Approved: Carl Dean Holmes
Date 4-29-99

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES.

The meeting was called to order by Chairman Carl Holmes at 9:08 a.m. on March 4, 1999 in Room 522-S of the Capitol.

All members were present except:

Committee staff present: Lynne Holt, Legislative Research Department
Mary Torrence, Revisor of Statutes
Jo Cook-Whitmore, Committee Secretary

Conferees appearing before the committee: David Heinemann, KCC
Walker Hendrix, CURB

Others attending: See Attached List

Hearing on SB 123 - Corporation commission; effective date of orders; notice of rate hearings.

David Heinemann, Executive Director for the Kansas Corporation Commission, testified as a proponent of **SB 123** (Attachment 1).

Mr. Heinemann responded to questions from the committee at the conclusion of his testimony.

Chairman Holmes stated that **HB 2119** was germane to **SB 123** and asked if Mr. Heinemann would like to speak to **HB 2119**. Mr. Heinemann spoke to the bill and explained the background and some of the reasoning behind the change from 240 days to 180 days as outlined in **HB 2119.** He related information that the Commission attempts to expedite the cases as quickly as possible. He also explained that the parties involved in the Commission dockets can request extensions on the 240 day deadline. When asked if a hearing were scheduled for the following day, could he be ready to testify? Mr. Heinemann indicated it would be possible for KCC Staff to respond. Chairman Holmes announced that a hearing would be held tomorrow on **HB 2119**.

Chairman Holmes introduced Walker Hendrix, General Counsel to the Citizen's Utility Ratepayer Board (CURB), who presented information on the origination and history of CURB, how it works and how they get involved in rate cases. The Citizen's Utility Ratepayer Board was created in 1988 as part of the corporation commission because the commission chairman felt there was a need for a consumer advocate within the commission. In 1989, the actual Board was spun off from the corporation commission by the legislature and made a separate entity. It is a small agency with five board members and three additional employees. Governor Graves enhanced the CURB Board after his election. Mr. Hendrix has practiced law in front of the commission for 24 years, representing a wide variety of clients and constituents. He also addressed an Attorney Generals Opinion (No 94-76) (Attachment 2) which clarified the issue of by what authority the legislature can be involved in determining rates. This AG Opinion was in response to an inquiry about price cap/rate of return regulation on telecommunications companies. Through legislation the Kansas Universal Service Fund was created. Mr. Hendrix also spoke about issues that were important to consumers. He stated that one of the biggest issues confronting consumers is stranded costs, which occur in the gas, electric and telecommunications industries. Mr. Hendrix stated that all utilities; natural gas, electricity and telecommunications; deal with the component of stranded cost when dealing with the issue of restructuring. He explained how difficult it is to recover those costs and determine who exactly must pay for those costs, whether it is the rate payer or the investor. Mr. Hendrix then spoke about the 180 day time frame for the Kansas Corporation Commission on rate cases as addressed in **HB 2119**. He stated that the shorter time frame could effect the consumer in an adverse manner.

Mr. Hendrix then responded to questions from the committee.

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES, Room 522-S Statehouse, at 9:08 a.m. on March 4, 1999.

Tom Day, Legislative Liaison for the Kansas Corporation Commission, spoke about the distribution of the Report to the 1999 Kansas Legislature from the Kansas Corporation Commission (Attachment 3), as required by statute. The report includes information from Fiscal Year 1998 regarding utility companies and transportation companies' filings with the Commission.

Chairman Holmes stated he had received a letter from the Speaker regarding **HB 2400** and **HB 2495** being amended into **SB 243.** He asked Mary Torrence, Revisor, about the germaneness. She stated they were germane. The hearing on **SB 243** will be on Monday. We will have a hearing on **HB 2119** tomorrow.

Meeting adjourned at 10:35 a.m.

Next meeting is Friday, March 5.

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 4, 1999

NAME	REPRESENTING
DICK CARTER	ENRON
J.C. Long	UCU
Sandy Braden	McGill, Gaches, & Assoc.
Leslie Kaufman	Ks Farm Bureau
BRUCE GRAHAM	KEPCo
ED SCHAUB	WESTERN RESOURCES
Patrick D Hurley	KCPL
WALKER HENDRIX	CURB
TOM DAY	KCC
Jon Gaches	McGill, Gaches & Asso.

HOUSE UTILITIES COMMITTEE

Testimony presented by David J. Heinemann, Executive Director
Kansas Corporation Commission
March 4, 1999
Senate Bill 123

Chairman Holmes, ladies and gentlemen of the committee. The Commission appears today as a proponent of Senate Bill 123 and would like to offer the following comments to the committee.

Senate Bill 123 contains two policy changes. The first deals with K.S.A. 66-117a which allows the Secretary of Administration to intervene in any rate hearing wherein the rates would affect the state as a consumer. The sentence which mandates that the Commission give notice to the secretary is being stricken. The Commission's records indicate that the Secretary of Administration has not intervened in any case for at least 15 years. Recently, an intervener raised the lack of issuance of notice to the Secretary of Administration in a pleading designed to forestall implementation of a Commission order. The Secretary promptly waived notice making the objection moot. The Secretary of Administration has been contacted and has no objection to this amendment.

The second policy change will allow the Commission to expedite the implementation of its orders. K.S.A. 66-118l and K.S.A. 66-1,168 currently provide that all orders or decisions of the Commission shall become operative and effective 30 days after the service of the order or decision. The effective date of an order or decision can be further delayed by a party or intervener filing a motion for reconsideration and, even longer, as the Commission is beginning to see more of, by the filing of a motion to reconsider the order on reconsideration. The amendment of these two sections to follow certain requirements of the Kansas Administrative Procedures Act (KAPA), specifically K.S.A. 77-530(a) and K.S.A. 77-528 (copies attached), will allow the Commission to expedite the effective date of its orders and decisions by making them effective upon service or upon the date stated in the order. In short, with this amendment procedural technicalities could not be used to forestall Commission action. Any subsequent decision of the Commission to grant a stay of a decision or order will be subject to the limitations of KAPA, specifically K.S.A. 77-528, which allows an agency the discretion to grant a stay of a final order only until such time as a petition for judicial review can be timely filed.

I would be pleased to respond to any questions you may have.

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ATTACHMENT 1

77-530. Orders, when effective. (a) Unless a later date is stated in a final order or a stay is granted, a final order is effective upon service.

(b) Unless a later date is stated in an initial order or a stay is granted, an initial order shall become effective and shall become the final order: (1) When the initial order is served, if administrative review is unavailable; (2) when the agency head serves an order stating, after a petition for review has been filed, that review will not be exercised; or (3) 30 days after service if no party has filed a petition for review by the agency head, the agency head has not given written notice of its intention to exercise review and review by the agency head is not otherwise required by law.

(c) This section does not preclude a state agency from taking immediate action to protect the public interest in accordance with K.S.A. 77-536 and amendments thereto.

History: L. 1984, ch. 313, § 30; L. 1988, ch. 356, § 16; July 1, 1989.

Research and Practice Aids:

Administrative Law and Procedure ⇐ 496 et seq.

C.J.S. Public Administrative Law and Procedure § 150.

77-528. Stay. A party may submit to the presiding officer or agency head a petition for stay of effectiveness of an initial or final order until the time at which a petition for judicial review would no longer be timely, unless otherwise provided by statute or stated in the initial or final order. The presiding officer or agency head may take action on the petition for stay, either before or after the effective date of the initial or final order.

History: L. 1984, ch. 313, § 28; July 1, 1985.

Research and Practice Aids:

Administrative Law and Procedure ⇐ 674.

C.J.S. Public Administrative Law and Procedure §§ 194, 195.

STATE OF KANSAS

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June 8, 1994

ATTORNEY GENERAL OPINION NO. 94- 76

The Honorable Carl Holmes
State Representative, One Hundred Twenty-Fifth District
P.O. Box 2288
Liberal, Kansas 67905

Re: Public Utilities--Powers of the State Corporation Commission; Telecommunications Public Utilities--Telecommunications Public Utility; Power; Authority and Jurisdiction

Synopsis: Rate making is a legislative function which necessarily implies a range of legislative discretion. Within this discretion lies the authority to prescribe specific conditions in a rate order such as the conditions found in 1994 House Bill No. 3039. Cited herein: K.S.A. 66-101b; 66-104; 66-128b; 66-1,189; 66-1,191; 66-1,192, as amended by L. 1994, H.B. No. 2665; 66-1,194; 1994 H.B. No. 3039; Kan. Const., art. 2, § 1; U.S. Const., amend. IV.

* * *

Dear Representative Holmes:

As representative for the one hundred twenty-fifth district you inquire about the legitimacy of 1994 house bill no. 3039, a/k/a TeleKansas II. Specifically you ask whether the legislature has the authority to require the Kansas corporation commission (KCC) to condition the extension of TeleKansas I (Docket No. 166, 856-U) upon "the continuation of current levels of employment in this state as of April 1,

HOUSE UTILITIES

DATE: 3-4-99

ATTACHMENT 2

1994," thereby requiring the KCC to prescribe the utility company's level of employment.

1994 house bill no. 3039 provides, in part:

> "Sec. 2. (a) The Kansas corporation commission, for a period extending through March 1, 1997, shall continue to regulate all telecommunications public utilities with more than 500,000 access lines in accordance with the terms and conditions set forth in TeleKansas I. The continuation shall include: (1) Capital expenditures, above normal construction investment, of not less than $64,000,000 by such telecommunications public utilities in a manner and amount to be determined by agreement between such telecommunications public utilities and the corporation commission and (2) the continuation of current levels of employment in this state through March 1, 1997 based on employment in this state as of April 1, 1994. The commission may require such additional investments and commitments so that the overall terms and conditions are no less favorable than those which have been publicly offered by such utility in states contiguous to Kansas during the six months prior to the effective date of this act. Such additional capital expenditures shall include but not be limited to the completion of a fiber optic network for public high schools in areas served by Southwestern Bell in Kansas. The corporation commission shall monitor each approved project and the expenditures therefore. The commission shall not conduct any earnings audit for the purpose of requiring rate reductions prior to January 1, 1996.
>
> "(b) Nothing in this section shall prevent the corporation commission from further relaxing regulation of telecommunications services, from authorizing competition in existing

services or entry of new competitive services, or from complying with preemptive federal orders prior to March 1, 1997. With the exception of subdivision (a), this section does not otherwise alter the commission's statutory authority.

"(c) For purposes of this section, 'TeleKansas I' means the scheme of regulation set forth in the corporation commission's February 2, 1990 order in the case styled In the Matter of Southwestern Bell Telephone Company's Proposal for Network Modernization, Rate Stability and Pricing Regulation, a/k/a 'TeleKansas,' docket number 166,856-U."

The provisions of this bill clearly alter the commission's present statutory authority by providing a specific order rather than general guidelines for the KCC to follow. See Colorado Interstate Gas Co. v. State Corporation Comm'n, 192 Kan. 2, 12 (1963) (whether a particular determination is an order is determined by its substance and not by its label). The legislature may provide such an order because public utility rate making is a legislative function regardless of whether the utility is regulated by an administrative body or by the legislature itself. Kansas Gas & Electric Co. v. Kansas Corporation Comm'n, 239 Kan. 483, 491 (1986); 64 Am.Jur.2d Public Utilities, §§ 89, 240 (1972).

At issue is whether the prescribing of a certain level of employment in the legislative rate order amounts to a taking of property without due compensation in violation of the takings clause of the 5th amendment of the United States constitution, made applicable to the state under the 14th amendment. Generally, in the exercise of its police power the legislature may intrude in the management of a public utility to the extent public interests demands. 64 Am.Jur.2d Public Utilities § 9 (1972). The authority to regulate public utilities is, however, not without parameters; the power must be exercised within the confines of constitutional protections and legal principles established by caselaw in the area. Kan. Const., art. 2, § 1; Duquesne Light Co. v. Barasch, 488 U.S. 299, 313, 109 S.Ct. 609, 618, 102 L.Ed.2d 646, 661 (1989); State v. Johnson, 61 Kan. 803, 816 (1900); 64 Am.Jur.2d Public Utilities § 133 (1972). Smith v. State Highway Comm'n, 185 Kan. 445, 453 (1959). In other words if the regulation and

control of a public utility is to be reasonable and not amount to a taking of property, the regulation and control cannot extend beyond constitutional and legal principles applicable to rate-making decisions. Southwestern Bell Tele. Co. v. State Corporation Commission, 192 Kan. 39 (1963), 64 Am.Jur.2d Public Utilities § 191 (1972).

The leading case in the area, Power Comm'n v. Hope Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944) has been explained and consistently followed by our highest court. In Kansas Gas and Electric Co. v. Kansas Corporation Comm'n, 239 Kan. 483 (1986) the Kansas Supreme Court explains the legal standard established by Hope:

> "In applying the standard requiring 'just and reasonable' rates, the Hope court emphasized that the focus of inquiry is properly upon the end result or 'total effect' of the rate order, rather than upon the rate-setting method employed. The court described the ratesetting process as a balancing process involving the weighing of certain enumerated interests of the consumer and of the investor." 239 Kan. at 489.

The standard in Hope requires that the focus of the inquiry be on the total effect of the rate order on the utility's property, not on the method used to produce the effect. In the application of this standard there is no constitutional effect on the utility's property if there are countervailing factors that compensate the utility in some respect. Duquesne, 488 U.S. 299, 314, 109 S.Ct. 609, 618, 102 L.Ed.2d 646, 661 (1989). Whether there is a constitutionally challengeable consequence is a factual question, dependent on the facts in each particular case. 64 Am.Jur.2d Public Utilities § 191 (1972). Southwestern Bell Tele. Co. v. State Corporation Commission, 192 Kan. 39, 47 (1963). It is thus necessary to consider your inquiry in light of the actual effect of the utility's situation and opportunities.

The legislative rate order prescribing the level of employment is compensated by the KCC's refrain from "conduct[ing] any earnings audit for the purpose of requiring rate reductions prior to January 1, 1996." 1994 H.B. No. 3039, sec. 2(a). The costs attributable to maintaining the prescribed level of employment in accordance with the legislative rate order is balanced or offset by the guarantee that the rates will not be

lowered as a result of an audit of the utility's property and further offset by the KCC's authority to engage in "further relaxing regulation of telecommunication services," section 2(b).

Interested parties have argued that there appear to be theoretical inconsistencies between the legislative regulatory rate scheme authorizing the KCC to require a public utility to furnish reasonably efficient and sufficient service in order to maintain just and reasonable rates (K.S.A. 66-101b), and the rate-making relaxed regulatory scheme in question providing a set rate that is presumed reasonable and relinquishing authority to perform audit earnings for purposes of rate reductions. See Order, Appendix "A", p. 2, 9. These theoretical inconsistencies are not subject to constitutional challenge or even subject to judicial inquiry unless the resulting effect or "total effect" under the particular circumstances fixes rates or results in governmental action that is confiscatory. See Hope, ibid. and Duquesne, ibid. The legislature under this standard is thus free to determine what costs are reasonable and subject to recovery from the captive ratepayer. The legislature may utilize any methodology or technique it chooses, including one that changes the present regulatory scheme. 64 Am.Jur.2d Public Utilities § 9 (1972).

In conclusion it is our opinion that the consequences of prescribing a certain level of employment does not under these circumstances result in a confiscatory net effect and thus is not subject to constitutional challenge under the takings clause of the 5th amendment.

Your second question is twofold; you inquire whether the investment provisions in the legislation are unconstitutionally vague and if not, whether the KCC's authority has any limitations under these provisions. Generally a challenge of vagueness is made against criminal statutes and is determined by whether the statute's language conveys a sufficient warning as to the proscribed conduct. Boatwright v. Kansas Racing Comm'n, 251 Kan. 240, 245 (1992). The criminal standard of review is not relevant to our inquiry because the statute does not involve criminal liabilities. Our inquiry is afforded greater leeway because the statute regulates business rather than proscribes criminal conduct. Guardian Title Co. v. Bell, 248 Kan. 146, 150 (1990) citing In Re Brooks, 228 Kan. 541, 544 (1980). The investment provisions in the statute are thus subject only to a common sense determination of fairness that inquires whether an

ordinary person exercising common sense can understand and comply with the statute's terms. Guardian, ibid. The standard is all but lost in its application to our facts. The investment provisions are part of a statute directed at an agency that has vast expertise and discretion in the complex field of public utility regulation. See K.S.A. 66-1,192, as amended by 1994 H.B. No. 2665. The statute in question directs the KCC to execute the legislature's directives by relaxing regulation and by requiring a quid pro quo from the utility company. See Kansas Gas & Electric Co. v. Kansas Corporation Comm'n, 239 Kan. 483, 395 (1986) (discussing the KCC's expertise); Guardian Title Co. v. Bell, 248 Kan. 146, 154 (1991) (the character of an administrative agency is important in determining whether adequate standards have been provided by the legislature). In our judgment the investment provisions requiring expenditures of not less than $64 million "in a manner and amount to be determined by agreement" does not lend itself to a challenge for vagueness given the KCC's broad statutory discretion. See generally K.S.A. 66-1,189; 66-1,191; 66-1,194; 66-101b; 66-128b.

Your last question is whether the legislative directives found in 1994 H.B. no. 3039 impose any limitations on the KCC's authority. The legal issue presented by your question is whether the bill contains reasonably clear standards to control the KCC's exercise of authority and avoid a challenge based on unlawful delegation of legislative authority. Whether clear standards are fixed and serve to limit the KCC's authority is a question of fact given the parameters of the KCC's statutory authority generally (K.S.A. 66-104 et seq. 66-1,187 et seq.), and given how the legislation in question alters the KCC's statutory authority. We must for this reason review the bill within the terms of the order it incorporates.

1994 house bill no. 3039 incorporates the terms and conditions set forth in TeleKansas I and provides other conditions to be met. The additional conditions that are the subject of your inquiry cannot be reviewed outside the provisions of TeleKansas I because this agreement forms the foundation of the additional requirements or provisions. The alternative regulatory approach from rate base regulation to pricing regulation proposed by Southwestern Bell (Order, p. 11) was subject to a gamut of prehearing conferences, public hearings and evidentiary hearings, and it also involved many interested parties. The KCC issued an extensive setting order forth the parties' stipulations and making other extensive findings of fact and conclusions of law that prevents arbitrary action and provides a record to facilitate judicial review.

In this context, 1994 house bill no. 3039 authorizes the KCC the discretion to

> "require such additional investments and commitments so that the overall terms and conditions are no less favorable than those which have been publicly offered by such utility in states contiguous to Kansas during the six months prior to the effective date of this act."

The legislative directive is specific in requiring a comparison with surrounding states. Setting a cap at not less than $64,000 the legislature specifically authorizes negotiations with the telecommunication public utility on the manner and amount of capital expenditures, above normal investment. The KCC in order to use the discretion (found in the language quoted above) must make more findings of fact and set conditions as required by the legislature. See Guardian, 248 Kan. at 154 (the modern trend is to require less detailed standards in areas of complex problems); State, ex rel., v. Fadely, 180 Kan. 652, 663 (1957). In our judgment 1994 house bill no. 3039, when considered in its proper context, has sufficient guidelines and limitations and is not subject to a challenge based on unlawful delegation of legislative authority.

In summary, we find that rate making is a legislative function which necessarily implies a range of legislative discretion. Within this discretion lies the authority to prescribe specific conditions in a rate order such as the conditions found in 1994 house bill no. 3039.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Guen Easley

Guen Easley
Assistant Attorney General

RTS:JLM:GE:jm

COMPLETE COPY OF THIS ATTACHMENT AVAILABLE FROM LEGISLATIVE RESEARCH

Report to the 1999 Kansas Legislature

Kansas Corporation Commission

House Utilities
March 4, 1999
Attachment 3