the SWKIs' Petition for Judicial Review.

II. The SWKIs' reliance on the filed rate doctrine is incorrect; the filed rate doctrine is inapplicable to the issues upon which the SWKIs seek review.

Statement of Facts and Procedural History

On July 1, 1998, AESC and SWKI-SE entered into a freely negotiated Gas Sales Agreement. Under the Agreement, the rate for natural gas transportation service to SWKI-SE was $0.50 per MMBtu. The Agreement had a month-to-month term, and either party could terminate the Agreement upon thirty days notice. AESC first delivered to SWKI-SE on Anadarko Gathering Company's natural gas gathering line, and then, after a pipeline system reconfiguration, on ANGC's Hugoton Residue Delivery System ("HRDS"). (R. Vol. 2, 60).

On August 3, 2000, in accordance with the KCC Order issued in Docket No. 00-ANGG-218-COC, Anadarko submitted for filing with the KCC 43 gas service contracts – including the 1998 Gas Sales Agreement between AESC and SWKI-SE. (R. Vol. 2, 63).

On June 1, 2002, ANGC and SWKI-SWC entered into a freely negotiated Gas Sales Agreement. The Agreement between ANGC and SWKI-SWC contained a rate for natural gas transportation of $0.50 per MMBtu, had a month-to-month term, and could be terminated by either party on thirty days notice. (R. Vol. 2, 63). This Agreement contained identical material terms that were included in the 1998 Agreement. (R. Vol. 2, 63).

Both of these agreements were in effect until 2013, when ANGC and Black Hills Energy ("Black Hills") filed a Joint Application with the KCC requesting an order approving the sale, to Black Hills, of all of ANGC's HRDS physical assets located east of Hugoton, Kansas – including the transfer of ANGC's customer specific and contract specific certificates associated with the HRDS east of Hugoton. The Joint Application was assigned KCC Docket No. 13-BHCG-509-ACQ ("Black Hills Docket"). (R. Vol. 2, 65).

In total, the Agreement between AESC and SWKI-SE was in effect for 15 years, and the Agreement between ANGC and SWKI-SWC was in effect for 11 years. For both Agreements,

the price was the total of two component parts: (a) natural gas transportation; and (b) the physical natural gas commodity. Over the course of these combined 26 years, the $0.50 per MMBtu amount for natural gas transportation (part (a)) did not increase under either Agreement. The price of the physical natural gas commodity included in both Agreements (part (b)) varied by month, and was the published index price for natural gas under a widely published industry price, published in F.E.R.C.'s Gas Market Report. (R. Vol. 2, 90). All parties fully performed all duties and obligations under these two contracts, and no complaints were ever raised. (R. Vol. 3, 9, 147-48).

The SWKIs are not now, and have never in the past, made a claim for damages based on breach of contract. In fact, Mr. Kirk Heger, president of SWKI-SE, testified at the Evidentiary Hearing in the Black Hills Docket that ANGC always performed in accordance with the terms of the 1998 Agreement, specifically stating that he did not contend there was any nonperformance. (R. Vol. 3, 9, 36-38). Mr. Jason Hitch, president of SWKI-SWC, testified at the same Evidentiary Hearing that he was "not objecting to the contract at all." (R. Vol. 3, 38). Mr. Hitch further testified that the $0.50 per MMBtu amount for delivery service was reasonable, and that, to his knowledge, SWKI-SWC had never made any complaint regarding the contracts. (R. Vol. 3, 9, 39-41). Mr. Heger and Mr. Hitch were the parties who signed the 1998 and 2002 Agreements on behalf of their respective SWKI entities, and were intimately familiar with the Agreements and the services that AESC and ANGC provided pursuant to them. (R. Vol. 2, 29, 47).

On July 11, 2013, as part of the Black Hills Docket – in which the KCC ultimately approved the sale and transfer of HRDS assets –KCC Staff ("Staff") filed a Report and Recommendation which noted that Staff was unable to determine whether gas sale contracts for

six customers taking gas service on the HRDS had been filed with the Commission. Two of those customers are the current Appellants – the SWKIs. (R. Vol. 2, 66-67).

Despite both SWKI Presidents testifying, as part of the Black Hills Docket, that the Gas Sales Agreements were fair and reasonable, on August 27, 2013, the SWKIs filed a Complaint at the KCC. The Complaint, assigned KCC Docket No. 14-ANGG-119-COM ("Complaint Docket") led to the instant action. (R. Vol. 2, 4-55).

In their Complaint in the Complaint Docket, the SWKIs alleged that the 1998 and 2002 Agreements were not filed at the KCC, and that the failure to file constituted a violation of Kansas law. (R. Vol. 2, 9). Therefore, the SWKIs alleged, all rates charged by ANGC and AESC under both Agreements were unlawful and void, and the SWKIs were entitled to a complete return of all payments, plus interest, for the natural gas commodity and the natural gas transportation for 26 years. (R. Vol. 2, 9). Simply stated, the SWKIs contended that they were entitled to 26 years of free natural gas and free natural gas transportation.

On October 7, 2013, in response to the SWKIs' Complaint, Anadarko filed a Motion to Dismiss and Answer in the Complaint Docket. (R. Vol. 2, 58-158). In the Motion, Anadarko argued that the Complaint was jurisdictionally deficient and failed to state a claim upon which relief could be granted, and requested that the Commission dismiss the Complaint. (R. Vol. 2, 69-77).

On November 26, 2013, after Responses and Replies by the Parties to Anadarko's Motion to Dismiss, Staff filed a Report and Recommendation in the Complaint Docket. (R. Vol. 3, 81-90). In its Report, Staff recommended that the KCC assess civil penalties against both AESC and ANGC. (R. Vol. 3, 87)

On January 15, 2014, ANGC, AESC, and Staff filed a Joint Motion for Approval of Stipulated Settlement Agreement. (R. Vol. 3, 105-21). Under the terms of the Agreement, ANGC and AESC would jointly pay $50,000 to settle all matters between Anadarko and the State of Kansas related to the Complaint Docket, while not admitting any violations.

On February 19, 2014, upon order of the KCC in the Complaint Docket, Anadarko and the SWKIs filed extensive briefs addressing threshold legal issues. (R. Vol. 4, 52-153). Consistent with its October 7, 2013, Answer, Anadarko reiterated its position that the KCC lacked jurisdiction to hear the Complaint because the SWKIs did not allege that they were charged an unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential rate. (R. Vol. 4, 83). The SWKIs, on the other hand, citing K.S.A. 66-1,203, claimed that the KCC had proper jurisdiction because, they alleged, Anadarko had failed to file the Gas Sales Agreements with the KCC. (R. Vol. 4, 36).

On January 15, 2015, finding that the SWKIs had failed to state a claim upon the Commission could grant relief, the KCC issued its "Order Granting Anadarko Natural Gas Company's Motion to Dismiss Complaint with Prejudice and Granting Joint Motion for Approval of Stipulated Settlement Agreement." ("Dismissal Order") (R. Vol. 5, 104-21).

On January 30, 2015, the SWKIs filed a Petition for Reconsideration of the Order, which the KCC denied on February 26, 2015. (R. Vol. 5, 219-29). At no time during the period of July 1, 1998 through February 26, 2015, did the SWKIs allege that either Agreement contained a rate that was unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential. To the contrary, during that period, the SWKIs testified not only that there was no claim of non-performance of the Agreements, but also that the amounts charged pursuant to the Agreements were reasonable.

On March 27, 2015, the SWKIs filed a Petition for Judicial Review in the District Court of Stevens County, Kansas, appealing the KCC's Order dismissing their Complaint and the KCC's Order denying their Petition for Reconsideration. (R. Vol. 1, 13-50). Anadarko filed a Motion to Intervene (R. Vol. 1, 51-53), which was granted, and also filed a Motion for Change of Venue – to Shawnee County – which was also granted. (R Vol. 1, 8-11).

On September 26, 2016, the District Court issued a Memorandum Decision and Order concluding that the SWKIs failed to state a claim upon which relief can be granted and, ultimately, denying the SWKIs' Petition for Review. (R. Vol. 1, 202-17). This appeal follows.

Arguments and Authority

I. Standard of Review.

Judicial review of a state administrative agency action is controlled by the Kansas Judicial Review Act ("KJRA"). *Frick Farm Properties, L.P. v. State Dept. of Agriculture, Div. of Water Resources*, 289 Kan. 690, 698 (2009). Under the KJRA, K.S.A. 77-621 enumerates the 8 situations in which a reviewing court may grant relief to a party seeking review of agency action, K.S.A. 77-621 (c), and an appellate court's scope of review for agency actions is limited to these eight situations. *John M. Denman Oil Co., Inc. v. State Corp. Com'n of Kansas*, 51 Kan.App.2d 98, 101 (2015). Upon review, a rebuttable presumption of validity attaches to all actions of an administrative agency, and the burden of proving arbitrary and capricious conduct lies with the party challenging the agency's actions. *Jones v. Kansas State University*, 279 Kan. 128, 139-40 (2005); see also K.S.A. 77-621(a)(1).

Under the KJRA, a KCC Order may only be set aside by the court if it is not supported by substantial competent evidence based upon the record as a whole; is without foundation in fact; or is otherwise unreasonable, arbitrary or capricious. *Kansas City Power & Light v. State Corp. Com'n of Kansas*, 52 Kan.App.2d 514, 371 P.3d 923, 927 (2016). Due to the extensive

discretion vested in the KCC by the Legislature, and because the KCC's decisions involve complex problems of policy and special knowledge relative to public utilities, the Court may not set aside a Commission order merely because the Court would have arrived a different conclusion had it been the trier of fact. *Id.* Rather, the court may reverse or nullify a Commission order only when the Commission's decision is so wide of the mark as to be outside the realm of fair debate. *Id.* (citing *Kansas Industrial Consumers v. State Corp. Com'n of Kansas*, 30 Kan.App.2d 332, 336 (2002)).

In the instant case, the District Court reviewed the SWKIs' Petition for Judicial review under K.S.A. 77-621 (c)(3) ("the agency has not decided an issue requiring resolution"); K.S.A. 77-621 (c)(4) ("the agency has erroneously interpreted or applied the law"); K.S.A. 77-621 (c)(7) (agency action is not supported by substantial evidence); and K.S.A. 77-621 (c)(8) ("the agency action is otherwise unreasonable, arbitrary, or capricious"). The SWKIs state that the District Court applied the correct standard of review. (*See* App. Br. p. 6).

In their Brief filed with this Court, the SWKIs claim they are entitled to relief under K.S.A. 77-621 (c)(3) (the Commission did not decide an issue requiring resolution under Kansas law); K.S.A. 77-621 (c)(4) (the Commission erroneously interpreted and applied Kansas law); K.S.A. 77-621 (c)(5) (the Commission failed to follow procedures required by Kansas law); K.S.A. 77-621 (c)(7) (the Commission decision is not supported by substantial evidence); and K.S.A. 77-621 (c)(8) (the Commission decision is otherwise unreasonable, arbitrary and capricious). (App. Br. pp. 6-7).

However, despite claiming that they are entitled to relief under K.S.A. 77-621 (c)(7-8), in their Brief filed with this Court, the SWKIs failed to put forth any argument that the Commission's Orders were not supported by substantial competent evidence or were

unreasonable, arbitrary or capricious. An issue not briefed by an appellant is deemed waived and abandoned. *State v. Reed*, 300 Kan. 494, 505 (2014) (citing *State v. Boleyn*, 297 Kan. 610, Syl. ¶ 10 (2013)). Further, the District Court determined that the SWKIs' claims for relief under K.S.A. 77-621 (c)(5) were more properly reviewed under K.S.A. 77-621 (c)(4). (R. Vol. 1, 207). As the SWKIs agree that the District Court applied the correct standard of review, and failed to brief why they are entitled to relief under K.S.A. 77-621 (c)(7-8), this Court should only consider whether the SWKIs are entitled to relief under K.S.A. 77-621 (c)(3) or K.S.A. 77-621 (c)(4).

II. The Commission correctly interpreted and applied Kansas law and properly dismissed, with prejudice, the SWKIs' Complaint for failing to state a claim upon which relief could be granted; accordingly, the District Court correctly denied the SWKIs' Petition for Judicial Review.

In their Petition for Reconsideration and Petition for Judicial Review, the SWKIs alleged that the Commission's Dismissal Order was arbitrary and capricious because it was not supported by substantial competent evidence and did not set forth findings of fact and conclusions of law. (R. Vol. 5, 123; Vol. 1, 18-19). The SWKIs further claimed that the Commission erred by not citing or applying K.S.A. 66-117, K.S.A. 66-1,203, the filed rate doctrine, or retroactive ratemaking. (R. Vol. 5, 122-23; Vol. 1, 18-19). Additionally, the SWKIs alleged that the Commission erroneously interpreted or applied K.S.A. 66-154a and K.S.A. 66-154c, and failed to analyze the complaint under K.S.A. 66-1,205. (R. Vol. 5, 123; Vol. 1, 18-19). Finally, the SWKIs allege that the Commission improperly dismissed their Complaint, rather than permitting them to amend it under K.A.R. 82-1-220. (R. Vol. 5, 123; Vol. 1, 18-19).

A. The KCC's Orders were not arbitrary and capricious, correctly followed and applied statutory mandates, and were supported by substantial competent evidence.

If an action by the KCC is authorized by statute, it is presumed valid on review unless it is not supported by substantial competent evidence and is so wide of its mark as to be outside the

realm of fair debate, or is otherwise unreasonable, arbitrary, or capricious and prejudices the parties. *Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of Kansas*, 28 Kan.App.2d 313, 315-16 (2000) (citing *Zinke & Trumbo, Ltd. V. Kansas Corporation Comm'n* 242 Kan. 470, 475 (1988)). When issuing an Order, KCC findings need not be rendered in minute detail, however, the findings must be specific enough to allow judicial review of the reasonableness of the order. *Id.* at 316. Further, the record must contain evidence which furnishes a substantial basis of fact from which the issues tendered can be reasonably resolved. *Id.* at 317.

Administrative agencies are created by statute and have only the powers granted to them by statute. *In Protest of Lyerla*, 50 Kan.App.2d 1012, 1020 (2014). A KCC 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 order. *Farmland Industries, Inc. v. State Corp. Com'n of Kansas*, 24 Kan.App.2d 172, 175 (1997) (citing *Midwest Gas Users Ass'n v. Kansas Corporation Commission,* 3 Kan.App.2d 376, 380, *rev. denied* 226 Kan. 792 (1979)). An order is generally considered reasonable if it is based on substantial competent evidence. *Id.* Finally, reviewing courts must give due account to the harmless error rule; therefore, if an agency error did not prejudice the parties, the agency's actions must be affirmed. *Id.*; *See also* K.S.A. 77-612(e).

1. The KCC's Orders were lawful and were not arbitrary and capricious because they followed the statues, rules, regulations, and procedure mandated by Kansas law.

The Legislature has created a complete and comprehensive statutory framework for regulation of public utilities in the State of Kansas. *Kansas Gas and Elec. Co. v. State Corp. Com'n.*, 239 Kan. 483, 491 (1986). A large portion of that framework entrusts ensuring compliance and enforcement of such statutes to the Commission and Staff, and the legislature

has vested the KCC with broad discretion in executing its functions. *Kansas City Power & Light v. State Corp. Com'n of Kansas*, 52 Kan.App.2d 514, 371 P.3d 923, 927 (2016). As the KCC only has the powers granted to it by the Legislature, failure to respect this legislative delineation of rights and responsibilities would place the KCC outside the bounds of the law and outside its jurisdiction conferred by the legislature. *See Lyerla*, 50 Kan.App.2d at 1020. When a statute is plain and unambiguous, the court must give effect to the intent of the legislature as expressed rather than determine what the law should or should not be. *Citizens' Utility Ratepayer Bd*, 28 Kan.App.2d at 325 (citing *Ussery v. Kansas Dept. of SRS*, 258 Kan. 187, Syl. 6 (1995)).

The Kansas Legislature could have elected to create, by statute, a private right of action for violation of any or all of the Kansas public utility statutes. Instead, however, the Legislature elected to create, within the legislative framework, a very limited private right of action that may be lodged at the KCC in specific instances that most directly affect private consumers of public utility rates and practices. *See* K.S.A. 66-154a; K.S.A. 66-1,205. These private rights of action are specifically enumerated in two statutes – K.S.A 66-154a and K.S.A. 66-1,205 – which provide both rights and limitations on such private right of action.

K.S.A. 66-154a, applicable to all common carriers, provides that:

> No common carrier shall charge, demand or receive from any person, company or corporation an unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rate or charge for the transportation of property, or for hauling or storing of freight, or for use of its cars, or for any service afforded by it in the transaction of its business as a common carrier; and upon complaint in writing made to the corporation commission that an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted, such commission shall investigate such complaint, and, if sustained, shall make a certificate under its seal setting forth what is, and what would have been, a reasonable and just rate or charge for the service rendered.
>
> K.S.A. 66-154a.

K.S.A. 66-1,205, applicable specifically to natural gas providers, provides that:

> Upon 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, or that any rule and regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such natural gas public utility for the public is in any respect unreasonable, unfair, unjust, unreasonably inefficient or insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such natural gas public utility for the public is unreasonably inadequate, in efficient, unduly insufficient or cannot be obtained, the commission may proceed, with or without notice to make such investigation as it deems necessary.
>
> K.S.A. 66-1,205 (a).

K.S.A. 66-154a and K.S.A. 66-1,205 provide for a private complaint right of action in a very specific and narrow situation. The language of both statutes is materially the same – and is plain and unambiguous – on a critical point to this appeal: both statutes require that any complaint allege that a rate or practice of a utility is "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential."

In their Complaint the SWKIs did not – because they were unable to do so – allege that the rates or practices of ANGC or AESC were unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential. (R. Vol. 3, 9, 36-43).

The KCC precisely followed the unambiguous statutory mandates of K.S.A. 66-1,205. Although not alleged by the SWKIs, the KCC also considered the possible applicability of K.S.A. 66-154a. Both statutes plainly confer jurisdiction to the KCC to hear the complaint of a private entity only if such complaint alleges that a rate or practice is unreasonable, unfair, unjust, unjustly discriminatory, or unduly preferential. The SWKIs failed to make any such allegations; in fact, they explicitly disavow any claim that ANGC or AESC's rates under the Agreements were unfair or unreasonable. (*See* R. Vol. 3, 9, 36-43).

The allegations set forth in the SWKIs' Complaint do not – and could not with amendment – meet the requirements of either K.S.A. 66-1,205 (a) or K.S.A. 66-154a. Beginning with their initial Complaint, and continuing throughout the entire proceeding below, the SWKIs have not only failed to argue that the rates included in the 1998 and 2002 Agreements were in anyway "unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential," but they have explicitly disavowed as such. In their own words, the SWKIs candidly admit they have suffered no damages, and that the rates that they freely negotiated and paid under the 1998 and 2002 Agreements were reasonable. (*See* SWKI Objection to Joint Stipulated Settlement Agreement, R. Vol. 3, 147-48); (*See also* Testimony of Kirk Heger and Jason Hitch, R. Vol. 3, 9, 36-43). As the Commission aptly stated in its Order Denying the SWKIs' Petition for Reconsideration:

> ***Absent a complaint that satisfies K.S.A. 66-1,205, the SWKIs have no cause of action. The SWKIs are caught in a Catch-22 of their own making.*** In their Objection to the Joint Motion for Approval of Stipulated Settlement Agreement, they characterize their Complaint as: 'not a contract dispute, where one party alleges that performance under the agreement was somehow deficient or incompetent, or the other party alleges that payment under the agreement was inadequate' . . . ***In doing so, the SWKIs admit their claim is based on a failure to file the agreements, rather than any allegation that the rates in those agreements are unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential.***
>
> (R. Vol. 5, 225-26) (emphasis added).

Accordingly, the KCC properly found that it lacked jurisdiction to hear the SWKIs' Complaint and properly dismissed the Complaint with prejudice.

The SWKIs allege, in their Petition for Reconsideration, that the KCC erred, and its action was arbitrary and capricious, by not citing or applying K.S.A. 66-117, K.S.A. 66-1,203, or the "filed rate doctrine." (R. Vol. 5, 122-23). In their Brief filed with this Court, the SWKIs contend that "[t]he primary error committed by the Commission and the District Court was the

failure to apply the Filed Rate Doctrine." (*See* App. Br. p. 7). However, neither the two statutes cited, nor the "filed rate doctrine," provide the SWKIs a private right of action.

The SWKIs' Complaint was entirely deficient under both K.S.A. 66-154a and K.S.A. 66-1,205. Accordingly, the Commission and the District Court correctly held that the Complaint did not meet the minimum statutory threshold requirements for the Commission to act. Because the Commission lacked jurisdiction to hear the SWKIs' Complaint, it was not necessary for it to address these additional issues. (R. Vol. 5, 225, 227).

Finding it to be in the public interest, the Commission approved the Stipulated Settlement Agreement ("SSA") reached between Staff and Anadarko. (R. Vol. 5, 114). In doing so, the Commission levied a not inconsequential civil penalty against Anadarko and fully resolved all matters between Anadarko and the State of Kansas related to this matter – i.e. ensured and enforced compliance with Kansas public utility statutes, as required by the legislature. (Vol. 5, 113-14). Notably, while the SWKIs opposed the SSA at the time it was executed, they did not allege that the Commission erred in approving it.

Ultimately, correctly finding that it lacked jurisdiction to act on the SWKIs' Complaint, and properly ensuring that all issues over which it has been granted statutory jurisdiction were resolved by the SSA, the Commission correctly dismissed the SWKIs' Complaint with prejudice.

2. The KCC's Orders were reasonable; were not arbitrary and capricious; relied on substantial competent evidence; and were specific enough to allow the reviewing court to reasonably discern the Commission's decision.

On appeal, a Commission finding will not be overturned if there is substantial competent evidence to support it. *Kansas Pipeline P'ship v. State Corp. Comm'n*, 24 Kan.App.2d 42, 49 (1997). Substantial evidence is evidence which possesses relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. *Unified*

School Dist. No. 461, Wilson County v. Dice, 228 Kan. 40, 50 (1980). The Commission's findings do not need to be rendered in minute detail, they simply must be specific enough to allow judicial review of the reasonableness of the order. *Citizens' Utility Ratepayer Board*, 28 Kan.App.2d at 316.

Following these well-established rules, the Commission's Orders dismissing the SWKIs' Complaint and Denying their Petition for Reconsideration need not to be stated in minute detail. The Commission needs only to follow statutory mandates and provide sufficient supporting evidence, from the record, that this Court can conclude that the Orders are reasonable. Both the Commission's Orders clearly meet this standard.

As the SWKIs have waived this issue by failing to brief it, Anadarko will not exhaustively address all the evidence relied upon by the Commission. However, both the Commission's Dismissal Order, and its Order Denying the SWKIs' Petition for Reconsideration, clearly and specifically outlined the entire history of the case and detailed every pleading that the Commission relied upon in reaching its decision to dismiss the SWKIs' Complaint. *See generally Grinsted Products, Inc. v. Kansas Corp. Com'n.*, 262 Kan. 294, 302-05 (1997) (KCC properly considered facts and arguments raised in verified pleadings in reaching decision to dismiss a claim for failure to state a claim upon which relief can be granted).

In both Orders, the Commission addressed – and dismissed – the SWKIs' arguments, and provided both statutory, and additional, support for its reasoning. (R. Vol. 5, 104-114; 219-28). Importantly, the Commission stated that the SWKIs did not contend that the rates were too high, or that the terms of the 1998 and 2002 Agreements were unreasonable. As a result, the SWKI Complaint did not satisfy the requirements of K.S.A. 66-154a or K.S.A. 66-1,205 for maintaining a Complaint at the KCC. (R. Vol. 5, 110-11).

The Commission further explained why, under Kansas public utility statutes, even if the SWKIs' Complaint had been pled properly – which it was not – the correct remedy would not be to summarily give the SWKIs a full refund for 26 years of natural gas and natural gas delivery. (R. Vol. 5, 110) (emphasis added). On the contrary, fully refunding the SWKIs after the freely negotiated and, admittedly fair, contracts were fully performed would, itself, be an unreasonable action. (R. Vol. 5, 111). Rather, under Kansas law, as opposed to issuing a refund, the KCC would be empowered to establish rates that are just and reasonable. (R. Vol. 5, 111). Additionally, the Commission pointed out that the SWKIs' arguments clearly ignored substantial portions of the procedural history and record of the Docket – portions which were critical to the Commission in reaching its decision:

> [t]he SWKI Reply claims . . . the Commission should act to 'avoid sending any unintended signal to other regulated entities that the failure to file its rates and contracts in violation of Kansas law will not be tolerated.' This argument ignores the substantial fine the Commission levied against Anadarko and AES for failing to comply with prior Commission orders. Similarly, the SWKIs' argument that dismissal of their complaint prior to gathering, reviewing and weighing any factual or evidentiary evidence demonstrates the Order is unreasonable, arbitrary and capricious . . . **ignores the extensive briefing the parties submitted on the question of jurisdiction.**
>
> (R. Vol. 5, 223) (emphasis added).

Ultimately, the Commission clearly and specifically described the substance of the pleadings pertinent to its decisions, specifically outlined the applicable law, and precisely explained why, under the mandates of Kansas law, it must dismiss the SWKIs' complaint. In doing so, the Commission provided a clear, discernible, blueprint, supported by relevant evidence from the record, by which this Court can review its decision. Neither the KCC's Order dismissing the SWKIs' Complaint, nor its Order denying the SWKIs' Petition for

Reconsideration were arbitrary and capricious. The Commission's Orders and the District Court should be affirmed, and the SWKIs' requested relief should be denied.

B. The Commission's Orders were not required to cite or analyze all arguments raised by the SWKIs because the SWKIs' Complaint did not allege a jurisdictional basis for any KCC action.

Findings of the KCC do not have to be stated with such particularity as to amount to a summation of all evidence. *Western Resources, Inc. v. Kansas Corp. Comm'n*, 30 Kan.App.2d 348, 374 (2002). Further, the KCC is not generally required to explain why it did not accept every piece of evidence presented. *Id.* (citing *Southwest Kansas Royalty Owners Ass'n v. Kansas Corp. Comm'n*, 244 Kan. 157, 190 (1989)). Rather, the Commission's findings must only be "specific enough to allow a judicial review of the reasonableness of the order." *Id.* (citing *Zink & Trumbo, Ltd. v. Kansas Corp. Comm'n*, 242 Kan. 470, 475 (1988)).

The SWKIs claim that the Commission and District Court erred by failing to apply the filed rate doctrine. (App. Br. p. 7). However, the inability of the SWKIs to allege the minimum threshold requirements to maintain a complaint at the KCC justified the Commission's dismissal and negated the need for the Commission to address each and every argument advanced. As the Commission Stated in its Order Denying the SWKIs' Petition for Reconsideration:

> K.S.A. 66-1,205 is dispositive on the issue of jurisdiction. The first item identified in the SWKIs' List of Threshold Issues was 'Does the Commission have jurisdiction to determine the merits of the [SWKIs'] Complaints against either or both AESC or ANGC?' Once the Commission determined it lacked jurisdiction over the complaint, there is no need to address the filed rate doctrine.
>
> (R. Vol. 5, 226).

Due to the SWKIs' failure to meet basic threshold requirements, the Commission was required by the Kansas public utility statutes to dismiss the Complaint for failing to state a claim upon

which the Commission could act. Accordingly, the Commission did not need to address every argument raised by the SWKIs in their Complaint.

In making its Orders, the Commission was only required to set forth its findings in a specific enough manner that a reviewing court could reasonably discern the Commission's reasoning and path – a standard the Commission clearly met. The Commission properly cited and relied upon the sworn pleadings of the SWKIs, which placed their alleged claim squarely outside of the redressable claims delineated by the Kansas Legislature. Accordingly, the Commission did not need to cite to K.S.A. 66-1,203, K.S.A. 66-117, or the filed rate doctrine.

C. The SWKIs' interpretation of Commission Regulations is incorrect; the Commission's dismissal of the Complaint without allowing amendment was correct.

Appellate courts extend deference to an agency's interpretations of its own regulations, and an agency's interpretation will not be disturbed on appeal unless it is clearly erroneous or inconsistent with the regulation. *Reed v. Kansas Racing Com'n.*, 253 Kan. 602, 610 (1993). When a party files a formal complaint at the Commission, K.A.R. 82-1-220 (c) requires that the Commission examine the complaint to ascertain whether or not the allegations, if true, would establish a prima facie case for action by the commission. K.A.R. 82-1-220 (c). If the complaint fails to establish a prima facie case for commission action, the commission must allow the complainant the opportunity to amend the complaint prior to dismissing it. *Id.* If, assuming that all allegations are true, the Commission finds that the complaint has alleged a claim on which the Commission can act, the Commission formally serves the complaint on the complained of utility. *Id.*

In their Complaint, the SWKIs (incorrectly) alleged that the Commission had jurisdiction to act on their Complaint. For the purpose of its initial review, the Commission – as required by

its rules and regulations – had no choice but to accept that allegation as true, and formally served the complaint upon ANGC and AESC on September 23, 2013, thereby extinguishing the SWKIs' right to amend their Complaint pursuant to K.A.R. 82-1-220 (c).

Although the SWKIs' *right* to amend their Complaint was extinguished, under the KCC rules and regulations, the SWKIs could have chosen to voluntarily amend their Complaint at any time. K.A.R. 82-1-220 (d) allows that a "complainant may file an amended complaint on its own initiative upon leave granted by the commission." K.A.R. 82-1-220 (d). Further, K.A.R. 82-1-219 provides that "[t]he amendment of any pleading may be allowed by the commission at its discretion." K.A.R. 82-1-219 (k).

The SWKIs did not amend their Complaint because they could not, in good faith, do so. The SWKIs' admission – in sworn testimony and a sworn and verified pleading – that their complaint was not based on a claim that the rates charged by ANGC and AESC were unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, prevented any possibility that the SWKIs' Complaint could be amended to state a claim under either K.S.A. 66-154a or K.S.A. 66-1,205. (*See* SWKI Objection to Joint Stipulated Settlement Agreement, R. Vol. 3, 147-48); (*See also* Testimony of Kirk Heger and Jason Hitch, R. Vol. 3, 9, 36-43).

Prior to formally serving the Complaint on Anadarko, the Commission was required to accept the SWKIs' allegation that the KCC had jurisdiction to hear the Complaint as true. Upon being formally served the Complaint by the Commission, Anadarko was able to evaluate the merits of the Complaint; after its evaluation, Anadarko filed its Answer and Motion to Dismiss (R. Vol. 2, 58-158), in which it raised the issue of jurisdiction. Once the issue was raised by Anadarko, the Commission correctly determined that the SWKIs' Complaint failed to state a claim on which the Commission could act.

Assuming, for argument sake only, that the Commission incorrectly dismissed the SWKIs' Complaint without allowing amendment pursuant to K.A.R. 82-1-220(c), because the SWKIs could not amend their complaint to fall within the narrow confines of K.S.A. 66-154a or K.S.A. 66-1,205, such a dismissal did not prejudice the SWKIs, and, accordingly was a harmless error not sufficient to justify the reversal of the Commission's Orders. K.S.A. 77-612(e); *Farmland Industries, Inc. v. State Corp. Com'n of Kansas*, 24 Kan.App.2d 172, 175 (1997).

Likewise, the SWKIs' reliance on K.A.R. 82-1-204(d) (*See* App. Br. p. 17) is misplaced. K.A.R. 82-1-204(d) simply defines the term "Complainant," it does not, and cannot, independently grant the KCC jurisdiction to hear a complaint – such jurisdiction can only be found in the statutory mandates of the legislature. This fact, of course, is recognized in the regulation, itself. K.A.R. 82-1-204(d) defines a "Complainant" as "any party who complains to the commission of . . . (2) any other alleged wrong over which the commission may have jurisdiction." K.A.R. 82-1-204(d). Clearly, before deciding a complaint on its merits, the Commission must still have jurisdiction to do so. The mere fact that the SWKIs, arguably, fit the definition of "complainant" does not, in and of itself, grant the Commission jurisdiction to hear their complaint. The SWKIs might be complainants, but, as complainants, their Complaint failed to state a claim upon which the Commission could grant relief, and the Commission correctly dismissed their Complaint.

The SWKIs were on notice, beginning with Anadarko's initial filing – its Answer and Motion to Dismiss – that Anadarko believed the Complaint was jurisdictionally deficient. Pursuant to K.A.R. 82-1-219 (k) or K.A.R. 82-1-220 (d), the SWKIs could have voluntarily amended their Complaint at any time between Anadarko filing its Answer on October 7, 2013, and the KCC's Dismissal Order on January 15, 2015 - - a period of 15 months. However, as the

Commission stated, despite filing a "voluminous response" to Anadarko's brief on threshold issues, the SWKIs did not exercise that right. (R. Vol. 5, 227).

Ultimately, the Commission's Orders clearly followed statutory mandates, were not arbitrary and capricious, were supported by substantial competent evidence, and were consistent with its rules and regulations. Once the Commission correctly determined that the SWKIs had failed to meet the basic, statutorily mandated, threshold requirements necessary for a private party to maintain a complaint at the KCC, it correctly dismissed the Complaint for failing to state a claim upon which relief could be granted.

The burden of proving that the Commission's Orders were arbitrary and capricious falls on the SWKIs. However, rather than address the threshold issue of jurisdiction, which the Commission clearly ruled upon, the SWKIs continue to argue that the KCC – even without jurisdiction – should have considered the filed rate doctrine. In doing so, they failed to provide, either in their Brief filed with this Court, or in any arguments below, any concrete, meaningful evidence that the Commission's orders were unlawful. Accordingly, as demonstrated, the SWKIs have failed to sustain their burden of proof, and their requested relief should be denied.

III. The SWKIs' reliance on the filed rate doctrine is incorrect; it is not applicable to the SWKIs' Complaint.

Upon finding that it lacked jurisdiction to hear the SWKIs' Complaint, the KCC correctly found that it was unable to address the SWKIs' filed rate doctrine arguments. However, virtually all of the SWKIs' Brief filed with this Court, and a substantial portion of its arguments below, rely on the filed rate doctrine to support the SWKIs' allegation that they: (i) are entitled to a full refund, plus interest, of 26 years of natural gas and natural gas transportation; (ii) despite not having incurred any actual damage or injury. Further, in its Brief filed with this Court, the

SWKIs' have – inappropriately – requested relief based upon its incorrect reliance on the filed rate doctrine. Accordingly, Anadarko will, briefly, address the SWKIs' argument.

In *Sunflower Pipeline*, the Kansas Court of Appeals affirmed a KCC order that held that Sunflower, a natural gas utility, had violated K.S.A. 66-117. *Sunflower Pipeline Co. v. State Corp. Com'n*, 5 Kan.App.2d 715, 722 (1981). Sunflower was authorized by the KCC to provide its customers with irrigation gas service pursuant to a KCC approved tariff rate. *Id.* at 716. As the cost of natural gas rose, Sunflower entered into customer specific contracts at a rate greater than its single tariff rate. *Id.* Sunflower did not seek KCC approval to increase (i.e. change) its tariff rate, and did not file the new customer contracts that included the increased rates with the KCC. *Id.* A customer who had entered into a contract for the higher rate filed a complaint with the KCC. *Id.* Upon investigation, the Commission found that, by failing to file the new, changed rate for approval, Sunflower had failed to comply with K.S.A. 66-117, because it did not seek approval to increase its tariff rate prior to charging its customers the increased contract rate. *Id.* The KCC then ordered Sunflower to refund those amounts collected above the filed tariff rate, pursuant to the unfiled changed rate. *Id.*

The SWKIs' reliance on *Sunflower*, and the related filed rate doctrine, to support their claims for free gas is misplaced. *Sunflower* plainly deals with a violation of K.S.A. 66-117, which requires a utility to seek KCC approval prior to **changing** any rate, rule or practice relating to utility service. *See* K.S.A. 66-117(a). It clearly addresses a situation where a utility charged rates that were higher than the utility's Commission-approved tariff rate.

As recognized by Kansas courts in *Sunflower*, and as applied by federal courts, in its most basic form, the filed rate doctrine prohibits a public utility from charging a rate that is different than the rate "on file" with a public service commission. *Qwest Corp. v. AT&T Corp.*,

479 F.3d 1206, 1210 (10th Cir. 2007); *Sunflower Pipeline*, 5 Kan.App.2d at 719. The doctrine is primarily intended to prevent a utility from charging similarly situated customers, who are subject to the same tariff, different rates for identical services. *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998).

In the instant case, unlike in *Sunflower*, ANGC did not have a single authorized tariff rate. Rather, pursuant to ANGC's Limited Certificate, ANGC and its customers were required to privately negotiate all the rates, terms, and conditions for natural gas service. These agreements were then filed at the KCC for review and approval, subject to K.S.A. 66-131 (the "initial rates"). Once approved, the agreement would serve as a customer-specific tariff. If ANGC and its customer later agreed to modify the rate or terms contained in the initial agreement on file with the KCC, an amended agreement would have to be filed for KCC approval in accordance with K.S.A. 66-117(a) (the "changed rates"). In fact, ANGC and AESC **did not change** their rate for, a collective, 26 years (R. Vol. 2, 72).

Under the terms of ANGC's Limited Certificate, for the sake of argument only, if ANGC failed to file an initial gas sales agreement it would be in violation of K.S.A. 66-131 (the granting of initial rates). It would not have a KCC approved tariff, and it could be subject to a civil penalty, payable to the State Treasurer, by way of enforcement proceeding under K.S.A. 66-138. Anadarko would not, however, be in violation of K.S.A. 66-117(a), because no "changed rates" were involved. This critical distinction was recognized by the Commission when it approved the Stipulated Settlement Agreement in the Complaint Docket. In assessing a civil penalty against Anadarko, the Commission specifically found that, if the contracts were not filed (a finding the Commission did not make), such an omission would constitute a violation of K.S.A. 66-131 (Vol. 5, 111, 114) not a violation of K.S.A. 66-117(a).

The Agreements in question were filed with, and approved by, the KCC. (R. Vol. 2, 63, 64, 68). However, for the sake of argument only, even if they were not, the Commission would, by statute, be required to review the service provided and determine whether or not the service and rates were just and reasonable. (establish "initial rates"). (R. Vol. 5, 109-10, 226). Clearly the Commission considers a rate of "free" - which is the rate that the SWKIs are championing in their Complaint – to be unreasonable (R. Vol. 5, 226) ("[g]ranting the SWKIs' demand for a full refund of nearly twenty years of gas purchases would not result in just and reasonable rates").

The SWKIs' arguments fail even the most basic test of logic. The SWKIs allege that ANGC and AESC did not file and receive a KCC approved rate for sales to the SWKIs. If no Commission approved rate was obtained – as alleged by the SWKIs – Anadarko could not have charged a rate that is different from a rate on file with the Commission (K.S.A. 66-117(a)). Failing to file and receive a rate is wholly different than charging a rate that is different than a Commission approved rate. (K.S.A. 66-131).

The SWKIs' reliance on the filed rate doctrine is incorrect. The filed rate doctrine is entirely inapplicable to the facts of the instant case, and the SWKIs' requested relief based upon the filed rate doctrine must be denied.

Conclusion

The KCC Orders correctly interpreted and applied Kansas law, were not arbitrary and capricious, and fully addressed all issues that the Commission was required to address in order to properly dispose of the SWKIs' claims.

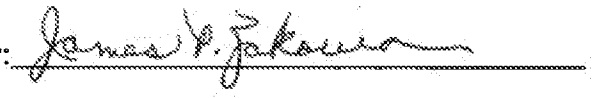
Despite candidly admitting that they were fully satisfied with the Agreements – and were in no way damaged or injured– and despite continuing to accept delivery of natural gas under the Gas Sales Agreements for, a collective, 26 years, without complaint, the SWKIs are now relying

on an wholly incorrect analysis of Kansas and Federal law to attempt to extract 26 years of natural gas and natural gas delivery entirely for free and entirely after the fact. Their arguments are legally incorrect and their requested relief is not supported by law or the evidence in the case.

Accordingly, Anadarko Natural Gas Company respectfully requests that this Court affirm the District Court's Memorandum Decision and Order denying the SWKIs' Petition for Judicial Review.

Respectfully submitted,

SMITHYMAN & ZAKOURA, CHARTERED

By: 

James P. Zakoura, #07644
Joseph L. McEvoy, #26964
Smithyman & Zakoura, Chartered
750 Commerce Plaza II
7400 West 110th Street
Overland Park, KS 66210-2362
Phone: (913) 661-9800
Fax: (913) 661-9863
Email: jim@smizak-law.com
joe@smizak-law.com

ATTORNEYS FOR ANADARKO NATURAL GAS COMPANY LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Intervenor Anadarko Natural Gas Company LLC was forwarded to all parties, in the United States Mail, postage prepaid, on this 21st day of April, 2017, as follows:

Frank A. Caro
Anne E. Callenbach
POLSINELLI PC
900 W. 48th Place, Suite 900
Kansas City, Missouri 64112
Telephone: (816) 753-1000
Facsimile: (816) 753-1536
Email: fcaro@polsinelli.com
acallenbach@polsinelli.com

Timothy J. Sear
POLSINELLI PC
6201 College Boulevard, Suite 500
Overland Park, Kansas 66211
Telephone: (913) 451-8788
Facsimile: (913) 451-6205
Email: tsear@polsinelli.com

Wayne R. Tate
TATE & KITZKE LLC
1024 S. Trindle St.
Hugoton, KS 67951
Telephone: (620) 544-2103
Facsimile: (620)544-2403
Email: wtate@pld.com

ATTORNEYS FOR PETITIONERS/APPELLANTS,
SWKI-SEWARD WEST CENTRAL, INC.
AND SWKI-STEVENS SOUTHEAST, INC.

Brian G. Fedotin
Deputy General Counsel & Chief Appellate Counsel
Kansas Corporation Commission
1500 SW Arrowhead Rd.
Topeka, Kansas 66604
Telephone: (785) 271-3105
Facsimile: (785) 271-3314
Email: b.fedotin@kcc.ks.gov

ATTORNEY FOR RESPONDENT/APPELLEE,
KANSAS CORPORATION COMMISSION

James P. Zakoura