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CLERK OF THE APPELLATE COURT
CASE NUMBER: 116795

No. 16-116795

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SWKI-SEWARD WEST CENTRAL, INC.
AND SWKI-STEVENS SOUTHEAST, INC.,

Petitioner/Appellant,

v.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS,

Respondent/Appellant.

BRIEF OF APPELLEE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

APPEAL FROM THE DISTRICT COURT OF SHAWNEE COUNTY, KS
HONORABLE LARRY D. HENDRICKS, JUDGE
DISTRICT COURT CASE NO. 2016-CV-93

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April 21, 2017

Oral Argument: 20 minutes

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NATURE OF CASE

The central question presented in this appeal is should SWKI-Seward West Central, Inc. and SWKI-Stevens Southeast, Inc. (SWKIs) be permitted to receive fifteen years of free natural gas, worth tens of millions of dollars, from Anadarko Natural Gas Company (Anadarko).

STATEMENT OF THE ISSUES

I. The District Court gave proper weight to the SWKIs' Filed Rate Doctrine argument.

II. The District Court properly applied K.S.A. 66-154a and K.S.A. 66-1,205.

STATEMENT OF FACTS

On August 27, 2013, the SWKIs filed a Complaint alleging they overpaid Anadarko for natural gas from the Hugoton Residue Delivery System (HRDS), and therefore are entitled to a refund. (Vol. 2, 7-8).[1] In their Complaint, the SWKIs argued Anadarko's failure to file two contracts with the Commission for approval rendered the rates charged by Anadarko unlawful, void, and subject to refund with interest. (Vol. 2, 9). The two contracts in question are a Gas Sales Agreement between Anadarko Energy Services Company (AES) and SWKI-Stevens Southeast, Inc., dated July 1, 1998 (1998 GSA), and a Gas Sales Agreement between Anadarko and SWKI-Seward West Central, Inc., dated June 1, 2002 (2002 GSA). (Vol. 2, 5). Essentially, the SWKIs are seeking a full refund, plus interest, on all of the natural gas they purchased from Anadarko from 1998-2013.

[1] The citations to the record refer to the Record on Appeal prepared by the District Court of Shawnee County on March 2, 2017.

Through an earlier Commission proceeding, the 13-BHCG-509-ACQ Docket (509 Docket), the SWKIs became aware that Commission Staff (Staff) was unable to locate any Commission orders approving the gas sales contracts at issue in this appeal. (Vol. 4, 10). Upon learning Staff could not locate any orders approving the contracts, the SWKIs filed their Complaint. The SWKIs characterize this dispute as a simple one that does not allege any deficiency in performance. (Vol. 4, 10). Their Complaint is based solely on whether the gas sales contracts were filed with and approved by the Commission. (Vol. 4, 10).

On October 7, 2013, Anadarko filed its Motion to Dismiss and Answer to Complaint, arguing: (1) the Complaint fails to state a claim upon which relief can be granted; and (2) any dispute arising out of, or relating to, the 1998 GSA and 2002 GSA must go to arbitration. (Vol. 2, 70). Anadarko contends the 1998 GSA was filed with the Commission no later than August 3, 2000, and pursuant to K.S.A. 66-117 was deemed approved by operation of law thirty days later. (Vol. 2, 70-71). In support of its claim that the 1998 GSA had been filed no later than August 3, 2000, Anadarko referenced a transmittal letter reflecting the 1998 GSA was submitted to Staff. (Vol. 2, 70). In the 509 Docket, a Staff member testified, "they [the 1998 GSA] were filed with the Commission Staff as far as I could tell from the [transmittal] letter." (Vol. 2, 151-152). Similarly, Anadarko explained the 2002 GSA was filed with and approved by the Commission in 2002, and refiled in 2008 and 2013. (Vol. 2, 72).

On October 21, 2013, the SWKIs filed their Response to Anadarko's Motion to Dismiss. (Vol. 2, 159-223). The SWKIs characterized their response as a simple one -- based on Anadarko's inability to prove the disputed contracts were filed with and

approved by the Commission, the Complaint should proceed. (Vol. 2, 159). Under the SWKIs' theory of the case, failure to file the contracts with the Commission and obtain Commission approval renders the rates contained in the contract unlawful. (Vol. 2, 160). If the contractual rates are deemed unlawful, the SWKIs assert they are entitled to a full refund, with interest. (Vol. 2, 162).

On November 4, 2013, Anadarko filed its Reply to the SWKIs' Responses to Anadarko's Motion to Dismiss. (Vol. 3, 4-80). Anadarko explained it complied with the terms of the gas sales agreements, and that the SWKIs never sought to terminate the agreements, even though the agreements were renewable on a month-to-month basis. (Vol. 3, 5). Because the SWKIs' Complaint never alleged they were harmed, and instead admitted that Anadarko performed as called for under the gas sales agreements, (Vol. 3, 9) Anadarko claimed the SWKIs are attempting to retroactively extract free gas and free delivery of that gas for a fifteen year period. (Vol. 3, 12). Anadarko reiterated its position that the 1998 GSA was submitted to the Commission, citing the August 3, 2000 transmittal letter and a 2009 fax from another Staff member confirming forty-three Anadarko gas sales agreements, including the 1998 GSA, had been submitted to the Commission. (Vol. 3, 5, 7).

On November 26, 2013, Staff filed its Report and Recommendation, concluding the various Anadarko affiliates in Southwest Kansas often conducted business as if they were a single entity. (Vol. 3, 86). AES sold gas to end users, including the SWKIs, through pipelines operated by Anadarko. (Vol. 3, 86). Since AES was not certified as a public utility in Kansas, Staff recommended assessing a $55,000 civil penalty against AES for conducting business as a public utility since July 1, 1998, without a certificate of

convenience. (Vol. 3, 86-87). Staff's Report and Recommendation also recommended assessing a $41,100 civil penalty against Anadarko for failing to file the 2002 GSA. (Vol. 3, 87). Under the terms of a Stipulated Settlement Agreement, Anadarko and AES agreed to jointly pay $50,000 to settle the civil penalties recommended by Staff, while not admitting any violations. (Vol. 3, 111, 117). The SWKIs objected to the proposed Stipulated Settlement Agreement. (Vol. 3, 135-159).

On February 19, 2014, the parties filed briefs addressing threshold legal issues. (Vol. 4, 4-47, 52-153). In relevant part, Anadarko claimed the Commission lacked jurisdiction to hear this Complaint under K.S.A. 66-154a, based on the SWKIs' failure to allege they were charged an unfair, unjust, unreasonable, or unjustly discriminatory or unduly preferential rate. (Vol. 4, 66). The SWKIs cited K.S.A. 66-1,203, which requires every natural gas public utility doing business in Kansas to publish and file its rate schedules with the Commission to argue the Commission has jurisdiction to hear their Complaint. (Vol. 4, 16). On March 6, 2014, the parties filed reply briefs. (Vol. 4, 159-Vol. 5, 74). In their Reply Brief, the SWKIs argued K.S.A. 66-154a is inapplicable as it is limited to common carriers involved in the transportation of goods. (Vol. 4, 190).

On January 15, 2015, the Commission 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 (Order). (Vol. 5, 104-121). Based on the SWKIs' admission that their claim is based on a failure to file the agreements, rather than an allegation that the rates in those agreements are unfair, unjust, unreasonable, unjustly discriminatory, or unduly preferential, as required by K.S.A. 66-154a and K.S.A. 66-1,205, the Commission found the Complaint failed to present a cause

of action upon which relief can be granted. (Vol. 5, 109-111). While finding it lacked authority to alter the contractual obligations of the 1998 and 2002 GSAs, the Commission relied on its authority to levy fines or penalties for failure to comply with Commission orders, to approve the Stipulated Settlement Agreement, requiring Anadarko and AES to jointly pay $50,000 in civil penalties. (Vol. 5, 111, 114). In approving the Stipulated Settlement Agreement, the Commission incorporated the terms of the Stipulated Settlement Agreement into its Order. (Vol. 5, 114). Term 6(b) of the Stipulated Settlement Agreement declared Anadarko had either submitted the disputed contracts to the Commission or in the alternative, had been executed by the parties as the SWKIs and Anadarko had performed their contractual obligations. (Vol. 5, 116-117).

On January 30, 2015, the SWKIs filed their Petition for Reconsideration of the Order. (Vol. 5, 122-149). In essence, the SWKIs argue the Commission erred in failing to address K.S.A. 66-117, K.S.A. 66-1,203, and the Filed Rate Doctrine, resulting in the Order being unreasonable, arbitrary and capricious, and unsupported by substantial, competent evidence. (Vol. 5, 122-123). Specifically, the SWKIs sought retraction of the portion of the Order dismissing their Complaint with prejudice and a full evidentiary hearing on their Complaint. (Vol. 5, 123). The Petition for Reconsideration did not contest the portion of the Order approving the Stipulated Settlement Agreement.

On February 9, 2015, Anadarko filed its Response to the SWKIs' Petition for Reconsideration, explaining the Order correctly interpreted and applied K.S.A. 66-154a and K.S.A. 66-1,205 in dismissing the Complaint with prejudice as the SWKIs failed to allege the challenged GSAs were unfair, unjust, unreasonable, unjustly discriminatory, or unduly preferential. (Vol. 5, 165). On February 19, 2015, the SWKIs filed their Reply to

Anadarko's Response, claiming dismissal of their Complaint prior to gathering, reviewing and weighing any factual or evidentiary evidence demonstrates the Order is unreasonable, arbitrary and capricious. (Vol. 5, 182). The SWKIs' Reply accused the Commission of failing to give any weight to the Filed Rate Doctrine. (Vol. 5, 179). The SWKIs also argued the "Commission engaged in an unlawful procedure by relying upon K.S.A. 66-154a, K.S.A. 66-154c, and K.S.A. 66-1,205 in dismissing the complaint with prejudice." (Vol. 5, 179). On February 25, 2015, Anadarko filed its Sur-Reply. (Vol. 5, 212-218).

On February 26, 2015, the Commission denied the SWKIs' Petition for Reconsideration. (Vol. 5, 219-229). In denying the Petition for Reconsideration, the Commission reasoned that by filing the Complaint under K.S.A. 66-1,205, the SWKIs admit that K.S.A. 66-1,205 applies. (Vol. 5, 225). The Commission explained that absent a complaint that satisfies K.S.A. 66-1,205, the SWKIs have no cause of action as the Commission lacks jurisdiction to hear the Complaint. (Vol. 5, 225-226). Finding K.S.A. 66-1,205 dispositive on the issue of jurisdiction, the Commission concluded there was no need to address the Filed Rate Doctrine. (Vol. 5, 226).

On March 27, 2015, the SWKIs filed a Petition for Judicial Review in Stevens County, Kansas. (Vol. 1, 13-50). Upon Anadarko's Motion for Change of Venue, the District Court of Stevens County transferred this appeal to the District Court of Shawnee County. (Vol. 1, 7-12). On September 26, 2016, the District Court issued its Memorandum Decision and Order, denying the SWKI's Petition for Review. (Vol. 1, 202-218). The District Court concluded the SWKIs failed to state a claim upon which relief can be granted because: (1) they failed to allege the rates were "unreasonable,

unfair, unjust, unjustly discriminatory, or unduly preferential; (Vol. 1, 212); (2) as private entities, K.S.A. 66-117 does not provide them authority to challenge a contract (Vol. 1, 214); and (3) K.S.A. 66-1,203 does not create cause of action (Vol. 1, 215). This appeal follows.

ARGUMENT

STANDARD OF REVIEW

The exclusive remedy to review agency actions is the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* K.S.A. 66-118c; *Midwest Crane & Rigging, Inc. v. Kansas Corp. Comm'n*, 38 Kan. App. 2d 269, 271 (2007). K.S.A. 77-621(c) controls the standard of review for an agency decision, and in reviewing a district court determination, the appellate court determines whether the district court followed the requirements and restrictions placed upon it and reviews the agency action in the manner set forth for the district court in the statute. *Connelly v. State Highway Patrol*, 271 Kan. 944, 964 (2001). An appellate court's scope of review focuses on the facts as found by the Commission. *Kansas City Power & Light v. Kansas Corp. Comm'n*, 52 Kan. App. 2d 514, 519 (2016). Although the legislature's 2009 modification to the KJRA requires judicial review of all the evidence supporting and detracting from the agency's decision, nothing in the statute indicates the legislature intended to alter the traditional standards applicable in Commission decisions regarding public utility rates. *Id.*

Even though the legislature altered the court's scope of review under the Judicial Review Act, it has not altered the broad discretion previously delegated to the Commission. *Id.* at 521. The courts have also recognized the unique role of the Commission. *See id.* at 520. Based on the legislature vesting the Commission with broad

discretion in executing its functions, the courts "have no authority to substitute [their] judgment for that of the Commission." *Id.* A court may reverse or nullify a Commission order only when the decision is so wide of the mark as to be outside the realm of fair debate. *Kansas Indus. Consumers v. Kansas Corp. Comm'n,* 30 Kan. App. 2d 332, 336 (2002). The appellate court exercises the same statutorily limited review of an agency action as does the district court. *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 611 (2006), *quoting Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 245 (2003). Even when an appellate court reviews the Commission's decision in light of the record as a whole, it is not the court's responsibility to reweigh the evidence relied upon by the Commission. *Kansas City Power & Light*, 52 Kan. App. 2d at 520, *citing* K.S.A. 77–621(d) and *Mobil Expl. & Producing U.S. Inc. v. Kansas Corp. Comm'n,* 258 Kan. 796, 815 (1995). As the party challenging the legality of the Commission's orders, the SWKIs bear the burden of proof under K.S.A. 77-621(a)(1). *Citizens' Util. Ratepayer Bd. v. Kansas Corp. Comm'n*, 28 Kan. App. 2d 313, 315 (2000), *rev. denied* 271 Kan. 1035 (2001).

While the SWKIs' argument consists of multiple subparts, it essentially rests on whether the Filed Rate Doctrine applies to their Complaint. *See* App. Br., p. 7. The SWKIs purport "[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. The District Court concluded the actual substance of the SWKIs' allegations brought under K.S.A. 77-621(c)(5) was best reviewed under K.S.A. 77-621(c)(4). (Vol. 1, 207). By conceding "the District Court appears to have applied the correct standard of review," but claiming it reached the wrong result (*see* App. Br., p. 6), the SWKIs appear to be arguing the

District Court erroneously interpreted or applied the law. Accordingly, K.S.A. 77-621(c)(4) is the applicable standard of review. K.S.A. 77-621(c)(4) provides, "[t]he court shall grant relief only if it determines ... the agency has erroneously interpreted or applied the law." K.S.A. 77-621(c)(4). It is a question of law whether the factfinder correctly interpreted or applied the law. *Farmland Indus., Inc. v. Kansas Corp. Comm'n*, 25 Kan. App. 2d 849, 852 (1999). In addressing a question of law, an appellate court's review is unlimited. *Id.*

I. The District Court gave proper weight to the SWKIs' Filed Rate Doctrine argument.

The SWKIs' claim that both the Commission and District Court erred in deciding "whether the Filed Rate Doctrine applied to the Complaint was not an issue requiring resolution" (*See* App. Br., p. 16) ignores the Complaint was dismissed on jurisdictional grounds. The Commission elected not to address the Filed Rate Doctrine because it dismissed the Complaint on jurisdictional grounds. Absent jurisdiction, there is no authority to reach the merits of a case. *In re Marriage of Sandhu*, 41 Kan. App. 2d 975, 977 (2009). In its Order Denying the Petition for Reconsideration, the Commission found K.S.A. 66-1,205 dispositive on the issue of jurisdiction, and concluded there was no need to address the Filed Rate Doctrine. (Vol. 5, 226). When a motion to dismiss raises an issue concerning the legal sufficiency of a claim, dismissal is justified when a review of the complaint clearly demonstrates the complainant does not have a claim. *Grindsted Products, Inc. v. Kansas Corp. Comm'n*, 262 Kan. 294, 302 (1997). Since the Commission and District Court determined the SWKIs' Complaint did not meet the

statutory requirements of K.S.A. 66-154a or K.S.A. 66-1,205, there was no need to engage in a detailed review of the Filed Rate Doctrine.

As the cases the SWKIs cite in their own brief reveal, the Filed Rate Doctrine does not create a cause of action for them. The only Kansas case cited under the section "Kansas Courts Have 'Not Wavered' in Applying the Filed Rate Doctrine," (*see* App. Br., p. 12) *Amundson & Assoc. Art Studio, Ltd. v. National Council of Comp. Ins. Inc.*, 26 Kan. App. 2d 489 (1999), affirms the dismissal for failure to state a claim upon which relief may be granted, finding the claim is barred under the Filed Rate Doctrine. *Amundson* explains, "[t]he filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." *Id.* at 498. In other words, the Filed Rate Doctrine serves as a shield against judicial overreach, preventing a court from adjudicating the reasonable rate, rather than a check on agency discretion to determine just and reasonable rates. Applying *Amundson*, it is evident the Filed Rate Doctrine serves as a limitation on the courts, not the agency.

> A certain level of deference to an agency's expertise in performing the functions assigned by the legislature is not a new concept in Kansas. The court in *Southwestern Bell Tele. Co. v. State Corporation Commission*, 192 Kan. 39, 48-49, 386 P.2d 55 (1983), emphasized that courts are ill-equipped to second guess a rate regulator's determination of a reasonable rate.
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> * * * *
>
> Regardless of whether the filed rate doctrine is seen to protect the consumer or the competitor, it preserves the integrity of the agency's decision. ... [G]ranting of injunctive relief (the equivalent of a rate reduction) would undermine such rate regulatory schemes by allowing a jury or court to intrude upon the [agency's] authority to determine the reasonableness of filed rates.

Amundson, 26 Kan. App. 2d at 500-501. Ironically, the SWKIs are urging the Court to use the Filed Rate Doctrine to second guess the agency's determination and grant injunctive relief, in the form of a rate reduction. The SWKIs are urging the Court to turn the Filed Rate Doctrine on its head.

Similarly, *Armour v. Transamerica Life Ins. Co.*, 2012 WL 234032 (D. Kan. Jan. 25, 2012), an unpublished federal case relied on by the SWKIs, applied the Filed Rate Doctrine to dismiss a petition for failure to state a claim. *Id.* at *5. As *Armour* explains,

> [t]he [filed rate] 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).

Id. at *3. The SWKIs' reliance on the Filed Rate Doctrine runs afoul of both of the Doctrine's stated goals. First, giving the SWKIs fifteen years of free gas would create an unduly discriminatory rate, compared to the rates charged to Anadarko's other gas customers. Rather than eliminate discrimination among Anadarko's customers, the SWKIs would exacerbate the discrimination by using the Filed Rate Doctrine to gain an unfair advantage over Anadarko's other customers in the form of fifteen years of free gas. Second, giving the SWKIs free gas "would interfere with the [Commission's] ratemaking process, which violates the non-justiciability strand of the filed rate doctrine." *Id.* at *4. Essentially, the Court would be imposing a rate of zero for the fifteen years of the contract in violation of the non-justiciability strand of the Filed Rate Doctrine.

Both the Commission and District Court correctly interpreted the Filed Rate Doctrine and concluded it had no bearing on the SWKIs' Complaint. The SWKIs rely on *Sunflower Pipeline Co. v. Kansas Corp. Comm'n*, 5 Kan. App. 2d 715 (1981), and *Farmland Indus. v. Kansas Corp. Comm'n*, 29 Kan. App. 2d 1031 (2001), to argue the

Filed Rate Doctrine requires a utility to refund any rates paid "in excess of the filed and approved Commission rate." *See* App. Br., p. 16. *Sunflower Pipeline* involved a pipeline company that entered contracts with some of its customers at a rate substantially higher than the last authorized rate. *Sunflower Pipeline*, 5 Kan. App. 2d at 716. *Sunflower Pipeline* is readily distinguishable from the present controversy because, if as the SWKIs allege, the gas service contracts were never filed or approved, there are no rates in place. Without a last authorized rate, *Sunflower Pipeline* cannot apply. The District Court recognized this when it concluded, "[h]ere, no established rate exists and so ANGC and AESC were not over- or under-collecting or deviating from an established rate." (Vol. 1, 216).

The SWKIs have created a Catch-22; if the contracts were never filed, the Filed Rate Doctrine does not apply, as no established rate exists to be deviated from. And if the contracts were filed and deemed approved, the SWKIs have no basis to complain. Either way, the SWKIs are not entitled to relief. The nature of the contracts between the SWKIs and Anadarko create one more insurmountable obstacle for the SWKIs. Unlike Sunflower Pipeline, which was only authorized to charge a single rate to its irrigation customers, Anadarko supplies natural gas to its customers under a Commission-approved Limited Certificate. (Vol. 3, 14). Under its Limited Certificate, Anadarko is authorized to charge individual customers based on customer-specific, freely negotiated contracts. (Vol. 3, 14). Since Anadarko is authorized to charge different contract rates to its individual natural gas customers, those contractual rates result from free and open negotiations with the customers. In comparison, since the Commission authorized Sunflower Pipeline to charge its irrigation customers one rate for natural gas service,

Sunflower Pipeline could not negotiate a different rate with its customers. (Vol. 3, 14). Therefore, *Sunflower Pipeline* is not applicable to the present case.

The SWKIs' claim that the District Court erred by failing to consider the Filed Rate Doctrine ignores the District Court's finding that the SWKIs are not entitled to relief under K.S.A. 66-117. (Vol. 1, 214). The SWKIs allege "Kansas has codified the Filed Rate Doctrine at K.S.A. 66-117." App. Br., p. 13. In analyzing K.S.A. 66-117, the District Court found "[a]ll parties appear to agree on the applicability of K.S.A. 66-117 to the case at hand ... The parties differ on whether the statute provides Petitioners the right to challenge the GSA's in an agency action." (Vol 1, 213). The SWKIs do not challenge the District Court's conclusion that all the parties agree K.S.A. 66-117 applies to this case. (Vol. 1, 213). Nor do they challenge the District Court's findings that: (1) K.S.A. 66-117 does not provide a private entity the right to challenge a contract in an agency proceeding and (2) because the SWKIs have no right to challenge the Gas Sales Agreements under K.S.A. 66-117, they are not entitled to relief. (Vol. 1, 214). By not challenging those findings, the SWKIs have waived their ability to do so now. *State v. Reed,* 300 Kan. 494, 505 (2014) (An issue not briefed by the Appellant is deemed waived and abandoned).

In addition to addressing K.S.A. 66-117, the District Court reviewed K.S.A. 66-109 and K.S.A. 66-1,203, the other two statutes the SWKIs cited in their Complaint to allege they are entitled to a refund (*see* App. Br., p. 4), and concluded neither created a cause of action for the SWKIs. The District Court postulated, "the question that must be addressed before reaching the merits of the complaint is whether or not K.S.A. 66-109 provides Petitioners the right to challenge the GSA's in an agency action without alleging

the rates are 'unreasonable, unfair, unjust, unjustly discriminatory, or unduly preferential.'" (Vol. 1, 210). The District Court concluded K.S.A. 66-109 does not provide private entities like the SWKIs a right to challenge contracts in an agency action absent a claim of unfair rates. (Vol. 1, 210). The SWKIs do not challenge the District Court's finding that K.S.A. 66-109 does not afford them a cause of action. Again, by failing to brief the District Court's finding that the SWKIs cannot challenge the GSAs under K.S.A. 66-109, the SWKIs are precluded from doing so now. *Reed,* 300 Kan. at 505. Likewise, the SWKIs fail to challenge the District Court's finding that K.S.A. 66-1,203 only empowers the Commission to create rules and regulations, but does not create a cause of action. (Vol. 1, 215-216). Therefore, the SWKIs waived any argument on whether K.S.A. 66-1,203 provides them a cause of action. In finding none of the statutes that formed the basis for the SWKIs' underlying Complaint before the Commission, (including K.S.A. 66-117, which the SWKIs allege codifies the Filed Rate Doctrine), provided the SWKIs with a cause of action, the District Court gave the Filed Rate Doctrine the weight it deserved. Therefore, the Court should reject the SWKIs' argument that the Commission and District Court failed to properly apply the Filed Rate Doctrine.

II. The District Court properly applied K.S.A. 66-154a and K.S.A. 66-1,205.

The SWKIs appear to argue the Commission erred in applying K.S.A. 66-154a because the SWKIs did not assert a claim under K.S.A. 66-154a. *See* App. Br., p. 22. Accordingly, K.S.A. 77-621(c)(4) is the applicable standard of review. K.S.A. 77-621(c)(4) provides, "[t]he court shall grant relief only if it determines ... the agency has erroneously interpreted or applied the law." K.S.A. 77-621(c)(4). It is a question of law

whether the factfinder correctly interpreted or applied the law. *Farmland,* 25 Kan. App. 2d at 852. In addressing a question of law, an appellate court's review is unlimited. *Id.*

In relevant part, K.S.A. 66-154a provides:

> 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.

Pursuant to K.S.A. 66-154a, the Commission is authorized to investigate a complaint and to establish a reasonable and just rate or charge for the services rendered "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." K.S.A. 66-154a. The Commission reasoned that before it can investigate a complaint, the party seeking Commission action must file a complaint alleging an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted. (Vol. 5, 109). The Commission relied on the SWKIs' own pleadings to conclude the SWKIs did not allege an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted. (Vol. 5, 109-110). Specifically, in their Objection to the Joint Motion for Approval of Stipulated Settlement Agreement, the SWKIs characterized 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. The NPUs[2] have recognized that both parties performed their obligations pursuant to the agreement – that is not the issue here. Rather the NPUs assert that because the agreements were not filed with and approved by the Commission as required by Kansas law and the 218 Order, the rates contained in the agreements are void, unlawful, and subject to refund.

[2] The SWKIs referred to themselves as the NPUs.

(Vol. 3, 147-148). By admitting 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 rate, the SWKIs demonstrated they have no cause of action under K.S.A. 66-154a. (Vol. 5, 110). The Commission also explained that even if the Complaint had alleged an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted, claims for recovery of any payments made more than three years before the Complaint was filed would be time-barred under K.S.A. 66-154c. (Vol. 5, 110).

The best way to determine legislative intent is to rely on the plain and unambiguous language of the statute. *State v. Spencer Gifts, LLC*, 304 Kan. 755, 761 (2016). In relevant part, K.S.A. 66-154a provides, "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." K.S.A. 66-154a plainly and unambiguously demonstrates the Commission shall investigate complaints alleging "an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted." The SWKIs offer no authority to suggest K.S.A. 66-154a does not apply to complaints filed with the Commission. Nor do the SWKIs provide any authority suggesting the Commission is authorized to investigate a complaint that fails to allege "an unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential rate or charge has been exacted."

Instead, the SWKIs claim K.S.A. 66-154a is inapplicable because no one claims Anadarko is a "common carrier." *See* App. Br., p. 23. But the Commission found Anadarko qualifies as a common carrier. As the Commission explained in its Order,

> Common carriers are defined to include "all freight-line companies, equipment companies, pipe-line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state." [K.S.A. 66-105] As the operator of the HRDS pipeline, Anadarko qualifies as a common carrier. Black's Law Dictionary defines goods as, "[t]angible or movable personal property". Natural gas falls within the definition of goods. Therefore, contrary to the SWKIs' assertion, K.S.A. 66-154a applies, as the complaint is levied against a common carrier transporting goods.

(Vol. 5, 108). By not arguing Anadarko is not a common carrier in the District Court, the SWKIs have not preserved that issue for appeal. Even if the SWKIs had preserved the issue for appeal, K.S.A. 66-105's definition of "common carrier" covers Anadarko. Again, the SWKIs offer no reason for the Court to overlook the plain meaning of K.S.A. 66-105 and find Anadarko is not a common carrier as used in K.S.A. 66-154a. The failure to support a point with pertinent authority or show why it is sound absent supporting authority is treated as failing to brief the issue. *State v. Tague*, 296 Kan. 993, 1001 (2013). Even if ignoring the plain meaning of K.S.A. 66-105 were advisable, the SWKIs did not preserve this issue for appeal as they did not allege at the District Court level that the Commission erred in determining Anadarko qualified as a common carrier. *See* Vol. 1, 121.

Even if the Court were to ignore K.S.A. 66-105, rendering K.S.A. 66-154a inapplicable, K.S.A. 66-1,205 mandates dismissal of the Complaint. The Commission's Order explained, "[e]ven if K.S.A. 66-154a did not apply, K.S.A. 66-1,205 produces the

same result." (Vol. 5, 110). The Commission determined K.S.A. 66-1,205 applied because Anadarko is a natural gas public utility. (Vol. 5, 111). The District Court agreed, finding K.S.A. 66-1,203 does not create a general cause of action. (Vol. 1, 215). A cause of action could arise out of K.S.A. 66-1,204 if the rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential" or under K.S.A. 66-1,205, which permits the Commission to investigate a complaint alleging rates are "unjust, unreasonable, unjustly discriminatory or unduly preferential." (Vol. 1, 215). But the District Court correctly concluded neither K.S.A. 66-1,204 nor K.S.A. 66-1,205 is applicable because the SWKIs did not allege the rates were unfair. (Vol. 1, 215-216).

The SWKIs' sole stated objection to the District Court's interpretation of K.S.A. 66-1,204 and K.S.A. 66-1,205 is that it purportedly amounts to retroactive ratemaking. See App. Br., p. 23. Just as the SWKIs tried to turn the Filed Rate Doctrine on its head to limit the Commission's ability to determine rates, the SWKIs are trying to turn retroactive ratemaking on its head. "Retroactive ratemaking" describes the due process violation that occurs when a utility's legally approved "filed rates" are second guessed at a later date. *See Kansas Gas & Elec. Co. v. State Corp. Comm'n*, 14 Kan. App. 2d 527, 533 (1990). As the District Court concluded, "no established rate exists and so ANGC and AESC were not over- or under-collecting or deviating from an established rate." (Vol. 1, 216). The record is devoid of any evidence that the rates are unfair or unjust. It is undisputed that the contract rates were freely negotiated and despite the contracts being on a month-to-month basis, there is no record of the SWKIs ever seeking to renegotiate or terminate the contracts. The SWKIs freely admit that both parties performed as contemplated by the contracts. (Vol. 3, 147-148). Other than their presumption that the

contracts are invalid, the SWKIs are unable to identify any reason the rates are unfair or unjust.

Under the guise of retroactive ratemaking, the SWKIs urge the Court to second guess the rates they freely negotiated to obtain a full refund of fifteen years of gas purchases, plus interest. Ironically, if it granted a refund, the Court would be retroactively setting rates, effectively setting the SWKIs' rates at zero over a fifteen year period. Doing so would violate the Filed Rate Doctrine, which is designed in part "to prevent courts from engaging in rate-making that is the province of regulatory agencies (the 'non-justiciability' strand)." *Armour*, 2012 WL 234032, at *3; *see also Amundson*, 26 Kan. App. 2d at 500-501 ("granting of injunctive relief (the equivalent of a rate reduction) would undermine such rate regulatory schemes by allowing a jury or court to intrude upon the [agency's] authority to determine the reasonableness of filed rates"). The prohibition against retroactive ratemaking does not relieve the SWKIs from having to allege they were charged an unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rate.

The SWKIs have not and cannot allege they were charged an unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rate, as they suffered no harm. Therefore, they would be unjustly enriched if the Court awarded them fifteen years' worth of free gas. Even if the Complaint complied with K.S.A. 66-1,205 by alleging Anadarko charged or received an unreasonable, unfair, unjust or unjustly discriminatory or unduly preferential rate, the remedy is not a full refund. (Vol. 5, 111). Under K.S.A. 66-1,205, the Commission is empowered to establish rates that are just and reasonable. *See* K.S.A. 66-1,204. Likewise, the remedy under K.S.A. 66-154a is not a

full refund, rather it is the Commission determining a just and reasonable rate for the service rendered. (Vol. 5, 110). Since the SWKIs acknowledge "both parties performed their obligations pursuant to the agreement" (Vol. 3, 148), the freely negotiated rates in the gas service agreements are just and reasonable for the services rendered. Granting the SWKIs' demand for a full refund of fifteen years of gas purchases, plus interest would not result in just and reasonable rates. Rather, denying Anadarko any compensation for the natural gas it provided to the SWKIs from 1998-2013, would produce an unjustly discriminatory rate. (Vol. 5, 111). Therefore, there is no evidence to support the SWKIs' demand for a full refund.

The SWKIs 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. The [SWKIs] have recognized that both parties performed their obligations pursuant to the agreement." (Vol. 5, 109). Since by the SWKIs' own admission, they were not harmed by Anadarko's alleged failure to file the Gas Service Agreements, they would be unjustly enriched by a full refund. A full refund for their gas purchases from 1998-2013, would not constitute a reasonable or just rate.

Since their Complaint alleges Anadarko violated the law and a Commission order by failing to file the contracts, the proper remedy is for the Commission to sanction Anadarko. While the Commission found it lacked authority to alter the contractual obligations in the Gas Service Agreements, it levied a $50,000 fine against Anadarko for its failure to comply with Commission orders. (Vol. 5, 111-114).

The District Court correctly interpreted K.S.A. 66-154a and K.S.A. 66-1,205 to require a Complaint allege rates are unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential, to be actionable. Specifically, the District Court denied the SWKIs' Petition for Judicial Review finding none of the three statutes relied on by the SWKIs' provided a right to challenge the contracts at the Commission. (Vol. 1, 216).

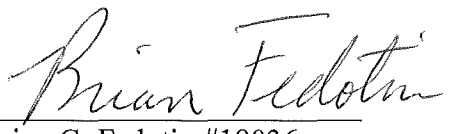
CONCLUSION

The SWKIs' Complaint sought a full refund of fifteen years' worth of gas and delivery charges, plus interest, but did not allege any deficiency in the quality of the gas or the services rendered by Anadarko. Instead, the SWKIs asserted the agreements were not filed with and approved by the Commission, rendering the contractual rates void, unlawful, and subject to refund.

Since the Complaint failed to allege the rates were unfair, unjust, unreasonable or unjustly discriminatory or unduly preferential, it did not satisfy either K.S.A. 66-154a or K.S.A. 66-1,205, leaving the Commission no choice but to dismiss their Complaint for failure to state a claim upon which relief may be granted. After reviewing K.S.A. 66-109, K.S.A. 66-117, and K.S.A. 66-1,203, the District Court correctly determined there is no right to challenge a contract in an agency proceeding without claiming the rates are unfair, unjust, unreasonable or unjustly unreasonable. The Filed Rate Doctrine does not create a cause of action and is inapplicable to the disputed contracts. If anything, the Filed Rate Doctrine bars the relief sought by the SWKIs.

WHEREFORE, for the reasons stated above, the Commission respectfully requests the Court affirm the District Court's denial of the SWKIs' Petition for Judicial Review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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