

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 9:14 a.m. on March 17, 1999 in Room 522-S of the Capitol.

All members were present except: Rep. Cliff Franklin

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

Conferees appearing before the committee: Wayne Kitchen, Western Resources

Others attending: See Attached List

Chairman Holmes announced that after the hearing on **HCR 5033**, the committee would work the bill, followed by **SB 123** and **SB 186**. He also stated he had received a response to his request of the Attorney General on an opinion on **HB 2400**. We will also have a report from Rep. Alldritt on the Legislative Post Audit Committee.

Hearing on HCR 5033 - Concerning regional transport of ozone-related air emissions and requirements for Kansas.

Wayne Kitchen, Vice President of Regulatory/Environmental Affairs for Western Resources, testified in favor of **HCR 5033** (Attachment 1).

Mr. Kitchen responded to questions from the committee following his testimony.

HCR 5033 - Concerning regional transport of ozone-related air emissions and requirements for Kansas.

Rep. Johnson moved to report HCR 5033 favorable for passage and place it on the Consent Calendar because it is non-controversial in nature. Seconded by Rep. Vining. Rep. Klein stated he would pull the resolution off of the Consent Calendar. Rep. Johnson withdrew his motion, then made a new motion to report HCR 5033 favorable for adoption. Motion carried. Rep. Johnson will carry the resolution.

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

Lynne Holt, Legislative Research, went over the Bill Brief on **SB 123**. Following discussion, Rep. Loyd moved that we report SB 123 favorable for passage. Rep. Dreher seconded the motion. Motion carried. Rep. Loyd will carry the bill.

SB 186 - Certain school district expenditures exempted from bid procedures.

Rep. Alldritt moved that SB 186 be recommended favorable for passage. Rep. O'Brien seconded the motion. Motion carried. Rep. Alldritt will carry the bill.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON UTILITIES, Room 522-S Statehouse, at 9:14 a.m. on March 17, 1999.

Chairman Holmes distributed copies of the letter (Attachment 2) he received from the Attorney General's office in response to his request regarding the authority of the Legislature to statutorily define certain property as commercial and industrial as opposed to public utility property for purposes of property tax classification. He asked Lynne Holt, Legislative Research, to go over the opinion letter. Lynne also provided copies of Article 11 (Finance and Taxation) of the State Constitution (Attachment 3). Discussion followed.

Chairman Holmes requested a report from Rep. Alldritt, who is a member of the Legislative Post Audit Committee. Rep. Alldritt distributed a copy of a Scope Statement - Reviewing Payments from the Kansas Universal Service Fund (Attachment 4). Legislative Post Audit has been directed to conduct an audit of the Kansas Universal Service Fund (KUSF) and contributions and receipts to/from price capped local exchange companies. Rep. Alldritt explained what the Legislative Post Audit Committee was able to do and responded to questions from the committee.

The Chair distributed copies of a newspaper article from the Wichita Eagle about KGE/KPL power usage and sales during the summer of 1998 (Attachment 5).

Chairman Holmes announced there would not be a meeting tomorrow, Friday or next Monday. Tuesday's meeting will be on call of the Chairman.

Meeting adjourned at 9:59 a.m.

HOUSE UTILITIES COMMITTEE GUEST LIST

DATE: March 17, 1999

NAME	REPRESENTING
JC Long	UCA
Kim Bulley	CKM
Bruce GRAHAM	KEPC
Tom Day	KCE
Wayne Kitchen	Western Resources
Jack Glavin	Duke-UN + Ody
Chuck Layman	KDHE
Jan Sides	KDHE
Cal Felt	SWED
Ron Hoopes	McBillo, Hoopes & Associates
Don Miles	
Julie Hein	

TESTIMONY BEFORE THE
HOUSE UTILITIES COMMITTEE

By

Wayne Kitchen, Vice President, Regulatory/Environmental Affairs

WESTERN RESOURCES

March 17, 1999

Chairman Holmes and members of the Committee:

Western Resources strongly supports HCR 5033. The Kansas Legislature needs to send a strong message to the Federal EPA to set aside its plans for additional ozone transport analysis regarding Kansas and other outlying states. This resolution will encourage EPA to support the extensive technical findings of the Ozone Transport Assessment Group (OTAG). Following more than two years of data gathering and emission modeling, that technical group found that Kansas does not impact ozone attainment in downwind states.

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Attachment 1

EPA's October 27, 1998, final rule requires 22 States and the District of Columbia to submit state plans to address the regional transport of ground level ozone through reductions in air emissions of nitrogen oxides (NO_x). By reducing emissions of NO_x (a precursor to ozone formation), the actions directed by these 22 States are intended to decrease significant transport of air pollution across state boundaries into the eastern United States. Kansas is currently not included in these requirements.

While taking no direct action against Kansas to require additional air emission control measures, in October, EPA announced plans to conduct additional State-by-State analysis before determining that additional controls will not be required in Kansas and the other outlying states.

EPAs proposal is in discord with the technical findings of OTAG which indicated Kansas does not make a significant contribution to downwind ozone attainment problems in other states and that

federally-mandated ozone transport related control measures are not necessary in Kansas.

Why am I here talking to you about this issue? If Kansas is required by EPA to comply with their unnecessarily strict ozone standards, it could cost Western Resources nearly \$200 million and the entire state hundreds of millions of dollars more.

My company has stood before this committee on many occasions this session defending the cost of our product. We do not need unnecessary Federal Mandates that would increase our cost of providing electricity to our customers.

We encourage you to approve this resolution and be on the record opposing burdensome federal regulations which could negatively affect our state.

Thank you for this opportunity to appear before you today.



State of Kansas

Office of the Attorney General

301 S.W. 10th Avenue, Topeka 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

March 16, 1999

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The Honorable Carl Dean Holmes
Chairman, House Utilities Committee
State Capitol, Room 115-S
Topeka, Kansas 66612-1504

Re: Constitution of the State of Kansas—Finance and Taxation—System of Taxation;
Classification; Definition of Public Utility; Exclusion of Property Used in the
Generation, Marketing and Sale of Electricity

Dear Representative Holmes:

You request our opinion regarding the authority of the Legislature to statutorily define certain property as commercial and industrial, as opposed to public utility property, for purposes of property tax classification. The property in question is that which is defined in 1999 House Bill No. 2400 (H.B. 2400) as:

“[P]roperty used solely in the generation, marketing and sale of electricity generated by an electric generation facility no portion of which is included in the rate base of: (1) An electric public utility that is subject to rate regulation by the state corporation commission; (2) a cooperative, as defined by K.S.A. 17-4603 and amendments thereto, or a nonstock member-owned cooperative corporation incorporated in this state; or (3) a municipally owned or operated electric utility.” H.B. 2400, § 13.

Attorney General Stephan addressed a similar question in Attorney General Opinion No. 93-142, finding that because the term “public utility” is not defined in Article 11, Section 1 of the Constitution, and because that Section specifically authorizes the Legislature to define by law what property is in each subclassification, there is some room for legislative interpretation of what is meant by the term “public utility” as used in Article 11, Section 1. “However, any legislative definition of a term used in the constitution must be within reason and must conform to the commonly understood meaning of the term, as intended by the framers of the constitutional provision and the people adopting it. . . . The legislature may not grant partial exemptions under the guise of improper definitions.” See also *State ex rel. Stephan v. Parrish*, 256 Kan. 746, 762 (1994). The Opinion then set out definitions for the term “public utility” that existed at the time the Classification Amendment was adopted, in 1985. The common elements of the definitions set forth

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include: The service or commodity provided is an essential one that is required to be made available without discrimination to all who apply; the entity has been granted eminent domain or special franchises for use of public property; the entity is subject to regulation and guaranteed a rate of return on investments; the entity is monopolistic. *See First Page, Inc. v. Cunningham*, 252 Kan. 593, 605 (1993). The Opinion concluded that entities generally having these characteristics could be included by the Legislature in the definition of public utility for property tax purposes. The reverse would also be true: Entities generally having these characteristics cannot by statute be excluded from the definition of public utility for property tax purposes.

At the time the Classification Amendment was adopted, the term “public utility” was defined in K.S.A. 79-5a01 to include:

“[E]very individual, company, corporation, association of persons, lessees or receivers that now or hereafter are in control, manage or operate a business of:

“(5) generating, conducting or distributing to, from, through or in this state electric power;” L. 1983, Ch. 314, § 1.

[While there is also a definition of the term “public utility” in K.S.A. 1998 Supp. 66-104, the Kansas Supreme Court has found that the Chapter 66 definition should not be read into the tax statutes. *First Page, supra* at 600 (1992). *See also In re Appeal of Topeka SMSA Ltd. Partnership*, 260 Kan. 154 (1996).]

The above-quoted portion of the definition found in K.S.A. 79-5a01 has not since changed. This definition of “public utility,” as far as electricity is concerned, appears broader than the general definitions discussed above. However, as pointed out in Attorney General Opinion No. 93-142, K.S.A. 79-5a01, as amended by L. 1983, Ch. 314, § 1, “did not actually define the term ‘public utility,’ it simply set forth a laundry list of entities to be considered as public utilities for purposes of valuation by the state.” The opinion then suggested that the list provided some clues as to why the Legislature included what it did. Two factors that appeared to be of importance were whether the entity was regulated and whether the entity operated in more than one county. Additionally, with regard to electricity, the statutory definition’s failure to include the characteristics generally thought of as constituting a public utility does not necessarily mean that those factors were consciously excluded from the definition, for at that point in time companies capable of generating, conducting or distributing electric power generally possessed those characteristics; it may have not been considered necessary to spell them out.

Attorney General Opinion No. 93-142 did not actually determine whether the entity in question at that time fell within the definition of a “public utility” for purposes of classification, finding that to be a question of fact. However, the Opinion concluded that “the legislature may, under article 11, section 1 of the Kansas constitution, define and redefine the term ‘public utility’ as necessary and reasonable to effectuate the makers’ and adopters’ intent in treating such property differently for purposes of taxation, as long as the legislative definition remains consistent with the commonly understood meaning of the term.” We concur with the legal conclusion reached in that Opinion and

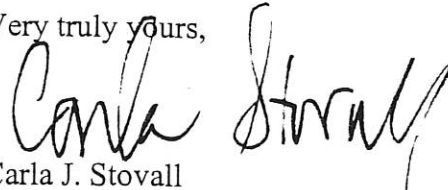
observe further that the Legislature appears to have some latitude in the instant situation, due to the change of circumstances attending generation and distribution of electric power over the past few years. Legislative acts are presumed constitutional, and must be clearly contrary to the Constitution before the Courts will strike them down. At this point in time, the Legislature may be able to go either way with its definition and, as long as there is a rational basis for doing so, may choose to treat these "new" types of entities either as public utilities or not, as long as there is a rational basis for the decision and an argument can be made that they do, or do not, possess the basic characteristics of a public utility.

The bill would exclude from the K.S.A. 79-5a01 definition of public utility "the business of generating, marketing and selling electricity generated by a nonnuclear electric generation facility no portion of which is included in the rate base of: (A) An electric public utility that is subject to rate regulation by the state corporation commission; (B) a cooperative, member-owned cooperative corporation incorporated in this state; or (C) a municipally owned or operated electric public utility." Thus, the element of regulation appears to be absent from the type of entity sought to be excluded from the definition of public utility. If there is no regulation, presumably there would be no threat that the entity would be monopolistic. If there is no monopoly involved, presumably there would be no need to require that the service or commodity be offered on a nondiscriminatory basis to everyone who applies to purchase the service or commodity. As far as we can tell, no eminent domain powers will be granted the type of entity in question; if the entity needs to use transmission lines, it will have to contract to use those already in existence. If these are indeed the facts, it appears that an argument can be made that these entities do not possess many of the "trappings" of a public utility and therefore can be excluded from the definition legislatively for property tax purposes. On the other hand, 1985 entities that generated electricity for sale to the public generally were public utilities and it would not seem unreasonable for the Legislature to continue to define them as public utilities today.

Because you have requested extraordinary expediency in our response to your request, we have responded by informal opinion letter rather than with a formal opinion. This means we have not had the opportunity to do the extent of research and analysis generally required for issuance of a formal opinion. I understand you would like to have a formal opinion to follow this letter, and I will therefore have my staff continue researching the issue for that purpose. Please understand that, while unlikely, further research may dictate a contrary result.

I hope this information will be of assistance to you and the Legislature as a whole.

Very truly yours,


Carla J. Stovall
Attorney General of Kansas

Attorney General's Opinions:

Aged and infirmed persons; financial aid; state county participation. 92-18.

CASE ANNOTATIONS

13. Section not violated by narrowing of eligibility guidelines for general assistance and MediKan. Bullock v. Whitman, 254 K. 177, 183, 865 P.2d 197 (1993).

§ 5.

Research and Practice Aids:

Social Security and Public Welfare ⇐ 174 et seq., 251 et seq; Taxation ⇐ 111.1 et seq.

C.J.S. Social Security and Public Welfare §§ 94, 146, 147 et seq.; Social Security and Public Welfare §§ 165, 192, 194.

§ 6.

Attorney General's Opinions:

Finance and taxation; revenue for current expenses. 91-142.

Article 9.—COUNTY AND TOWNSHIP ORGANIZATION

§ 1.

Attorney General's Opinions:

County-city consolidation; legislative authority; delegation and guidelines. 97-21.

§ 2.

Attorney General's Opinions:

County commissioners; budget for sheriff's office. 88-171. County commission cannot, by charter ordinance, change term limitations of county officials which are established by statute. 92-134.

Article 10.—APPORTIONMENT OF THE LEGISLATURE

§ 1.

Research and Practice Aids:

States ⇐ 27(1) et seq.

C.J.S. States §§ 62 to 71.

Attorney General's Opinions:

Persons to be included in resident enumeration; determination of residence. 88-111.

Reapportionment of senatorial and representative districts; members of state board of education. 89-11.

Census data; reapportionment of senatorial and representative districts; definitions. 89-141.

State board of education; vacancy; effect of redistricting. 91-84.

Reapportionment of senatorial and representative districts; census. 91-99.

Powers and duties of county commissioners; rearrangement of commissioner districts. 94-51.

CASE ANNOTATIONS

10. Census accuracy, minor population deviations as factors in reapportionment considered. In re Substitute for House Bill No. 2492, 245 K. 118, 775 P.2d 663 (1989).

11. Validity of bill reapportioning house and senate districts upheld; formal opinion to follow. In re House Bill No. 3083, 251 K. 595, 833 P.2d 1017 (per curiam); 251 K. 597, 598, 836 P.2d 574 (1992).

Article 11.—FINANCE AND TAXATION

Law Review and Bar Journal References:

"Survey of Kansas Law: Taxation," Sandra Craig McKenzie and Eric B. Milstead, 37 K.L.R. 961, 964 (1989).

§ 1. System of taxation; classification; exemption.(a) The provisions of this subsection shall govern the assessment and taxation of property on and after January 1, 1993, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The legislature may provide for the classification and the taxation uniformly as to class of recreational vehicles, as defined by the legislature, or may exempt such class from property taxation and impose taxes upon another basis in lieu thereof. The provisions of this subsection shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:

Class 1 shall consist of real property. Real property shall be further classified into seven subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

- (1) Real property used for residential purposes including multi-family residential real property and real property necessary to accommodate a residential community of mobile or manufactured homes including the real property upon which such homes are located 11½%
- (2) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article 11 of the constitution... 30%
- (3) Vacant lots..... 12%

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- (4) Real property which is owned and operated by a not-for-profit organization not subject to federal income taxation pursuant to section 501 of the federal internal revenue code, and which is included in this subclass by law 12%
- (5) Public utility real property, except railroad real property which shall be assessed at the average rate that all other commercial and industrial property is assessed 33%
- (6) Real property used for commercial and industrial purposes and buildings and other improvements located upon land devoted to agricultural use 25%
- (7) All other urban and rural real property not otherwise specifically subclassified 30%

Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

- (1) Mobile homes used for residential purposes 11½%
- (2) Mineral leasehold interests except oil leasehold interests the average daily production from which is five barrels or less, and natural gas leasehold interests the average daily production from which is 100 mcf or less, which shall be assessed at 25% 30%
- (3) Public utility tangible personal property including inventories thereof, except railroad personal property including inventories thereof, which shall be assessed at the average rate all other commercial and industrial property is assessed 33%
- (4) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 30%
- (5) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when

- new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 25%
- (6) All other tangible personal property not otherwise specifically classified .. 30%

(b) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchants' and manufacturers' inventories, other than public utility inventories included in subclass (3) of class 2, livestock, and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 62; L. 1923, ch. 255, § 1; L. 1963, ch. 459, § 1; L. 1974, ch. 460, § 1; L. 1985, ch. 364, § 1; L. 1992, ch. 342, § 1; Nov. 3, 1992.

Law Review and Bar Journal References:

"Reappraisal—How Long Will It Last," Bruce Landeck, 58 J.K.B.A. No. 1, 15, 18 (1989).
 "Liberalizing Kansas Real Property Tax Exemptions: The 1988 Legislation," Joan M. Bowen, 37 K.L.R. 597, 615, 639 (1989).
 "Kansas Property Classification and Reappraisal: The 1986 Constitutional Amendment and Statutory Modifications," Nancy Ogle, 29 W.L.J. 26 (1989).
 "Spurring Economic Development in Kansas Through Property Tax Exemptions—Are We Getting the Results We Want?" Laura Ellen Johnson, 30 W.L.J. 82, 83 (1990).
 "Survey of Kansas Law: Taxation," Sandra Craig McKenzie, 41 K.L.R. 727, 735 (1993).
 "Tax Law: Braum, a Valuable Tax Crop [Board of County Commissioners v. Smith, 857 P.2d 1386 (Kan. Ct. App. 1993)]," Nels P. Noel, 34 W.L.J. 381, 388 (1995).

Attorney General's Opinions:

Exemption of property for economic development; exclusive use requirement. 88-123.
 Shawnee county fair association—tax levy, protest petition and election. 88-136.
 Statewide reappraisal of farm land; methods of establishing valuations. 88-144.
 Tax exempt property; machinery and equipment of electric utility company. 88-158.
 Property valuation, county and district appraisers' duties; valuation methods; pasture and rangeland. 89-63.

Coal and gas
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 Statewide rea
 Taxation; clas
 Extending de
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 Property exe
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Coal and gas of public utility; system of taxation; classification; exemption. 89-85.

Statewide reappraisal of real property; CRP land. 89-144. Taxation; classification. 89-145.

Extending deadline for property tax payment; equal protection. 89-146.

Property exempt from taxation; merchants' and manufacturers' inventory. 89-148.

Classification; excise tax on inventories. 89-150.

Classification of property; constitutionality. 90-10.

County planning and zoning; agricultural purposes; greyhound operations. 90-68.

Change in property valuation for tax purposes. 90-82.

System of taxation; classification; exemptions; uniform and equal provisions of constitution. 91-71.

Community colleges; boards of trustees; powers and duties; political campaign posters and signs on campus. 91-112.

Taxation; classification; uniform and equal requirement on state assessed taxes. 91-147.

Taxation; extent of classification for 501 organizations. 93-17.

Water pollution act; stormwater utility fee; state-owned and operated facility. 93-32.

Public utilities; definition; constitutionality of excluding certain telephone companies. 93-142.

Contracts for assistance in collecting property taxes. 94-8.

Property taxation; classification; commercial and industrial machinery and equipment not in use. 94-52.

Property tax obligation release; escaped personal property; constitutionality. 94-79.

Property tax accumulated interest amnesty program in Wyandotte county; uniform operation of law; constitutionality. 94-89.

Taxation classification; recreational vehicles; application to houseboats. 95-18.

Classification and valuation of machinery and equipment; "used factor"; ownership by not-for-profit organizations. 95-99.

Beds, sheets and forks, valued and taxed as commercial and industrial machinery and equipment. 96-41.

Constitutional exemption from property taxation for farm machinery and equipment does not require that property be exclusively used for farming. 97-11.

Classification of property as commercial and industrial machinery and equipment; personal property in process of construction and installation. 97-97.

CASE ANNOTATIONS

197. Cited; allegations regarding illegal or void valuations or assessments of real property prohibited before exhausting administrative remedies examined. Board of Osage County Comm'r's v. Schmidt, 12 K.A.2d 812, 813, 758 P.2d 254 (1988).

198. Cited; tax exempt status of publicly owned property leased to private business and unavailable to general public examined. Salina Airport Authority v. Board of Tax Appeals, 13 K.A.2d 80, 83, 761 P.2d 1261 (1988).

199. County appraiser authorized (79-1461) to scrutinize and revalue taxpayer's filed inventory statement to fair market value. In re Tax Appeal of Wichita Bldg. Material Co., 14 K.A.2d 39, 779 P.2d 875 (1989).

200. Taxable status under 79-201a *Second* of property owned to produce revenue for financing governmental function (airport, 27-315 et seq.) examined. Tri-County Public Airport Auth. v. Board of Morris County Comm'r's, 245 K. 301, 305, 777 P.2d 843 (1989).

201. NCAA as educational institution exempt from payment of sales taxes on purchases (79-3606(c)) examined. NCAA v. Kansas Dept. of Revenue, 245 K. 553, 555, 781 P.2d 726 (1989).

202. Property rented or leased for profit nonexempt even though lessee uses property for purpose stated in §13. Board of Wyandotte County Comm'r's v. Kansas Ave. Properties, 246 K. 161, 168, 786 P.2d 1141 (1990).

203. Nonexempt tax status of city's royalty interest in oil and gas lease on city-owned property examined. City of Liberal v. Seward County, 247 K. 609, 802 P.2d 568 (1990).

204. Natural gas owned and stored for resale by public utilities exempt from taxation as merchants' and manufacturers' inventory. Colorado Interstate Gas Co. v. Board of Morton County Comm'r's, 247 K. 654, 663, 802 P.2d 584 (1990).

205. Personal property of one-way radio paging service company should be classified subclass (5) of class 2 hereunder. First Page, Inc. v. Cunningham, 252 K. 593, 596, 847 P.2d 1238 (1993).

206. Board of tax appeals' findings regarding charitable purposes of claimant examined. Woman's Club of Topeka v. Shawnee County, 253 K. 175, 853 P.2d 1157 (1993).

207. Cited in holding county appraisers permitted to hire outside agencies to assist in assessment of properties. Dillon Stores v. Lovelady, 253 K. 274, 279, 855 P.2d 487 (1993).

208. Methods of valuation of real property for tax purposes that meet uniform and equal basis requirements examined. In re Tax Appeal of Andrews, 18 K.A.2d 311, 851 P.2d 1027 (1993).

209. Phrase "land devoted to agricultural use" construed; owner's intentions for future use not a determinate factor. Board of Johnson County Comm'r's v. Smith, 18 K.A.2d 662, 670, 857 P.2d 1386 (1993).

210. Cited; lack of uniform and equal treatment among public utilities for taxation purpose discussed. Colorado Interstate Gas Co. v. Beshears, 18 K.A.2d 814, 815, 860 P.2d 56 (1993).

211. Whether BOTA's order denying pipelines tax treatment granted to railroads by federal law violates uniform and equal clause examined. In re Tax Appeal of ANR Pipeline Co., 254 K. 534, 535, 539, 541, 546, 866 P.2d 1060 (1994).

212. Cited; whether the adoption of art. 15, § 3c altered the definition of lottery as expressed in previous case law examined. State ex rel. Stephan v. Finney, 254 K. 632, 652, 867 P.2d 1034 (1994).

213. Whether BOTA's use of discount method to value subdivision parcels of property violates uniform and equal requirements examined. Hixon v. Lario Enterprises, Inc., 19 K.A.2d 643, 645, 648, 875 P.2d 297 (1994).

214. Whether taxpayer parochial school's soccer field qualifies for educational-use exemption from taxation examined. Strecker v. Hixon, 20 K.A.2d 489, 490, 892 P.2d 906 (1994).

215. Whether waiving penalties for certain classes of private property owners violates uniform and equal taxation requirement examined. State ex rel. Stephan v. Parrish, 257 K. 294, 295, 891 P.2d 445 (1995).

216. Differential personal property tax treatment of railroad parties from other utilities not based on purposeful discriminatory scheme. In re Tax Appeal of Colorado Interstate Gas Co., 258 K. 310, 311, 903 P.2d 154 (1995).

217. Appellate courts lack jurisdiction to hear constitutional challenge to statute when parties have settled disputed claims. Labette Community College v. Board of Crawford County Comm'r's, 258 K. 622, 623, 907 P.2d 127 (1995).

218. Assessment of taxes against intervenor nonprofits not illegal; subsection (a)(4) not self-executing. *Most Worshipful Grand Lodge v. Board of Shawnee County Comm'rs*, 259 K. 510, 511, 912 P.2d 708 (1996).

219. When nontaxable intangible property may be included in utility valuation examined; unit value method discussed. *In re Tax Appeal of Western Resources, Inc.*, 22 K.A.2d 593, 597, 919 P.2d 1048 (1996).

220. Race track held to be owned and operated by city for governmental function and exempt from ad valorem taxation. *Lario Enterprises, Inc. v. State Bd. of Tax Appeals*, 22 K.A.2d 857, 860, 925 P.2d 440 (1996).

221. "Retail cost when new" does not include sales tax nor add-on costs charged separately and which are readily discernible from actual sales price of item. *Board of Leavenworth County Comm'rs v. McGraw Fertilizer Serv., Inc.*, 261 K. 901, 902, 906, 933 P.2d 698 (1997).

222. Valuation of real property used for residential purposes. *Board of Douglas County Comm'rs v. Cashatt*, 23 K.A.2d 532, 540, 541, 543, 933 P.2d 167 (1997).

223. Property of instrumentality of governmental entity used exclusively for governmental purposes exempt from taxation. *League of Kansas Municipalities v. Board of Shawnee County Comm'rs*, 24 K.A.2d 294, 295, 300, 302, 944 P.2d 172 (1997).

§ 2.

CASE ANNOTATIONS

6. Constitutionality of statutes (79-3201 et seq.) taxing of federal military retirement benefits examined and upheld. *Barber v. State*, 249 K. 186, 815 P.2d 46 (1991); *rev'd.*, 112 S.Ct. 1619 (1992).

7. Applying separate income tax rates for single and married persons does not violate due process. *Peden v. Kansas Dept. of Revenue*, 261 K. 239, 244, 930 P.2d 1 (1996).

§ 4.

Attorney General's Opinions:

Finance and taxation; revenue for current expenses. 91-142.
Motor vehicle tax receipts attributable to tax levies for school districts and community colleges. 94-32.

County and city retailers' sales tax; election required; validation of election. 95-22.

§ 5.

Law Review and Bar Journal References:

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SCOPE STATEMENT

Reviewing Payments from the Kansas Universal Service Fund

When the Legislature passed the Kansas Telecommunications Act of 1996, it authorized creation of the Kansas Universal Service Fund. That Fund was intended to help ensure all Kansans would have access to a first-class telecommunications infrastructure that provided excellent service at an affordable price, and to promote access for both rural and urban consumers to a full range of telecommunications services, including advanced services like Internet hook-ups.

Every telecommunications carrier, public utility, and wireless service provider that offers telecommunications services within Kansas is required to contribute to the Fund. These moneys primarily come from surcharges phone companies levy on their customers. This money may be used to compensate telecommunications companies for revenues they've lost in charging "equalized" interstate and intrastate rates. It also may be used to recover shortfalls caused by the need to rebalance intrastate rates to maintain parity with interstate access rates, by additional investments needed to provide universal service and enhanced universal service, and by certain changes in federal rules or certain requirements mandated by a legislative, regulatory or judicial authority.

During the first 15 months of the Fund's existence, more than \$98 million was collected and more than \$66 million was paid out. Projected collections and distributions from June 1998 to May 1999 are \$68.7 million and \$100 million, respectively.

The Kansas Corporations Commission is responsible for overseeing the Fund. The Fund's day-to-day administration is carried out by the National Exchange Carrier Association under contract with the Commission. The administrator is responsible for collecting and auditing all relevant information from companies that receive moneys from or provide moneys to the Fund, verifying the amount each company owes the Fund, collecting all moneys owed, and distributing the amounts owed to qualified companies.

Recently, legislators have expressed an interest in knowing what the basis is for the distributions made to individuals telephone companies, and whether those distributions are being made in accordance with the intent of the law. A performance audit addressing these concerns would answer the following questions.

1. **Has the Corporation Commission established reasonable methods for collecting and distributing moneys in the Kansas Universal Service Fund?** In answering this question, we'd review State and federal laws relevant to universal service and the use of the Fund, and would interview Commission officials to determine what criteria have been established for such things as the amount each company pays into the Fund, which companies are eligible to receive payments, and how much those payments should be. We'd assess whether these criteria and the rules and procedures adopted for implementing them appear to be reasonable and to address the requirements outlined in law. We'd conduct additional work as needed.

(over)

House Utilities
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2. **Have the Commission and the Fund's administrator taken adequate steps to ensure that companies are entitled to the amounts they receive from the Fund?** To answer this question, we'd interview Commission officials to determine what procedures they've established to ensure that the Fund's administrator is paying out only the amounts companies are entitled to receive under the law and Commission guidelines. We'd interview officials from the National Exchange Carrier Association (the Fund's administrator) to determine what they do to audit or verify the amounts claimed by individual companies or carriers. On a sample basis, we'd look at any audits or verification work done by the Association to ensure that payments made from the Fund are in accordance with the law and Commission guidelines. We'd conduct additional work as needed.
3. **What portion of the Kansas Universal Service Fund's disbursements represent high cost recovery, and what portion represents revenue neutrality.** We'd contact the Fund's administrators to determine what information they may have to identify how much of the total disbursements are represented by each of these two components. As needed, we'd analyze the Fund's accounting records or conduct other testwork.

Estimated time to complete: 6-10 weeks

TO PUT:

④ How do other states assess
and collect universal service funds
and on what basis are disbursements
made?

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Updated SUNDAY March 14, 1999

Local

Wichita's power went north during 1998 heat wave

Documents show Western Resources was shipping cheap KGE power to KPL last summer when KGE's business customers were being told to turn out lights.

By Bob Cox
The Wichita Eagle

When it got hot for days on end last summer, Western Resources Inc. and KGE asked some of Kansas' largest businesses to drastically reduce their power consumption so the utility would have enough power to go around.

So employees at Boeing Wichita and Raytheon Aircraft Co. worked in 85-degree offices with the lights dimmed. Factory workers labored in the heat when giant fans were turned down or off. Vulcan Chemical Co. shut down operations on several days, sending employees home rather than pay exorbitant prices to get electricity.

What no one knew at the time was that KGE apparently had lots of electricity available, more than enough to meet all of its customers' needs.

And it was sending large amounts of power north to Western's other utility, KPL, at very low prices.

Those practices are apparently legal and are specified in contracts between KPL and KGE. But some of Western's big customers want the Kansas Corporation Commission to look into the matter further.

Western executives argue they were simply operating the entire electrical system in the most efficient way possible, which in the long run saves customers money in the form of lower electric rates. Documents obtained from Western recently by the city of Wichita show that through much of 1998, KPL was regularly drawing lots of power from KGE. And in the summer months, when air conditioners across the state were running all out, KPL was forced to draw heavily on power generated by KGE.

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The information disclosed in the documents, which are public record, has added fuel to the simmering discontent among large business customers over being forced to cut power usage and shut down operations last summer.

But the new disclosures also have implications for all KGE customers, business and residential.

Two companies or one?

Western officials maintain that the reason KGE customers pay higher prices for electricity is that the KGE generating and transmission system, particularly the Wolf Creek nuclear power plant, cost more to build and operate than the KPL system.

What happened last summer, critics say, shows the flimsiness of Western officials' arguments justifying a two-company, two-rate structure.

"KGE customers pay the bill for KGE, and they should have first call on that power," said Jim Zakoura, an Overland Park attorney who is representing a group of large companies challenging Western on rate and service issues, including Boeing, Raytheon and Farmland Industries.

"They can run this as one system if there's one set of rates," Zakoura added. "If there's two sets of rates, then KGE customers should get the power they're paying for."

Mayor Bob Knight said he has not studied the information in the Western documents in detail. But Knight added that the power sales from KGE to KPL, at a time when area businesses were being told shut down, are "part of the overall concern that the city has been expressing for years now."

The power cutbacks last summer were more than an inconvenience to the big companies. Paul Tobia, plant manager for Vulcan Chemical Co., testified before the state Legislature that the cost of the power shortages to his company was "greatly in excess of \$1 million."

Farmland Industries, with the support of other companies, has asked the KCC to fully investigate the circumstances of last summer's power cutbacks.

The city of Wichita has weighed in with the KCC in support of Farmland's request for a thorough investigation.

Filings in the case by Farmland and the city contain several revelations.

One is a detailed written agreement, originally filed with the Federal Energy Regulatory Commission, specifying exactly how Western operates KPL and KGE as a single, interconnected electrical generation and transmission system.

If KPL is short of power, the agreement states, it can buy power from KGE. And KGE can buy extra power from KPL if it needs to.

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Western officials have consistently acknowledged they operate both utility companies through a single dispatch center, but they have also maintained that KPL's assets are for KPL customers, and KGE assets are for KGE customers. In a crisis, they have said, each utility's customers would have first call on that utility's power.

Moving power around

The documents filed with the KCC by the city do show that in 1996 and 1997, power went both ways on the Western system. Some months KPL bought more power, some months KGE.

But beginning in the summer of 1997, KGE consistently sold large amounts of power to KPL. And when the weather got hot and stayed hot last June, KPL was forced to rely heavily on KGE for electricity.

KPL bought 162.5 million kilowatt hours of electricity in June, substantially more than it had in June of the prior two years. It bought 221 million kilowatt hours in July; 224 million in August; and 245 million in September.

How much power is that? Enough for a small city for a year. KGE provided about 232.7 million kilowatt hours to customers in El Dorado for all of 1997.

The midsummer sales to KPL, Zakoura says, typically exceeded the amount of power required by KGE's industrial customers.

"It appears the only reason they were asked step down or step off (to cut power use or shut down altogether) was to make the power available to KPL, and that's not right," said Zakoura.

That doesn't sit well with the big companies. Some, like Farmland and Vulcan, had interruptible power supply contracts, which give KGE the right to shut off their power in an emergency situation in return for special electric rates. Others, like Boeing and Raytheon, complied voluntarily.

"We were told if we didn't curtail there wouldn't be enough power to meet all the needs and there would be brownouts and rolling blackouts," said Raytheon spokesman Jim Gregory People. "People would be without electricity. We didn't want to be a part of that disaster.

"So when we learn there was power going outside this (KGE's) primary service district, it is upsetting."

Carl Koupal, executive vice president of Western, said that during the periods of peak demand the utility company's managers had to make hard decisions about how to spread the available electricity around and still maintain mandated reserves.

At times Western was buying electricity from other utilities, but at other times Koupal said there was little or no extra power to buy because the heat wave gripping much of the country was straining electric generation and transmission resources everywhere.

"We were in a situation last summer where we were very close, on a

5-3

number of days, in terms of our ability to serve our customers," Koupal said.

"I would say we were doing the very best we could to manage the system the best we could and take care of our customers. ... We don't interrupt our customers, even those with interruptible contracts, without a lot of thought."

Koupal said Western doesn't buy the argument that KGE customers should all get their power before any is shipped to KPL.

By operating the two utilities from a single dispatch point, he said, the company is able to use its generating plants and transmission lines most efficiently. That saves money that has been passed on to consumers and businesses in the form of lower electric rates.

Who gets electricity?

The industrial customers were angered early on when they discovered Western and KGE had firm contracts to supply power to other utility companies. KGE delivered power to those utilities when it was cutting back power to its own business customers.

The new documents show that KGE had plenty of power to take care of all its regular customers, including outside utilities, if it had not been sending large amounts of power to KPL.

Now, Zakoura says, the industrial customers are asking whether Western may have been shifting KGE power to KPL, then selling it to other utilities at highly profitable, spot market prices.

"The answer is no," said Koupal. At the time large business customers were being asked to turn their lights off and thermostats up, Western was not making any non-contractual power sales.

Western also had an incentive to use the cheapest power available. Most of its contracts preclude the utility from passing on to customers the added cost of buying higher-priced power. So the added costs of buying power from other sources would have come out of the company's profits.

At other times during the summer, when Western had plenty of power available and all of its customers were being served, Koupal said Western did sell power on the spot markets.

The documents show that in the June-July-August period, Western sold KGE power to KPL for prices ranging from less than 1 cent per kilowatt hour to slightly more than 2 cents. Big industrial customers typically pay between 4 and 6 cents a kilowatt hour, while residential customers in the Wichita area pay more than 8 cents a kilowatt hour on average.

Western was able to sell surplus power to other utilities for prices ranging from a few cents a kilowatt hour to 50 cents and, apparently in at least one case, as much as \$3.70.

Western's customers say they don't mind the utility company doing everything it can to operate efficiently, save money and turn a profit.

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But since they can't buy electricity anywhere else, they want to be assured of uninterrupted electric service.

Terry Keller, manager of utility services for Boeing Wichita, recently told state legislators:

"In our opinion, if Kansas electric consumers -- residential, commercial and industrial -- have an absolute obligation to purchase from a certificated utility, the certificated utility has a corresponding absolute obligation to serve those consumers with sufficient and efficient service."

Bob Cox writes about business. He can be reached at 268-6424 or by e-mail at bcox@wichitaeagle.com.

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