Approved: Carl Dean Holmes
Date 4-24-96

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes at 3:42 p.m. on March 7, 1996, in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mary Torrence, Revisor of Statutes
Marcia Ayres, Committee Secretary

Conferees appearing before the committee: Joe Dick, Board of Public Utilities of Kansas City, Kansas
Louis Stroup, Jr., Kansas Municipal Utilities, Inc.
Terry Leatherman, Kansas Chamber of Commerce & Industry
Bob Johnson, Kansas Industrial Consumers
Walker Hendrix, Citizens' Utility Ratepayer Board
Gary L. Haller, Johnson County Park and Recreation District
Howard Parr, Drainage District Coalition

Others attending: See attached list

Hearing on SB 635: Board of public utilities, rate increase procedures

Joe Dick. Mr. Dick read testimony submitted by Hugh J. Taylor, manager of Rates and Regulations for the Board of Public Utilities of Kansas City, Kansas, in support of **SB 635**. He stated that this legislation affects only the BPU, and it emulates the process used by the Kansas Corporation Commission in implementing rates of utilities under its jurisdiction. (Attachment #1)

Louis Stroup, Jr. Mr. Stroup, executive director of Kansas Municipal Utilities, Inc., supported Kansas City Board of Public Utilities' request for **SB 635** because it would treat them in the same manner as jurisdictional utilities are treated by the KCC, and also because it provides that any increase implemented would be subject to refund if a petition is filed in district court. (Attachment #2)

Terry Leatherman. Mr. Leatherman, who is with the Kansas Chamber of Commerce and Industry, did not appear during Senate deliberations on this bill but now has questions regarding how **SB 635** would alter the ability of businesses served by the Kansas City BPU to challenge what they might feel are unfair rate increases. He urged that a legislative solution be crafted so legitimate consumer concerns would receive resolution by an appropriate third party prior to implementing a rate increase. (Attachment #3)

Robert Johnson. Mr. Johnson, senior partner in the law firm of Peper, Martin, Jensen, Maichel & Hetlage who represent the Kansas Industrial Consumers, urged rejection of the provisions of SB 635 because it would deprive consumers of their basic rights previously granted by legislation. (Attachment #4)

Walker Hendrix. Mr. Hendrix, representing the Citizens' Utility Ratepayer Board, testified in opposition to **SB 635** because the Board of Public Utilities is self-regulated, and CURB feels an investigation should be undertaken to consider putting the BPU under the jurisdiction of the Kansas Corporation Commission.

Questions followed after which the hearing was closed.

Hearing on SB 597: Counties, use of sand royalties

Gary Haller. Mr. Haller, director of the Johnson County Park & Recreation District, supported the passage of **SB 597** because it would allow his district the option to utilize the sand royalty dollars for other costs such as land acquisition for the Johnson County Streamway Park System instead of solely for the cleaning and maintenance of state streams. (Attachment #5)

Howard Parr. Mr. Parr, a supervisor in the Tri-County Drainage District, expressed concerns regarding limiting the use of sand royalty money, the formula for division and distribution of the sand royalties, and the exemption for one county. He provided specific statutory language his districts would prefer. (Attachment #6)

Questions followed for the conferees.

Representative Laura McClure distributed a memo from Wakefield Dort, Jr., who is a geology professor at The University of Kansas, regarding the condition of the river bank along the channel of the Kaw from a point about 6 miles upstream from Bonner Springs all the way to the confluence with the Missouri River. (Attachment #7)

Chairperson Holmes closed the hearing on **SB 597** and announced he will chair a sub-committee to work on the bill along with Representative Vaughn Flora and Representative Becky Hutchins.

The meeting adjourned at 5:00 p.m.

The next meeting is scheduled for March 8, 1996.

ENERGY AND NATURAL RESOURCES COMMITTEE
COMMITTEE GUEST LIST

DATE: March 7, 1996

NAME	REPRESENTING
WALKER HENDRIX	CURB
J. C. LONG	UtiliCorp United, INC.
Bob Johnson	Kans Industrial Consumers
JOE DICK	KCK BPU
Mary Shivers	KDOT
Louie Stroup	Kansas Municipal Utilities
Gary L. Haller	Johnson Co. Park & Rec.
Larry Ran	Johnson Co
GERRY RAY	Johnson Co Commission
Laird French	Tri County Drainage Dist
Gail Pauls	" " "
Frank Rice	Kaw River Drainage Dist
Dennis B. Hall	Tri County Drainage
Dale Sandberg	North Topeka Drain. Dist.
HOWARD PARR	TRI CO DRAINAGE DIST.
David G. Stadler	Tri Co. Drainage Dist
Bill Maasen	Jo. Co. Park & Rec Dist.
Glenn D. Cotswell	N. Topeka Drainage Dist
WES Holt	Ks Co. Commissioners Assoc

ENERGY AND NATURAL RESOURCES COMMITTEE
COMMITTEE GUEST LIST

DATE: March 7, 1996

NAME	REPRESENTING
LANCE WEEKS	
Anne Spiess	Ks. Assoc of Counties
LEWJENE SCHNEIDER	KS. LIVESTOCK ASSOC.

Board of Public Utilities 700 MINNESOTA AVENUE • KANSAS CITY, KANSAS 66101 • (913) 573-9000

TESTIMONY OF HUGH J. TAYLOR
OF THE BOARD OF PUBLIC UTILITIES
IN SUPPORT OF
SENATE BILL NO. 635

My name is Hugh J. Taylor. I am Manager of Rates and Regulations for the Board of Public Utilities of Kansas City, Kansas. The Board of Public Utilities (BPU) is the largest municipally-owned utility in the State and serves electricity and water to the City of Kansas City, Kansas.

I appear before you to urge your approval of Senate Bill 635, on behalf of the Board of Public Utilities of Kansas City, Kansas. This legislation affects only the BPU, and it emulates the process used by the Kansas Corporation Commission in implementing rates of utilities under its jurisdiction.

Presently, the process of implementing rates for the Board of Public Utilities starts with the Board publishing a notice of proposed rate increase and setting a hearing date not less than 90 days from the publication of notice. Following completion of the public hearing, the Board determines the appropriateness of the proposed rate increase and directs the implementation of the approved level. In the event there is intervention in the rate hearing process, and in the event there is disagreement between the parties, the intervenors can file for a stay of rates in the district court, with the finding of the district court subject to appeal. A stay of rates would, of course, deny the Utility

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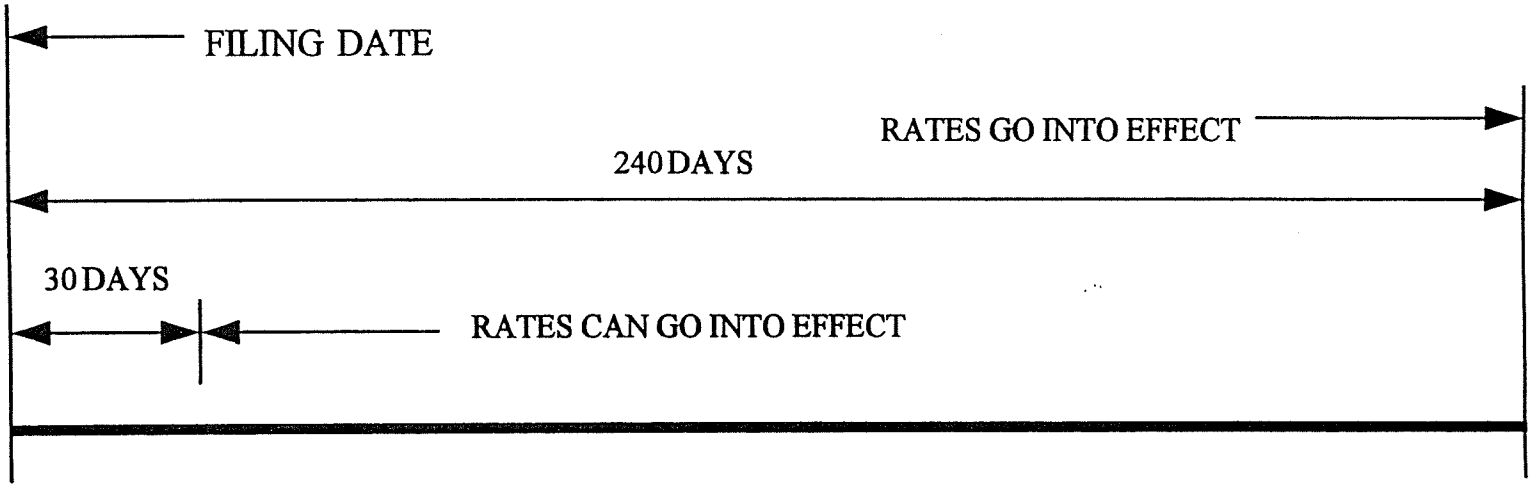
Attachment 1

the necessary revenues to meet its operations until the court makes a determination, even though the courts might find the proposed rate increase reasonable and prudent. This might result in a substantial delay before rates could be increased.

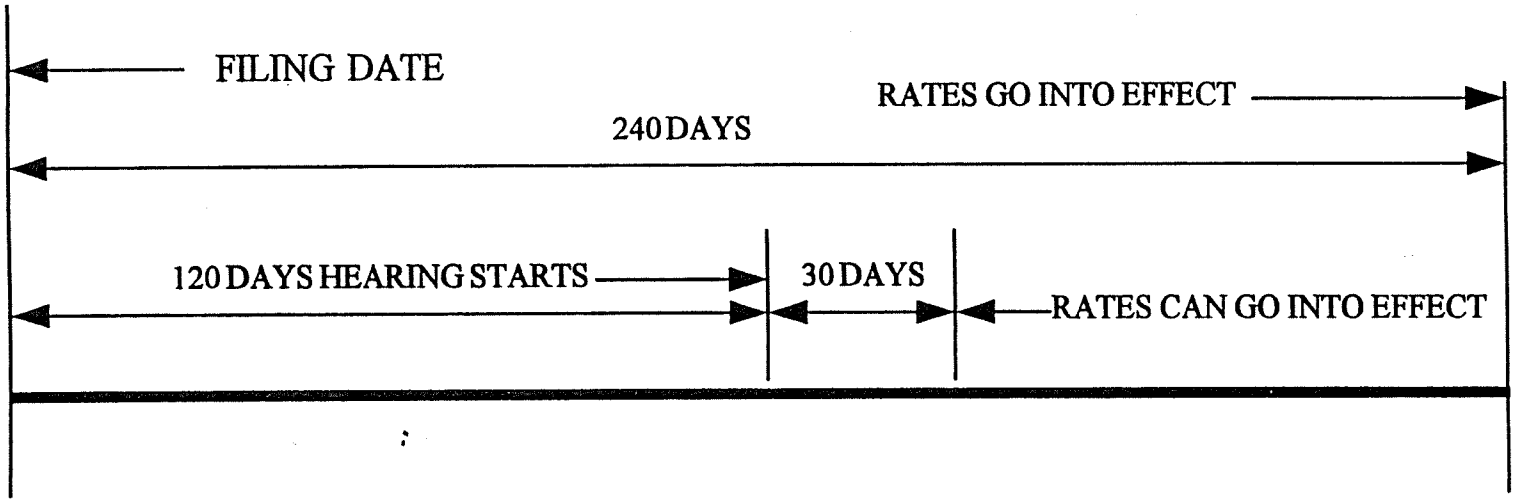
The proposed process does essentially two things, it lengthens the time between the notice of publication of the proposed increase and the date of hearing from 90 days to 120 days, thus giving customers more time to review the proposal. It also provides that the proposed rate increase will become effective, subject to refund and with interest not later than 240 days from the date of notice, just like the Kansas Corporation Commission processes do. Such a process allows the rates to become effective so that revenues are not denied the Utility when court processes find such rates may be reasonable. In the event that an intervenor wishes to appeal the rates through the district court and later through an appellate court, that is still provided under the statute and would require that any overcharge as a result of implementing increased rates above and beyond any judged reasonable and prudent would be refunded to customers of record.

The Board of Public Utilities urges your approval of this legislation so that the Board of Public Utilities can operate on "a level playing field" with other utilities. I have attached a time line showing the implementation process of an investor-owned utility under the jurisdiction of the KCC and that of the proposed statute for the Board of Public Utilities. No other communities or municipal utilities are affected by the proposed legislation.

INVESTOR OWNED RATE INCREASE TIMELINE



PROPOSED MUNICIPAL RATE INCREASE TIMELINE



TESTIMONY ON SB 635

Before House Energy & Natural Resources Committee
March 7, 1996

Mr. Chairman, members of the committee, I am Louis Stroup, Jr., executive director of Kansas Municipal Utilities, Inc., a statewide association of municipal electric, gas and water cities which was founded in 1928 and whose member cities provide utility services to more than 1 million Kansans.

KMU SUPPORTS SB 635

KMU supports Kansas City Board of Public Utilities' request for SB 635 for a number of reasons, including:

1 - **Retail rates** - The change would treat Kansas City BPU in the same manner as jurisdictional utilities are treated by the Kansas Corporation Commission under K.S.A. 66-117. This basically says if the KCC doesn't issue a final order on a rate request within 240 days, the proposed rate request goes into effect automatically. SB 635 provides similar treatment for Kansas City. The BPU board could implement a new rate within the the 240- day time frame, but such action still would be subject to a district court petition.

2 - **Subject to refunds** - The bill also provides that any increase implemented would be subject to refund if a petition is filed in district court. This basically is the same procedure used by the Federal Energy Regulatory Commission in Washington, D.C. when electric utilities file for "wholesale" rate increases.

See example shown on page 5 of attached FERC Order dated February 2, 1996 involving Midwest Energy and its municipal wholesale customers. This authority is contained in Section 205 of the Federal Power Act and is standard procedure in federal wholesale rate matters. KMU first began participating in wholesale rate cases before the Federal Power Commission (now FERC) in the early 1960s.

FERC normally suspends a rate request for a nominal period (usually less than 1 day) and then the new rate goes into effect subject to a final order and subject to refunds.

House ENR
3-7-96
Attachment 2

66-117. Change of rates or schedules; procedure; effective date; higher rates of return in certain cases; hearing. (a) Unless the state corporation commission otherwise orders, no common carrier or public utility over which the commission has control shall make effective any changed rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of such public utility or common carrier except by filing the same with the commission at least 30 days prior to the proposed effective date. The commission, for good cause, may allow such changed rate, joint rate, toll, charge or classification or schedule of charges, or rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier to become effective on less than 30 days notice. Any such proposed change shall be shown by filing with the state corporation commission a schedule showing the changes, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof.

(b) Whenever any common carrier or public utility governed by the provisions of this act files with the state corporation commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, the commission either upon complaint or upon its own motion, may give notice and hold a hearing upon such proposed changes. Pending such hearing, the commission may suspend the operation of such schedule and defer the effective date of such change in rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier by delivering to such public utility or common carrier a statement in writing of its reasons for such suspension. The commission shall not delay the effective date of the proposed change in rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, more than 240 days beyond the date the public utility or common carrier filed its application requesting the proposed change. If the commission does not suspend the proposed schedule within 30 days of the date the same is filed by the public utility or common carrier, such proposed schedule shall be deemed approved by the commission and shall take effect on the proposed effective date. If the commission has not issued a final order on the proposed change in any rate, joint rate, toll, charge or classification or schedule of charges, or any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, within 240 days after the carrier or utility files its application requesting the proposed change, then the schedule shall be deemed approved by the commission and the proposed change shall be effective immediately, except that (1) for purposes of the foregoing provisions regarding the period of time within which the commission shall act on an application, any amendment to an application for a proposed change in any rate, which increases the amount sought by the public utility or common carrier or substantially alters the facts used as a basis for such requested change of rate, shall, at the option of the commission, be deemed a new application and the 240-day period shall begin again from the date of the filing of the amendment, and (2) if hearings are in process before the commission on a proposed change requested by the public utility or common carrier on the last day of such 240-day period, such period shall be extended to the end of such hearings plus 20 days to allow the commission to prepare and issue its final order.

(c) Except as provided in subsection (b), no change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within 30 days after such changes have been authorized by the state corporation commission or become effective as provided in subsection (b), copies of all tariffs, schedules, and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

(d) Upon a showing by a public utility before the state corporation commission at a public hearing and a finding by the commission that such utility has invested in projects or systems that can be reasonably expected (1) to produce energy from a renewable resource other than nuclear for the use of its customers, (2) to cause the conservation of energy used by its customers, or (3) to bring about the more efficient use of energy by its customers, the commission may allow a return on such investment equal to an increment of from ½% to 2% plus an amount equal to the rate of return fixed for the utility's other investment in property found by the commission to be used or required to be used in its services to the public. The commission may also allow such higher rate of return on investments by a public utility in experimental projects, such as load management devices, which it determines after public hearing to be reasonably designed to cause more efficient utilization of energy and in energy conservation programs or measures which it determines after public hearing provides a reduction in energy usage by its customers in a cost-effective manner.

(e) Except as to the time limits prescribed in subsection (b), proceedings under this section shall be conducted in accordance with the provisions of the Kansas administrative procedure act.

History: L. 1911, ch. 238, § 20; R.S. 1923, 66-117; L. 1978, ch. 264, § 1; L. 1980, ch. 201, § 2; L. 1980, ch. 200, § 1; L. 1988, ch. 356, § 225; July 1, 1989.

Research and Practice Aids:
Public Utilities ⇐ 119 et seq.
C.J.S. Public Utilities §§ 15 to 20, 39 to 49, 55 to 58.

Law Review and Bar Journal References:
Review of history of regulations, Marion Beatty, 27 J.B.A.K. 186, 191 (1958).
"Corporation Commission Practice," John E. Davis, 37 J.B.A.K. 87, 88 (1968).
"Wolf Creek and The Rate-Making Process," Brian J. Moline, 33 K.L.R. 509, 510 (1985).

Attorney General's Opinions:
Public utilities; powers of KCC over municipal franchises and ordinances. 84-54.

CASE ANNOTATIONS

1. Telegraph station cannot be discontinued without permission of utilities commission. The State, ex rel., v. Postal Telegraph Co., 96 K. 298, 150 P. 544.

2. Special privilege cannot be granted unless tariff filed, etc. Mollohan v. Railway Co., 97 K. 51, 154 P. 248.

3. Change in rates not made without consent of utilities commission. Telephone Co. v. Utilities Commission, 97 K. 136, 137, 154 P. 262.

4. Nonfeasance primarily under control of commission, mandamus refused. City of Seammon v. Gas Co., 98 K. 812, 815, 160 P. 316.

5. Change in rates, rules, regulations, consent of commission necessary. The State, ex rel., v. Gas Co., 100 K. 593, 595, 165 P. 1111.

6. Rates filed with commission cannot be changed without assent of tribunal. Milling Co. v. Postal Telegraph Co., 101 K. 307, 309, 166 P. 493.

7. Section does not supersede provision relating to control by cities. City of Wilson v. Electric Light Co., 101 K. 425, 428, 166 P. 512.

8. Power to cities to regulate utility; powers of utilities commission. Street Light Co. v. Utilities Commission, 101 K. 774, 778, 169 P. 205.

9. Telephone service discontinued, restoration; order not enforced by mandamus. The State, ex rel., v. Telephone Co., 102 K. 318, 322, 170 P. 26.

10. Discount allowed by water company, discontinued, consent of city commission. City of Great Bend v. Water Co., 106 K. 553, 555, 189 P. 146.

11. Changes and modification of rates must be filed with commission. Railroad and Light Co. v. Court of Industrial Relations, 113 K. 217, 230, 214 P. 797, 804; State, ex rel., v. Telephone Co., 115 K. 236, 274, 223 P. 790.

12. Statute is valid exercise of police power. State, ex rel., v. Telegraph Co., 117 K. 651, 232 P. 1038.

13. Special rate to landowner changed only on compliance with section. Empire Natural Gas Co. v. Thorp, 121 K. 116, 243 P. 1058.

14. Provision has no application to interstate rate. Missouri Pac. Rld. Co. v. Red Star Milling Co., 122 K. 122, 125, 251 P. 417.

15. Cited in construing reparations statute. State, ex rel., v. Public Service Comm., 135 K. 491, 493, 11 P.2d 999.

16. Charges for hotel private telephone exchanges upheld though no tariff filed, individual contracts. Tri-State Hotel Co., Inc., v. Southwestern Bell Telephone Co., 155 K. 358, 370, 371, 125 P.2d 728.

17. Nature and scope of appellate review of commission's judicial orders determined. Union Pac. Rld. Co. v. State Corporation Commission, 165 K. 368, 370, 194 P.2d 939.

18. Injunction enjoining commission from interfering with collection of increased telephone rates improperly granted. Southwestern Bell Tel. Co. v. State Corporation Commission, 169 K. 509, 515, 219 P.2d 377.

19. Mentioned; authority of city to grant to utility right to use streets determined. Kansas Power & Light Co. v. City of Great Bend, 172 K. 126, 128, 238 P.2d 544.

20. Hearing to determine rate base for increase requested hereunder not mandatory. City of McPherson v. State Corporation Commission, 174 K. 407, 408, 412, 413, 432, 257 P.2d 123.

21. Existing rates must adversely affect public interest to justify rate change. Central Kansas Power Co. v. State Corporation Commission, 181 K. 817, 821, 822, 824, 825, 826, 827, 828, 829, 831, 316 P.2d 277.

22. Commission cannot by approval limit liability of telegraph company for error in intrastate message. McNally Pittsburg Mfg. Corp. v. Western Union Telegraph Co., 186 K. 709, 713, 353 P.2d 199.

23. Mentioned in construing electrical energy purchase contract between government and utility. United States v. Kansas Gas and Electric Company, 215 F.Supp. 532, 534, 535.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Midwest Energy, Inc.) Docket No. ER95-590-000

ORDER GRANTING EXTENSION OF TIME
TO CONFORM WITH FUEL CLAUSE REGULATIONS,
GRANTING WAIVER OF NOTICE, AND ACCEPTING FOR FILING,
SUSPENDING, AND SETTING FOR HEARING PROPOSED RATES

(Issued February 2, 1996)

Introduction

Midwest Energy, Inc. (Midwest) is an electric cooperative that provides power and transmission services to another cooperative and several municipal utilities. Shortly after it paid off all outstanding loans to the United States government, and thus became a public utility within the jurisdiction of this Commission, it filed with the Commission the rate schedules under which it has provided service to its customers. It subsequently filed an amended agreement with its cooperative customer as well as generally available, open access transmission tariffs. Intervenors have filed protests and requests for hearing and summary disposition.

As discussed more fully below, we will accept for filing, suspend, and set for hearing the proposed rates (to become effective, subject to refund, on the dates requested by Midwest). The terms and conditions of the tariffs will not be set for hearing and, instead, will be subject to the final rule in the Open Access NOPR proceeding. 1/

1/ See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662 (Apr. 7, 1995), IV FERC Stats. & Regs. ¶ 32,514 (1995).

Background

Recently, cooperatives with outstanding loans from the United States government were provided an opportunity to pay off their debt at a discount. Midwest, a generation and transmission cooperative, took advantage of this offer. As a result, this Commission now has jurisdiction over the rates Midwest charges for wholesale sales and transmission service in interstate commerce. See, e.g., Dairyland Power Cooperative, 37 FPC 12 (1967); Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983). As we held in Golden Spread Electric Cooperative, Inc., 39 FERC ¶ 61,322, reh'g denied, 40 FERC ¶ 61,348 (1987), Midwest, as a Commission-regulated public utility under the Federal Power Act (FPA), is required to file here the rate schedules that govern its jurisdictional transactions with its customers.

Midwest's Proposal

Midwest sells power and transmission services to Sunflower Electric Cooperative, Inc. (Sunflower) and seven municipal utilities (the Cities of Hill City, Lacrosse, Oakley, Jetmore, Colby, Radium and Seward, Kansas). On July 10, 1995, Midwest completed its filing by supplying additional cost support for its existing rate schedules. Those rate schedules govern firm and interruptible power service and transmission service it provides its customers. In addition, Midwest filed: (1) a superseding agreement with Sunflower; and (2) open access transmission tariffs. According to Midwest, the open access transmission tariffs are modeled on the pro forma transmission tariffs contained in the Commission's Open Access NOPR.

Midwest requests effective dates of January 12, 1995 for its existing rate schedules (the date Midwest paid off its United States government debt and became FERC-jurisdictional); July 1, 1995 for the superseding agreement with Sunflower; and November 10, 1995 (120 days after tender) for the open access tariffs. Midwest supports waiver of notice on the ground that it acted expeditiously and in good faith to tender the rate schedules after it became subject to this Commission's jurisdiction.

Notice of Filing and Interventions

Notices of Midwest's filings were published in the Federal Register, 60 Fed. Reg. 13,143 and 37,888 (1995), and 61 Fed. Reg. 63 (1996) with comments, interventions or protests due on or before January 5, 1996.

On July 31, 1995, Sunflower filed a motion to intervene in support of Midwest's filing.

On March 16 and July 31, 1995, the Cities of Hill City, Lacrosse, Jetmore, Oakley, Colby, Radium and Seward, Kansas, the Kansas Municipal Utilities and the Kansas Municipal Energy Agency (collectively, Kansas Cities) filed a protest, motion to intervene, and request for suspension, investigation and hearing. On January 2, 1996, certain of the Kansas Cities -- the Cities of Oakley and Colby, Kansas Municipal Utilities and the Kansas Municipal Energy Agency (Cities) -- filed a supplemental protest, motion to intervene, and request for investigation and hearing. (Their arguments, and Midwest's responsive arguments, are discussed in relevant respects in the following sections of this order.)

On August 15, 1995, Midwest filed an answer and request for a technical conference. Midwest stated that it wanted to avoid the time and expense of a hearing and argued that a technical conference, if instituted by the Commission, would permit Midwest to work with the protesters to resolve their concerns. On September 1, 1995, October 6, 1995, and December 7, 1995, Midwest requested that the Commission defer action on the instant filing in order to allow the parties an opportunity to resolve their differences in a consensual manner. As a result, on September 1, 5, and 8, 1995, the Cities of Jetmore, Lacrosse, Radium, Seward and Hill City withdrew their protests. On December 12, 1995, Midwest informed the Commission that it could not resolve its differences with the remaining intervenors (Cities) and requested that the Commission act on the instant filing.

Discussion

Preliminary Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1995), the timely, unopposed motions to intervene of Sunflower and Kansas Cities serve to make them parties to this proceeding.

Cities contend that Midwest's filing is deficient, and should be summarily rejected, because it does not include Statements AA through BM as required under section 35.13 of the Commission's regulations, see 18 C.F.R. § 35.13 (1995). We disagree. We find that the data submitted by Midwest meet the minimum threshold filing requirements and contain sufficient specificity to enable us to analyze Midwest's filing. Further, the open access transmission tariffs filed by Midwest in response to the Open Access NOPR qualify for the abbreviated cost support requirements of section 35.12, see 18 C.F.R. § 35.12 (1995). 2/

2/ See American Electric Power Corporation, et al., 71 FERC ¶ 61,393 at 62,543 & n. 20, order on reh'g, 72 FERC ¶ 61,287 (1995), reh'g denied, 74 FERC ¶ _____(1996).

Accordingly, the filing is not deficient and should not be rejected.

Fuel Adjustment Clause

Midwest requests waiver of section 35.14 of our regulations, 18 C.F.R. § 35.14, or an extension of one year in which to conform its fuel adjustment clause to our regulations. We will deny the request for a complete waiver. Contrary to Midwest's claims, the differences between its fuel adjustment clause and our regulations are not cosmetic. The existing arrangement places no limits on Midwest's recovery of purchased power costs. Section 35.14 excludes certain purchased power costs entirely from fuel clause recovery and allows recovery of other costs only under certain conditions.

Nevertheless, we remain cognizant of the abrupt change in Midwest's jurisdictional status, and its attendant filing responsibilities, as of the date (January 12, 1995) it completed its loan repayment. Indeed, the regulations clearly recognize that fuel clause changes may require some time -- up to one year -- to implement. 3/ For these reasons, we will grant a one-year extension of time from the date it completed its filing, until July 10, 1996, for Midwest to conform its rate schedules with the requirements of section 35.14. 4/

3/ Section 35.14(a)(8) states as follows:

> All rate filings which contain a proposed new fuel clause or a change in an existing fuel clause shall conform such clauses with the regulations. Within one year of the effectiveness of this rulemaking, all public utilities with rate schedules that contain a fuel clause should conform such clauses with the regulations. Recognizing that individual public utilities may have special operating characteristics that may warrant granting temporary delays in the implementation of the regulations, the Commission may, upon showing of good cause, waive the requirements of this section of the regulations for an additional one-year period so as to permit the public utilities sufficient time to adjust to the requirements.

4/ Midwest's revised fuel clause shall be filed in a new rate proceeding.

3-4

Rate Analysis

Our preliminary analysis of Midwest's submittal indicates that the proposed rates have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise excessive. Accordingly, we will accept the proposed rates for filing, suspend them for a nominal period, and set them for hearing, subject to refund, as discussed below.

Midwest has adopted the terms and conditions of the pro forma tariffs without any material change. Consistent with our recent guidance orders on this subject, see supra note 2, we will resolve non-rate terms and conditions on a generic basis in the Open Access NOPR proceeding. All non-rate terms and conditions of Midwest's proposed transmission tariffs will remain subject to the outcome of the Open Access NOPR proceeding. If the parties believe any case-specific issues remain after we have issued a final rule in the Open Access NOPR proceeding, they may raise them at that time.

Waiver of Notice

Midwest requests waiver of notice to permit an effective date of January 12, 1995 (the date it completed its repayment of its loan on an accelerated basis and became a FERC-jurisdictional public utility) for the existing agreements. Midwest's situation is unusual in that its filing of the agreements is the result of an abrupt change in its jurisdictional status. While Midwest did not submit rates to the Commission until after January 12, 1995, we have no reason to suspect that it, unfamiliar with the jurisdictional responsibilities of public utilities, acted with anything less than expedition and good faith. Further, we note that Midwest's rates in its existing customer-specific agreements simply continue the rates previously charged its customers.

For these reasons, we will grant waiver of notice and allow the rates in the existing (newly FERC-jurisdictional) agreements to become effective as of January 12, 1995, subject to refund. Consistent with Midwest's request, we also will allow the superseding agreement with Sunflower and the proposed transmission tariffs to become effective, subject to refund, on July 1, 1995 and November 10, 1995, respectively.

Finally, we will deny Midwest's request (to the extent it continues to pursue this request) that the Commission convene a technical conference in lieu of setting any issues for hearing. Consistent with the Commission's Rules of Practice and Procedure, Midwest may use the Commission's settlement procedures to work directly with Cities and Commission Trial Staff, or make any other appropriate motion to the presiding judge, thus meeting the objectives of its proposed technical conference.

The Commission orders:

(A) Cities' request for rejection of Midwest's rates or for issuance of a deficiency letter is hereby denied.

(B) Midwest's request for a complete waiver of the Commission's fuel clause regulations is hereby denied. As discussed in the body of this order, its alternative request for a one-year extension of time, until July 10, 1996, to conform its fuel clause to the Commission's requirements is hereby granted.

(C) Midwest's motion for waiver of notice is hereby granted. Midwest's request for a technical conference is hereby denied.

(D) Midwest's existing agreements, its superseding agreement with Sunflower, and proposed transmission tariffs filed in Docket No. ER95-590-000 are hereby accepted for filing and suspended for a nominal period, to become effective on January 12, 1995, July 1, 1995, and November 10, 1995, respectively, subject to refund. In addition, the non-rate terms and conditions of the proposed tariffs remain subject to the outcome of the Open Access NOPR proceeding.

(E) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER95-590-000 concerning the justness and reasonableness of the proposed rates, as discussed in the body of this order.

(F) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a conference in this proceeding, to be held within approximately 15 days after the date of issuance of this order, in a hearing room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

SB 635

March 7, 1996

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Energy and Natural Resources

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Mr. Chairman and members of the Committee:

My name is Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to comment on SB 635.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 46% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The legislation before you today was called to the Kansas Chamber's attention recently by a KCCI member company, General Motors. KCCI did not appear during Senate deliberations on this bill. However, questions regarding how SB 635 would alter the ability of businesses served by the Kansas City Board of Public Utilities to challenge what they might feel are unfair rate increases prompts KCCI to urge caution during your consideration of SB 635.

House ENR
3-7-96
Attachment 3

The Legislature realized there must be a method to challenge rate hikes proposed by th[illegible]-regulated Board of Public Utilities when it crafted the current process, which requires the consumer to convince a judge that a proposal is excessive. The question SB 635 raises is whether the consumer is protected when the Board of Public Utilities can propose, implement and retain higher utility rates during a legal challenge to determine the legitimacy of a proposal.

The current system does not appear to be onerous to the Board of Public Utilities, especially when you consider the challenge rests with the consumer to justify why their case would prevail in court before a stay of an increase is granted. To the degree that SB 635 appears to be a significant departure from the current process, KCCI would urge this Committee to consider if a need for change truly exists. If the need for change can truly by justified, KCCI would further request a legislative solution be crafted so legitimate consumer concerns will receive resolution by an appropriate third party prior to implementing a rate increase.

Thank you for the opportunity to comment on SB 635. I would be happy to attempt to answer any questions.

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Position of Kansas Industrial Consumers Served by the Board of Public Utilities on SB 635

Good afternoon. My name is Robert C. Johnson. I am a Senior Partner in the law firm of Peper, Martin, Jensen, Maichel and Hetlage based in St. Louis, and am appearing before you on behalf of the members of the Kansas Industrial Consumers (KIC) who are presently served by the Board of Public Utilities (BPU) at facilities located in the Kansas City, Kansas area. These companies include the following:[1]

General Motors Corporation
Owens-Corning
Griffin Wheel Division of Amsted Industries
ConAgra

Each of these four listed members of the KIC obtain its electric energy and water service from the BPU.

For more than fifteen years we have actively participated in electric rate cases and recently in water rate cases before the BPU. This participation has involved discovery, preparation of direct testimony, participation in hearings including cross-examination and briefing. The basic procedures now followed in these hearings and were established by the Kansas statutes enacted in 1980 and 1982 (specifically KSA 13-1228). The purpose of these statutes, as established by this legislature, was to ensure certain basic rights and due process for all consumers served by the BPU. Prior to enactment of this legislation, on one occassion with which I am familiar, the BPU simply announced that there would be a substantial rate increase and proceeded to implement the increase without a public hearing or due process. The BPU contended it was not obligated to

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[1] We also represent an industrial client group in utility matters before the Kansas Corporation Commission that includes Boeing, LaFarge, Cargill, Texaco and Heinz Pet Foods.

House ENR
3-7-96
Attachment 4

conduct a public hearing in order to justify the increase. This attitude resulted in litigation as a result of which the BPU changed its position and held a hearing on that particular rate proposal. It's important to bear in mind that the Board of Public Utilities is a self-regulated utility. There is no regulatory oversight of the BPU by the Kansas Corporation Commission or any other regulatory authority as is the case with Western Resources and its affiliates Kansas Gas and Electric Company and Kansas Power and Light Company. As a substitute for regulatory oversight, the Kansas legislature, as stated before, enacted the statutes presently in effect which require the Commission to hold a public hearing and to base its decision on the evidence presented at that hearing. These statutes also provide for the right of appeal by a participant in the rate proceedings. Because the BPU is a self-regulated utility, the legislature also saw fit that, in the case of an appeal, a petitioning party would have the right to stay the rate increase determined by the BPU during the course of the appeal. This right of a stay is subject to the express limitation that, upon five (5) days notice, the right to a stay shall be reviewed by the Court and if the stay is to be maintained, the court must make a specific finding that the petitioning party would prevail in the case based upon the evidence presented to the Court. Accordingly, a party who has a weak case or simply is interested in harassing the BPU will almost certainly lose the right to stay the rate increase during the appeal proceeding. The stay provision (which would be eliminated by this legislation) is eminently fair for the homeowner and for the commercial and industrial consumers.

Analysis of SB 635

We have reviewed SB 635 and prepared a brief analysis of its principal substantive provisions, a copy of which is attached to this testimony. This bill seeks to change the existing statutes in two substantive areas. First, it provides that any rate increase proposed by the BPU shall become effective in any event within 240 days following the date on which the BPU gives notice of a public hearing on the proposed rate increase. There is no qualification to this provision. Therefore, whether or not the Commission has completed hearings and made a quasi-judicial determination with respect to the rate increase, the proposed rate increase goes in effect in 240 days. The BPU, in this situation, has absolute control over the hearing process as a self-regulated utility. It determines whether or not the hearing may be continued by its own ruling or at the request of its staff, or any other party. As a result it's clearly possible that the rate increase will be implemented as proposed by the BPU prior to completion of the hearing process. It's also important to bear in mind that in many instances the amount of the rate increase originally proposed by the BPU or by its staff may be reduced following the hearing process. This is a typical situation in cases before the Kansas Corporation Commission and has occurred in BPU cases. If the BPU has the absolute right to automatically increase its rates (after 240 days), as would occur under the proposed amendments, it would have little incentive to work with consumers in an effort to achieve agreements on rates or to reduce a proposed rate consistent with the evidence presented by consumers. Furthermore the elimination of the appellate stay (as discussed in the following paragraph) would ensure its right to use of the proceeds.

Secondly, but no less important, the proposed legislation eliminates the automatic stay provision provided under current law. This, apparently, is related to the provision of SB 635 which provides for the automatic increase in any event after 240 days following notice. Removal of the stay provision erodes the rights of a consumer who is participating in a rate proceeding. It essentially gives to the Board a blank check. It is totally inconsistent with the regulatory process that applies to proceedings before the Kansas Corporation Commission which is independent of the regulated utilities. These proposals of the BPU, together will eliminate a consumer's right to due process and to effectively challenge a rate increase. This bill is an anti-consumer bill of the worse kind.

We note that the proposed legislation does provide for a refund if a consumer ultimately prevails. This could take several years and could probably be offset by multiple or pancake filings. This proposed legislation is extremely unfair to all users including homeowners, commercial establishments, and industrial users and sets a terrible precedent in Kansas. Because of the late introduction of this bill in the Senate, the expedited hearing schedule, placement on the consent calendar, and quick passage--we were not aware of the bill and were not able to give this testimony to the Senate.

We recognize that the BPU has been sustaining substantial operating losses ($9.4 million in the last fiscal year) but this is no reason to deprive consumers of their basic rights previously granted by this legislature. The ultimate solution to the BPU's problems may be regulatory oversight.

We respectfully request and urge rejection of these legislative proposals by the BPU.

Thank you for the opportunity to address your Committee.

ANALYSIS OF SENATE BILL 635
PROPOSED BY THE KANSAS CITY, KANSAS
BOARD OF PUBLIC UTILITIES AND COMPARISON WITH EXISTING LAW

K.S.A. 13-1228: PRESENT STATUTE

K.S.A. 13-1228 governs the procedure for rate increases by the board of public utilities. It requires the board to give at least 90 days publication notice of a rate increase. It requires the board to make information supporting the rate increase available to the public. It requires the board to hold a public hearing to present findings supporting the reasonableness of the proposed rate increase. Affected customers may appear at the public hearing, present evidence on the record, conduct cross-examination and file briefs in support of their positions. The public hearing may be continued from time to time, and within five days after the hearing is completed, the board must fix rates which it deems justified based upon the evidence presented.

K.S.A. 13-1228 also provides a procedure for appealing the board's rate increase. Upon the request of any petitioning party, the increase must be stayed upon the filing of a petition with the district court. Upon request of the board of public utilities, the district court must hold a hearing upon five days' notice to determine whether the stay should remain effective. If the district court makes a specific finding that the board's rate decision was probably unlawful or unreasonable, then the stay is continued. Upon final judgment of the district court, K.S.A. 13-1228 provides for appeal to the state court of appeals.

K.S.A. 13-1228: BOARD OF PUBLIC UTILITIES' PROPOSED CHANGES

The Kansas City, Kansas Board of Public Utilities ("BPU") has proposed by Senate Bill No. 635 to amend K.S.A. 13-1228 in significant respects. The BPU proposes to add a new provision to the existing provisions governing rate increase hearings which provides that "***in no event shall such rates become effective later than 240 days from the date of notice of public hearing.***" The effect of this change would be that a rate increase will ***automatically*** become effective 240 days after the notice of the rate increase, whether or not the BPU has complied with the statutory requirements applicable to rate increases. Thus, the BPU can increase rates automatically without conducting a hearing, making data available, or issuing a decision.

The Board also wants to amend the existing provision to ***eliminate*** the provision for district court stay of its rate increases. Rate increases already ***implemented*** are subject to refund when found unreasonable after appeal. Thus, an customer or other party who wishes to petition a court that the board's rate increase is unlawful must wait until the rates are actually implemented, and being collected from customers, and the appeal is decided by the appellate court, before he can obtain relief. Even then, the customer can only request that the court refund the unlawful rate increase already collected. Thus, the Board's proposed amendments shift the burden from the utility to the customer, who must pay the unlawful rate increase until its unlawfulness is established on appeal.

In addition, the Board proposes to extend the 90 day notice period for rate increases to 120 days.

Shawnee Mission Park Offices

7900 Renner Road
Shawnee Mission, KS
66219-9723

Voice (913) 438-7275
TDD (913) 831-3342
Fax (913) 492-7275

TESTIMONY
to
KANSAS HOUSE OF REPRESENTATIVES
ENERGY AND NATURAL RESOURCES COMMITTEE

by
Gary L. Haller, Director
Johnson County Park and Recreation District
March 7, 1996

SENATE BILL NO. 597

Honorable Chairperson Holmes and Committee Members:

First let me state that since S.B. 597 was developed, we have new information from the Kansas Department of Agriculture Division of Water Resources, as per letter attached, from Mr. David L. Pope, P.E., Chief Engineer, that they would not oppose the Bill if it contained the language applying to urban areas of over 300,000 population. With this addition, the Bill amendment would pose no problems related to the Division's administration of the original Obstruction in Streams Act, K.S.A. 82a-302, et. sec. Since Sedgwick County is the only other county to which the urban area population would apply and that county has no sand dredging or royalty distributions, the Senate amended S.B. 597 to apply only to Johnson County. The bill passed the Senate by a vote of 39-0.

As you might note, this is a unique Bill as it applies to utilizing sand royalty money distributed to eligible Kansas counties. Johnson County borders approximately 20 miles of the Kansas River containing from three to four sand dredging operations. There is no drainage district formed in Johnson County relative to the Kansas River.

Sand royalties are currently collected by the State at .08 cents per ton and then redistributed to eligible Kansas counties. The income received by Johnson County ranges from only $7,000 to $9,000 annually. Since there is no drainage district associated with the Kansas River, these distributions have accumulated over the years to approximately $100,000.

House ENR
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Attachment 5

The Park and Recreation District administers a County-wide streamway program involving eight of the major streams in Johnson County. Four of the major streams--Turkey, Mill, Cedar and Kill Creeks--are major tributaries to the Kansas River. Currently the Park and Recreation District is constructing facilities on three of these streams.

Should the S.B. 597 be passed, it would allow the Park and Recreation District the option, subject to Board of County Commissioners and the Kansas Department of Agriculture Division of Water Resources approvals, to utilize these sand royalty dollars to construct trails, shelters, boat ramps, and other recreation facility along the Kansas River and its tributaries to assist in the overall County-wide streamway plan of development.

Provided along with Mr. Pope's correspondence (attached) is a position from the Board of Johnson County Commission legislative platform, endorsing the passage of this legislation.

As noted earlier, the only other county that would be affected by the option presented in S.B. 597 is Sedgwick County. I have contacted the Sedgwick County Budget Office and have been informed that they receive no sand royalty distributions from the State.

The favorable passage of S.B. 597 by the House Energy and Natural Resources Committee would be appreciated.

Thank you.

Attachments

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Alice A. Devine, Secretary of Agriculture

DIVISION OF WATER RESOURCES
David L. Pope, Chief Engineer-Director
901 South Kansas Avenue, 2nd Floor
Topeka, Kansas 66612-1283
(913) 296-3717 FAX (913) 296-1176

KANSAS DEPARTMENT OF AGRICULTURE

January 31, 1996

WILLIAM R MAASEN LAND ACQUISITION SPECIALIST
JOHNSON COUNTY PARK & RECREATION DIST
7900 RENNER RD SHAWNEE MISSION PARK OFFICES
SHAWNEE MISSION KS 66219-9723

Re: Sand Royalties

Dear Mr. Maasen:

Your January 29, 1996 letter requested comments from the Chief Engineer as to the Division's position on the proposed draft language to amend State Statute K.S.A. 82a-309:

> Provided, that in counties having a population greater than 300,000, the amount allotted to the county can be utilized for preservation of land and creation of public areas along the state stream or its tributaries adjacent to such streams.

Based upon what we know about this issue at this time, the Division's position on this proposal would be neutral, since it appears to only affect how sand royalty funds would be spent within a county having a population in excess of 300,000 residents. It does not appear that this proposal would affect any issues the Division deals with in administering the Obstruction in Streams Act, K.S.A. 82a-301 et. seq.

Thank you for the opportunity to comment on this proposal. If you have additional questions, please contact this office.

Sincerely,

David L. Pope, P.E.
Chief Engineer

DLP:WJA:dv
cc: Allie Devine, Secretary

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EXCERPT FROM:

JOHNSON COUNTY
BOARD OF COUNTY COMMISSIONERS
1996 LEGISLATIVE PROGRAM

PARKS AND RECREATION

ISSUE: CHANGE IN USE OF SAND ROYALTIES

POSITION: SUPPORT

RATIONALE: Currently in KSA 82a309, there are restrictions placed on counties as to the use of funds received from sand royalties. The funds are limited to actual cleaning and maintenance of state streams. Johnson County requests that the option be given to counties, with a population over 300,000, to utilize the revenues for other costs such as land acquisition for the Johnson County Streamway Park System. This is a Park system being developed along streamways throughout the county.

TESTIMONY

DATE: MARCH 7 1996

TO: HOUSE ENERGY & NATURAL RESOURCES COMMITTEE

FROM: Drainage District Coalition of:
Kaw River Drainage District
North Topeka Drainage District
Tri-County Drainage District

RE: Sand royalties for drainage districts (SB-597)

Mr. Chairman, members of the committee, my name is Howard Parr, a supervisor in the Tri-County Drainage District. I am from Rossville, Kansas. I am speaking for all of the above drainage districts.

In legislation passed earlier by this committee, the definition of how drainage districts could use sand royalty money was changed from "any lawful purpose" to "embankment maintenance and soil conservation." Additionally, the rate of royalty on sand dredged from the Kansas River was raised from .08/ton to .15/ton and the percentage which goes to drainage districts and counties was reduced from 50% to 10%.

Limiting Use of Royalties

This limitation on how we can spend sand royalty money will adversely affect us in maintaining our levees on the Kansas River. We have an opinion from the Division of Water Resources which specifically states that embankment maintenance is NOT levee maintenance. That opinion is attached to my testimony.

The primary purpose for which drainage districts were organized was, and is, construction, operation and maintenance of flood control improvements which are mainly levee systems. By scientific and legal definition, levees are normally not banks of a stream, because banks are at ground surface elevations, while levees are placed on and above ground surface elevations and often times quite some distance away from the banks of a stream. A drawing is attached to illustrate the difference between a bank and a levee.

The definition of "soil conservation" has not been included in the law, but is to impact the use of sand royalties because drainage districts were not organized for the purpose of soil conservation. Whether they perform such function is subject to legal interpretation and probably dispute. Litigation is something which should not be encouraged because of the loss of time and expenses it causes.

If the language of the existing statute needs to be changed from "any lawful purpose", then we suggest language such as "maintenance and operation of flood control systems." This language, though narrower than existing law, would include levee systems.

House ENR
3-7-96
Attachment 6

Royalty distribution formula

Our second concern is the formula for division and distribution of the sand royalties. We are thankful for the Legislature's foresight in collecting the sand royalties and sending a portion of it back to local drainage districts where it was obtained. The Districts use these funds as part of their budgets to repair and maintain flood control structure, mainly levees, along the Kansas River. However, the fiscal impact of reducing the percentage which goes to drainage districts, even on an increased royalty, would reduce the amounts received below that which we have received in the past. Please refer to the chart I am providing in my testimony which shows you how much sand is being dredged from the Kansas River and the royalty fees paid in the the past few years. You can see by the chart that even at .15 per ton, if we only receive 10% of the royalty, we will receive $50,000 - $65,000 less than at the present rate. This may not seem like a great deal of money but it is important to our small budgets. What we would have to do to make up this difference is to increase taxes in our drainage districts to replace the lost revenue -- just to maintain our current budget needs. We do not believe this is the result intended by this committee.

We understand that there was some concern that by raising the rate, you would be creating a windfall to drainage districts. We believe there has been a misconception all along about the amount of sand we're talking about. I would like to refer you again to the chart I have provided you. You can see that in the past few years there has been less than 3,000,000 tons of sand dredged from the Kansas River. So even if cities and counties do have to pay the royalty where they didn't in the past, there is still only a certain amount of sand that is taxable. If every bit of sand taken from the river in the past four years had been taxed, at the new percentage rate of 10%, we still would have been shorted, see attached table.

The Drainage Districts are not looking for a windfall in revenue. We are asking that you treat us fairly as in the past and return a portion of these royalties back locally where they were generated.

Uniform and Equal

Another issue is significantly important to us in SB-597 and deals with the exemption for one county. I'm sure each of you has dealt with home rule issues in the past and this is one that would cause drainage districts a problem. If you amend the current law to exempt one county from the statutes, we are fearful that this would cause that law to become not uniform and equal and would allow counties to charter out of the drainage district statutes. This type of action has caused us problems in the past and we respectfully request that you not let this happen to the drainage district statutes.

We also would ask that you either restore the language "for any legal purpose" or use the language "maintenance and operation of flood control systems." We further request that you raise the percentage of sand royalty fee from 10% to 30% for drainage districts or no less than the average amount distributed for the past three years, whichever is greater. Specific statutory language is attached.

Thank for your your time. I would be pleased to attempt to answer any questions.

KSA 1995 Supp. 82a-309

(a) Of the net proceeds from the sale of sand products, taken from the bed of any river which is the property of the state of Kansas ~~51/3 10~~ *30%, or no less than the average amount distributed for the past three years, whichever is greater,* shall be returned as follows:

(1) If the sand products are taken from the bed of the river at a location which is within the boundaries of a drainage district, the board of directors of the district from which the sand products were taken shall be entitled to receive 2/3 of the amount returned and the remaining 1/3 shall be divided among the remaining drainage districts in the county, to be used for ~~bank stabilization or soil conservation~~ *maintenance and operation of flood control systems* in proportion to the frontage on such river.

(2) If the sand products are taken from the bed of the river at a location which is not within the boundaries of a drainage district, the proceeds attributable to such sand products shall be returned to the counties which have adopted this act and have notified, prior to July 1 following the adoption of this act, the director of taxation of such adoption, and through which such river flows, in proportion to the mileage of the river bank in such county. Moneys paid to a county pursuant to this paragraph shall be disbursed or used as follows:

(A) If there are one or more drainage districts organized under the laws of this state which are located in such county along a river that is the property of the state of Kansas and which operate and maintain river flood control improvements in or along such river, the county shall disburse such moneys to each such drainage district, to be used for ~~bank stabilization or soil conservation~~ *maintenance and operation of flood control systems*, in proportion to each district's frontage on such a river.

(B) If there is no drainage district organized under the laws of this state which is located in such county along a river that is the property of the state of Kansas, the county may use the moneys for ~~bank stabilization or soil conservation~~ *maintenance and operation of flood control systems.*

(b) The unencumbered balance of any moneys which were distributed to a county pursuant to this section as it existed before its amendment on July 1, 1995, and which remain in the county treasury on July 1, 1995, shall be distributed in the manner provided by this section as amended on July 1, 1995.

KANSAS STATE BOARD OF AGRICULTURE
Phillip A. Fishburn, Secretary

DIVISION OF WATER RESOURCES
David L. Pope, Chief Engineer-Director
901 S. Kansas Avenue, Second Floor
Topeka, Kansas 66612-1283
(913) 296-3717 Fax (913) 296-1176

April 22, 1994

Susana Valdovinos
Assistant County Counselor
Office of County Counselor
Shawnee County Courthouse
200 E. 7th St., Ste. 203
Topeka, Kansas 66603-3933

RE: Distribution of Sand Royalties to Tri-County Drainage District No. 1

Dear Ms. Valdovinos:

Without knowing from where the sand royalties came (other than the Kansas River, Shawnee County, Kansas), the Board of Shawnee County Commissioners will have difficulty in determining the specific dollar amounts to be divided among the various drainage districts in the county. However, the Secretary of State's office should be able to track the origin of the funds which you have received. This knowledge will be necessary in order for there to be compliance with the statute.

To clarify one point, the Division of Water Resources does not claim direct supervisory authority over K.S.A. 82a-309, 1993 Supp. Our sole direct involvement would be in approving, or not, the contracts, plans and specifications for the proposed improvements that are part of the actual cleaning and maintenance of the river bed if the money is sand royalties due the county. Our only other involvement would be in approving possible modifications to a drainage district's general plans. However, modifications to a general plan would be subject to the approval of the chief engineer regardless of the source of the money.

The information that follows is intended to be of assistance to you and should not replace an opinion from the Attorney General of Kansas and which you may still wish to seek. Nor is the Division of Water Resources advocating a position on behalf of or for any or all drainage districts or any other public entity involved in this process.

K.S.A. 82a-309, 1993 Supp., is in essence a two part statute. After meeting the requirement that the sand be from a state-owned river, then if the area from which the sand is "harvested" is

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within a drainage district, those sand royalties are divided on the following basis:

2/3 of the proceeds go to the district from which the sand was taken.
1/3 of the proceeds are then split between the remaining districts who have frontage on the Kansas River in accordance with the amount of frontage they possess.

In Shawnee County, there are 24 approved applications for sand plants. However, there are only four active operations or sites. Those in N. Topeka Drainage District include Kansas/Sand Concrete, Inc., with two sites and Victory Sand/Gravel, Inc., with one site. Therefore, N. Topeka Drainage District would receive 2/3 of the proceeds from the Kansas/Sand Concrete, and Victory Sand/Gravel, Inc., sites. Also, N. Topeka Drainage District's area covers both sides of the river and the river bed so the river clearly extends into or through the drainage district and the sand products are from within their territory.

Based on the information we have in our Water Structures Section, both Tri-County Drainage District and Kaw River Drainage District each have an estimated ten miles of bank line. Therefore, it appears they would share equally in the 1/3 of the proceeds listed above. Silver Lake Drainage District, for example, does not have any frontage on the Kansas River and would not qualify for this money.

The fourth known active site belongs to Meier's Ready Mix, Inc., which is adjacent to Kaw River Drainage District. The "land" portion of Meier's is certainly within the district's boundaries. Since Kaw River Drainage District does not apparently extend beyond the river bank into the bed of the river from where the sand products are taken, it is our opinion that the proceeds from this sand plant operation are an exception to the above formula. I would note, for your benefit, that the statute does contemplate the river extending "into or through any drainage district". There may be an argument by Kaw River Drainage District that their District extends "into" the Meier's Ready Mix, Inc., site. Based on our information, the water structures section would not agree that Kaw River Drainage District extends "into" the bed of the Kansas River but rather stops at the bank.

For purposes of the formula, if it is determined that the area from which the sand products are taken is within the Kaw River Drainage District, then Kaw River Drainage District would receive 2/3 of the proceeds. From the remaining 1/3 of the proceeds, the proportions would be split according to river mileage. North Topeka Drainage District would qualify for approximately 87 miles of river frontage (they have river frontage on both sides of the

river) and again, Tri-County Drainage District would receive its proportion based on its estimated 10 miles of river frontage.

There are no specific restrictions on how the drainage districts may use the money on those funds which are received from sand plants which are operated within a drainage district other than complying or modifying their general plans in accordance with state laws, rules and regulations.

A minor point which may be of interest to you is that past practice was for the Secretary of State's office to remit the proceeds directly to the drainage districts.

The second half of the statute contemplates the Secretary of State's office transferring funds to counties based on their proportion to the mileage of the river bank in the county. Basically, this portion of the statute envisions all sand royalties from sand plants operating outside of drainage districts being split between counties on a per river frontage mile basis. If the moneys currently in the county's possession were allotted to the county on this basis, then the county may use this money for very limited purposes.

The County may use these funds for actual cleaning and maintenance of the river. This would include properly placed revetments, dredging of sand, jetties and other bank maintenance or cleaning work. It would not included rebuilding levees.

If a levee were now the river bank, then the county could consider that the current river bank and do whatever properly placed revetments or jetties were appropriate to stabilize and maintain the bank. They could not rebuild the levee at that site as that is beyond the scope of "actual cleaning and maintenance" of the river.

The county would also be required to "submit all contracts, plans, and specifications for the proposed improvements to, and receive the approval of, the chief engineer of the division of water resources" prior to the expenditures of any of the funds.

The drainage districts do not have a right to the moneys dispersed in the second half of the statute. However, it may be more cost effective for the county to contract with the drainage districts who have either river frontage or river frontage and bed to do the cleaning and maintenance than for the county to do it. Should you decide to contract with drainage districts to do the work, the restrictions cited in the paragraph just immediately above would still apply to this work. There is nothing within the statute that would bar Shawnee County from contracting with only one district so long as the work done complied with the

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restrictions contained in the statute.

I hope this information is of some use to you and answers some of the questions contained in your letter of March 15, 1994. Please call if we can be of further service to the county. If you have any technical questions, please contact George Austin, Water Structures Section Head, at (913) 296-2933.

Sincerely,

DeAnn E. Hupe Seib

DeAnn E. Hupe Seib
Asst. Legal Counsel

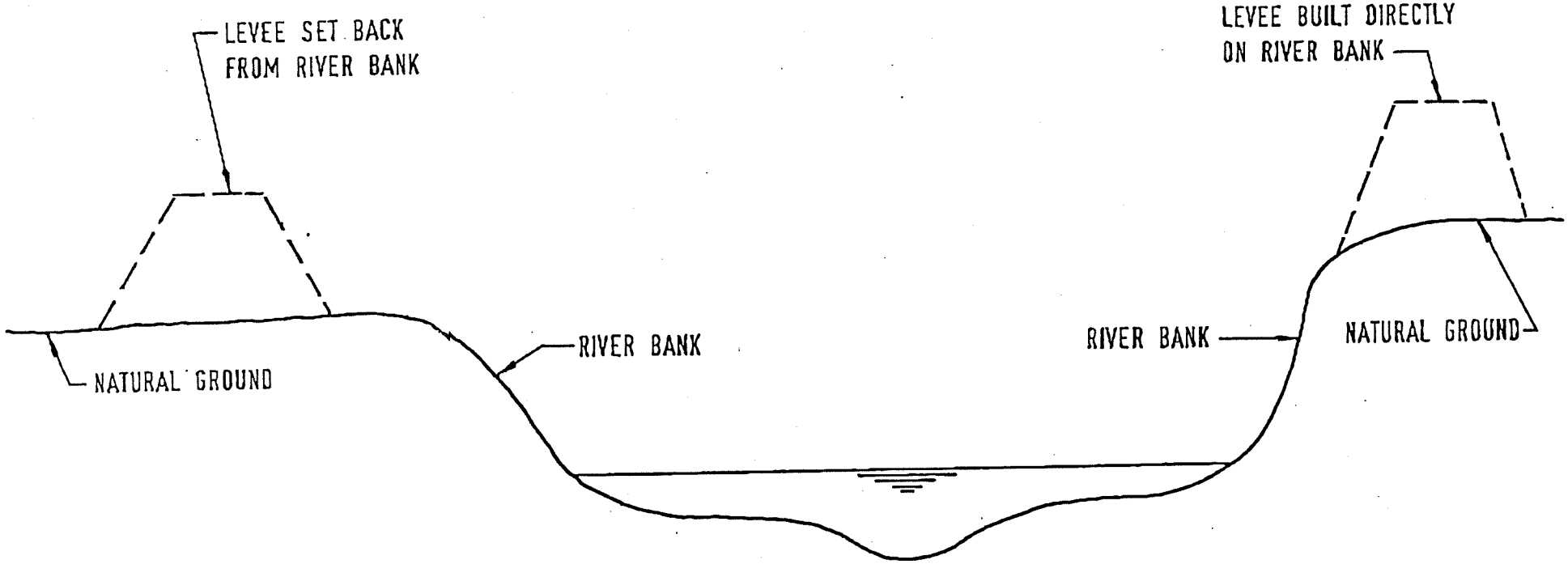
cc: Dennis Hall, Attorney
George Austin

6-7

KANSAS RIVER SAND

6-8

	TONNAGE			TONNAGE	(Current	Law)				
	DREDGED	X .15 / ton	@ 10%	TAXED	X .08/ton	@ 50%	X .15/ton	@ 10%	@ 25%	@ 30%
1991	2,995,262	449,289	44,928	1,963,761	157,100	78,550	294,564	20.456	73,641	88,369
1992	2,855,898	428,384	42,838	2,109,289	168,743	84,371	316,393	31,638	79,098	94,917
1993	2,916,094	437,414	43,741	2,253,800	180,304	90,152	338,070	33,807	84,517	101,421
1994	2,697,723	404,650	40,465	2,489,500	199,160	99,580	373,425	37,342	93,356	112,027
1995				2,112,488	168,999	84,499	316,873	31,687	79,218	95,062
	Figures from			*Figures from*						
	Corps of Eng.			*Dept. of Revenue*						



TYPICAL RIVER SECTION

NOT TO SCALE

WHITE, MARTIN
& ASSOCIATES, INC.
ENGINEERING
CONSULTANTS

The University of Kansas

Department of Geology

February 12, 1996

FAX (913) 296-0251

Memo to Representative McClure:

The valleys of most rivers are widest at their downstream ends. The Kansas River, however, becomes progressively narrower in the reach between DeSoto and Kansas City because it is confined by beds of unusually resistant massive limestone.

Compilation of the Atlas of Historic Channel Change Maps for the Corps of Engineers revealed that from a point about 6 miles upstream from Bonner Springs all the way to the confluence with the Missouri River, the channel of the Kaw has undergone almost no lateral movement in the last 150 years. No other portion of this river has been so stable in historic time.

It can therefore be stated that there has been very little channel migration or bank collapse along the Kaw through all of Wyandotte County. Part of this same reach abuts Johnson County. In the reach farther west, where Johnson County lies south of Leavenworth County, there have been migration and collapse problems in the past, and these continue today. In general, the extent and rapidity of channel change increases westward or upstream.

Wakefield Dort Jr.

Wakefield Dort, Jr.
Professor

House ENR
3-7-96
Attachment 7

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