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CASE NUMBER: 116795

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,

REPLY 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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I. ANADARKO AND THE COMMISSION CANNOT GET THE FACTS STRAIGHT REGARDING WHETHER THE GAS SALES AGREEMENTS WERE FILED WITH THE COMMISSION.

The Complaint of Appellants is based on the simple fact that Commission Staff issued a Report and Recommendation stating that the subject Gas Sales Agreements had never been filed with the Commission and approved by the Commission. (R. 5, 845). The Commission Staff specifically stated that the failure of ANGC to file the Gas Sales Agreements was a violation of K.S.A. 66-117 (R. 3, 303-304).

Now ANGC and the Commission make a new argument that perhaps the Gas Sales Agreements had been filed. Appellants are entitled to rebut this claim. *Supreme Court Rule 6.05*.

Without claiming that Appellants' Statement of Facts is incorrect, *Supreme Court Rule 6.03(a)(3)*, ANGC asserts in its Statement of Facts that it did file the Gas Service Agreements with the Commission. *ANGC Brief* at 2, 22. The Commission hedges its bet—arguing in the alternative—"if the contracts were never filed . . .And if the contracts were filed and deemed approved . . ." *Commission Brief* at 12.

Which is it? Did Anadarko file any contracts with the Commission and, if any of the contracts were filed with the Commission, were any of the Anadarko contracts approved by the Commission? The Commission sidestepped these important questions and improperly dismissed the Complaint.

This Court cannot sidestep those issues. This Court must reverse the dismissal of the Complaint and remand this case to the Commission to make a finding of fact as to whether the Anadarko contracts were filed for approval with the Commission, and if the

Commission determines that the Anadarko contracts were filed, then the Commission must be directed to make a finding of fact as to whether the Anadarko contracts were approved by the Commission.

If the Commission determines that it did not approve the Anadarko contracts, then the Commission must be instructed to follow the "Filed Rate Doctrine" and the *Sunflower* decisions and order refunds of all amounts paid under the "rates that were not legal at the time of the charge." *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas,* 5 Kan.App.2d 715, 721, rev. denied 229 Kan. 671 (1981)(*Sunflower II).*

II. THE COMMISSION DOES HAVE JURISDICTION OVER THE ENTIRE COMPLAINT—AND THE POWER TO LEVY FINES AND ORDER REFUNDS.

A new matter is argued by ANGC and Commission regarding the "jurisdiction" or "power" to decide Appellants' Complaint. The Commission and Anadarko assert that the Commission—in Docket No. 14-ANGG-119-COM—had the jurisdiction and power "to levy fines or penalties for failure to comply with Commission orders" but lacked the "jurisdiction" and "power" to order refunds of unfiled and unapproved rates. *Commission Brief* at 5; *ANGC Brief* at 13.

Appellants are entitled to rebut that new matter. *Supreme Court Rule 6.05.*

Neither the Commission nor Anadarko have any explanation how the Commission had sufficient "jurisdiction" or "power" to levy fines against Anadarko for failing to comply with Kansas law—but that the Commission lacked the "jurisdiction" or "power" to enforce the Filed Rate Doctrine. Since the Commission had the "jurisdiction" and "power" to assess a civil penalty for AESC conducting a business of a public utility

without first obtaining Commission authority and had the "jurisdiction" and "power" to assess fines and penalties against ANGC for failing to file the Gas Sales Agreements—then the Commission could not have lacked "jurisdiction" and "power" to exercise all its powers—including its obligations and powers under the Filed Rate Doctrine—and order refunds of the illegal rates.

These fines and penalties were levied against the Anadarko entities in the Complaint proceeding filed by Appellants—Docket No. 14-ANGG-119-Con—not in a separate docket. Absent the Complaint filed by Appellants, there is no indication that the Commission would have taken any action against Anadarko. ANGC has never contended that the Commission had no jurisdiction to levy such penalties within the Complaint proceeding filed by Appellants. Arguing that the Complaint that triggered the penalties must be dismissed on jurisdictional grounds fails the most basic tests of logic. If the Commission had jurisdiction to penalize Anadarko for failing to file the Gas Sales Agreements, it certainly had the jurisdiction to order refunds for collecting unfiled, unapproved rates pursuant to the same Gas Sales Agreements.

Finally, the levy of fines is not dispositive of whether the Commission is required to also order refunds of the illegal charges. Both the Commission and Anadarko agree that the Commission Settlement specifically carved out and did not settle any claims that "the rates charged by ANGC were unlawful, void, and/or subject to refund with interest." (Vol. 3, 385, 386; Vol. 5, 743).

III. THE COMMISSION IS PROHIBITED BY LAW FROM ENGAGING IN "RETROACTIVE RATEMAKING"

The Commission argues, for the first time, that the rule against "retroactive ratemaking" applies only to courts ("the filed rate doctrine serves as a limitation on the courts, not the agency." *Commission Brief* at 10).

Appellants are entitled to rebut that claim. *Supreme Court Rule 6.05.*

Sunflower I made it clear that the Commission "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." *Sunflower Pipeline Co. v. The State Corporation Commission of the State of Kansas*, 3 Kan.App.2d 683, 685 (1979)(*Sunflower I).*

Sunflower II made clear that refunds are the appropriate remedy for the collection of rates not approved by the Commission. *Sunflower II* at 716.

The fact that application of the Filed Rate Doctrine results in reduced charges for natural gas or even "free" natural gas is without consequence because 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.

The fact that Appellants contracted for the exact rate charged by ANGC is without consequence—because ANGC's authority to negotiate contracts with individual customers is expressly conditioned on a requirement to file those negotiated contracts for approval by the Commission and unapproved rates are "void as against public policy." R. 5, 846; *Sunflower II* at 722-723.

The Commission's claim that the Commission is entitled to engage in "retroactive ratemaking" conflicts with the holding of *Sunflower II* that "K.S.A. 66-109 does not allow deviation from approved rates without filing with the KCC. . . partial refunds would amount to retroactive ratemaking by the commission. . . since we conclude the contracts . . were void as against public policy, any less than a full restitution to the user-contractor would be depriving them of their property . . . without due process of law." *Sunflower II* at 722-723 (emphasis added).

In support of its of its claim that "the filed rate doctrine serves as a limitation on the courts, not the agency," the Commission profoundly misinterprets two cases cited by Appellants: *Armour v. Transamerica Life Ins. Co.*, 2012 WL 234032 (D. Kan. Jan. 25, 2012) and *Amundson & Assoc. Art Studio Ltd. v. Nat'l Council on Comp. Ins. Inc.*, 26 Kan.App.2d 489, 988 P.2d 1208 (Kan.Ct.App. 1999). *Commission Brief* at 10-11.

Neither Armour nor Amundson involved or approved "retroactive ratemaking" by the regulatory agency. In both *Armour* and *Amundson*, the insurance companies filed their rates for approval by the Kansas Insurance Department *before* they began charging their customers. *Armour*, 2012 WL 234032 at p. 2; *Amundson*, 26 Kan.App.2d at 491. By contrast, ANGC never filed its rates with the Commission. Both *Armour* and *Amundson* affirmed that one goal of the Filed Rate Doctrine is to prevent courts from engaging in rate-making that is the province of regulatory agencies. *Armour,* 2012WL at 234032 at 3; *Amundson,* 26 Kan.App.2d at 501.

The other goal of the Filed Rate Doctrine, which is directly applicable to this case, is "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). When a regulated company fails to make the agency cognizant of its rates, the remedy is a full refund. *Sunflower II* at 722-23; *Farmland Indust.* at 1039. Issuing a refund does not "exacerbate" rate discrimination, as claimed by the Commission (*Commission Brief* at 11) but prevents rate discrimination by enforcing the requirement to file rates. It is common sense that "without rates on file, the Commission cannot determine whether those rates are just, reasonable, and not unduly discriminatory." *Carolina Power & Light Co.*, 87 F.E.R.C. ¶ 61,083, 61,356 (1999).

In fact, assessing penalties at a fraction of the refund liability after the public utility has been charging those illegal rates for fifteen years—amounts to nothing less than impermissible "retroactive ratemaking" by the Commission. In effect, the Commission orders a "partial refund" (retroactively approving a rate of the illegal rate less the penalty) of the illegal rates—and then keeps the "partial refund" for the benefit of the Commission instead of refunding the illegal rates to the customer.

This sort of prohibited "retroactive ratemaking' by the Commission cannot stand. *Sunflower* II at 722 ("[P]artial refunds would amount to retroactive ratemaking by the commission").

CONCLUSION

This Count must reverse the Orders of the Kansas Corporation Commission dismissing the Complaint and Denying the Motion for Reconsideration and direct that the Commission decide the issue of fact as to whether the Gas Sales Agreements between Appellants and ANGC and AESC were filed with the Commission—and approved by the

Commission—and order that if the Commission determines that the Gas Sales Agreements were not approved by the Commission, that the Commission order that all amounts paid by Appellants be refunded.

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 May 16, 2017, which served counsel of record, and a copy also was sent by Electronic Mail on May 16, 2017 to the following:

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