

MEMORANDUM

**TO: LEO HAYNOS
KANSAS CORPORATION COMMISSION**

FROM: DAVID PIERCE
1

**SUBJECT: IMPACT OF “RIGHT-OF-WAY” AGREEMENTS ON GAS
SUPPLY OBLIGATIONS**

DATE: 6 SEPTEMBER 2005

Leo:

I have reviewed the documents you provided that have been used to convey easements to companies constructing and maintaining pipelines in the Hugoton Field. The comments I am making are general and will not focus on any particular individual’s documents since it is likely that even the “form” documents have often been subject to negotiation and modification.

I have sought to respond to three questions: (1) What is the obligation to provide gas? (2) Will a failure to deliver gas as provided in the easement cause it to terminate? (3) Do the terms of the easement, and the conduct of the easement owner, create any sort of statutory obligation to provide gas?

(1) Contractual Obligation to Provide Gas. Although the “Easement” and “Right-of-Way”¹ documents are in the form of a conveyance of rights to the pipeline company, they also create contractual rights between the parties. Typically the easements specify the landowner/grantor’s rights and obligations when seeking gas service. The easements also state when the pipeline/grantee can cease providing the service. For example, it may provide for a termination of gas service when:

- “Grantee shall temporarily cease to use said pipe line for any reason, or shall remove or abandon said pipe line for any reason” [1970’s Panhandle Eastern Pipe Line Company]
- “so long as such pipe lines, and appurtenances thereto, shall be maintained” [1940’s Northern Natural Gas Company]
- “as long as Grantee transports gas from this or Seller’s pipe line” [1950’s Cities Service Gas Company]

1 “Right-of-Way” is merely another term for “Easement.”

- “subject . . . to Grantee’s right, without further obligation, to abandon or interrupt its use of any such line, or to transport through the same, substances which are not suitable for use by Grantor” [1970’s Northern Natural Gas Company]
- “subject . . . to Grantee’s right, without further obligation to Grantor, to discontinue or interrupt its use of any such line or to transport substances through the same which are not suitable for use by Grantor.” [1990’s Ensign Operating Co.]
- “It is understood and agreed that said pipeline is a transportation line and not a distribution line and that whenever Grantee shall temporarily cease to use said pipeline for any reason, or shall remove or abandon said pipeline for any reason, the right of Grantor to purchase gas therefrom, during such period of disuse, removal or abandonment shall cease and terminate.” [2000’s Duke Field Services, LP]

Any termination or interruption of service that is consistent with the terms of the easement, would not result in contractual liability to the landowner/grantor.

(2) Effect of a Failure to Provide Gas. Many of the easements contain what is known as a “special limitation” on the grant meaning they will automatically terminate under stated conditions. These provisions define the duration of the easement rights, and provide the easement will continue, for example:

- “so long as such pipe lines, and appurtenances thereto, shall be maintained” [1950’s Northern Natural Gas Company]
- “so long as any structure installed hereunder is used or remains thereon” [1950’s Cities Service Gas Company]
- “so long thereafter as a pipeline is maintained thereon” [1950’s Colorado Interstate Gas Company]

However, in none of the documents reviewed was there any sort of “special limitation” associated with providing gas services. This means that providing gas services is a “covenant” which, if breached, would not cause the easement rights to automatically terminate. Instead, the landowner/grantor would be left to a contract remedy which will typically be damages caused by the breach.

(3) Regulatory Obligation to Provide Gas. This section focuses on what is clearly the most difficult issue: by undertaking to provide gas to easement grantors, have the pipeline companies become subject to Kansas public utility law? For example, many of the easements provide substantially as follows:

- “gas to be taken under this provision shall be measured and furnished to the grantor at the rates and upon the terms as may be established by grantee, or by any vendee of grantee, from time to time.” [1950’s Northern Natural Gas Company]

- “at the price from time to time charged domestic consumers of natural gas from this or Seller’s pipe line and continue to so sell, or cause to be sold, such gas” [1950’s Cities Service Gas Company]
- “shall be measured and furnished to Grantor at the rate and upon such terms as may be established by Grantee (or its vendee or assignee) from time to time.” [1970’s Northern Natural Gas Company]

When a pipeline company enters into a contract to provide gas service to a landowner/easement grantor, the issue is whether the pipeline becomes a “public utility” operating facilities for the conveyance of gas “in connection with or for the general commercial supply of gas” K.S.A. § 66-104. The essence of the easements I reviewed is an agreement to provide access to gas as part of the consideration for granting the easement. The easement authorizes the pipeline company to set the terms for providing the gas, including “rates” and “terms of service” and, through the years, has resulted in 1000’s of “customers” which, I understand, have been, in many instances, captive customers through KCC-sanctioned “certificated areas.”

Although K.S.A. § 66-105a excludes a “gas gathering system” from regulation as a “public utility” or “common carrier,” the issue is whether the activities of the pipeline/easement grantees are fundamentally different from K.S.A. § 55-150(d) “gas gathering system” activities. It appears when many of the easements were entered into much more was being offered, and supplied, than merely the “transportation” that defines the limits of the “gas gathering system.”

The next question is if the entities providing gas services under easements are “public utilities,” what are their obligations under the Kansas public utility laws? What service obligations do they have to their “customers”? What effect, if any, does a subsequent transfer of metering facilities and operations to a separate entity have on the pre-existing, pre-fragmented entity’s regulatory status? These appear to be questions for the Commission and its Staff to wrestle with in light of their analysis of the law and facts.

It would be most helpful to obtain the regulatory analysis of the pipelines on these issues. It is also possible the Commission has already addressed some of these issues in prior proceedings. I assume the Commission Staff and the affected pipelines would be aware of any orders that exist concerning these matters.

If the pipelines, under these circumstances, are public utilities with service obligations to their “customers,” it would certainly impact the Commission’s regulatory options and the basic rights of the consumers being served by the pipelines.