Approved Ken Grotewiel
2/24/92 Date

MINUTES OF THE HOUSE COMMITTEE ON ENERGY & NATURAL RESOURCES.

The meeting was called to order by Representative Ken Grotewiel Chairperson at

3:38 ~~xxx~~/p.m. on February 20, 1992 in room 526-S of the Capitol.

All members were present except:
Representative Corbin, excused
Representative McKechnie, excused

Committee staff present:
Raney Gilliland, Principal Analyst, Legislative Research Department
Pat Mah, Legislative Research Department
Lenore Olson, Committee Secretary

Conferees appearing before the committee:

Rebecca Rice - Legislative Counsel, Amoco Production Company
Brian Moline - General Counsel, Kansas Corporation Commission
Bill Bryson - Director of Oil & Gas, Conservation Division, KCC, and Chair of Commission on Natural Gas Policy
Don Low - Director, Utilities Division, Kansas Corporation Commission
Alan Decker - Consumer Counsel, Citizens' Utility Ratepayer Board

The Chair opened the hearing on HB 2900.

HB 2900 - An act concerning public utilities; relating to the jurisdiction of the state corporation commission over compressed natural gas; amending KSA 66-104 and repealing the existing section.

Rebecca Rice, Amoco Production Company testified on HB 2900. She said that although they requested this bill be introduced, this legislation, as drafted, is flawed, at no fault of staff. Due to errors in the draft as submitted, the bill is more sweeping in nature than was intended. The KCC will propose amendments to the bill which, in her opinion, will solve the problem of the exemption language being overly broad. (Attachment 1)

Brian Moline, Kansas Corporation Commission, presented an amendment to HB 2900 which would clarify that the state has no jurisdiction over the marketing or sale of compressed natural gas for end use as motor vehicle fuel. (Attachment 2)

The Chair closed the hearing on HB 2900.

The Chair opened the hearing on SCR 1633.

SCR 1633 - A Concurrent Resolution relating to the commission on natural gas policy; extending the date for the commission's written report to be presented to the governor and to the Kansas legislature; amending chapter 301 of the 1991 Session Laws of Kansas.

Bill Bryson, Chair of the Kansas Commission on Natural Gas Policy, testified in support of SCR 1633. He said that in order to provide both the governor and the legislature a natural gas policy having solid recommendations instead of short term solutions, an extra year is needed for completion of the project. (Attachment 3)

The Chair closed the hearing on SCR 1633.

Chairperson Grotewiel then announced that he had formed a subcommittee to work on HB 2801 (solid waste management). The subcommittee will be chaired by Representative Charlton, and the other members appointed were Representatives Gatlin and Thompson. The subcommittee was instructed to present a balloon on points of agreement to the full Committee within one week.

The Committee reviewed the minutes of February 17, 1992. A motion was made by Representative Thompson, seconded by Representative Correll, to approve the February 17, 1992, minutes. The motion carried.

The Chair opened the hearing on HB 2899.

HB 2899 - An act concerning public utilities; relating to rates; amending KSA 1991 Supp. 66-101f, 66-1,193, 66-1,206 and 66-1,236 and repealing the existing sections.

Don Low, Kansas Corporation Commission, testified in support of HB 2899. He said that many other states have adopted policies of disallowing part or all of those costs resulting from charitable donations and membership dues, either through commission decisions or by legislation; and the KCC is requesting that it be given similar authority. (Attachment 4) Mr. Low then responded to questions from the Committee.

Alan Decker, Citizens' Utility Ratepayer Board, testified in support of HB 2899, stating that the Board believes it is important that the State Corporation Commission have broad authority to establish a dues and donation policy. (Attachment 5)

The Chair closed the hearing on HB 2899.

Bill Bryson, KCC, reappeared to present information to the Committee which was requested at their February 13, 1992, hearing on HB 2888. The information he submitted outlined which states have some type of statutory or regulatory authority over cathodic protection wells. (Attachment 6)

The meeting adjourned at 4:25 p.m.

GUEST LIST

COMMITTEE: ENERGY & NATURAL RESOURCES DATE: 2/20/92

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bill Brysm	Topeka, Kans	KCC
Don Low	"	"
Irvin Nelson	"	"
Bill Anderson	Mission	Water Dist #1 of Jo Co.
Jim Ludwig	Topeka	KPL Gas Service
Robert A. Fox	" "	KCC
Tom Day	"	KCC
Alan Dealoor	"	CURB
Tom Whitaker	"	Ks Motor Carriers Assn
Bill Daughtridge	Columbus	Empire District Electric
Dan Haas	Overland Park	KCPL
Steve Keaveny	Topeka	KG&E
Ed Schaub	Topeka	KPL Gas Service
George Barbee	Topeka	Enron
Lee Eisenhauer	Topeka	KLPGA
Mike Reecht	"	AT&T
Bob Hodges	"	Ks Telecom Assn
Jo Russell	"	United Tels.
Ken Peterson	"	Ks Petroleum Council
Steve Potter	"	Peoples Nat. Gas
Ron Hein	"	Mesa
Rebecca Rice	Topeka	Amoco Production

TESTIMONY PRESENTED TO THE
HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE
re: HB 2900

2-20-92

by: Rebecca Rice
Legislative Counsel for Amoco Production Company

Thank you Mr. Chairman and members of the committee. I appear before you today on behalf of Amoco Production Company, who requested that HB 2900 be introduced.

As most of you are aware, Amoco Corporation installed a retail pump for compressed natural gas at 6th and Quincy in Topeka. This legislation was requested for clarification that the Kansas Corporation Commission does not have, nor want, jurisdiction over the retailing of compressed natural gas as a motor fuel to the general public. Although the KCC has been very helpful in our efforts to make this motor fuel available to the public, Amoco would prefer to codify that KCC should not regulate the sale of this product to the general public.

I will tell you at the outset that this legislation, as drafted, is flawed, at no fault of staff. Suggested language for the bill was drafted in Denver, and most of that language was incorporated into HB 2900. Due to errors in the draft as submitted, the bill is more sweeping in nature than was intended.

The Kansas Corporation Commission will present proposed amendments to the bill which will, in our opinion, solve the problem of the exemption language being overly broad. The KCC did allow us to review the amendatory language which they will propose, and we are in complete agreement with the proposed amendments. We appreciate the fact that they were willing to spend some of their staff time to clean up a bill which we inadvertently drafted in an overly broad manner. In that light, I would note that we are on new ground with this legislation, and, therefore, indulgence in our attempts to work through some of the statutory problems encountered by retailing compressed natural gas as a motor fuel would be appreciated.

To have a compressed natural gas retail pump in the state of Kansas is a very exciting development. As the country moves forward in attempting to find alternative cleaner burning fuels, the importance of "big oil" in this area is highlighted. The willingness of Amoco to put forth the large amount of capital necessary to make this retail outlet a reality is a sign of faith, by Amoco, in the state of Kansas and a willingness to invest in our state.

Thank you, Mr. Chairman.

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House E+NR
Attachment 1

Suggested Amendment for HB 2900

(1) Strike new Sec. 1 and new Sec. 2

(2) Strike lines 28 through 33 of Sec. 3 and insert the following:

"The term 'public utility' shall not include any activity of an otherwise jurisdictional corporation, company, individual, association of persons, their trustees, lessees or receivers as to the marketing or sale of compressed natural gas for end use as motor vehicle fuel."

2/20/92
House E+NR
Attachment 2

TESTIMONY ON SENATE CONCURRENT RESOLUTION 1633

PRESENTED BEFORE THE HOUSE ENERGY AND
NATURAL RESOURCE COMMITTEE

February 20, 1992

My name is Bill Bryson and I am appearing here today as the elected Chairperson of the Kansas Commission on Natural Gas Policy established through Senate Concurrent Resolution 1633. I am appearing in support of the amendment extending the life of the Commission for one year.

Throughout the last twenty years there have been several attempts to establish a National Energy Policy. Some of these have been aborted by changing economics of the petroleum industry in relation to global oil politics or by changing administrations in the United States. Some energy strategies or policy drafts have proceeded forward only to find that implementation would be either impractical or difficult due to lack of understanding and commitment by industry, the states and the federal government to practice oil energy conservation. Natural gas, while always included in energy policies as a source of more environmentally acceptable energy source and a more abundant source of clean fuel, has been treated as a mistrusted, generally ignored stepchild to the charismatic aura and romantic dependency upon oil.

Kansas is blessed with large gas reserves primarily from the Hugoton-Panoma field and several other deeper gas zones. The State of Kansas, like many other states until 1991, never acknowledged that perhaps natural gas policy elements are more appropriately discussed and addressed at the state, not the federal level. If all the states, in concert, can develop viable policies for the production and marketing of natural gas, then the natural gas component of any future National Energy Policy will be reflective of what the public wants. The additional advantage of state level policy development is that a Kansas gas policy will be based on a knowledge of Kansas gas resources and will integrate both technical realities and public needs into one thought process. Public education and reshaping of public perceptions relating to natural gas is a necessary part of the process.

The Kansas Commission on Natural Gas Policy as authorized through SCR

2/20/92
House E+NR
Attachment 3

1633 has met regularly since September 1991. We have a very knowledgeable membership which have been able to lend unique expertise to technical, policy making and consumer issues germane to development and utilization of Kansas gas resources. The Legislative direction to have the Commission develop a final report by the beginning of the 1992 Legislative session was an encouraging sign that the Legislature viewed establishing of a Kansas gas policy as extremely important. Unfortunately, just as Rome wasn't build in a day or a year, neither can a viable gas policy be hastily developed which has the proper substance to be lasting. I have the opinion that even if the Commission had started meeting last May instead of September, we would still be here asking for an extension to complete the report. This reflects the complex nature of policy issues surrounding the journey of natural gas from a producing well to the end user.

Therefore, in order to provide both Governor Finney and the Kansas Legislature a natural gas policy having solid recommendations and proposed policy direction instead of short term solutions, the Commission urges the Committee to approve SCR 1633 to provide an extra year to complete the project.

PRESENTATION BEFORE
THE HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE
ON HOUSE BILL NO. 2899

BY THE CORPORATION COMMISSION
DON LOW, DIRECTOR - UTILITIES DIVISION
FEBRUARY 20, 1992

THE COMMISSION REQUESTS THIS AMENDMENT TO VARIOUS STATUTES IN ORDER TO CLARIFY ITS AUTHORITY WITH REGARD TO THE ISSUE OF WHETHER RATEPAYERS SHOULD PAY FOR THE COSTS OF CIVIC AND CHARITABLE DUES AND DONATIONS BY UTILITIES.

ALTHOUGH THE AMOUNT OF THESE COSTS ARE A RELATIVELY SMALL PORTION OF UTILITY COSTS, THEY HAVE TRADITIONALLY BEEN THE SUBJECT OF CONSIDERABLE DEBATE AND CONTENTION IN RATE CASES. THE KCC HAS STRUGGLED FOR AT LEAST THIRTY YEARS WITH THE OPPOSING VIEWPOINTS ON THE ISSUE AND BELIEVES THAT LEGISLATION EXPLICITLY AUTHORIZING THE COMMISSION TO ADOPT A POLICY OF SHARING THE COST OF DUES AND DONATIONS BETWEEN RATEPAYERS AND UTILITIES IS DESIRABLE.[1]

TO APPRECIATE THE NEED FOR LEGISLATION, A BRIEF REVIEW OF COURT DECISIONS ON THIS ISSUE IS NECESSARY. (ATTACHED ARE EXCERPTS FROM THE KANSAS COURT DECISIONS DEALING WITH THE ISSUE.) IN 1963 AND 1983, THE KCC ATTEMPTED TO EXCLUDE ALL CIVIC AND CHARITABLE DUES AND DONATIONS FROM BEING REFLECTED IN RATES. THIS WAS BASED ON FINDINGS THAT RATEPAYERS SHOULD NOT BE FORCED TO INVOLUNTARILY MAKE SUCH INDIRECT PAYMENTS TO ORGANIZATIONS, EVEN IF THEY WERE WORTHWHILE CAUSES. HOWEVER, THE SUPREME COURT IN 1963 OVERTURNED THAT FINDING BASED ON ITS CONCLUSION THAT SUCH EXPENSES ARE

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[1]This policy would not apply to "dues" for which there is a clear basis for disallowance, such as those to country clubs which benefit only utility employees, or to professional organizations which engage partially in political lobbying.

2/20/92
House E+NR
Attachment 4

LEGITIMATE FOR ANY BUSINESS IN MAINTAINING "ITS STANDING AND GOOD WILL." THE 1983 KCC DECISION WAS ALSO OVERTURNED BASED ON THE 1963 COURT DECISION.

SUBSEQUENTLY, THE COMMISSION INFORMALLY ADOPTED A GENERAL POLICY WHICH ALLOWED ONE-HALF OF A UTILITY'S DUES AND DONATIONS AS AN OPERATING EXPENSE. THIS WAS BASED ON A JUDGMENT THAT UTILITY SHAREHOLDERS BENEFITTED AT LEAST AS MUCH AS RATEPAYERS FROM THE GOODWILL GENERATED BY DUES AND DONATIONS AND SHOULD THEREFORE BEAR HALF THE COSTS. HOWEVER, IN TWO APPEALS DEALING WITH THE ISSUE, THE COURT OF APPEALS FOUND ITSELF BOUND BY THE 1963 AND 1983 CASES. THE COURT HELD THAT THE KCC DECISION, "WHILE IT MIGHT BE SUPPORTED IN TERMS OF FAIRNESS," DID NOT COMPLY WITH THOSE PRIOR CASES, WHICH CONTEMPLATED DISALLOWANCE ONLY OF SPECIFIC DUES OR DONATIONS WHICH WERE FOUND TO BE UNREASONABLE. THE COURT STATED: "IN THE ABSENCE OF LEGISLATION OR REGULATIONS CODIFYING THE POLICY FOLLOWED BY THE KCC IN THE PRESENT CASE, THE KCC WAS REQUIRED TO FIND THE CHARITABLE CONTRIBUTIONS UNREASONABLE IN ORDER TO DISALLOW THEM AS OPERATING EXPENSES."

AS A RESULT OF THESE COURT DECISIONS, THE KCC HAS NO LATITUDE - IN THE ABSENCE OF LEGISLATION - TO REQUIRE THE SHARING OF COSTS OF CIVIC AND CHARITABLE DUES AND DONATIONS BETWEEN RATEPAYERS AND SHAREHOLDERS. AS A PRACTICAL MATTER, THIS MEANS THAT KCC IS FORCED TO PASS ON THE COSTS OF ALL DUES AND DONATIONS TO RATEPAYERS.[2] THIS IS BECAUSE THE COMMISSION FINDS IT ALMOST IMPOSSIBLE TO DETERMINE THAT ANY SPECIFIC DUE OR DONATION IS UNREASONABLE. THERE IS SIMPLY NO BASIS, IN MOST CASES, TO DETERMINE THAT A SPECIFIC AMOUNT OF DONATION IS EXCESSIVE OR THAT A CERTAIN TYPE OF CAUSE IS UNWORTHY, WITHOUT BEING ARBITRARY OR CAPRICIOUS.

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[2]Some utilities have not contested a 50/50 split of these costs in the past but clearly could do so in light of the court decisions.

THE COMMISSION CONTINUES TO BELIEVE THAT A POLICY OF SHARING THESE COSTS IS THE MOST APPROPRIATE. MANY OTHER STATES HAVE ADOPTED POLICIES OF DISALLOWING PART OR ALL OF SUCH COSTS, EITHER THROUGH COMMISSION DECISIONS OR BY LEGISLATION. THE KCC IS REQUESTING THAT IT BE GIVEN SIMILAR AUTHORITY.

THANK YOU.

was included in the consolidated return as a deduction.' In his computations for the determination of the amount of income tax allocable to the Applicant, he included interest expense which was paid by the Applicant to its parent or other members participating in the filing of this consoldated income tax return. Yet in filing this consolidated tax return he eliminated such interest. In fact, he testified as follows:

"'I go back to my original statement, Mr. Rice. In a consolidated return you *will have to eliminate interest payments between parties within the consolidation.*' (Emphasis supplied.) His computation includes as a deduction interest *which was not* deducted in computing federal income taxes (interest payments to the parties within the consolidation), and neglects to include interest which was utilized as a deduction for federal income taxes (interest on system-wide debt).

"The Staff proposed an adjustment of federal income taxes of $298,431. Witness Leroy, formerly a revenue agent with the Internal Revenue Service, proposed to correct witness Griesedieck's computation by accepting only those things which witness Griesedieck concedes must be done in the tax returns as they were filed and the taxes were actually paid by A. T. & T. He began with the total capital employed in the State of Kansas, as reflected in Whiteaker's Exhibit No. 2. He thereupon applied the system-wide debt ratio of 34.29 percent to this total capital and determined that the amount of system-wide debt which was allocable to the property in Kansas was $62,389,859, and computed the debt cost allocable to the State of Kansas of $2,133,733. This interest cost was substituted for the interest cost used by the Applicant in its compuations of income tax liability. Using this method he ascertains that the actual income tax expense incurred by the Aplicant was $298,431 less than the amount presented by the Applicant in its testimony.

"The Applicant's federal income tax liability was incurred and assessed on a basis of a consolidated income tax return filed by A. T. & T. and its operating subsidiaries. The Applicant introduced copies of checks which indicated that it paid funds direct to the Director of Internal Revenue. This method of payment does not affect the ultimate liability of the Applicant, nor does it constitute evidence of the amount of taxes which were in fact incurred. Apparently the Applicant paid a portion of income taxes which should have, in fact, been paid by its parent, A. T. & T. In the final analysis the tax liability was incurred and the taxes paid on the basis of the consolidated return. In such return the interest expense which was deducted from gross income was not the interest expense which witness Griesedieck testified he used in his computations, but rather, the consolidated interest costs of the groups paid to persons or entities outside the consolidated group."

The parent company has seen fit to take advantage of a consolidated income tax return by combining its income and expense with that of its numerous subsidiaries. We cannot say as a matter of law that the Commission abused its discretion in calculating the Company's income tax liability on the actual debt ratio of the parent and its subsidiaries which is approximately 66 percent equity and 34 percent debt.

Another expense item, which is immaterial in this case but appears to be a matter of principle worthy of considerable space in the briefs, is that of the Chamber of Commerce [redacted]. In its brief, the Commission states its position as follows:

"The Company, in its income statement, included the sum of $18,337, which constituted Chamber of Commerce dues and charitable contributions. The Commission granted to the Company the benefit of 52 per cent income tax deduction resulting in a net adjustment of approximately $9,000. The Commission ascertained that these amounts were donations and not a business expenditure which should be borne by the telephone subscribers. Accordingly, charitable contributions were found to be donations to be absorbed by the stockholders."

The district court found that the items should be allowed as expense. There is no contention that the amounts are unreasonable or excessive.

It is concluded that such expenditures are necessary if a company, firm or individual is to maintain its standing and good will in a community. Such expenditures should be allowed as a legitimate expense in any business. They are, however, subject to strict scrutiny by the Commission as to their reasonableness and propriety. Decisions may be found supporting both sides of the argument. Their review would serve no purpose here. It has not been the policy of this state to penalize any individual or corporation for assuming reasonable charitable and civic responsibilities.

It was estimated that the expense of the Company in preparing and presenting this rate case before the Commission would cost approximately $558,950. The Commission amortized this amount over a five-year period for the purpose of normalizing future expense. Included in the estimated expense is the sum of $119,886 which the Company claims represents the wages and salaries of regular employees who assisted the engineer in making his valuation study. It contends that the expense will be a continuing one and should be allowed as an expense. The Commission contends in its brief:

"These employees were also engineers with the Company and work on many other projects. If their work is performed on a capital asset, such as building or other telephone plant, the wages and salaries of such personnel are capitalized. These sums are then returned in the form of depreciation expense over the life of the building or plant on which the work is performed. If the work performed is on a building having a forty-year life, then such wages and salaries are recouped at the rate of 2½% a year and not for 100 per cent. The Commission was of the opinion that such employees, whose entire wages and salary which are not necessarily placed in operating expenses,

pertains to time periods other than the test period. [Cite omitted.] A satisfactory resolution of this conflict is that when *known and measurable* post-test-year changes affect with certainty the test-year data, *the commission may, within its sound discretion,* give effect to those changes. [Cite omitted.]' *Narragansett Elec. Co. v. Harsch,* 117 R.I. 395, 416, 368 A.2d 1194 (1977)." 4 Kan. App. 2d at 635-36 (emphasis original).

Accord *Kansas Power & Light Co. v. Kansas Corporation Commission,* 5 Kan. App. 2d 514, 517, 620 P.2d 329 (1980), *rev. denied* 229 Kan. 670 (1981).

The Commission recognized the known and measurable test in making a number of staff-proposed adjustments to the test year. We conclude the Commission abused its discretion and unreasonably refused to adjust the test year to recognize the loss of sales to the refinery. We also recognize our decision to be a hollow victory for Gas Service, because it has applied for another rate increase which will replace any increase the Commission ultimately makes in this proceeding. In addition, any such increase will be applicable during the summer months when natural gas sales are low, so the practical effect of our decision will be of little consolation to Gas Service.

Gas Service also argues the Commission erred in disallowing as operating expenses the dues and charitable donations made during the test year. The Commission disallowed *all* of the contributions and dues and devoted some three pages of its order to explaining why it was doing so. The Commission basically determined ratepayers should not be required to involuntarily pay dues and charitable donations made by a utility. It further determined there was a lack of evidence by Gas Service to show the reasonableness of any of the dues and charitable donations. We deem the latter argument to be of no real significance. For at least twenty years, utilities have been allowed to include in operating expenses the dues and charitable donations they pay, subject only to a reasonableness standard. Most of the $105,041 disallowed here (about 25 cents a year per user) was given to legitimate, recognized charitable organizations such as United Way, Heart Association, Menninger's, and educational institutions. In addition, Gas Service paid dues such as those to Chamber of Commerce, and to Rotary Club and Kiwanis Club for its key employees. Staff counsel conceded at oral argument that the Commission is now disallowing charitable donations and dues as a matter of policy, and we deem that to be the issue

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before us. The list of charitable donations and dues paid by Gas Service is such that it would be unreasonable to disallow them in toto, for at least a substantial number of them are reasonable on their face without further evidence as to their reasonableness. Thus, the issue before us is not their reasonableness but whether the Commission can, as a matter of policy, disallow *all* dues and charitable contributions as operating expenses.

The Supreme Court in *Southwestern Bell Tel. Co. v. State Corporation Commission,* 192 Kan. 39, Syl. ¶ 8, 386 P.2d 515 (1963), stated:

"The reasonable cost of meeting civic responsibilities such as Chamber of Commerce dues and charitable donations should be allowed as an operating expense in a public utility rate investigation, but they are subject to close scrutiny as to reasonableness."

In the absence of some indication that the Supreme Court will no longer follow its earlier decision, we are duty-bound to follow its prior case law. Although only one member of the court that wrote *Southwestern Bell Tel. Co.* is still a member of the Supreme Court, we have no indication the Court would change its position. We are aware of the considerable authority existing to support the argument that whether to allow dues and charitable donations as operating expenses is a political issue to be decided by the legislature and not a legal issue. However, the Supreme Court has spoken, and since we are of the opinion that *Southwestern Bell Tel. Co.* controls the proceeding before us, we are duty-bound to follow it. In the future, if the Commission on remand truly believes any charitable donations or dues are unreasonable, it should state specifically which it finds to be unreasonable and its reasons for so finding.

Midwest Gas Users requested at oral argument that we consider an issue not raised in the rate hearing and not briefed by the parties, and that is whether the Commission is subject to the open-meeting law and, if so, whether a new hearing is required. We do not deem the issue to be such that its consideration is necessary to serve the interests of justice or to prevent the denial of fundamental rights (*State v. Puckett,* 230 Kan. 596, 640 P.2d 1198 [1982]), thus we decline to consider the issue.

We have examined the argument of Midwest Gas Users, W. S. Dickey Company and Owens-Corning concerning the Commission's order allowing a rate increase on a volumetric basis rather

sufficient specificity to convey to the parties, and to the courts, an adequate statement of facts which persuaded the Commission to arrive at its decision. [Citations omitted.]" Ash Grove Cement Co. v. Kansas CORPORATION COMMISSION, 8 Kan.App.2d 128, 132, 650 P.2d 747 (1982).

The findings of the Commission do not, however, "have to be stated with such particularity as to amount to a summation of all the evidence." Ash Grove Cement Co., 8 Kan.App.2d at 133. In this instance, the Commission summarized the testimony of principal witnesses Moyer and York as well as the tenor of testimony offered by members of the agricultural community. Although KN may not agree with the conclusions drawn from that testimony, the findings provide an adequate explanation of the Commission's reasoning in establishing a rate of return.

We likewise find no merit in KN's contention that the distressed agricultural economy is not a valid consideration in determining rate of return. At argument on rehearing before the Commission, KN's attorney represented that 11.5% of its total customer base is comprised of irrigation customers who account for roughly one-third of its Kansas sales. They are parties whose interests are to be balanced. Kansas Gas & Electric Co. v. Kansas Corporation Comm'n, 239 Kan. at 488.

KN also contends the Commission has failed to consider its business and financial risk. The order reveals that the Commission acknowledged KN's risk but chose to limit that risk to the Kansas jurisdictional operation.

KN next argues that the return on equity was greater in its last rate case and has been greater in applications made by other utilities. This observation is irrelevant in that rate applications are unique to each company, and statutory provision is made for continuous reevaluation of rates at the instigation of either the Commission or the utility. See K.S.A. 66-101 et seq. Furthermore, res judicata does not ordinarily apply to the decisions of administrative tribunals. Warburton v. Warkentin, 185 Kan. 468, Syl. P 3, 345 P.2d 992 (1959).

KN finally contends that the Commission inconsistently adopted the low end of witness York's recommendation. "The Commission has discretion to weigh and accept or reject testimony presented to it." Ash Grove Cement Co., 8 Kan.App.2d at 131. The Commission's determination was within the range of evidence presented. Our Supreme Court has commented on the "elusive" range of reasonableness: "A court can only concern itself with the question as to whether a rate is so unreasonably low or so unreasonably high as to be unlawful. The in-between point, where the rate is most fair to the utility and its customers, is a matter for the State CORPORATION COMMISSION'S determination." Southwestern Bell Tel. Co. v. State CORPORATION COMMISSION, 192 Kan. 39, Syl. P 17, 386 P.2d 515 (1963).

The Commission's determination on rate of return, although less than requested by KN, is reasonable and lawful.

II. Dues and Donations.

KN challenges the elimination of 50% of its dues and donations which resulted in a reduction of $4,365 to operating expenses. The Commission's only witness on the subject acknowledged that $8,700 was not an unreasonable level of contribution.

This issue has been before the appellate courts of this state before. Our Supreme Court, in Southwestern Bell Tel. Co. v. State CORPORATION COMMISSION,

192 Kan. at 73, addressed the matter of Chamber of Commerce dues and charitable donations.

"It is concluded that such expenditures are necessary if a company, firm or individual is to maintain its standing and good will in a community. Such expenditures should be allowed as a legitimate expense in any business. They are, however, subject to strict scrutiny by the Commission as to their reasonableness and propriety. Decisions may be found supporting both sides of the argument. Their review would serve no purpose here. It has not been the policy of this state to penalize any individual or corporation for assuming reasonable charitable and civic responsibilities."

In that case the Commission had ALLOWED DUES and DONATIONS as an expense item.

This court, in Gas Service Co. v. Kansas CORPORATION COMMISSION, 8 Kan.App.2d 545, 662 P.2d 264, rev. denied 233 Kan. 1091 (1983), considered a situation in which the Commission had DISALLOWED all DUES and contributions on the ground that ratepayers should not be required to contribute involuntarily. This court perceived the issue before it to be not the reasonableness of the expenses, "but whether the Commission can, as a matter of policy, DISALLOW all DUES and charitable contributions as operating expenses." 8 Kan.App.2d at 551. We felt "duty-bound" to follow the holding in Southwestern Bell Tel. Co., 192 Kan. 39, and held the total DISALLOWANCE of DUES and charitable DONATIONS unreasonable and remanded the issue to the Commission. We directed the Commission, if it finds DUES and charitable DONATIONS unreasonable, to "state specifically which it finds to be unreasonable and its reasons for so finding." 8 Kan.App.2d at 551.

Here, the only evidence is that the $4,365 excluded is reasonable. That part of the decision excluding the $4,365 from expenses is reversed.

III. Outside Services.

KN contends the Commission acted unreasonably in decreasing operating expenses by $52,361 in order to eliminate the cost of outside services used to evaluate a tender offer by Mesa Petroleum Company to purchase KN's common stock.

Staff presented testimony the studies were performed from an investor's perspective. KN testimony was that it wanted to establish a "normal and continuing annual systemwide amount."

The Commission accepted the staff adjustment to operating expense, finding:

"The adoption of a 'representative level,' however, for a single account would be violative of the matching of expense and revenue inherent in use of the test year concept. Past levels of outside service expense do not justify departure from actual test year operations. Moreover, the expenses associated with the tender offer are not in the nature of a recurring expense to be recovered again and again each year the proposed rates are in effect."

This court, in Gas Service Co. v. Kansas CORPORATION COMMISSION, 4 Kan.App.2d 623, 609 P.2d 1157, rev. denied 228 Kan. 806 (1980), reviewed principles relevant to allowance of existing operating expenses. "The general rule is that the Commission may not arbitrarily disallow an actual, existing operating expense incurred during a test year. [Citation omitted.]" 4 Kan.App.2d at 635. We acknowledged the Commission's discretion to adjust test year results to allow for known changes to make the test year representative of the future. In the present case, costs incurred to evaluate the tender offer admittedly will not recur; KN argues, however, that these costs are representative of costs incurred for outside services. This appears to violate the test year

treatment is appropriate. The KCC weighed the testimony in favor of CURB's witness. There is substantial competent evidence to support the KCC's conclusions.

The final adjustment contested on appeal is the imputation of revenue to KG & E's space-heating rate to offset projected short-term revenue losses of $3.096 million. The KCC describes this rate as "designed to give KG & E a tool to compete with the natural gas industry by offering special rates to those customers who made the investment and commitment to using electricity to heat their homes in the winter and help with load management in the summer cooling months during critical peak times and to increase sales during off-peak times." The KCC notes this rate was originally approved by the KCC on the basis that KG & E would not seek to recover the losses associated with it from its other customers. By not adjusting its revenue, however, KG & E would not be shifting the burden of this rate to the ratepayers. The KCC balanced this result against the positions presented by its staff and KG & E. The KCC acknowledged it was not finding the rate unreasonable, but was requiring the loss to continue to be borne by the shareholders.

CURB's witness testified that the imputation should be made to offset the loss expected to occur as a result of the space-heating rate. There was testimony that imputation was necessary to accomplish the result of KG & E bearing the cost of the rate, and also testimony regarding the potential economic effects of the rate over time. There was substantial competent evidence for the KCC to adopt this adjustment.

KG & E argues that the KCC, in prior orders, encouraged KG & E to make interruptible sales and off-system power sales, and to put the space-heating rate into effect. Thus, the adjustments adopted in the present order are a departure from the KCC's prior position and, in fact, KG & E is being punished for doing the very things the KCC encouraged. Without going into a lengthy analysis regarding whether this is indeed true, the KCC clearly sets forth its policy with respect to the continued viability of the Wolf Creek orders. Throughout the Wolf Creek rate orders, the KCC has been committed to balancing the risk-sharing between the shareholders and the ratepayers. The KCC iterates this policy with reference to the present case. Thus, even a departure from prior orders would not be arbitrary, capricious, or unreasonable in view of the KCC's justification.

The test is not whether we believe the KCC's orders are sound business decisions and fair to KG & E. We have studied the record before us and examined the positions taken by the parties and, under our statutory standard of review, do not find error.

Charitable Contributions

The KCC, citing a general policy of ALLOWING "equal sharing of a reasonable level of DONATIONS among ratepayers and stockholders," only ALLOWED recovery of one-half of KG & E's charitable DONATIONS.

The only testimony in the record regarding the charitable contributions was by Debra Weiss, a certified public accountant employed by the KCC as a Senior Utility Regulatory Auditor and Economist. She stated:

"In previous dockets, The Commission adopted a general standard which ALLOWS the equal sharing of a reasonable level of DONATIONS among the ratepayers and stockholders. This objective standard recognizes KG & E's interest in being an active and responsible corporate citizen in the communities it serves and that

the goodwill inuring to the Company as a result of its DONATIONS benefits the stockholders and ratepayers equally. By making this adjustment, Staff is recommending that this standard be applied in this current docket as well."

This issue is governed by two Kansas cases. In Southwestern Bell Tel. Co. v. State CORPORATION COMMISSION, 192 Kan. 39, 73, 386 P.2d 515 (1963), the court held that charitable contributions should be allowed as a legitimate business expense subject to "strict scrutiny by the Commission as to their reasonableness and propriety." The court recognized that, to maintain standing and goodwill in the community, such expenditures must be allowed. In addition, the court acknowledged that other jurisdictions are split on the issue.

In Gas Service Co. v. Kansas CORPORATION COMMISSION, 8 Kan.App.2d 545, 550, 662 P.2d 264, rev. denied 233 Kan. 1091 (1983), we addressed a KCC policy disallowing recovery of all charitable contributions as a matter of policy. The court stated, "We are aware of the considerable authority existing to support the argument that whether to ALLOW DUES and charitable DONATIONS as operating expenses is a political issue to be decided by the legislature and not a legal issue." 8 Kan.App.2d at 551. This court then held that it was bound by Southwestern Bell in determining whether, as a matter of policy, the KCC could disallow all contributions. We reversed the KCC's decision because there had been no determination of whether the contributions were reasonable. 8 Kan.App.2d at 552.

Based on the record before us, the KCC's decision to disallow one-half of the charitable contributions was arbitrary and capricious and not based upon substantial competent evidence. The KCC, apparently in other unidentified dockets, has articulated a general standard of equal sharing of the contributions between the ratepayers and the shareholders. The KCC stated:

"The policy reflects that the charitable organizations receiving donations serve the utility's Kansas service area; do not promote a political or special interest group; that no part of each recipient's earnings inures to the benefit of any private stockholder or individual; and that each donation is to or for the use of a community chest, association, corporation, foundation, fund, organization, or trust located in and conducting substantially all of its activities in the State of Kansas."

The KCC went on to state that, because shareholders and ratepayers both benefit, requiring them to contribute equally was fair. The only reference to reasonableness in the order was a statement by the KCC that it would be unreasonable to make ratepayers fund 100 percent of the contributions because KG & E's rates were well above average for Kansas utilities.

In Gas Service Co., the court contemplated a finding by the KCC that the specific donations or contributions are unreasonable. The court states first, "The list of charitable DONATIONS and DUES paid by Gas Service is such that it would be unreasonable to DISALLOW them in toto, for at least a substantial number of them are reasonable on their face without further evidence as to their reasonableness." 8 Kan.App.2d at 551. The court further noted that on remand the KCC should state which charities it finds unreasonable and its reasons. 8 Kan.App.2d at 551.

In the present case, no testimony was introduced as to the reasonableness of KG & E's charitable contributions. The KCC did not make any finding of unreasonableness as to the charities. Rather, the KCC based its decision on a policy that, while it might be supported in terms of fairness, is not in

compliance with the standard articulated in Southwestern Bell and followed in Gas Service Co. In the absence of legislation or regulations codifying the policy followed by the KCC in the present case, the KCC was required to find the charitable contributions unreasonable in order to disallow them as operating expenses. Since we are cited to no such authority, the KCC acted arbitrarily and capriciously. This adjustment to KG & E's rates is reversed.

Supremacy Clause

KG & E contends that, because the wholesale rates for electricity sold by it to OMPA were approved by the Federal Energy Regulatory Commission (FERC), the KCC's imputation of revenue to KG & E from the sale violated the Supremacy Clause of the United States Constitution. KG & E made off-system sales of gas-fired generating capacity to OMPA. This power is less expensive than Wolf Creek power. CURB argued that, in effect, KG & E was shifting "the burden of its most expensive capacity from the company to its captive ratepayers while selling its least expensive power off system." In addition, CURB maintained KG & E had used the capacity sold to OMPA to help meet the 41 MW condition to add the Ripley impact to the third phase-in increase. The KCC agreed and, as a result, imputed $13.5 million to KG & E's revenue, reflecting Wolf Creek costs for the 41.2 MW capacity sale to OMPA, although KG & E actually only recovered the lesser gas-fired generated rate.

The FERC has exclusive jurisdiction over the wholesale rates for sale of electricity in interstate commerce. 16 U.S.C. s 824 et seq. (1988). A line of cases interpreting the Federal Power Act, 16 U.S.C. s 791a et seq. (1988), resulted in the development of what is called the "filed rate doctrine." Montana-Dakota Co. v. Pub. Serv. Co., 341 U.S. 246, 95 L.Ed.2d 912, 71 S.Ct. 692 (1951). In Montana-Dakota, the Court held, "[T]he right to a reasonable rate is the right to the rate which the Commission [at that time, the Federal Power Commission, now FERC] files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." 341 U.S. at 251-52. The doctrine has undergone some expansion and an overview of the cases is necessary to an understanding of the posture of the instant case.

In Narragansett Elec. Co. v. Burke, 119 R.I. 559, 381 A.2d 1358 (1977), cert. denied 435 U.S. 972 (1978), the court determined the Federal Power Act preempted the Public Utility Commission's authority to investigate interstate prices. 119 R.I. at 569. The Public Utility Commission must treat the interstate rate filed as reflecting reasonable operating expenses. 119 R.I. at 568. The Court, in Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 69 L.Ed.2d 856, 101 S.Ct. 2925 (1981), did not allow a seller of electricity to charge a higher-than-filed FERC rate pursuant to a contract with the purchaser. 453 U.S. at 581-82. The buyer and seller may contract, but if there is a conflict between the rates, the filed rates govern. 453 U.S. at 582.

KG & E relies heavily on Nantahala Power & Light v. Thornburg, 476 U.S. 953, 90 L.Ed.2d 943, 106 S.Ct. 2349 (1986), for its argument that the KCC's imputation of revenue from the OMPA sale is prohibited by the Supremacy Clause. Nantahala and Tapoco both owned power plants and produced electricity that went into the Tennessee Valley Authority. In return, they received a fixed supply of low-cost entitlement power. Nantahala purchased the remainder of power at a higher rate to serve its retail ratepayers. For the purpose of

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PRESENTATION BEFORE
THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES
ON
HOUSE BILL NO. 2899

BY THE CITIZENS' UTILITY RATEPAYER BOARD
ALAN DECKER, CONSUMER COUNSEL

February 20, 1992

The Citizens' Utility Ratepayer Board supports House Bill No. 2899 and the effort to clarify the State Corporation Commission's authority regarding civic and charitable dues and donations. As the Board understands it, this bill does not affect the Commission's authority to completely disallow country club, athletic club, and social club dues. Although the Board supports the proposed legislation, the Board believes two modifications would provide additional flexibility and support for the Commission's dues and donations policy.

Whether and how much ratepayers should be required to pay dues and make donations through their utility bills is a difficult issue for regulators and ratepayers. This bill provides the Commission the authority the courts have said the Commission currently lacks to set a general policy on dues and donations. The Board believes it is important that the Commission have broad authority to establish a dues and donations policy.

Indeed, the Board believes that rather limiting the Commission's authority to disallowing up to 50% of dues and donations that the Commission would have more flexibility if the Commission could disallow up to 100% of these completely

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discretionary expenditures.

In addition, because civic and charitable dues and donations present difficult rate case issues, the Board recommends that utilities be required to prove that dues and donations are a reasonable expenses to pass on to ratepayers. In other words, because the utilities determine which dues and donations to make, the burden of proof should be on the utilities to show that these are reasonable expenses for utility customers to pay. It is not unreasonable to require utilities to demonstrate in their rate filings the reasonableness of their expenses, and this would provide the Commission with support for their dues and donations general policy.

The Board recognizes that civic and charitable dues and donations do not make up a large proportion of total utility costs. Nevertheless, they do represent discretionary costs which should be subject to strict review. Furthermore, because of the unique duty and position of utilities, the Commission should have broad discretion to review these expenses. Because this bill will provide that authority, the Board recommends approval of the bill with the proposed amendments.

Thank you.

Requested Information on
Cathodic Protection Wells
HB 2888
February 20, 1992

The House Energy and Natural Resources, during the discussion of HB 2888, a question was raised as to the number of other states which had some type of statutory or regulatory authority over cathodic protection wells. We were able to contact 17 states in the amount of time available.

States which have statutory or regulation authority over cathodic protection wells.

Alabama - Doesn't have cathodic wells
* California - Has very stringent regulation on the construction and plugging of these wells.
* Colorado - Yes - Construction standards, reports to Oil and Gas and state water engineer
Florida - Called but no response
* Illinois - Yes - no further explanations
* Indiana - Yes - Oil and Gas Division requires location reports, oriented toward pipeline safety
* Louisiana - Yes - Oil and Gas Conservation requires location. Intent to drill - only in Northern part of state.
* Missouri - Yes - Working on new more stringent standards.
Nebraska - No , but good idea.
* New Mexico - Yes - regulatory program
North Dakota - No
Ohio - No
* Oklahoma - Yes - stricter requirements in geologic sensitive areas.
Pennsylvania - No response
* Texas - Yes - Working on statewide regulations which are stricter.
Utah - No
* Wyoming - Yes - Regulations. Process lots of applications.

Prepared by:
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*Asterisks denote states which regulate cathodic protection.

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