M I N U T E S

SPECIAL COMMITTEE ON JUDICIARY

November 4 and 5, 1976
Room 514, State House

Members Present

Senator J.C. Tillotson, Chairman
Representative Dave Heinemann, Vice-Chairman
Senator Bob Storey
Representative Eugene Gastl
Representative Fred Lorentz
Representative Phil Martin
Representative Neal Whitaker

Staff Present

Art Griggs, Revisor of Statutes' Office
Sherm Parks, Jr. Revisor of Statutes' Office
Walt Smiley, Kansas Legislative Research Department

Conferees Present

John Seeber, Kansas Judicial Council
Jack Byrd, Kansas Judicial Council
Bob Alderson, Kansas Corporation Commission
David Ryan, Washburn Law School
John Martin, Attorney General's Office
Jack Briar, Secretary of State's Office
Marshall Crowther Kansas Public Employees' Retirement System
Robert Duncan, State Board of Tax Appeals

November 4, 1976
Morning Session

Proposal No. 29 - Administrative Procedures

The Chairman called the meeting to order at 10:00 a.m. He then directed staff to review the bill draft on Proposal No. 29.

Mr. Griggs reviewed two Kansas cases: Rydd v. State Board of Health (202 Kan. 721) and Stephens v. USD 500 (218 Kan. 220). He noted that the Rydd case is a landmark Kansas decision on administrative law, while Stephens concerns trial denovo on appeals from decisions of the Workman's Compensation Board and the Civil Rights Commission.

Mr. Griggs noted that there are two components of the bill draft, one concerning hearing procedures before state boards and commissions, the other consisting of the procedure for adopting rule and regulations. He noted that not all state agencies are authorized to hold hearings by their respective statutes. To make S.B. 574 applicable to all state agencies, the Committee would have to review all state agencies' statutes and decide whether an opportunity for hearing should be provided in each instance. Under the present bill draft, the hearing procedures specified in the draft are applicable in all instances where the agencies' statutes presently authorize a hearing.

In response to a question, staff noted that failure to receive notice does not invalidate a regulation adopted by a state agency. It was also pointed out that the bill draft does not affect the location where hearings are held.

Staff noted that two major issues in this draft are whether the benefits of a State Register publication outweigh the costs, and whether the effective date of regulations whould remain the same as at present.

Staff then reviewed the results of a questionnaire mailed to several state agencies concerning administrative procedure. A memo on this survey is appended as Attachment 1.

Staff also discussed an estimate on the printing costs of a State Register (see Attachment 2). Information concerning the Kansas Administrative Regulations was also discussed (see Attachment 3).

The Committee recessed for lunch.

Afternoon Session

The Chairman introduced Mr. John Seeber, who was a member of the Kansas Judicial Council Committee on Administrative Proceudres. Mr. Seeber noted that the declaratory judgement provisions of the bill draft may be necessary, because decisions of administrative agencies are appealable, and because few agencies reconsider their decisions. He noted that Rydd requires notice and an opportunity to be heard, and he felt this was applicable to the licensing provisions of the bill.

With reference to the Register, Mr. Seeber noted that the Judicial Council Committee was of the opinion that the Register was a reasonable method of giving notice to parties. He also pointed out that the Register could serve as a central reference work for all state agency hearing notices and regulations.

Mr. Seeber noted that the revised model state administrative act would prohibit the courts from passing judgement on the correctness of an agency's decision. In his view, such judgement would almost have to follow a fact hearing.

A Committee member noted that, in conversation with two Supreme Court judges, it appeared that a denovo trial would be required by statute for specific agencies. However, the Committee member was not certain that all agencies should have trial denovo on appeal.

In response to a question, Mr. Seeber noted that notice by mail and by Register is desirable. He felt the Register would be used as a reference work, and thus would be of benefit to persons who otherwise may receive no notification of pending agency action.

In response to a question, Mr. Seeber said there should be a right to counsel in agency hearings and that agencies should have the subpoena power.

Mr. Seeber noted that, in his opinion, there is no need for a rehearing prior to judicial review of an agency decision.

The Chairman then introduced Mr. Jack Byrd, who was also a member of the Judicial Council Administrative Procedures Advisory Committee. In Mr. Byrd's opinion, there is a need for rehearing prior to judicial review, so the agency may be afforded an opportunity to correct its mistakes.

Mr. Byrd noted that occasionally oral arguments are required subsequent to an application for rehearing. He felt that this process should be shortened.

In closing Mr. Byrd noted that the language in S.B. 574 allowing the court to reverse an agency decision represents a compromise between two opposing views.

The next conferee was Mr. Bob Alderson, General Counsel of the Kansas Corporation Commission (KCC). Mr. Alderson noted that the Corporation Commission does not mail copies of proposed rule changes due to their bulk; he also noted a lack of interest in such items. He stated that in one recent instance, KCC mailed notices of a hearing to 3,600 parties; technically, KCC could have notified as many as 12,000 persons.

Mr. Alderson noted that the need is great for rehearings on agency decisions. He also said that the time lag between accepting an application for rehearing and actually holding the rehearing is used for reconsidering the agency's decision; when the agency holds as many as four weeks of hearings prior to the original decision, this reconsideration period could be extensive. He said that the agency needs sufficient time to reconsider its decision and to narrow the issues prior to a court appeal.

In Mr. Alderson's opinion, providing notice by mail and by the State Register would mean duplication of notice.

Referring to Section 8 of the draft, Mr. Alderson noted a vagueness in the language "persons who may be affected by the agency." He felt that everyone directly affected by the agency should be notified. He also called attention to the language "imminent peril to the public safety." He thought this standard was very high, and should be revised to read "in the preservation of the public safety."

Mr. Alderson noted that the definition of "party" now used by the KCC is superior to that in S.B. 574.

Mr. Alderson objected to Section 4(i). He thought that an agency should be able to administatively notice prior decisions and prior testimony before the agency.

With reference to Section 20(b) he noted that a party not represented by counsel should not be allowed to cross-examine witnesses. He recommended the Committee look at the KCC rules provision concerning counsel.

Mr. Alderson referred to the 1976 H.B. 3216, which would have authorized appeals from decisions of the KCC to go to the Court of Appeals. He thought this provision should be included in the bill.

Concerning another issue, Mr. Alderson stated there was no need to allow parties to intervene on appeal if they were not parties in the original case before the Commission. Mr. Alderson objected to Section 22(f)(5), noting that if there is substantial evidence for an agency's decision, then the court has no authority to disturb that decision.

The Chairman introduced Professor David Ryan, of Washburn University Law School. Professor Ryan noted that he prefers S.B. 574 to the present draft.

Professor Ryan noted that the benefits deriving from a State Register were significant; not the least of these benefits would be that groups not otherwise notified could receive notice through the Register. Professor Ryan noted that in Stephens, the district court's flexibility was broadened. He knew that appeals to the district court allowed attorney to "forum shop," and this would be avoided if appeals were taken to the Court of Appeals. Professor Ryan thought that the rehearing requirement would help particularize the specific errors of the Board or Commission, and thus should remain in the bill.

In response to a question about contested cases, he noted that other states' laws tend to let each agency's statute specify when a contested case occurs. He noted that the present draft may allow more "triggering rights" than S.B. 574, which is undesirable.

Professor Ryan noted that the respondent should retain the 30 day limitation on his right to appeal while seeking rehearing. "Final action" on an agency decision would thus be suspended during the rehearing period.

Professor Ryan noted that the scope of review section (Section 22), could exempt out the Kansas Civil Rights Commission and Workman's Compensation Board, and thus comport with Stevens.

The next conferee was Mr. Robert Duncan, of the Board of Tax Appeals. He called attention to Section 19(h), and asked who would pay for the transcript so requested. In his view, the requesting party should bear the costs of making the transcript.

Mr. Duncan entered a proposed amendment to Section 21(b) of the draft (see Attachment 4).

The Chairman then introduced Mr. John Martin, Assistant Attorney General. Mr. Martin noted that perhaps 75 percent of all "emergency" regulations do not stem from "emergency" conditions as required by statute. In his view, the Board of Rules and Regulations is abused by agencies who cannot demonstrate imminent peril to the public safety, health or welfare, as statute requires, when requesting emergency regulations.

Mr. Martin called attention to the provision in the bill which would require two separate agencies to assign numbers to permanent and emergency regulations. He thought this was unnecessary.

Mr. Martin called attention to a letter he had previously submitted to the Chairman, which discusses certain notice requirements (Attachment 5).

Mr. Martin thought that the State Register was not likely to improve the dissemination of information around the state.

Mr. Martin called attention to the sentence in Section 7 of the draft which requires the agency to incorporate its reasons for adopting regulations. He wondered whether this meant a justification for regulations, and whether such reasons would be used in court against the agency.

The Chairman then introduced Mr. Jack Briar, Assistant Secretary of State, Mr. Briar suggested that session laws, official state paper items, and the Kansas Administrative Regulations be published in the State Register. He thought this would make the Register a more useful publication and could swell subscription rolls, thus making it more feasible economically. Mr. Briar thinks there is a long list of things which could be included in a Register, including bid notices, purchase notices, notices of job openings, etc.

The Chairman introduced Mr. Marshall Crowther, of the Kansas Public Employment Retirement System (KPERS). He asked whether the rehearing would do anything for the applicant, other than increase costs. Mr. Crowther noted that allowing cross-examination may be an empty right without the subpeona power. Mr. Crowther further noted that all actions taken against KPERS must be heard in Shawnee County District Court in an administrative review procedure, not in trial denovo.

Mr. Crowther felt that taking appeals to the Court of Appeals would mean less forum-shopping, and would allow one court to develop skills in administrative laws.

The Chairman thanked conferees and Committee members for there attendance and recessed the meeting.

November 5, 1976
Morning Session

The Chairman called the meeting to order at 9:00 a.m. and announced that the agenda for the morning would be staff review of and Committee decision-making on administrative procedures.

Following some discussion on the usefulness of the State Register and the notice requirements of the bill, Representative Lorentz moved to separate Sections 15-23 from the remainder of the draft bill. Motion was seconded by Representative Heinemann. Representative Lorentz explained that this would allow the Committee to consider only the administrative procedures portion of the bill and would thus exclude the rules and regulations portion of the bill. He expressed the opinion that uniform administrative procedures are needed more than a State Register, which could cost a large amount of money. Following further discussion, the motion carried.

The Committee proceeded through Sections 15-23 of the draft. The Committee agreed to delete Section 18(b)(3), so that the administrative procedures act would not require a hearing in addition to any presently required by statute.

Staff distributed copies of a proposed amendment concerning the reinstatement of licenses (Section 18(b)). The Committee agreed to adopt this language (see Attachment 6).

The Committee agreed to delete the reference in Section 19(c) to the Register, since there will be no Register under the draft, and to allow present practices to continue.

In reference to Section 19(h), the Committee agreed that transcripts should be provided at the cost of the requesting party. It was noted that not all proceedings before state agencies are in the presence of a court reporter, so often there is no record for appeal purposes. The Committee appeared to agree that this section does not require a court reporter to be present at all agency proceedings.

Section 19(i) refers to matters that can be administratively noticed. Mr. Alderson had raised a question about this section on the previous day, and the Committee agreed that staff should inquire of KCC whether the language in this section precludes them from administratively noticing prior agency decision.

In reference to Section 20, it was pointed out that the rules of evidence as applied in non-injury civil cases in the district courts also apply to proceedings before administrative bodies, but these rules can be relaxed. The Committee agreed to insert "except that" between the two sentences at the beginning of Section 20(a).

The Committee agreed to insert the language proposed by the Board of Tax Appeals into Section 21(b). The Committee then discussed the problem of appeals time when application for rehearing has been made. The Committee agreed that this section should be reworded so that the period of time within which a party may file for an appeal does not begin to run until the rehearing process is completed.

It was noted in regard to Section 22(c) that an exception should be made for licensing and other such acts. The Committee agreed to this amendment.

There was much discussion of the implication of Stevens to trial by jury and trial denovo when the Committee came to Section 22(e). The Committee appeared to agree that trial by jury should be allowed where it is provided for by the constitution, and not where provided by statutes or by regulations. Staff was instructed to prepare language in accord with this intent.

The Committee agreed that appeals from decisions by administrative agencies should be to the district court, as at present.

The Chairman instructed staff to send a redraft of this bill to the Judicial Council conferees and to Committee members prior to the next meeting.

The Committee recommended further study on the State Register publication. It was noted that the Register could be a comprehensive publication including session laws, official state paper items, and notice of bids and notice of purchases, in addition to a reference for regulations and agency notices.

The Committee felt that notice requirements in general should be further examined.

After some discussion, the Committee agreed that its next meeting should be November 15 and 16, 1976. Final action on all items will be taken at that meeting.

Proposal No. 30 - Security Transfer Simplification

Staff presented a draft report on Proposal No. 30 - Security Transfer Simplification. Representative Heinemann moved and Representative Lorentz seconded a motion to approve the draft report on Proposal No. 30. Motion carried.

Proposal No. 28 - Child Custody Issues

Staff presented a draft report on Proposal No. 28 - Child Custody Issues. After some discussion, Representative Heinemann moved, and Representative Lorentz seconded a motion to approve the draft report on Proposal 28. Motion carried.

Afternoon Session

Proposal No. 26 - Natural Gas

The Chairman introduced Mr. Bob Anderson, Mid-Continent Oil and Gas Association. Mr. Anderson noted that if H.B. 3038 and 3032 were to pass, much litigation would result. He noted that Kansas-Nebraska Natural Gas Company is presently providing gas to irrigators. He said that if Kansas or any other state attempted to set the priority of use of natural gas for irrigation, the farmer may lose all his gas supplies.

The Chairman then introduced Don Schnacke, with the Kansas Independent Oil and Gas Association (KIOGA). Mr. Schnacke referred to his July 13 statement to the Committee. He cited several events that have occured since the July 13 meeting. Mr. Schnacke referred to a statement by Dr. Robert Robel, Chairman of the Kansas Energy Advisory Committee, who

spoke at the annual meeting of the Kansas Farm Bureau on October 25. Mr. Schnacke noted that Dr. Robel was concerned about the increasing amount of land under irrigation. Mr. Schnacke also noted that the KCC is taking formal testimony beginning November 8 to establish priority of curtailment of natural gas for agricultural purposes. Mr. Schnacke also referred to emergency rules of the Kansas Energy Office concerning gas.

The Chairman then introduced Mr. Richard Randall, chairman of KIOGA's legislative committee. Mr. Randall emphasized that adequate safeguards presently exist for operators who do not function within the "prudent operator" rule. He noted that there is an implied covenant to develop a gas lease as a result of case law. In Mr. Randall's view, to terminate a lease with no compensation to the lessor amounts to the denial of property rights. He said H.B. 3038 passes a basic tenet of equity justice would be violated, namely, "equity abhors a forfeiture."

Concerning H.B. 3032, Mr. Randall felt that the Federal Power Commission could and would undo the bill. He noted that gas companies have cooperated with land owners and with the purchasing companies.

In response to a question, Mr. Randall noted that the companies determine when it is uneconomical to continue production of a particular well. Contracts are released or terminated when the companies so determine, according to Mr. Randall. He said that a large number of leases had been determined to be uneconomical and have been terminated.

In response to a question, Mr. Randall noted that the implied covenant to develop a lease is limited to proof that "prudent operators" would drill to a certain depth. In general, he said that the company will drill to the deepest known productive horizon. In his view, the issue is whether, after some number of years, property rights which have been legitimately purchased may be arbitrarily cut off.

The Chairman introduced Mr. Jack Glaves, with Panhandle Eastern Pipeline Company. Mr. Glaves submitted a statement (see Attachment 7).

Mr. Glaves noted that at the Committee's July meeting Mr. Dale Stuckey cited several states with laws similar to H.B. 3038. Mr. Glaves said that this was not true, although Merril's Implied Covenants on Oil and Gas Leases, (Second Edition), may have been the source for Mr. Stuckey's statement. Mr. Glaves said that he could find no state with legislation resembling H.B. 3038. Mr. Glaves then cited several other states' laws (e.g. Revised Statutes of Nebraska 57-229; Indiana Statues Annotated 32-5-8-1(3-1633)). Mr. Glaves stated that adequate remedies are presently available under Kansas Law and cited Fisher v. Magnolia Petroleum Company (156 Kan. 357).

In response to a question, Mr. Randall said that codifying this case law might be a satisfactory approach, but H.B. 3038 does not do this. Mr. Randall assured the Committee that it is routine company practice to drill and to release leases. Panhandle has had no problems in this regard, he said.

The Chairman thanked the conferees for their statements, and adjourned the meeting.

Subsequent to the meeting, Kansas Association of Defense Council submitted a letter concerning Proposal No. 31 - Product Liability. This letter is appended as Attachment 8.

Prepared by Walt Smiley

Approved by Committee on:

Nov. 16, 1976
date

ATTACHMENT

MEMORANDUM

November 4, 1976

TO: Special Committee on Judiciary

FROM: Kansas Legislative Research Department

RE: Administrative Procedures Survey

A questionnaire was mailed to each of 17 state agencies (see Attachment II.) Twelve agencies returned completed questionnaires (see Attachment I.) The results are as follows.

1. Only three of the 12 agencies responding to the survey indicated a problem with the present deadlines for filing regulations. The remaining nine agencies indicated no problem with the present deadline. The Civil Rights Commission noted the seasonal nature of the filing procedures makes it difficult to allow enough lead time to file proposed regulations by October 1. The Department of Corrections simply indicated that the present deadline does create a problem.

2. The number of licensees, regulated parties or other identifiable individuals which are affected by the agencies' operations (and who could potentially be notified) range from a low of 1,500 motor vehicle inspection stations (under the Highway Patrol's supervision) to as many as the 130,000+ active and retired members of the Kansas Public Employees Retirement System. Nearly all of the 12 agencies indicated that a large number of persons are affected by their operations.

3. Only two agencies (the Consumer Credit Commission and the Highway Patrol) reported no problem with a requirement to notify by mail all licensees, regulated parties or other identifiable individuals affected by the agency, of hearings to adopt or to amend rules and regulations.

The remaining ten agencies all reported having some problem with the kind of requirement - all cited increased costs related to printing and mailing, and several agencies indicated a problem in determining who would receive such notices. The Department of Administration said it would be impossible to identify and to notify all affected persons and groups. The Department of Corrections indicated that it would have a problem if the department were required to notify state prison inmates.

4. The number of appeals taken from agency decisions ranged from a low of none (in the case of the Consumer Credit Commission) to a high of 50 per year (in the case of the Department of Transportation.) The total number of appeals from decisions of the 12 responding agencies' could be as many as 150 per year. The total number of agency decisions per year are undetermined.

Six of the 12 responding agencies said they preferred appeals to the district court, while two agencies preferred appeals to the Court of Appeals. The remaining agencies did not express a preference.

Several agencies indicated that their problems were not with the appeals process, but with the lack of uniform hearing procedures before administrative bodies.

Six of the responding agencies saw some benefit in a state register publication, while six agencies saw no benefits. Of those agencies finding some benefit, several cited the chief benefit as a knowledge of other agencies' rules, or as notice to the public. One agency noted that the register could provide information to county and district attorneys, judges, and practicing attorneys.

5. Several agencies said that they send notices of hearings only to the individuals, licensees or related parties directly involved in such hearings. Several other agencies, however, noted that hearing notices are mailed to several thousand people.

ATTACHMENT I

Kansas Legislative Research Department November 4, 1976

AGENCIES SURVEYED

(Asterisk -*- indicates the agency returned a questionnaire)

* Department of Administration
  Secretary of State
  Department of Revenue
  Social and Rehabilitation Services
* Department of Corrections
* Department of Transportation
* Kansas Civil Rights Commission
* Kansas Public Employees Retirement System
  Board of Regents
  Kansas Corporation Commission
* Insurance Department
  Department of Human Resources
* Department of Health and Environment
* Kansas Highway Patrol
* Governmental Ethics Commission
* Consumer Credit Commission
* Department of Education
* Board of Agriculture

ATTACHMENT 2

Kansas Legislative Research Department October 7, 1976

QUESTIONNAIRE RELATING TO ADMINISTRATIVE PROCEDURES ACT

Agency Name: _____

Your Name: _____ Extension: _____

If additional space is needed please attach additional sheets. Typewritten responses are not necessary. Return to Walt Smiley, Kansas Legislative Research Department Room 545N, State House, Topeka, Kansas 66612.

1. Presently, rules and regulations, other than emergency regulations, must be filed by October 1 of each year to take effect February 15 of the following year. Does this procedure create any problems for your agency?

_____

_____

2. Approximately how many licensees, regulated parties or other identifiable individuals are affected by your agency's operations?

_____

3. It is contemplated that a provision may be made to require agencies to notify by mail all licensees, regulated parties or other identifiable individuals affected by your agency's operations whenever an agency has scheduled hearings to adopt or to amend rules and regulations. Would this requirement create any problems for your agency?

_____

_____

4. About how many appeals (either per month or per year) are taken from decisions made by your agency. Are there ways in which this appeals process could be made more satisfactory for your agency? In your view, should such appeals go to the Kansas Supreme Court, the Court of Appeals, or the District Court? What is your reasoning?

_____

_____

_____

5. A "state register", similar to the Federal Register, is being considered. It would be available on a subscription basis with a monthly or bi-weekly publication date at a cost of $15 to $30. The "state register" would be used to: (1) publish emergency rules and regulations, (2) give notice of hearings involving individual licensees, regulated parties or other identifiable individuals affected by your agency's operations, and (3) give notice of proposed rule and regulation-making hearings. The "state register" would be in addition to notice by mail to licensees or regulated parties. Do you feel that a "state register" of this type would be of added service or benefit to your agency's operations?

   If yes, what benefit do you see?

   _____

   _____

   _____

6. When giving notice of proposed rule and regulation-making hearings, how does your agency give notice of such hearings to the agency's licensees regulated parties or other identifiable individuals affected by your agency? By mail, by legal advertisements in newspapers or by other means?

   _____

   _____

7. Does your agency presently send out notices of hearings involving individual licensees or regulated parties? (An example would be mailing a docket of upcoming hearings.)

   If yes, about how large is your mailing list?

   _____

8. What kinds of other routine mailings are done by your agency which, in your judgment, might be incorporated into a "state register?" (Please be as specific as possible.)

   _____

   _____

   _____

   What, if any, charges are associated with the notices and other mailings from your agency?

   _____

ATTACHMENT 6

REINSTATEMENT OF LICENSES

(to be inserted before the period at the end of (b) of section 18)

; or (5) an applicant seeks reinstatement of a license which has been previously denied, revoked, cancelled, suspended or withdrawn after an opportunity to be heard thereon; except when the previous action against the applicant's license was based on a failure which is described in (2) above and such failure has been remedied or when a statute specifically requires an opportunity to be heard in such instance or authorizes reinstatement of a license after a prescribed period of time.

ATTACHMENT 7

LAW OFFICES OF
GLAVES, WEIL & EVANS
900 O. W. GARVEY BUILDING
200 WEST DOUGLAS
WICHITA, KANSAS 67202

EDWARD WEIL (1974)
JACK GLAVES
W. BOYD "BUD" EVANS
CHARLES E. HOKE II
R. EDWARD BRAUSA

October 15, 1976

TELEPHONE (316) 262-5181

Hon. J. C. Tillotson
Chairman
Interim Judiciary Committee
Relating to Proposal 26 (H.B. 3032)
State House
Topeka, Kansas 66603

Dear Senator Tillotson:

In behalf of Panhandle Eastern Pipe Line Company, I would like to submit the enclosed memorandum for consideration by your committee with respect to House Bill 3032.

I have also noted the report submitted by the Kansas Geological Survey on this matter, and particularly the contention at pages 21 and 24 to the effect that the FPC's regulatory authority does not extend to gathering facilities or sales from gathering facilities. We believe that this is a very erroneous conclusion and is premised solely on the regulatory power of the FPC relating to the transportation of natural gas in interstate commerce. It must be noted that in addition to this power, the Natural Gas Act also reposes authority in the Federal Power Commission to regulate natural gas companies engaged in such transportation or the sale of natural gas in interstate commerce. The regulation of the interstate companies includes exclusive authority over the construction, extension or abandonment of facilities and the requirement of a certificate of convenience and necessity for such construction. Before authorization for a direct sale may be granted, the FPC must find that the pipeline company is both able and willing to do the act and perform the service proposed and that the company will abide by and conform to the rules and regulations of the FPC. The FPC must find that said proposed service, sale or construction is or will be required by the present or future public convenience and necessity. [15 U.S.C. 717(f)(e)]

The FPC considers the proposed end use of the gas. (FPC v. Transcontinental Pipeline Corp., 365 U.S. 1, 5 L.Ed2d 377; Charleston & Western Carolina Rwy Co. v. FPC, 234 F.2d 62 (D.C. Cir. 1956); Nat'l Coal Ass'n v. FPC 191 F.2d 462). The effect the issuance of a certificate would have upon the pipeline's present service to its existing customers, (FPC v. Transcontinental Gas Pipeline Corp., supra; Panhandle Eastern Pipe Line Co. v.

FPC, 232 F.2d 467 (3rd Cir. 1956); In the Matter of Northern Natural Gas Co. 28 FPC 1155, rehearing denied, 29 FPC 450; whether the pipeline possesses the financial resources with which to construct the proposed project and whether the proposed financing is reasonable and feasible, (In the Matter of Panhandle Eastern Pipe Line Co., supra; In the Matter of Northern Natural Gas Co., supra); whether the gas reserves will be adequate for the services proposed and whether the proposed sale would pre-empt gas reserves to the detriment of the domestic consumer (FPC v. Transcontinental Gas Pipeline Corp., supra); whether the use of natural gas would displace a less valuable fuel, and many other factors.

Under the provisions of the Natural Gas Act, a sale may be commenced only under the provisions of Sections 7(a) and 7(c) [15 U.S.C. 717(f)(a)(c)]. In short, even though direct sales are unregulated by the FPC with respect to price, they are most certainly regulated with respect to authorization for the making of such sale and the construction of facilities relating thereto. We firmly believe that the proposed bill is in contravention of federal regulation under the Natural Gas Act and respectfully submit the foregoing and the enclosed memorandum for consideration of your committee.

Very truly yours,

GLAVES, WEIL & EVANS

Jack Glaves

JG:sc
Enclosure

LAW OFFICES OF
GLAVES, WEIL & EVANS
900 O. W. GARVEY BUILDING
200 WEST DOUGLAS
WICHITA, KANSAS 67202

JACK GLAVES
W. BOYD "BUD" EVANS
EDWARD WEIL (1974)

TELEPHONE (316) 262-5181

November 4, 1976

Hon. J. C. Tillotson, Chairman
and Members of the Interim Judiciary Committee
State House
Topeka, Kansas 66603

Re: Proposal 26 (H.B. 3032)

Dear Senator Tillotson and Members of the Committee:

In behalf of Panhandle Eastern Pipe Line Company, I would like to submit the enclosed memorandum for consideration by your Committee with respect to H.B. 3032.

I have also noted the report submitted by the Kansas Geological Survey on this matter and particularly the contention at pages 21 and 24 to the effect that the FPC's regulatory authority does not extend to gathering facilities or sales from gathering facilities. We believe this to be an erroneous conclusion, which understandably arises from a literal reading of Section 1(b) of the Natural Gas Act. Although this section states that the Act does not apply to the production or gathering of natural gas (15 U.S.C. Sec. 717(b)], "gathering" is not defined in the Act. Although there had been expressions by the Supreme Court prior to Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 98 L.Ed 1034 (1954), that the "production and gathering" exemption extended to gathering facilities, the Supreme Court in that case held that the exception should be strictly construed and held that the sales of natural gas for resale in interstate commerce before, during or after transmission, were subject to FPC jurisdiction. Later cases restricted the exemption by distinguishing between sales facilities and production facilities, holding that production facilities are within the exemption, whereas sales facilities are not. (Continental Oil Co. v. FPC, 226 F.2d 208 [1959] cert. den'd 361 U.S. 827 and Deep South Oil Co. of Texas v. Federal Power Comm'n, 274 F.2d 882 [1957]) In the latter case it was held that the affirmative grant of jurisdiction in Section 1(b) of the Act over interstate sales was not whittled down by the exemption of production and gathering, even though it was apparent in those cases that what was there involved was what was considered in the industry to be a part of the gathering operation.

The courts have thus greatly limited the exemption of gathering facilities in distinguishing between sales facilities, which are jurisdictional

to the FPC, and production facilities, which are not. One concludes that interstate pipelines, in effect, do not have gathering facilities as such term is used in the industry in determining the issue of FPC jurisdiction. The gathering exemption apparently exists only for a producer who owns his own gathering facilities or for an independent gathering company, which does not own transportation facilities to which such gathering facilities are attached.

Regulation of the interstate companies includes exclusive authority in the FPC over the construction, extension or abandonment of facilities, and the requirement of a certificate of convenience and necessity for such construction. Before authorization for a direct sale may be granted, the FPC must find that the pipeline company is both able and willing to do the act and perform the service proposed, and that the company will abide by and conform to the rules and regulations of the FPC. The FPC must find that such proposed service, sale or construction is or will be required by the present or future public convenience and necessity. [15 U.S.C. 717(f)e]

In short, even though direct sales are unregulated by the FPC with respect to price, they are most certainly regulated with respect to authorization for the making of such sale and the construction of facilities relating thereto.

We firmly believe that the proposed bill is in contravention of federal regulation under the Natural Gas Act, and that even aside from federal regulation, the bill is in effect an embargo on interstate commerce and impermissible under the federal constitution. We respectfully submit the foregoing and the enclosed memorandum for consideration of your committee.

Very truly yours,

GLAVES, WEIL & EVANS

Jack Glaves

JG:sc

QUESTION:

Is House Bill 3032 consistent with the United States Constitution and the Natural Gas Act?

CONCLUSIONS:

1. The bill violates the Commerce Clause in its preference of the needs of local economic interests over those of the interstate market.

2. The bill impermissibly clashes with federal regulation under the Natural Gas Act.

A. The bill would result in state orders directed at interstate purchasers, a practice expressly forbidden by the Supreme Court.

B. The bill infringes on FPC jurisdiction over interstate transportation of natural gas, which includes regulatory power over the quantity of gas flowing interstate.

C. "Abandonment" of existing services and unwarranted extensions of existing pipelines would result from enforcement of the bill, and these are matters subject to exclusive FPC scrutiny.

FACTS:

House Bill No. 3032, now before the Kansas legislature, seeks to meet the energy needs of the state's farmers, or at least of some of them, by requiring those who traffic in natural gas to siphon off enough to satisfy the demands of local irrigation. Section One accurately states the bill's purpose when it declares the provision of power for irrigating lands on which natural gas is either produced or transported in gathering lines to be a "preferred use, prior in order to all other uses except existing domestic uses to which such gas may be devoted." The next two sections seek to implement this policy by ordering every person, firm or corporation owning or operating either "any well from which natural gas is produced, sold, or used" or "a natural gas gathering pipeline located on lands in a proven natural gas field" to "make available, upon request, to any person engaged in agricultural activities upon such premises, sufficient gas...for the pumping of such amount of water produced from wells on such premises, as may be necessary and proper for the irrigation of such portion of said premises or may be devoted to the growth of agricultural products or to pasture or orchard uses." Price restraints would also be imposed, forbidding sellers of gas to beneficiaries of the act from charging prices higher than the wellhead price, if

the sale is made at the well, or higher than 25% over the wellhead price if the sale is made from a gathering line. Purchasers, on the other hand, would bear the burden of the costs incurred in siphoning off gas under the bill. The other important feature of the bill, contained in Section Five, is the vesting of jurisdiction over sales pursuant to the act in the state corporation commission. Enforcement of the measure would consist of private court actions by aggrieved farmers seeking compensatory damages and specific performance.

DISCUSSION:

"We need only consider the consequences if each of the few states that produce copper, lead, high-grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority." Hood v. Du Mond, 336 U.S. 525, 538-39 (1949). Mr. Justice Jackson had no doubt about the nature of those consequences: "What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun!" 336 U.S., at 539. Yet such a practice is precisely what H.B. 3032 seeks to enshrine. In its attempt to prefer Kansas agriculture to the interstate market the bill is unconstitutional both as an interference with interstate commerce and as an infringement of the federal regulatory scheme embodied in the Natural Gas Act.

I. Conflict with the Commerce Clause

Article I, §8, cl. 3 of the U. S. Constitution grants to Congress the power "to regulate Commerce...among the several States," and by negative implication denies it to the states when fragmented regulation of commerce would act "as substantially to affect its flow or deprive it of needed uniformity of regulation," Southern Pacific Co. v. Arizona, 325 U.S. 761, 780 (1945), or would "by its necessary operation [be] a means of gaining a local benefit by throwing the attendant burdens on those without the state." South Carolina State Highway Dept.

v. Barnwell Bros., 303 U.S. 177, 186 (1938). H.B. 3032 seeks to benefit local agriculture at the expense of consumers outside Kansas who would otherwise receive the natural gas which is siphoned off. Fifty years ago the Supreme Court considered an identical state scheme and found it unconstitutional--a result it would as surely reach today.

Pennsylvania v. West Virginia, 262 U.S. 581, 67 L. Ed. 1117 (1923), was the climax of a battle between three states over the dwindling natural gas reserves of one of them. West Virginia in 1919 passed a law requiring all suppliers of natural gas for public use to give West Virginia customers first priority in allocating gas produced in the state. The state public service commission was given authority to enforce this fiat, even to the extent of ordering extensions of existing lines to customers inadequately served. Pennsylvania and Ohio protested, and though the Court wrestled uncomfortably with questions of justiciability, it had no difficulty deciding the basic constitutional issue:

> "It is true that the business is of a quasi public character, but it is so in Pennsylvania and Ohio as well as in West Virginia. The obligations inhering in it and the power to insist on an adequate service are the same in all three states. The supply of gas necessarily marks the extent of the service that can be rendered. Much of the business is interstate and has grown up through a course of years. West Virginia encouraged and

> sanctioned the development of that part of the business and has profited greatly by it. Her present effort, rightly understood, is to subordinate that part to the local business within her borders. In other words, it is in effect an attempt to regulate the interstate business to the advantage of the local consumers. This she may not do." 262 U.S., at 597-98.

For the proposition that the states may not hoard natural resources for the benefit of local economic interests, the Court relied heavily on a classic statement concerning natural gas and the Commerce Clause which it had made a decade before:

> "The statute of Oklahoma recognizes it [gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,--the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead

> of the states, a new power appears and a new welfare,--a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interestate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court." West v. Kansas Natural Gas Co., 221 U.S. 229, 255-56 (1911).

See, Hood v. Du Mond, supra; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935); Buck v. Kuykendall, 267 U.S. 307 (1925); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).

The Commerce Clause barrier to H.B. 3032 is, therefore, a high one, and the courts have recently intimated that it will not soon be breached. In FPC v. Louisiana Power & Light Co., 406 U.S. 623, Justice Brennan noted:

> "Insofar as state plans purport to curtail deliveries of interstate gas, Pennyslvania v. West Virginia,...is authority that such plans, when they operate to withdraw a large volume of gas from an established interestate current whereby it is supplied to customers in other States, would constitute a prohibited interference with interstate commerce." 406 U.S., at 632-633.

An even stronger reaffirmation of Pennsylvania v. West Virginia came in FPC v. Corporation Commission of Okla., 362 F. Supp. 522 (W.D. Okla. 1973), aff'd summarily 415 U.S. 961 (1974):

> "In the light of the initial argument and the two reargruments and the attention which the case [Pa. v. W. Va.] received at the hands of the Court, the case is not an isolated decision to be looked at askance; rather it is the symbol of one of the weightiest doctrines in our law. It expressed the momentum of legal history which preceded it. Around it has clustered a voluminous body of rulings" 362 F. Supp. at 531.

H.B. 3032 confronts this "weighty doctrine" bearing all the impermissable features of the state law struck down in Pennsylvania v. West Virginia. Customers in other states would have to be content with the residue of gas that remained after agricultural interests in the gas fields had satisfied their irrigation needs. The state corporation commission and state courts would possess the power to order diversion of natural gas from the interstate stream to local farmers. Yet here the state would not even have access to the argument, advanced in Pennsylvania v. West Virginia, that the "public utility" status of those producers justified state regulation--for Section Five of the bill declares that:

> "...nothing in this act shall create in any manner an obligation or duty on the part of the operator of any well or gathering pipe line, who furnishes gas under the provisions of this act, to assume in any way public utility duties to the public at large, except as such duties may arise from such operator's acts separate and apart from any performance of obligations imposed under this act."

The Commerce Clause is not an absolute barrier to any state regulation of the natural gas industry. See, eg., Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932) (states may protect correlative rights of well owners); Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana, 332 U. S. 407 (1947) (state price regulation of local retail distributors approved); Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) (state regulation of wellhead prices permissible under Commerce Clause). But see, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) (state regulation of wellhead prices impermissible under Natural Gas Act). Nevertheless, this regulation cannot extend, practically or constitutionally, to state allocation of natural resources that favors local economic interests, when natural gas is in critical demand throughout the country. FPC v. La. Power & Light Co., supra, 406 U.S. at 681; FPC v. Corp. Comm'n of Okla., supra, 362 F. Supp. at 533. Even if "local interests" could be invoked to justify state involvement in the allocation of gas, economic interests are a wholly discredited basis for such intervention. See, Baldwin v. G.A.F. Seelig, supra; Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964).

II. Preemption by the Natural Gas Act

House Bill 3032 would, if enacted, fall before the strictures of the Commerce Clause, but it is worth noting that the bill is also in sharp conflict with federal authority under the Natural Gas Act, 15 U.S.C. §717. That should be no surprise, for Congress passed the Act in 1938 precisely to bring under federal scrutiny those aspects of the industry which the states could not constitutionally regulate. Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 682-83 (1954). Careful examination of the Act's language and the judiciary's efforts to interpret it will often lead to fine distinctions and narrow categories, but on the question of allocation of gas there are no hairsplitting difficulties. The Federal Power Commission has sole authority to order natural gas companies to sell, or curtail, their product.

When state regulation of an aspect of the natural gas industry presents the "possibility of collision" with legitimate federal authority, it is unacceptable. Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84, 92 (1963). H.B. 3032, indeed, in allowing action to be taken directly against interstate purchasers to enforce the rights it bestows, is in that respect a mirror image of the state scheme struck down in Northern Natural. Kansas had sought to achieve ratable production of natural gas as between individual wells in the same gas fields -- a perfectly legitimate

goal of state regulation, Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932)--through orders to buyers of natural gas for resale to purchase gas ratably. The Court concluded that:

> "...any readjustment of purchasing patterns which such orders might require of purchasers who previously took unratably could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States. This relationship is a matter with respect to which Congress has given the Federal Power Commission paramount and exclusive authority....Therefore, although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." 372 U.S., at 92.

H.B. 3032 would require every operator of a gathering line to siphon off gas for agriculture, whether or not the gas in that line had already been purchased for resale in another state. To that extent, at least, it could require the same readjustment of purchasing patterns and cost structures for which the orders in Northern Natural were voided.

"Possibility of collision" exists, however, on an even grander scale. The Natural Gas Act grants the FPC jurisdiction over "the transportation of natural gas in interstate

commerce," 15 U.S.C. §717(b), whether or not the gas will eventually be resold. FPC v. East Ohio Gas Co., 338 U.S. 464, 468 (1950); FPC v. Louisiana Power & Light Co., 406 U.S. 621, 636 (1972). As early as 1947 the Court concluded that this grant of jurisdiction applied to curtailment of gas:

> "...the matter of interrupting service is one largely related..,to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." Panhandle Eastern Pipeline Co. v. Public Service Com'n, 332 U.S. 507, 523 (1947).

Twenty-five years later Louisiana Power & Light, supra, confirmed this interpretation of §717(b), 406 U.S. at 641, and went on to state, "[t]hat head of jurisdiction plainly embraces regulation of the quantities of gas that pipelines may transport." 406 U.S. at 640. In holding that the FPC had authority to promulgate comprehensive curtailment plans to regulate the end-uses of natural gas, the Court noted that if authority to do so were left to the states, "unavoidable conflict between producing States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the Courts." 406 U.S. at 633-34. See, FPC v. Transcontinental Gas Corp., 365 U.S. 1, 20-22 (1961). Because H.B. 3032 seeks to give local agricultural interests and the state corporation commission power to regulate, to a substantial degree, both the quantity and end-use of gas flowing through interstate pipelines, it trespasses on turf reserved for the FPC.

More specifically, the bill directly clashes with one of the Natural Gas Act's central provisions, which guarantees that any change in the interstate flow of gas will undergo FPC scrutiny:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U.S.C. §717f(b).

There can be little doubt that this section applies to a large number of producers and purchasers who would be subject to H.B. 3032. Producers who sell gas for later resale in another state are, like the purchasers, "natural gas companies" under the Act. Phillips Petroleum v. Wisconsin, supra, 347 U.S., at 677. When any of the gas in a gathering line or a well has been purchased for interstate resale, it remains subject to FPC jurisdiction even after the contracts of sale expire. Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 156 (1960).

If the FPC has the power to prevent "abandonment," its responsibility to do so, and to do so in the very situation covered by H.B. 3032, is clear. "We have a regulatory responsibility to assure that gas once dedicated to the interstate

market will continue to be available to that market so long as the public interest demands...." Continental Oil Co., 31 F.P.C. 1079, 1082 (1964), aff'd sub. nom. United Gas Pipeline Co. v. FPC, 350 F.2d 689 (5th Cir. 1965), aff'd 385 U.S. 83 (1966). The Supreme Court, in its unanimous affirmance of the Commission's decision, not only quoted and approved that language, but joined the Commission in its view that producers who cease selling to the interstate market and interstate purchasers who stop buying from a producer are "abandoning" a "service" under §717f--and so must seek FPC approval. 385 U.S., at 88-89. As the Court said in Atlantic Refining Co. v. Public Service Com'n of N.Y., 360 U.S. 378 (1959):

> "Section 7(e) [of the Natural Gas Act] vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval." 360 U.S., at 389. See, Sunray, supra, 364 U.S., at 156.

That mere reduction of gas supply, as well as cessation, constitutes a §717f "abandonment" (or "partial abandonment") has long been clear. See, Panhandle Eastern Pipeline Co. v. Michigan Consolidated Gas Co., 177 F.2d 942, 945 (6th Cir. 1949). H.B. 3032 would give local economic interests the power to reduce the amount of gas committed to the interstate market

by producers and operators of gathering lines. Only the FPC has authority to allow such a reduction, and even the Commission must exercise that power with circumspection. More than a "possibility," collision between state and federal regulation seems rather a certainty.

The fact that the sales required under the bill would be direct and intrastate means nothing in this context. Where the gas diverted from the interstate market would go is immaterial after the conclusion of the Court in Sunray and United Gas that it may not be diverted at all. Further, the Court has concluded that if gas destined for intrastate direct sale is mingled in transit with gas fated for resale in another state, all of the gas is subject to FPC jurisdiction. FPC v. Amerada Petroleum Corp., 379 U.S. 687 (1965). See, California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965). For the state to order an extension of a pipeline to supply a local customer when FPC jurisdiction attaches to the gas under Amerada is quite probably an independent violation of §717f(c) of the Natural Gas Act, which provides:

> "No natural gas company...shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor,... unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

Because the gas is subject to FPC jurisdiction, an extension of a pipeline to transport and sell it requires FPC approval, and a state may not, therefore, order such an extension. In Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498 (1942) the Court stated flatly:

> "In determining the scope of the federal power over the proposed extension of facilities and sale of gas it is unnecessary to scrutinize with meticulous care the physical characteristics of appellant's business, in order to ascertain whether, as the court below held, the interstate commerce involved in bringing the gas into the state ends before delivery to distributors. In any case the proposed extension of appellant's facilities is so intimately associated with the commerce and would so affect its volume moving into the state and distribution among the states as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself....
>
> "As Congress, by §7(a)(c) of the Act has given plenary authority to the Federal Commission to regulate extensions of gas transportation facilities and their physical connections with those of distributors, as well as the sale of gas to them, and since no certificate of public convenience and necessity, required by §7(c), has been granted to appellant by the Federal Commission for the proposed extensions and sale, the state commission was without power to order them." 314 U.S., at 509-510.

Although here the sale would be to local farmers rather than distributors, the principle that the state may not compel the sale of gas committed to FPC supervision remains equally strong.

In sum, therefore, H.B. 3032 impermissibly infringes on federal regulation under the Natural Gas Act. Orders directed at interstate purchasers of gas for resale may be per se invalid, even if they would serve a legitimate state interest. More fundamentally, though, orders to divert gas to local consumers would violate both the broad power of the FPC to control the quantities of gas flowing in interstate commerce and its more narrow concern to prevent abandonment of service and unnecessary extensions of pipelines. Adoption of the measure would bid fair to provoke all the unhappy consequences foreseen by Mr. Justice Jackson in Hood v. DuMond.

Attachment C

Kansas Association of Defense Counsel

P. O. Box 1343
Salina, Kansas 67401
November 4, 1976

The Honorable J. C. Tillotson
Chairman, Special Committee on Judiciary
Statehouse, Room 511-S
Topeka, KS 66612

Re: Proposal No. 31 by the Special Committee on Judiciary

Dear Mr. Tillotson:

The Kansas Association of Defense Counsel has received a copy of the new products liability bill purportedly coming out of the Special Committee on Judiciary. It is the opinion of our Association that new Section 2(b) which provides that no damages shall be allowed if the jury finds that an injury was sustained after the expiration of the "ordinary useful life" of a defective product is not a workable solution to the statute of limitations problem and will cause more problems that it solves. Much time would have to be spent in litigating the question of what is the "ordinary useful life" of a product. If I were a plaintiff's attorney, I would make the argument that since the product was in use it must have been within its ordinary useful life. If the jury agrees with this logic, we are right back where we started.

Our Association thinks that Section 11 which provides, in essence, that the judges set the attorney's fees interferes with the right to freedom of contract and is unconstitutional. In addition, it is totally unnecessary. We are sure that the judges do not have the time nor the inclination to try to set fees for each side in each case.

We would again like to reiterate our position taken at the hearings that there should be a full study and investigation of all of our statutes of limitation. However, if your Committee feels this is not feasible, we would strongly urge that the same four-year statute be proposed that we now have for medical malpractice actions under K.S.A. 60-513(c).

Very truly yours,

Aubrey G. Linville

Aubrey G. Linville, President

cc: Mr. Roger D. Stanton, Vice President-President Elect
Mr. H. E. Jones, Secretary-Treasurer
Mr. Walt Smiley ✓

ATTACHMENT C

STATE OF KANSAS
DEPARTMENT OF Administration

DIVISION OF PRINTING

Telephone 296-3631 201 West Tenth Topeka, Kansas 66612

Mr. Walt Smiley
Legislative Research Dept.
5th Floor, Statehouse

Dear Mr. Smiley:

Regarding your request for an estimate to print a monthly Register, I have arrived at the following:

2,000	2,500	3,000	per month
$1,567.95	1,707.08	1,846.20	

The above figures are based on a 6 x 9 publication of 50 pages (25 to be camera ready and 25 to be typeset) with a self-cover; register to be saddle stitched. Stock for the register would be 20 lb. white sulphite.

Sincerely,

Ivy Martin

Ivy Martin
Estimator

IM: at

Annual cost: 2000 copies = $18,504
3000 copies = $22,152

1089-H

ATTACHMENT 3

ELW M. SHANAHAN
SECRETARY OF STATE

STATE OF KANSAS

OFFICE OF SECRETARY OF STATE
2ND FLOOR—THE STATEHOUSE
PHONE (913) 296-2236
TOPEKA, KANSAS 66612

November 2, 1976

Art Griggs
Revisor of Statutes
State House

Dear Mr. Griggs:

Following is the distribution information on the Kansas Administrative Regulations (KAR) for the fiscal year (to date).

1976 Supplement Sales

Cash sales	342
Interfund voucher	55
Free distribution	918
	1,315

KAR Complete Set Sales

Cash sales	17
Interfund voucher	5
Free distribution	5
	35

A plate is made for each new set sold. Our plate file includes the following approximate plate totals:

Paid subscribers	570
Free distribution	900

Free distribution is made in accordance with 1975 Supp. 77-430.

If you need additional information, please contact me.

Sincerely,

Donald L. Shaffer
Deputy Assistant Secretary of State
for Legislative Matters

From: Board of Tax Appeals

Attachment 4

PROPOSED AMENDMENT TO PROPOSAL NO. 29, NEW SEC. 21 (b)

If a rehearing be granted the matter shall be scheduled for rehearing within twenty (20) days from the date of the Order granting a rehearing. The matter shall be heard, determined and the agency decision or Order served on all parties within sixty (60) days from the date of the Order granting rehearing. If the agency decision or Order on rehearing is not served on all parties within said sixty (60) days it shall be taken as an affirmance of the original Order.

The force and effect of the original Order for purposes of judicial review shall be stayed until a new Order is issued or the original Order is affirmed as a matter of law.

ATTACHMENT C

STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

October 12, 1976

The Honorable J. C. Tillotson
State Senator
109 South State
Norton, Kansas 67654

Dear Senator Tillotson:

Pursuant to conversations with Art Griggs of the Revisor's office, I am offering some written comments concerning the notice provisions of Senate Bill No. 574. I will be out of the office on the date of the Committee's hearing on the bill, and offer these written comments for your consideration.

Section 3(a) provides that prior to the adoption, amendment or repeal of any rule, the agency shall give at least twenty days' notice by publication in the state register, and a copy of the notice shall be mailed to all licensees of the agency and to persons who have made timely request for advance notice of rule-making proceedings.

K.S.A. 1975 Supp. 77-421, the present applicable provision, requires that the adopting state agency give at least fifteen days' notice of its intended action "to all parties of interest known to the agency" and to all persons requesting such notice. Prior to 1971, it was the practice of this office, I understand, to approve notice in some instances by publication alone. It was my position that all too often, notice by publication was no notice at all, and that the statute required some mailed notice. The question then arose as to whom mailed notice should be sent. In the instance of the Board of Regents, for example, which adopts regulations governing parking on its property, administration of the state scholarship and tuition grant program, the interested persons number in the thousands, and many of them simply are not identifiable at the time of the rule adoption. Regulations of the Kansas Public Employees Retirement System affect thousands of state employees, as well as retirants, in some instances. It was obviously burdensome and much too costly

to require mailed notice to the thousands of persons who were affected by adoption of a particular rule or regulation, even though those persons might technically be identifiable. As a sort of middle ground, we settled on a procedure whereby the agency notifies organizations and representatives of affected parties. In the instance of KPERS, for example, the Board sends notice of proposed rule-making to its "contact" person in each state agency, with the request that these persons post the notice or otherwise disseminate the information among its employees. In the instance of the Board of Regents, for another example, notice is mailed to student government organizations and administrative officers on each campus.

Even in the cases of regulatory and licensing boards with known groups of licensees, mailed notice to each holder of a licensee may be costly. The Board of Healing Arts has several thousand licensees, several hundreds of whom may be doctors living in other states who maintain their Kansas licenses. Mailed notice to each of 2,000 or 3,000 licensees is obviously expensive, and requires substantial staff time preparing the mailings. In the case of that Board, for example, we have in the past agreed that the Board would send notice to the various state professional organizations representing physicians, chiropractors, and osteopaths, and to local medical and other societies. Thus, a notice may be mailed to two or three dozen parties, rather than several hundred or several thousand. These representative interest groups are not required, of course, to disseminate the information, but in the ordinary course, it is in the interests of their members to do so.

A number of state licensing boards each license several hundred persons, and in some instances, several thousand persons. I have no figures before me, but the State Board of Nursing, the Real Estate Commission, and the Barber Examiner Board are but three which come to mind which license a great number of persons. The budgets of these and other agencies would have to include substantial provision for postage and other costs entailed in providing mailed notice to each individual licensee.

Regulations of other state agencies affect others than licensees. The Board of Regents is a useful example, and the Department of Administration is another. Its regulations may very directly affect thousands of classified employees, for example, all of whom may be identified, as a technical matter. However, the process of mailing notice of a proposed rule involving overtime, for example, would involve thousands of mailed items.

The middle ground we have followed in the past is doubtless an imperfect one. However, to my knowledge, there have been very few complaints in the last five years that any agency adopted a

rule or regulation without adequate notice to the affected parties, whether they be licensees, or merely members of the public who are particularly affected by an agency action, such as students at Regents' institutions.

Thus, I suggest that the requirement in section 3(a) of mailed notice to all licensees is more costly and administratively burdensome to state agencies than the benefits, if any, of slightly more effective notice will justify, and secondly, that the language of this provision, referring only to licensees, does not apply to the action of many agencies whose rule-making procedures affect persons other than licensees, such as state classified employees, students, motorists on the Kansas Turnpike, and the like.

Yours very truly,

JOHN R. MARTIN
First Assistant
Attorney General

JRM:kj

cc: Mr. Art Griggs
Assistant Revisor of Statutes
2nd Floor - State Capitol Building
Topeka, Kansas 66612