

176 P.3d 250, 2008 WL 400222 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition
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H(Pursuant to **Kansas** Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published **Kansas** appellate court opinion.)

Court of Appeals of **Kansas**.

KANSAS INDUSTRIAL CONSUMERS GROUP, INC., Hawker Beechcraft Corporation (Successor to Raytheon Aircraft Company), Cessna Aircraft Company, Buzzi Unicem USA, Goodyear Tire & Rubber Company, Coffeyville Resources Refining & Marketing, LLC, Spirit Aerosystems, Inc., Protectionone, Inc., and the **Kansas** Hospital Association, Petitioners/Appellants,

v.

THE STATE CORPORATION COMMISSION of the State of **Kansas**, Respondent/Appellee.
No. 99,415.

Feb. 11, 2008.

West KeySummary

Electricity 145 ↪ 11.5(1)

145 Electricity

145k11.5 Discrimination and Overcharge
145k11.5(1) k. In General. [Most Cited Cases](#)

Gas 190 ↪ 14.6

190 Gas

190k14 Charges

190k14.6 k. Payment, Collection, and Recovery Back. [Most Cited Cases](#)
 Customer failed to show that electrical and gas corporation's bills were erroneous at the time they were issued. Corporation's tariff permitted refunds rather than credits only when customers were erroneously billed. The charges were legally collected under the tariff as it existed at the time the bills were issued. The Commission did not err or abuse its discretion in rejecting customer's claim that its members were entitled to refund checks rather than offsets against their bills.

Appeal from the **Kansas** Corporation Commission. Opinion filed February 11, 2008. Affirmed.

James P. Zakoura and **Arthur E. Rhodes**, of **Smithyman & Zakoura, Chartered**, of Overland Park, for appellants.

Dana A. Bradbury, litigation counsel, and **Martha J. Coffman**, chief advisory counsel, of **Kansas** Corporation Commission, of Topeka, for appellee.

Martin J. Bregman and **Cathryn J. Dinges**, of Westar Energy, Inc. and **Kansas** Gas and Electric Company, of Topeka, for intervenors Westar Energy, Inc. and **Kansas** Gas and Electric Company.

Niki Christopher, of Citizens' Utility Ratepayer Board, of Topeka, for intervenor Citizens' Utility Ratepayer Board.

Before **CAPLINGER**, P.J., **GREEN** and **MALONE**, J.J.

MEMORANDUM OPINION

PER CURIAM.

*1 The **Kansas Industrial** Consumers Group, Inc. (KIC), representing various large commercial and **industrial** consumers of electricity, collectively and individually appeal from an order of the **Kansas** Corporation Commission (Commission) in a rate case filed by Westar Energy, Inc. and **Kansas** Gas & Electric Company (collectively Westar). The Commission issued the challenged order following a remand after this court reversed portions of the Commission's prior orders.

KIC raises two primary issues in this appeal of the Commission's order on remand. First, it contends the Commission's order permitting Westar to recover its transmission-related expenses through a transmission service charge (TSC) violated [K.S.A.2005 Supp. 66-1237](#). Further, it contends the Commission erred in refusing to permit KIC members to receive a refund check rather than a refund credit for transmission delivery charges (TDC) improperly imposed by Wes-

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tar. Westar and Citizens' Utility Ratepayer Board (CURB) have intervened in this appeal.

KIC is one of three parties which have filed a petition for judicial review of the Commission's final order after remand. Unified School District No. 259 also filed a petition for judicial review of that final order and raised several issues, including the first issue raised by KIC in this appeal.

On this date, we have filed an opinion in *Unified School District No. 259 v. Kansas Corporation Comm'n*, No. 07-99414, unpublished opinion filed February 11, 2008. In that opinion, we affirmed the Commission's decision to permit Westar to recover its transmission-related expenses through a TSC. We incorporate by reference the opinion filed in that related case, and we adopt its holding and reasoning as applied to the KIC's petition for judicial review.

However, KIC also raises an additional issue in this appeal. This issue concerns TDC charges collected by Westar based on tariffs issued after the initial Commission order in this docket, which permitted unbundling of TDC charges pursuant to [K.S.A.2005 Supp. 66-1237](#). This court reversed the TDC charges and remanded to the Commission in *Kansas Industrial Consumers Group, Inc. v. Kansas Corporation Comm'n*, 36 Kan.App.2d 83, 98-104, 138 P.3d 338, rev. denied 282 Kan. 790 (2006), finding the TDC charges to be contrary to the statutory provisions of [K.S.A.2005 Supp. 66-1237\(a\)](#).

KIC now contends the Commission erred following remand by permitting Westar to offset the refunds for TDC overcharges in its customer bill. Instead, KIC argues the Commission was required to honor KIC members' requests to be issued separate refund checks.

In its initial order on this issue, the Commission rejected KIC's request based upon KIC's failure to cite tariff language mandating refund checks. The Commission further concluded it was not good policy to treat KIC's members different than other customers receiving refunds and that this treatment would only increase Westar's refund costs.

On reconsideration, KIC cited to Section 4.05.09 of Westar's tariff to support its claim to a refund:

***2** “*Correction of Erroneous Bills:* In the event of an error in billing, Company shall issue a corrected bill.... Any amounts paid by customer on the erroneous bill shall be shown as a credit on the corrected bill. However, if the amount is greater than the amount specified in Section 12.03, *Credit Due Amount*, and customer so requests, the amount will be refunded.”

The Commission considered and rejected application of this tariff, reasoning that the original bills containing the TDC charge were not “erroneous.” Rather, the Commission found the charges were legally collected under the tariff as it existed at the time the bills were issued.

“Tariffs contain those terms and conditions which govern the relationship between a utility and its customers. Tariffs duly filed with the regulatory agency are generally binding on both the utility and its customers. [Citation omitted.] Legally established tariffs are construed in the same manner as statutes. [Citation omitted.] And the interpretation of a ‘statute’ by an agency charged with responsibility of enforcing the ‘statute’ is entitled to judicial deference.” [Citation omitted.] *Farmland Industries, Inc. v. Kansas Corporation Comm'n*, 29 Kan.App.2d 1031, 1043, 37 P.3d 640 (2001), rev. denied 274 Kan. 1111 (2002).

The Commission interpreted Section 4.05.09 of Westar's tariff to permit refunds rather than credits only when customers were erroneously billed-*i.e.*, the bills were incorrect at the time they were issued. Here, the TDC charges were collected based on tariffs issued after the initial Commission order, but before this court's rulings. Therefore, the bills were accurate at the time they were issued; the TDC charges became unlawful only after this court's opinion was issued.

It is not unreasonable to distinguish between rates that are erroneous and those subsequently determined unlawful. *Cf. Farmland Industries, Inc.*, 29 Kan.App.2d at 1040, 37 P.3d 640 (discussing propriety of issuing refunds to current customers rather than to customers who may have paid charges in prior years; noting that original customers' charges were lawful under the then-existing tariff and charges did not become unlawful until struck down years

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later in courts).

The Commission's interpretation of the tariff is reasonable and entitled to deference. Because KIC has failed to show that Westar's bills were erroneous at the time they were issued, the Commission did not err or abuse its discretion in rejecting KIC's claims that its members were entitled to refund checks rather than offsets against their bills.

Affirmed.

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