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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 APPELLANTS

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

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AND SWKI-STEVENS SOUTHEAST, INC.

Oral Argument: 20 minutes

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NATURE OF THE CASE

This case presents the question of whether a Complaint alleging that entities acting as public utilities have collected rates on the sale of natural gas that have never been filed with or approved by the Kansas Corporation Commission establishes a prima facie case for Commission action requiring the Commission to investigate the Complaint and to order the entities acting as public utilities to refund the unapproved rates paid for natural gas.

STATEMENT OF ISSUES

ISSUE I: THE COMMISSION ERRED IN DISMISSING THE COMPLAINT AND DENYING THE PETITION FOR RECONSIDERATION AND THE DISTRICT COURT ERRED IN DENYING THE PETITION FOR REVIEW BECAUSE KANSAS STATUTES AND COMMISSION REGULATIONS AND THE FILED RATE DOCTRINE REQUIRE THE COMMISSION TO INVESTIGATE THE COMPLAINT AND ORDER REFUNDS WHERE A PUBLIC UTILITY CHARGES RATES THAT HAVE NEVER BEEN FILED WITH THE COMMISSION AND NEVER APPROVED BY THE COMMISSION

STATEMENT OF FACTS

In 2013, Intervenors Anadarko Natural Gas Company ("ANGC") and Black Hills/Kansas Gas Utility Company, LLC ("BHE") filed an Application with the Kansas Corporation Commission ("Commission") seeking approval of the transfers of certain ANGC Certificates of Public Convenience and Necessity and natural Gas Sales Agreements with respect to ANGC's natural gas utility business and operations to BHE. (R. 5, 844-856).

ANGC is a natural gas public utility subject to the jurisdiction of the Commission, having been issued a Certificate of Convenience and Necessity by the KCC in Docket No. 00-ANGG-218-COC. (R. 5, 846). ANGC's Certificate of Convenience and Necessity is conditioned on a requirement that, "In connection with providing gas service to future customers, [ANGC] shall file all Customer Specific Certificates and Contract Rate Schedules for review by and approval of the Commission consistent with applicable Kansas states and regulations." (R. 5, 846)(underlining in original).

The Appellants are farmer-owned not for profit utilities who utilize natural gas to power irrigation engines for agricultural purposes in southwest Kansas—and are two of the seven customers to whom ANGC claimed to have provided natural gas service on a contractual basis. (R. 4, 447).

After reviewing the ANGC and BHE Application, Commission Staff issued a Report and Recommendation. (R. 5, 844-856). In the Report, Commission Staff stated that the contracts between ANGC and Appellants that were proposed by ANGC to be transferred to BHE had never been filed with the Commission or approved by the Commission.

Commission Staff reported to the Commission that:

> In testimony filed in this Docket, ANGC characterizes the seven customers [Appellants are two of the seven "customers"] as public utility customers served under customer specific and contract specific limited Certificates of public

> Convenience and Necessity issued by the Commission. However, Staff concludes that only one of the customers listed in the Application [not one of the Appellants] can be identified as having a Commission Order approving the ANGC contract to provide utility service. Rather, it appears that ANGC failed to file the customer contracts [including the contracts with Complainants] for Commission approval as required by Commission Order in Docket 00-ANGG-218-COC.

Staff Report and Recommendation in Docket No. 13-BHCG-509-ACQ, July 11, 2013 (R 5, 845)(emphasis added).

The Commission Staff reported to the Commission that ANGC had, in fact, been granted a Certificate of Public Convenience and Necessity by the Commission to operate as a public utility in Kansas. (R. 5, 846). However, Commission Staff reported that under the ANGC Certificate of Public Convenience and Necessity, the Commission had ordered that ANGC "shall file all Customer Specific Certificates and Contract Rate Schedules for review by and approval of the Commission consistent with applicable Kansas statutes and regulations." (R. 5, 846)(underlining in original).

The Commission Staff reported to the Commission that ANGC had not filed the Gas Sales Agreements with Appellants with the Commission—and that ANGC had not obtained Commission approval of the Gas Sales Agreements. (R. 5, 845-846).

After the Appellants investigated and confirmed the findings of Commission Staff that Anadarko had been collecting charges from Appellants under the unfiled and unapproved Gas Sales Agreements, the Appellants filed a Complaint on August 27, 2013. (R. 2, 1-54). The Complaint asserted that the collection of unapproved rates constituted violations of Kansas law.

The Complaint referenced the July 11, 2013 Commission Staff Report and Recommendation in Docket No. 13-BHCG-509-ACQ (the "509 Docket") (Complaint, R. 2, 2-3) which noted that Commission Staff had not located Commission-approved contracts for sales of natural gas between ANGC and AESC and the Appellants.

The Complaint claimed that the Appellants had been charged rates significantly in excess of charges by ANGC to other ANGC customers. (R. 2, 5).

The Complaint requested that the Commission find that ANGC had violated Kansas law, including but not limited to K.S.A. 66-109 (forbidding a public utility from collecting any rate not specified in its schedules), K.S.A. 66-117 (requiring a public utility to file its rates with the Commission at least 30 days prior to the proposed effective date) and K.S.A. 66-1,203 (requiring every natural gas utility to publish and file with the Commission copies of all schedules of rates), by acting as a public utility and selling natural gas to customers without filed and approved rates from the Commission and demanded that the Commission take action and order that the unapproved rates paid by Appellants be refunded, and "for any such further relief that the Commission may deem just and appropriate." (R. 2, 1-7).

On October 7, 2013, ANGC filed a Motion to Dismiss the Complaint. (R. 2, 55-155).

On October 21, 2003, Appellants responded to the ANGC Motion to Dismiss. (R. 2, 156-176).

While the ANGC Motion to Dismiss was pending, the Commission Staff issued another Report and Recommendation on November 26, 2013 regarding the failure of ANGC to comply with Kansas law. (R. 3, 299-307)

The Commission Staff reported:

> On August 27, 2013, [Appellants] filed a complaint against Anadarko Natural Gas Company (ANGC) stating that ANGC's failure to file customer specific certificates and contract rate schedules with the Commission constituted violations of K.S.A. 66-109 and 66-117. . . The transactions in question span a period of 19 years and include at least three Anadarko "sister" companies as well as the [Appellants]. . . From our investigation into this Docket and from the discovery undertaken . . . Staff concludes ANGC did not file contracts between ANGC and the [Appellants] as required by Commission Order in Docket 00-ANGC-218-COC (00-218).

(R. 3, 299).

The Commission Staff specifically stated that the failure of ANGC to file the Gas Sales Agreements with Appellants was a violation of K.S.A. 66-117. (R. 3, 303-304).

On January 15, 2015, the Commission dismissed the Complaint for "failure to state a claim upon which relief may be granted." (R. 5, 748-765).

On January 30, 2015, Appellants filed a Petition for Reconsideration (R. 5, 766-793).

On February 26, 2015, the Commission issued its Order Denying the Petition for Reconsideration (R. 5, 864-874).

On March 27, 2015, the Appellants filed their Petition for Judicial Review in Stevens County District Court. ANGC moved to intervene and for change of venue. The Motions were granted and the Petition was transferred to the District Court of Shawnee County, Kansas, Case No. 2016-CV-93 (Hendricks, J.) (R. 1, 8-12).

On September 26, 2016, the District Court issued its Memorandum Decision and Order denying the Petition for Judicial Review. (R.1, 202-218).

On October 19, 2016 Appellants filed their Notice of Appeal. (R. 1, 219-220).

I. THE COMMISSION ERRED IN DISMISSING THE COMPLAINT AND DENYING THE PETITION FOR RECONSIDERATION AND THE DISTRICT COURT ERRED IN DENYING THE PETITION FOR REVIEW BECAUSE KANSAS STATUTES AND COMMISSION REGULATIONS AND THE FILED RATE DOCTRINE REQUIRE THE COMMISSION TO INVESTIGATE THE COMPLAINT AND ORDER REFUNDS WHERE A PUBLIC UTILITY CHARGES RATES THAT HAVE NEVER BEEN FILED WITH THE COMMISSION AND NEVER APPROVED BY THE COMMISSION

A. STANDARD OF REVIEW

This is an appeal of agency action, that being the decision of the Commission to dismiss the Complaint and deny the Petition for Reconsideration.

Challenges to agency action are reviewed pursuant to the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.*

Under K.S.A. 77-621(c),

> The court shall grant relief only if it determines any one or more of the following: . . . (3) the agency has not decided an issue requiring resolution; (4) the agency has erroneously interpreted or applied the law; (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure; . . . (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; (8) the agency action is otherwise unreasonable, arbitrary or capricious.

On appeal from the District Court to the Court of Appeals, the Court of Appeals must first determine whether the District Court applied the proper standard of review and then the Court of Appeals makes the same review of the administrative agency's action as does the District Court. *Connelly v. State*, 271 Kan. 944, 964, 26 P.3d 1246 (Kan. 2001). Appellants state that the District Court appears to have applied the correct standard of review (R.1, 205-208) but reached the wrong result. (R.1, 216-217)

There are no disputes of material fact in this case. When there is no dispute of fact, the Court has unlimited review of the statutory interpretation as no deference is given to the agency's interpretation of the statutes. *Douglas v. Ad Astra Info. Sys. L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723 (2013).

In this case, the decisions of the Commission dismissing the Complaint and denying the Petition for Reconsideration and the denial of the Petition for Review by the District Court must be reversed because the Commission did not decide an issue requiring resolution under Kansas law (K.S.A. 77-621(c)(3)), the Commission erroneously interpreted and applied Kansas law (K.S.A. 77-621(c)(4)), the Commission failed to follow procedures required by Kansas law

(K.S.A. 77-621(c)(5)), the Commission decision is not supported by substantial evidence (K.S.A. 77-621(c)(7)), and the Commission decision is otherwise unreasonable, arbitrary and capricious (K.S.A. 77-621(c)(8)).

B. THE FILED RATE DOCTRINE APPLIES WHEN A PUBLIC UTILITY CHARGES RATES NOT APPROVED BY THE REGULATORY COMMISSION

The primary error committed by the Commission and the District Court was the failure to apply the Filed Rate Doctrine to the facts that were presented to the Commission in the Complaint filed by Appellants.

As set out *supra* at 7-8, this dispute has its origins in a report by Commission Staff that, for a period of years, ANGC had been providing natural gas service to Appellants pursuant to private contracts that had never been filed with the Commission for approval and had never been approved by the Commission. The Commission Staff concluded that the failure to file and receive Commission approval for the contractual rates was a violation of Kansas law—K.S.A. 66-117—and Commission Orders in prior regulatory proceedings involving ANGC. (R. 3, 299-304).

The primary issue for this Court to decide is whether the Filed Rate Doctrine applies to the Complaint filed by Appellants with the Commission. If the Filed Rate Doctrine applies, the decisions of the Commission and of the District Court must be reversed. Both the Commission and the District Court erred when they determined that they were not required to decide this issue that required resolution. K.S.A. 77-621(c)(3). (R. 5, 872-873; R. 1, 216-217).

1. Origin of the Filed Rate Doctrine

The Filed Rate Doctrine prohibits a public utility from charging rates other than those filed with and approved by the appropriate regulatory agency. The Filed Rate Doctrine has its

origins in the Interstate Commerce Act, but state laws—including Kansas law—impose comparable requirements for state-regulated utilities.

As summarized by the United States Supreme Court, the Filed Rate Doctrine:

> [F]orbids a regulated utility to charge rates for its services other than those properly filed with the appropriate federal regulatory authority. . . The filed rate doctrine has its origins in [the United State Supreme] Court's cases interpreting the Interstate Commerce Act . . .and has been extended across the spectrum of regulated utilities. . . The considerations underlying the doctrine . . . are preservation of the agency's primary jurisdiction over the reasonableness of rates, and the need to insure that regulated companies charge only those rates which the agency has been made cognizant. . . Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively. . . In sum, the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission, and prevents the Commission itself from imposing a rate increase for gas already sold.

Arkansas Louisiana Gas Co., v. Hall, 453 U.S. 571, 577-578 (1981)(internal citations omitted)(emphasis added).

The fact that parties may have set their utility rates by private contract is of no import under the Filed Rate Doctrine because:

> [W]hen there is a conflict between the filed rate and the contract rate, the filed rate controls. . . This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress. . . Moreover, to permit parties to vary by private agreement the rates filed with the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate.

Arkansas Louisiana at 582 (emphasis added)(internal citations omitted).

The Filed Rate Doctrine has been repeatedly applied not only prevent a utility from increasing its rates without regulatory approval—but has also been applied where no rates were ever filed and approved.

In Michigan Electric Transmission Co. v. Midland Cogeneration Venture, 737 F.Supp.2d 715 (E.D.Mich. 2010), Michigan Electric, an electric public utility, sued Midland Cogeneration Venture, owner of a cogeneration facility, over certain contractual obligations. Midland defended the suit, claiming that although the obligations were freely contracted—that Michigan Electric was precluded from recovering under the contracts because Michigan Electric failed to file the contracts with the Federal Energy Regulatory Commission ("FERC") for regulatory approval. Michigan Electric at 728.

The federal District Court held that:

> The "filed rate" doctrine prohibits a public utility from charging for its services other than in compliance with the rates and conditions filed with the appropriate federal regulatory authority—in this case, FERC. . . [U]nder the filed rate doctrine, the Commission alone is empowered to make that judgment [as to the reasonableness of rates], and until it has done so, no rate other than the one on file may be charged. In granting this authority to FERC, "Congress withheld the authority to grant retroactive rate increases or to permit collection of a rate other than the one on file."
>
> The refusal to allow recovery when there are no approved rates or contractual terms is designed in part to safeguard the statutory authority of regulatory agencies. . .
>
> While the filed rate doctrine often arises in situations where the plaintiff seeks damages that are measured by some standard other than the charges approved by a regulator, the filed rated doctrine may also preclude a utility from seeking recovery when there is no contract on file. . .
>
> The filed rate doctrine not only prohibits public utilities from charging according to unapproved rates or contractual terms, it also prevents courts from awarding damages on unfiled terms. . .
>
> While dismissal of claims may appear inequitable at times, the U.S. Supreme Court has recognized that the filed rate doctrine "is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress."

Michigan Electric at 728-730 (internal citations omitted)(emphasis added).

Other federal courts have applied the Filed Rate Doctrine to unfiled rates. *BP W. Coast Prods., LLC v. F.E.R.C.*, 374 F.3d 1263, 1274 (D.C.Cir. 2004)(In applying the Filed Rate Doctrine, "the Commission may not grandfather unfiled rates on the assumption that if the rates had been filed, no challenge would have been brought. The Commission may not regulate rates as if they existed in a world that never was. It must take the rates as it finds them, and here, FERC found them unfiled."); *AT&T v. JMC Telecom*, 470 F.3d 525, 532 (3rd Cir. 2006)(Filed Rate Doctrine applies not just to rates that differ from a filed rate, but to a rate that was never filed by the utility); *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1193 (10th Cir. 2007)(Filed Rate Doctrine barred state law claims of utility that failed to file tariffs).

The Federal Energy Regulatory Commission has also applied the Filed Rate Doctrine to rates never filed with the Commission. In *Carolina Power & Light Co.*, 87 F.E.R.C. ¶ 61,083 (1999), the Federal Energy Regulatory Commission was presented with four service agreements that—like the agreements in the case at bar—had never been filed with the Federal Energy Regulatory Commission before Carolina Power & Light ("CP&L") began providing power to customers and collecting charges. CP&L argued that "administrative oversight caused it to neglect filing the four service agreements during a period of rapid growth in workload." *Carolina Power* at 61,354.

Similar to the arguments ANGC presented to the Commission and the District Court in the case at bar, CP&L argued the Filed Rate Doctrine should not be applied against it and that it should not be required to refund the charges collected under the never filed rates because:

> CP&L believes that the equities here weigh in its favor, considering that its customers bargained for the service agreements at arms-length, received the services at the agreed-upon prices, and, if [customers were] allowed to retain the

> refunds, would enjoy a windfall. While allowing that it may be reasonable to calculate a penalty for a deliberate wrongdoer based on the length of time out of compliance, CP&L avers that there is no logic in using the same formula for inadvertent mistakes that were corrected as soon as they were discovered.

Carolina Power at 61,355 (emphasis added).

The Federal Energy Regulatory Commission rejected the "windfall" argument, noting:

> CP&L makes every effort to characterize its refund payment as exorbitant. However, the mere fact that a refund is large does not necessarily make it excessive. The primary reason for the dollar amount of the refund in this case was the sizeable revenues collected and the extended period over which they were collected—a period throughout which CP&L remained in violation of the [Federal Power Act]. . .
>
> CP&L's failure to timely file its rate schedules did not constitute a minor infraction of the law; *utilities are statutorily required to have rates on file not only at the moment service commences but every day thereafter.* And without rates on file, the Commission cannot determine whether those rates are just, reasonable, and not unduly discriminatory or preferential.
>
> CP&L commenced service without filed rates and continued providing unauthorized service and charging unfiled rates for two years and more. . . Although the Commission eventually determined that the rates were not unjust or unreasonable, it is not true, as CP&L suggests, that no harm resulted from the delay. As we explained in *PacifiCorp*, when utilities fail to file rates in a timely manner, there is injury to "the Commission's ability to ensure that all rates for jurisdictional service (including those charged [CP&L's] other customers, present or potential) are just and reasonable *at the time they are being charged.*"

Carolina Power at 61,355-61,356 (internal citations omitted)(italics in original).

In response to the claims of CP&L that a refund of never approved rates would be inequitable, the Federal Energy Regulatory Commission stated:

> Here, we deal with a refund imposed because the company's rates were not on file in the first instance, thereby preventing any determination whether they were just and reasonable. . . the injury is in the first instance to the Commission's ability to enforce the prior notice requirement, and to ensure that rates are, as the [Federal Power Act] requires, just and reasonable, rather than merely to another party. . . there is no question in the instant case, where a jurisdictional public utility failed

> to timely file its rates, that imposing a refund promotes the purposes of the filed rate doctrine. . . CP&L's violation of the [Federal Power Act] does implicate the filed rate doctrine.

Carolina Power at 61356-57 (emphasis added).

All of these cases stand for the proposition that the Filed Rate Doctrine requires a refund of rates paid when no rate has been filed with and approved by the regulatory entity.

2. Kansas Courts Have "Not Wavered" in Applying the Filed Rate Doctrine

Kansas courts have recognized and applied the Filed Rate Doctrine.

> Kansas law recognizes the filed rate doctrine . . .which applies across a spectrum of industries and to a variety of claims. The doctrine has two goals: (1) to eliminate discrimination among ratepayers (the "non-discrimination" strand); and (2) to prevent courts from engaging in rate-making that is the province of regulatory agencies (the "non-justiciability" strand). . . Despite the sometimes harsh and seemingly merciless effect of this doctrine, courts have not wavered in its application.

Armour v. Transamerica Life Ins. Co., 2012 WL 234032, p. 3 (D.Kan. Jan. 25, 2012).

> [T]he filed rate doctrine establishes that a telecommunications carrier may charge no more and no less than its filed rate, and its customer may pay no more and no less than the filed rate. Consequently, where a carrier seeks payment based on a filed tariff, the customer may not avoid the tariff rate. This is true even if the customer and the carrier have validly executed a written agreement for a rate more favorable than that contained in the tariff. This is true even if the carrier induces the customer to sign the agreement through fraud and misrepresentation. Despite the sometimes harsh and seemingly merciless effect of this doctrine, courts have not wavered in [the Filed Rate Doctrine's] application.

MCI Tele. Corp. v. Value Call, 988 F.Supp. 1376, 1390 (D.Kan. 1997) (vacated March 6, 1998).

See also Amundson & Assoc. Art Studio Ltd. v. Nat'l Council on Comp. Ins. Inc., 26 Kan.App.2d 489, 498, 988 P.2d 1208 (Kan.Ct.App. 1999)(applied Filed Rate Doctrine to insurance rates to be approved by insurance commissioner).

3. The Kansas Court of Appeals Has Applied the Filed Rate Doctrine to Require Refunds of Unapproved Rates

Kansas has codified the Filed Rate Doctrine at K.S.A. 66-117 which requires that all public utility rates be filed and approved by the Commission, K.S.A. 66-109 which prohibits a public utility from charging a rate other than the rate on file with the Commission and K.S.A. 66-1,203 which requires that every natural gas utility doing business in Kansas publish and file its rates with the Commission.

This Court has repeatedly recognized the applicability of the Filed Rate Doctrine in Kansas utility rate law. *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 3 Kan.App.2d 683, 600 P.2d 794 (1979)("*Sunflower I*"); *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 5 Kan.App.2d 715, rev. denied 229 Kan. 671, 624 P.2d 466 (1981)("*Sunflower II*"); *Farmland Indust. v. Kansas Corporation Commission*, 29 Kan.App.2d 1031, 1039, 37 P.3d 640 (2001).

In *Sunflower I*, this Court summarized the power of the Commission.

> By legislative grant the KCC is given full power, authority and jurisdiction to supervise and control public utilities, and is empowered to do all things necessary and convenient for the exercise of such power and authority. K.S.A. 66-101. The KCC is vested with the authority to regulate affected utilities to insure reasonable rates and services to the public and to adopt reasonable and proper rules and regulations to govern its proceedings. Further, controlled utilities must publish and file with the KCC copies of all their schedules and rates, charges and classifications. K.S.A. 1978 Supp. 66-117. The KCC has the authority to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs and classifications of all rates, toll, fares, charges and all rules and regulations of such public utilities. K.S.A. 66-106 through 66-108.

Sunflower I at 685.

In S*unflower II*, this Court held that refunds are the appropriate remedy for the collection of rates not approved by the Commission and concluded that a "full refund should be ordered

when charges are not made pursuant to a rate legal at the time of the charge." *Sunflower II* at 721.

In *Sunflower II*, Sunflower Pipeline was selling irrigation gas to a group of farmers. Sunflower had a rate on file and approved by the Commission of 25¢ per Mcf. Without KCC filing or approval, Sunflower entered into contracts with customers for 65¢ per Mcf. One of the customers filed a Complaint with the Commission. The Commission issued an order to Sunflower to show cause why it should not be ordered to make refunds to customers for any unauthorized rates or charges collected. *Sunflower II* at 716.

After a hearing the Commission concluded that Sunflower had failed to comply with the provisions of K.S.A. 66-117 in that it did not file for changes in its charges with the Commission. Sunflower was, therefore, directed to refund to all retail customers the amount actually received by Sunflower over the previously approved rate of 25¢ per Mcf, plus interest at eight percent per annum. *Sunflower II* at 716.

On appeal to the Kansas Court of Appeals, Sunflower argued that ordering refunds was unreasonable because it would impair Sunflower's capital; that requiring Sunflower to only collect the approved rate of 25¢ per Mcf would cause Sunflower to sell actual gas at less than its cost; that the Commission in another case had approved as "reasonable" rates of 76¢ per Mcf (11¢ per Mcf more than Sunflower's unapproved rate); and that Sunflower's customers had voluntarily contracted for the unfiled rate. *Sunflower II* at 717.

This Court rejected all those arguments—holding that a full refund of all rates collected above the approved rate of 25¢ per Mcf was not only justified, but required, because the Commission could not allow the utility to keep any part of the unapproved rate, stating:

> The power of the KCC to order refunds for overcharges in violation of the act is implied from K.S.A. 66-101, which grants the state corporation commission "full

> power, authority and jurisdiction to supervise and control the public utilities . . . doing business in the state" and "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."

Sunflower II at 719.

> [P]artial refunds would amount to retroactive ratemaking by the commission. Sunflower, having previously failed to properly invoke commission jurisdiction to approve new rates, would have had the commission approve of new rates retrospectively by allowing Sunflower to retain some or all of the excess charges. Also, since we conclude the contracts for 65¢ per Mcf were void as against public policy, any less than a full restitution to the user-contractors would be depriving them of their property (that portion of the restitution of less than 40¢ per Mcf), without due process of law. This is because any restitution ordered in an amount less than 40¢ per Mcf would be depriving them of property to the extent that they paid at an illegal rate in excess of 25¢ per Mcf.

Sunflower II at 722 (emphasis added).

This Court also held that the fact that rates might have been paid voluntarily by the customer does not defeat a claim under the Filed Rate Doctrine.

> Whether the payments were voluntary in the case at bar is a question of fact that was not decided by the KCC, but such determination is not necessary herein because the right of the KCC to order refunds is not shown by Sunflower to be derivative from the rights of the irrigators [customers]. Rather, the right is derived from the implied power to enforce rate orders. The KCC would have power to make such orders of refunds regardless of whether the irrigators would be able to bring such an action in their own right.
>
> We conclude that K.S.A. 66-109 does not allow deviation from approved rates without filing with the KCC. Furthermore, partial refunds would amount to retroactive ratemaking by the commission. Sunflower, having previously failed to properly invoke commission jurisdiction to approve new rates, would have had the commission approve of new rates retrospectively by allowing Sunflower to retain some or all of the excess charges. Also, since we conclude the contract for 65 cents per Mcf were void as against public policy, any less than a full restitution to the user-contractors would be depriving them of their property (that portion of the restitution of less than 40 cents per Mcf) without due process of law.

Sunflower II at 722-23 (emphasis added).

This Court again applied the Filed Rate Doctrine in *Farmland Indust. v. Kansas Corporation Commission*, 29 Kan.App.2d 1031 (Kan.App. 2001). This Court summarized *Sunflower II* as holding that:

> Applying the "filed rate doctrine" implied from K.S.A. 66-108 (1980 Ensley)(now K.S.A. 66-101c), we held it was unlawful for the pipeline to charge in excess of the filed rates, even if those filed rates became unreasonably low after the tariff was filed. We also held the KCC had implied authority to order refunds under K.S.A. 66-101. And finally, we rejected the pipeline's claim that less than full restitution should be ordered on equitable grounds, reasoning that allowing the pipeline to refund less than 100% of the overcharges would constitute retroactive ratemaking.

Farmland Indust. at 1039 (internal citations omitted).

Summarizing these decisions of this Court, Kansas law requires the Commission to apply the Filed Rate Doctrine and requires it to order a "refund" to the customer of any rates paid by the customer to the public utility that were in excess of the filed and approved Commission rate—even if the charged rate was freely paid by the customer—even if the customer could not bring an action in their own right—even though the refund would cause the certificated public utility to sell at less than its cost—and could possibly result in the insolvency of the utility. *Sunflower II* at 723.

The Commission and the District Court erred when they determined that whether the Filed Rate Doctrine applied to the Complaint was not an issue requiring resolution. K.S.A. 77-621(c)(3).

C. THE COMMISSION AND DISTRICT COURT ERRONEOUSLY INTERPRETED AND APPLIED KANSAS LAW IN RULING THAT THE COMPLAINT DID NOT STATE A CLAIM FOR COMMISSION ACTION UNDER THE FILED RATE DOCTRINE

Having established that the Commission is required to enforce the Filed Rate Doctrine, the question turns to whether the Complaint filed by Appellants stated a claim for Commission action under the Filed Rate Doctrine.

As set forth in the Statement of Facts, Appellants learned that ANGC had not filed its contracts to sell natural gas to Appellants upon reading the Commission Staff Report. *Supra* at 6-7.

Commission Staff specifically stated that the "failure to file the [Gas Service Agreements] in question is a violation of K.S.A. 66-117." (R. 3, 303-304). Although not stated by Commission Staff, this Court has made clear that both K.S.A. 66-117 and K.S.A. 66-1,203 require that natural gas public utilities file all contracts with the Commission. *Kansas Pipeline Partnership v. State Corporation Commission*, 22 Kan.App.2d 410, 419 (1996)(rev. denied)(K.S.A. 66-117 applies to all public utilities; K.S.A. 66-1,203 applies only to natural gas public utilities).

This disclosure by Commission Staff caused Appellants to file the subject Complaint with the Commission—including claims that the unfiled rates violate K.S.A. 66-109, K.S.A. 66-117, K.S.A. 66-1,203 and the Filed Rate Doctrine. (R. 2, 1-7).

The Commission has promulgated regulations relating to "complaint proceedings." Under Commission regulations:

> (d) "Complainant" means any party who complains to the commission of either of the following: (1) Anything done or failed to be done in contravention or violation of either of the following: (A) The provisions of any statute or other delegated authority administered by the commission; or (B) any orders or regulations issued or promulgated by the commission under statute or delegated authority; or (2) any other alleged wrong over which the commission may have jurisdiction.

K.A.R. 82-1-204(d).

It is clear from the foregoing definition that Appellants are not limited to alleging rates are too high—Appellants may also allege violations of any statute, any orders, any regulations, and any other alleged wrong over which the Commission may have jurisdiction. There can be no

doubt that the Commission has jurisdiction to investigate complaints that ANGC violated K.S.A. 66-109, K.S.A. 66-117, K.S.A. 66-1,203 and the Commission's order granting ANGC's Certificate of Convenience and Necessity by charging unfiled and unapproved rates.

Commission regulations also provide that "[a]ny person may initiate a complaint proceeding by filing a formal complaint with the commission…" K.A.R. 82-1-220(a).

Commission regulations provide:

> Formal complaints shall be submitted in writing and shall comply with the requirements of these regulations. Formal complaints shall meet the following conditions: (1) Fully and completely advise each respondent and the commission as to the provisions of law or the regulations or orders of the commission that have been or are being violated by the acts or omissions complained of, or that will be violated by a continuance of acts or omissions; (2) set forth concisely and in plain language the facts complained by the complainant to constitute the violations; and (3) state the relief sought by the complainant.

K.A.R. 82-1-220(b).

No party claims that the Complaint did not comply with K.A.R. 82-1-220(b). The Complaint clearly stated what Commission Staff had already concluded—that ANGC had charged and collected natural gas rates that had never been filed and never been approved by the Commission and that ANGC had violated Kansas law. (R. 2, 1-7).

Upon receipt of the Complaint, the Commission regulations provide:

> (c) Commission action required upon the filing of a formal complaint. A formal complaint shall, as soon as practicable, be examined by the commission to ascertain whether or not the allegations, if true, would establish a prima facie case for action by the commission and whether or not the formal complaint conforms to these regulations. <u>If the commission determines that the formal complaint does not establish a prima facie case for commission action or does not conform to these regulations, the complainant or the complainant's attorney shall be notified of the defects, and opportunity shall be given to amend the formal complaint within a specified time.</u> If the formal complaint is not amended to correct the defects within the time specified by the commission, it shall be dismissed. If the commission determines that the formal complaint, either as originally filed or as amended, establishes a prima facie case for commission action and conforms to these regulations, each public utility, motor carrier, or common carrier

> complained of shall be served by the commission a true copy of the formal complaint, and the respondent or respondents shall either satisfy the matter complained of or file a written answer within 10 days.

K.A.R. 82-1-220(c)(emphasis added).

The Commission never gave notice that it had "determine[d] that the formal complaint does not establish a prima facie case for commission action or does not conform to these regulations."

The Commission never gave notice that there were any defects in the formal complaint nor did it provide Appellants an opportunity to amend the formal complaint.

The failure of the Commission to follow its own procedural regulations is reversible error under K.S.A. 77-621(c)(5).

It is clear that the Commission understood the Complaint. The Commission Staff summarized the Complaint as follows:

> In this complaint, the [Appellants] request the Commission find the contracts between ANGC or AESC and the [Appellants] are not valid and all rates charged by ANGC are subject to refund, with interest.

(R. 3, 304).

Even ANGC admits: "Under applicable Kansas law, a 'refund' may be paid when rates or charges differ from a KCC filed and approved public utility tariff rate." (R. 4, 504, para. 44)

In response to the Complaint, ANGC filed a Motion to Dismiss the Complaint claiming that the Gas Sales Agreements had been filed, that Appellants were contractually required to arbitrate any disputes, the Appellants claims were limited to payments made in the two years prior to the filing of the Complaint. (R. 2, 55-155).

Appellants responded to the ANGC Motion to Dismiss by explaining how the Complaint properly claimed that ANGC had violated K.S.A. 66-109, K.S.A. 66-117, K.S.A. 66-1,203 and

the Filed Rate Doctrine and that the Commission was required to investigate the Complaint and order refunds to customers if the Commission found that ANGC had collected unapproved rates. (R. 2, 156-176).

On January 15, 2015, the Commission entered its Order Granting the ANGC Motion to Dismiss. In summarizing its Order, the Commission stated:

> The Commission relied on both K.S.A. 66-154a and K.S.A. 66-1,205 to conclude that [Appellants] admission that their claim is based on a failure to file the agreements, and not an allegation that the rates in those agreements are unfair, unreasonable, or unjustly discriminatory or unduly preferential, and as a result, found their complaint fails to present a cause of action upon which relief can be granted by the Commission.

(R. 4, 864-874).

On February 26, 2015, the Commission issued its Order Denying the Petition for Reconsideration. In the Order, the Commission re-stated the bases for the dismissal of the Complaint and added that "since the Commission found that the Complaint did not meet the minimum threshold for the Commission to act upon, it was not necessary to address the filed rate doctrine." (R. 5, 872).

On January 30, 2015, Appellants filed their Petition for Review. (R. 1, 202-219).

Following briefing by the parties, on September 26, 2016, the District Court entered its Memorandum Decision and Order denying the Petition for Review. (R. 1, 202-219).

The District Court ruled that Appellants' Complaint did not state a claim upon which relief may be granted because K.S.A. 66-109 does not provide private entities the right to challenge Gas Sale Agreements in an agency action where "the rates had not been approved at the time services began due to the [Gas Sales Agreements] not being filed, the rates are not alleged to have been "unreasonable, unfair, unjust, unjustly discriminatory, or unduly preferential." (R. 1, 202-219).

The District Court did correctly find that K.S.A. 66-117 provides the process by which a public utility must follow to receive approval of a utility rate change—and that "entering into a new contract constitutes a proposed change." (R. 1, 213).

But the District Court then found that K.S.A. 66-117 "does not provide authority for a private entity to challenge a contract in an agency action" and "thus the claim is one upon which relief cannot be granted." (R. 1, 214).

Finally, the District Court held that none of the statutes cited by Appellants in the Complaint provide for a "private right of action" that could be brought by Appellants and that Appellants failed to state a claim upon which relief can be granted. (R. 1, 217). The District Court then dismissed the Petition for Review. (R. 1, 217).

The rulings of the Commission and of the District Court must be reversed because they erroneously interpreted and applied Kansas law (K.S.A. 77-621(c)(4))—and the rulings evidence a lack of understanding of a "complaint" filed under K.A.R. 82-1-204 et seq.

A "complaint" is not a civil suit in which a Plaintiff asserts a "private right of action." The complaint is not filed in a District Court under K.S.A. 60-203. A "complaint" does not seek a judgment in favor of the complainant.

Instead, a "complaint" triggers an obligation of the Commission "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)(emphasis added).

The Commission and the District Court failed to understand that Appellants were not attempting to bring a private right of action against ANGC. Instead, Appellants placed before the Commission allegations, that if found to be true, required the Commission to take action against ANGC.

The Commission and the District Court erred in not recognizing that–as in *Sunflower II*—a customer "complaint" alleging the charging of an unfiled rate—a violation of K.S.A. 66-117—compels action by the Commission. K.A.R. 82-1-220(c); *Sunflower II* at 716.

The Commission and the District Court erred in allowing the Commission to bypass its duty "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).

Instead of analyzing whether Appellants could pursue a claim directly against ANGC—the Commission and the District Court should have concluded that the Commission had jurisdiction over the Complaint, that Kansas law required the Commission to investigate the Complaint, and if the Commission found, like the Commission Staff, that the Gas Sales Agreements had not been filed with the Commission and approved by the Commission—that the Filed Rate Doctrine required the Commission to order refunds to the customers. *Sunflower II* at 722.

As noted above, the Filed Rate Doctrine requires that the Commission order refunds of unapproved rates regardless of whether Appellants could bring an action in their own right. *Sunflower II* at 722-23. The mistaken reliance of the Commission and the District Court on Appellants' claimed "failure to state a claim upon which relief can be granted" is erroneous and contrary to established Kansas case law. K.S.A. 77-621(c)(4).

D. THE COMMISSION AND DISTRICT COURT ERRED IN APPLYING K.S.A. 66-154a

At the outset, the Commission erred in finding that K.S.A. 66-154a had any applicability to this proceeding. Appellants did not assert a claim under K.S.A. 66-154a. (R. 2, 1-7).

K.S.A. 66-154a states 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."

No one claims in this proceeding that ANGC was a "common carrier" charging Appellants for "transportation" of natural gas or for the "hauling or storing of freight." ANGC was charging Appellants for the sale of natural gas.

K.S.A. 66-154a is inapplicable to this proceeding and all rulings of the Commission and District Court based upon that statute are contrary to Kansas law. K.S.A. 77-621(c)(4).

E. THE COMMISSION AND THE DISTRICT COURT ERRED IN APPLYING K.S.A. 66-1,205

The rulings of the Commission and the District Court relying on K.S.A. 66-1,205 also evidence a misunderstanding of Kansas law and the Filed Rate Doctrine.

Citing K.S.A. 66-1,205, the Commission held that Appellants could not state a claim upon which relief can be granted without an allegation that the unfiled and unapproved rates charged Appellants were "unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential." (R. 5, 748-765); (R. 4, 864-874).

The Commission held that if the Commission, under K.S.A. 66-1,205 found that the ANGC rates were "unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential, then the Commission is empowered, under K.S.A. 66-1,204 to establish rates that are just and reasonable." (R.5, 871). The Commission held that "[a]bsent a complaint that satisfies K.S.A. 66-1,205, the [Appellants] have no cause of action." (R. 5, 870).

This is a profound misreading of Kansas law and the Filed Rate Doctrine. The Commission's interpretation of K.S.A. 66-1,204 and K.S.A. 66-1,205 amounts to prohibited retroactive ratemaking. The Commission has no power, under K.S.A. 66-1,204, K.S.A. 66-1,205 or any other statute, to "establish rates that are just and reasonable" where there are no filed rates

or where the rate exceeds the filed rate. The Commission's "just and reasonable" determinations under K.S.A. 66-1,204 and K.S.A. 66-1,205 only apply on a prospective basis. This Court made clear in *Sunflower II* that retroactive ratemaking is prohibited—even where it appeared that the unfiled rate was lower than rates approved by the Commission in the same time period, *Sunflower II* at 717. Unapproved Kansas utility rates, even if agreed to by private contract, are "void as against public policy—and must be refunded regardless of any claim of "reasonableness of the unapproved rate or that the legal rate was "unreasonably low." *Sunflower II* at 722-23. The Commission and the courts are not permitted to review the "void" rates—under K.S.A. 66-1,204 or K.S.A. 66-1,205 or any other statute—and make a determination regarding "reasonableness"—as that would violate the rule against retroactive rulemaking. In other words, "the Commission may not regulate rates as if they existed in a world that never was. It must take the rates as it finds them. . ." *BP W. Coast Prods., LLC v. F.E.R.C.*, 374 F.3d 1263, 1274 (D.C.Cir. 2004)). In this case, the Commission Staff found the rates "unfiled" in violation of K.S.A. 66-109, K.S.A. 66-117 and K.S.A. 66-1,203 and, therefore, void.

The narrow focus of the Commission and the District Court on the first portion of K.S.A. 66-1,205 (addressing prospective "just and reasonable" rate determinations) also ignores the plain meaning of the full statute. In addition to permitting complaints based on the "unreasonableness" of rates, K.S.A. 66-1,205 permits complaints alleging that:

> any…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, inefficient, unduly insufficient or cannot be obtained. (emphasis added).

ANGC's failure to obtain prior approval of its rates is certainly an act "affecting or relating to any service performed or to be performed" and such failure is fundamentally "unfair" and "unjust" because it is illegal and contrary to public policy and, therefore, void.

Finally, the Complaint filed by Appellants fits squarely within the Commission's own regulation—K.A.R. 82-1-204(d) —in that Appellants complained that ANGC had charged rates "in contravention or violation of . . . (A) The provisions of any statute [K.S.A. 66-109, K.S.A. 66-117 and K.S.A. 66-1,203] . . . or (B) any orders . . .issued by the commission [Commission Order of May 19, 2000 requiring ANGC to file Contract Rate Schedules for review and approval of the Commission (R. 5, 846)] . . . or (2) any other alleged wrong over which the commission may have jurisdiction." K.A.R. 82-1-204(d)(emphasis added).

By failing to file its rates, ANGC denied the Commission the opportunity to determine that the ANGC rates were "reasonable." The Filed Rate Doctrine requires utilities to obtain prior approval of their rates—so that the "reasonableness" of their rates can be determined by the regulatory Commission prior to the rates coming into effect. When rates are never filed and never approved—the regulatory Commission has been denied its "primary jurisdiction over the reasonableness of rates, and the need to insure that regulated companies charge only those rates which the agency has been made cognizant." *Arkansas Louisiana Gas Co., v. Hall*, 453 U.S. 571, 577-578 (1981).

K.S.A. 66-136 also makes clear "void" rates cannot be retroactively approved under K.S.A. 66-1,204 or K.S.A. 66-1,205 because private contracts that contain unfiled rates are not "valid or of any force or effect whatsoever."

> No franchise or certificate of convenience and necessity granted a common carrier or public utility governed by the provisions of this act shall be assigned, transferred or leased, nor shall any contract or agreement with reference to or affecting such franchise or certificate of convenience and necessity or right

> thereunder be valid or of any force or effect whatsoever, unless the assignment, transfer, lease, contract or agreement shall have been approved by the Commission.

K.S.A. 66-136 (emphasis added).

The application of K.S.A. 66-136 to orders of the Commission is readily apparent in the Commission Order approving the ANGC Certificate of Public Convenience and Necessity which states that "[n]o service under any such contract shall be effective until such contract has been filed with and approved by the Kansas Corporation Commission). (R.5, 846). Certainly the customer specific Gas Sales Agreements are contracts affecting ANGC's Certificate of Public Convenience and necessity where ANGC holds only a customer specific.

Properly seen in this light, the Complaint filed by Appellants—alleging that ANGC had collected charges pursuant to rates never filed with the Commission and never approved by the Commission did "establish a prima facie case for commission action" (K.A.R. 82-1-220(c)) because such action by ANGC violates K.S.A. 66-109 (forbidding a public utility from collecting any rate not specified in its schedules), K.S.A. 66-117 (requiring a public utility to file its rates with the Commission), K.S.A. 66-1,203 (requiring every natural gas utility to publish and file with the Commission copies of all schedules of rates) and the Commission's order granting ANGC its Certificate of Convenience and Necessity.

The Commission was required to investigate the Complaint and if the Commission agrees with the findings of Commission Staff that the ANGC rates had never been filed with the Commission and never been approved by the Commission—then the Commission is legally required to order full refunds to the customers of ANGC. *Sunflower II* at 722.

The Commission and the District Court erroneously interpreted and applied Kansas law and their decisions must be reversed. K.S.A. 77-621(c)(4).

Although Appellants need not debunk each and every error of the District Court, as the Court of Appeals reviews the decision of the Commission, *supra* at 9, the District Court committed an error not committed by the Commission that is noteworthy.

The District Court found that K.S.A. 66-109 "permits the public utility to charge for rates other than the specified ones in the schedule so long as the customer agrees." (R. 1, 210).

This is a misstatement of K.S.A. 66-109. The exception in K.S.A. 66-109 for unfiled rates agreed to by the customer only applies "in cases of charity, emergency, festivity or public entertainment." No party claimed that this exception to K.S.A. 66-109 applies.

II. CONCLUSION

This Court must reverse the Orders of the Kansas Corporation Commission dismissing the Complaint and denying the Petition for Reconsideration and the Dismissal of the Petition for Review by the District Court, remand the Complaint to the Commission and Order that the Commission decide the issue of whether the Gas Sales Agreements between Appellants and ANGC were filed with the Commission—and approved by the Commission—and order that if the Commission determines that the Gas Sales Agreements were not filed and not approved by the Commission, that the Commission order that all amounts paid by Appellants be refunded, with interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was filed by the Court's electronic filing system on February 17, 2017, which served counsel of record, and a copy also was sent by Electronic Mail on February 17, 2017 to the following:

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