Approved: 2-11-08
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on January 29, 2008 in Room 313-S of the Capitol.

All members were present except:
Representative Ben Hodge - Excused
Representative Raj Goyle - Excused
Representative Paul Davis - Excused
Representative Kevin Yoder - Excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:
John Campbell, Kansas Insurance Department
Judge Stephen Leben, Kansas Judicial Council
Niki Christopher, CURB (Citizen Utility Ratepayer Board)
Martha Coffman, Kansas Corporation Commission

John Campbell, Kansas Insurance Department, appeared before the committee with a bill request that would make amendments to the insurance code with regard to the difference of opinion of who has the authority to implement rules and regulations. Representative Owens made the motion to have the request introduced as a committee bill. Representative Whitham seconded the motion. The motion carried.

Representative Joe Patton appeared before the committee with a bill request relating to conflicts between child in need of care and child support cases. He made the motion to have his request introduced as a committee bill. Representative Roth seconded the motion. The motion carried.

Representative Jim Ward requested a bill that relates to bonds contractors put up against fraud. He made the motion to have his request introduced as a committee bill. Representative Whitham seconded the motion. The motion carried.

Chairman O'Neal appeared before the committee with a bill request relating to insurance code regulation of Wrap-up policies. Representative Owens made the motion to have the request introduced as a committee bill. Representative Colloton seconded the motion. The motion carried.

The hearing on **HB 2619 - change of Judge in civil case**

Jerry Donaldson, Legislative Research Department, provided the committee with an overview of the Special Committee on Judiciary recommendations. They were charged with studying in more detail 2007 SB 86, which requires a change of a judge in a civil action if there is a written request filed by either party. The request would be granted only once and would be mandatory. The Committee felt that there was no support for that bill but because there are several different statutes addressing change in judge, requested a bill be drafted that clearly requires the litigant to prove the allegations with substantive evidence. The result was **HB 2619.**

Chairman O'Neal announced that the proposed bill is clarifying in nature. He would contact the Office of Judicial Administration to see if there is any interest by judges to have that clarification, if not the bill would not be worked.

The hearing on **HB 2618 - administrative procedure amendments**, was opened.

Jerry Donaldson provided the committee with a brief overview of the Special Committee on Judiciary recommendations. They requested legislation be drafted to clarify that the judicial review shall be on the entire record, including the record of any adjudicative hearing conducted by a presiding officer. It would also

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

place the burden of proof on the agency where a substantial property right is affected.

Judge Stephen Leben, Kansas Judicial Council, appeared to support the concept of the bill but asked the committee to consider the proposed amendments:

1. Clarify that the burden of proof in licensing proceedings is clear and convincing evidence and that it would only apply to occupational and professional licensing disciplinary proceedings against an individual and would not apply to business licensing proceedings.
2. Strike section 3 and replace with amendments from K.S.A. 77-527 (agency review) and 77-621 (judicial review). It would require an agency to give "due regard" to a hearing officer's credibility determinations.
3. Adding a separation of functions requirement and expanding the prohibition of *ex parte* communications.

He believes the amendments would achieve the same goals as **HB 2618.** The proposed amendments are based on the Revised Model State Administrative Procedure Act. (Attachment #1)

Niki Christopher, CURB (Citizen Utility Ratepayer Board), specifically supported the provisions that would allow for a whole record review of any agency actions. Agencies need to demonstrate, on paper, why they made the decisions they made and allow the courts the ability to look at any part of the record. (Attachment #2)

Martha Coffman, Kansas Corporation Commission (KCC), has concerns with section 3 and the changes that may occur because of it. Such as, it could be read to change the scope of judicial review to allow courts to exercise *de novo* review of all administrative proceedings and not necessarily take any of the agencies explanation of their decisions into consideration. She suggested that the courts do not have experts in evaluating applications and determining appropriate utility rates, mergers and acquisitions. (Attachment #3)

Chairman O'Neal disagreed with the statement above because an agency's final order has their explanation of their decision. Ms. Coffman stated that she is concerned that they will have to be more specific in their explanation of their decision. She requested that the KCC be exempted from the scope of review.

Chairman O'Neal stated that the proposed language by the Judicial Council is actually better language and that the committee would consider adopting that language and suggested that Ms. Coffman look it over.

The hearing on **HB 2618** was closed.

The committee meeting adjourned at 4:30p.m. The next meeting is scheduled for January 30, 2008.

MEMORANDUM

TO: **House Judiciary Committee**
FROM: **Kansas Judicial Council - Judge Steve Leben**
DATE: **January 29, 2008**
RE: **2008 HB 2618**

The Judicial Council Administrative Procedure Advisory Committee offered oral and written testimony before the Special Committee on Judiciary which recommended 2008 HB 2618. While the Advisory Committee supports the bill conceptually, its recommendations to the Special Committee on Judiciary were based on the Revised Model State Administrative Procedure Act, which is slightly different. In general, the Advisory Committee believes that following the Model Act would have advantages for the state in terms of clarity and consistency of the law. The purpose of this testimony is to point out where the Advisory Committee's recommendations were different from HB 2618 and why. Attached is a draft of the Advisory Committee's recommendations shown as balloon amendments to the bill.

Section 1 (77-512)

Section 1 of the bill amends K.S.A. 77-512 to clarify that the burden of proof in licensing proceedings is clear and convincing evidence. The Advisory Committee recommended a similar amendment; however, the Committee's proposed amendment was drafted more narrowly so that it would apply only to occupational and professional licensing disciplinary proceedings against an individual and would not apply to business licensing proceedings. In addition, the Advisory Committee's proposal incorporates the burden of proof language as a separate provision from the existing language regarding a hearing. (See page 1 of attached balloon amendments.)

Section 2 (77-620)

Section 2 of the bill amends K.S.A. 77-620 to clarify that the agency record shall include materials concerning a hearing or initial order by the office of administrative hearings. While the Advisory Committee had not previously recommended any amendment to this section, it agreed this change was a helpful clarification of the law.

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Section 3 (77-621)

Section 3 contains the meat of the bill. It amends K.S.A. 77-621 to clarify that judicial review of evidence "in light of the record as a whole" means that a reviewing court should consider not only evidence that supports, but also evidence that detracts from, the agency's determination. Section 3 also specifies that a reviewing court should accept a hearing officer's factual determinations unless they are clearly erroneous. Because judicial review and agency review are separate concepts, the Advisory Committee believes that any provision regarding agency review should be placed in K.S.A. 77-527 rather than 77-621. Under the bill, while the reviewing court is instructed to defer to the hearing officer's fact finding under the clearly erroneous standard, under K.S.A. 77-527(d), the agency would retain the full power of decision, which is inconsistent with the deferential review contemplated by the bill.

The Committee's recommendation is different from the bill in that the Committee recommended separate amendments to K.S.A. 77-527 (agency review) and K.S.A. 77-621 (judicial review) and also in that the Committee's proposal would require an agency to give "due regard" to a hearing officer's credibility determinations. The Committee's proposed language was taken from the Revised Model State Administrative Procedure Act which strikes an appropriate balance between protecting the independent fact findings of a hearing officer and preserving the agency's policy-making role. (See pages 2 and 5 of attached balloon amendments.)

Additional Advisory Committee Recommendations (77-514 and 77-525)

Finally, the Advisory Committee recommended amendments relating to *ex parte* communications and separation of functions, issues which the bill does not address. These amendments are intended to address the troubling situation that arises when agency personnel who act in an investigatory, prosecutorial or adversarial capacity are also involved in the adjudication by the agency. The Advisory Committee recommends the addition of a separation of functions requirement to K.S.A. 77-514, which governs who may serve as the presiding officer. The Committee also recommends the expansion of the prohibition on *ex parte* communications in K.S.A. 77-525 to prohibit intra-agency communication between presiding officers and investigatory or prosecutorial personnel. (See pages 3-4 of attached balloon amendments.)

Session of 2008

HOUSE BILL No. 2618

By Special Committee on Judiciary

1-10

AN ACT concerning administrative procedure; amending K.S.A. 77-512, 77-620 and 77-621 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 77-512 is hereby amended to read as follows: 77-512. A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license ~~unless the state agency first gives except by a decision supported by clear and convincing evidence after~~ providing notice and an opportunity for a hearing in accordance with this act. This section does not preclude a state agency from (a) taking immediate action to protect the public interest in accordance with K.S.A. 77-536, and amendments thereto, or (b) adopting rules and regulations, otherwise within the scope of its authority, pertaining to a class of licensees, including rules and regulations affecting the existing licenses of a class of licensees.

(b) Unless otherwise provided by law, the burden of proof for disputed issues of fact in occupational or professional licensing disciplinary proceedings against an individual shall be by clear and convincing evidence.

Sec. 2. K.S.A. 77-620 is hereby amended to read as follows: 77-620. (a) Within 30 days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action; other documents identified by the agency as having been considered by it before its action and used as a basis for its action; *any materials concerning a hearing conducted by, or initial order issued by, the office of administrative hearings related to the agency action;* and any other material required by law as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (c). Unless otherwise ordered by the court, the cost of the preparation of the transcript shall be paid by the appellant.

(c) By stipulation of all parties to the judicial review proceedings, the record may be shortened, summarized or organized.

(d) The court may tax the cost of preparing transcripts and copies for

the record against a party who unreasonably refuses to stipulate to shorten, summarize or organize the record.

(e) Additions to the record pursuant to K.S.A. 77-619, *and amendments thereto*, shall be made as ordered by the court.

(f) The court may require or permit subsequent corrections or additions to the record.

Sec. 3. K.S.A. 77-621 is hereby amended to read as follows: 77-621. (a) Except to the extent that this act or another statute provides otherwise:

(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and

(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) ~~*For purposes of this section, "viewed in light of the record as a whole" means that the reviewing court shall evaluate all of the relevant evidence in the entire record before it, including all relevant evidence that detracts from the agency's determination as well as all relevant evidence that supports the agency's determination, and shall give deference to any determination of the credibility of any evidence made by the authority that originally received such evidence into the record unless such credibility determination is shown to be clearly erroneous.*~~

(e) In making the foregoing determinations, due account shall be

Strike and insert the following:

For purposes of this section, "in light of the record as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record, compiled pursuant to KSA 77-620 and amendments thereto, that are cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

taken by the court of the rule of harmless error.

Additional recommended amendments:

New Sec. 4. K.S.A. 77-514 is hereby amended to read as follows: 77-514. (a) For agencies listed in subsection (h) of K.S.A. 75-37,121, and amendments thereto, the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings shall be the presiding officer. For all other agencies, the agency head, one or more members of the agency head, a presiding officer assigned by the office of administrative hearings, or, unless prohibited by K.S.A. 77-551, and amendments thereto, one or more other persons designated by the agency head shall be the presiding officer.

(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for administrative bias, prejudice or interest.

(c) Any party may petition for the disqualification of a person promptly after receipt of notice indicating that the person will preside or promptly upon discovering facts establishing grounds for disqualification, whichever is later.

(d) A person whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for a person who is disqualified or becomes unavailable for any other reason, any action taken by a duly appointed substitute for a disqualified or unavailable person is as effective as if taken by the latter.

(f) If the office of administrative hearings cannot provide a presiding officer, a state agency may enter into agreements with another state agency to provide presiding officers to conduct proceedings under this act.

(g) Notwithstanding any quorum requirements, if the agency head of a professional or occupational licensing agency is a body of individuals, the agency head, unless prohibited by law, may designate one or more members of the agency head to serve as presiding officer and to render a final order in the proceeding.

(h) Except as otherwise provided by law, in any proceeding under this act, a person shall not be eligible to act as presiding officer, and shall not provide confidential legal or technical advice to a presiding officer in the proceeding, if that person:

(1) Has participated in any stage of an investigation or prosecution associated with the proceeding or a proceeding arising out of the same event or transaction;

(2) is supervised or directed by a person who would be disqualified under paragraph (1); or

(3) has participated in the creation of a summary order as part of another stage of the proceeding.

New Sec. 5. K.S.A. 77-525 is hereby amended to read as follows: 77-525. (a) A presiding officer serving in an adjudicative proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding while the proceeding is pending, with any party or participant, with any person who has a direct or indirect interest in the outcome of the proceeding or with any person who has served in an investigatory or prosecutorial capacity or presided at a previous stage of the proceeding, without notice and opportunity for all parties to participate in the communication.

(b) A member of a multimember panel of presiding officers may communicate with other members of the panel regarding a matter pending before the panel, and any presiding officer may receive aid from staff assistants if the assistants do not:

(1) Receive *ex parte* communications of a type that the presiding officer would be prohibited from receiving; or

(2) furnish, augment, diminish or modify the evidence in the record.

(c) Unless required for the disposition of *ex parte* matters specifically authorized by statute, no party to an adjudicative proceeding, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the proceeding, may directly or indirectly communicate in connection with any issue in that proceeding, while the proceeding is pending, with any person serving as presiding officer unless notice and an opportunity are given all parties to participate in the communication.

(d) If, before serving as presiding officer in an adjudicative proceeding, a person receives an *ex parte* communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) A presiding officer who receives an *ex parte* communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications and a memorandum stating the substance of all oral communications received, all responses made and the identity of each person from whom the presiding officer received an *ex parte* communication and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the *ex parte* communication must be allowed to do so, upon requesting the opportunity for rebuttal within 10 days after notice of the communication.

(f) If necessary to eliminate the effect of an *ex parte* communication received in violation of this section, a presiding officer who receives the communication may be disqualified and the portions of the record pertaining to the communication may be sealed by protective order.

(g) The state agency shall, and any party may, report any willful violation of this section to appropriate authorities for any disciplinary proceedings provided by law. In addition, each state agency, by rule and regulation, may provide for appropriate sanctions, including default, for any violations of this section.

(h) This section shall not apply to adjudicative proceedings before:

(1) The state corporation commission. Such proceedings shall be subject to the provisions of K.S.A. 77-545;

(2) the commissioner of insurance concerning any rate, or any rule, regulation or practice pertaining to the rates over which the commissioner has jurisdiction or adjudicative proceedings held pursuant to the Kansas insurance holding companies act. Such proceedings shall be subject to the provisions of K.S.A. 77-546; and
(3) the director of taxation. Such proceedings shall be subject to the provisions of K.S.A. 77-548.

New Sec. 6. K.S.A. 77-527 is hereby amended to read as follows: 77-527. (a) The agency head, upon its own motion may, and upon petition by any party or when required by law shall, review an initial order, except to the extent that:
(1) A provision of law precludes or limits state agency review of the initial order; or
(2) the agency head (A) determines to review some but not all issues, or not to exercise any review, (B) delegates its authority to review the initial order to one or more persons, unless such delegation is expressly prohibited by law, or (C) authorizes one or more persons to review the initial order, subject to further review by the agency head.
(b) A petition for review of an initial order must be filed with the agency head, or with any person designated for this purpose by rule and regulation of the state agency, within 15 days after service of the initial order. If the agency head on its own motion decides to review an initial order, the agency head shall give written notice of its intention to review the initial order within 15 days after its service. If the agency head determines not to review an initial order in response to a petition for review, the agency head shall, within 20 days after filing of the petition for review, serve on each party an order stating that review will not be exercised.
(c) The petition for review shall state its basis. If the agency head on its own motion gives notice of its intent to review an initial order, the agency head shall identify the issues that it intends to review.
(d) Subject to KSA 77-621 and amendments thereto, in reviewing an initial order, the agency head or designee shall exercise all the decision-making power that the agency head or designee would have had to render a final order had the agency head or designee presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the agency head or designee upon notice to all parties. In reviewing findings of fact in initial orders by presiding officers, the agency head shall give due regard to the presiding officer's opportunity to observe the witnesses. The agency head shall consider the agency record or such portions of it as have been designated by the parties.
(e) The agency head or designee shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.
(f) The agency head or designee shall render a final order disposing of the proceeding or remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a matter, the agency head or designee may order such temporary relief as is authorized and appropriate.

(g) A final order or an order remanding the matter for further proceedings shall be rendered in writing and served within 30 days after receipt of briefs and oral argument unless that period is waived or extended with the written consent of all parties or for good cause shown.
(h) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between this order and the initial order and shall state the facts of record which support any difference in findings of fact, state the source of law which supports any difference in legal conclusions, and state the policy reasons which support any difference in the exercise of discretion. A final order under this section shall include, or incorporate by express reference to the initial order, all the matters required by subsection (c) of K.S.A. 77-526, and amendments thereto.
(i) The agency head shall cause copies of the final order or order remanding the matter for further proceedings to be served on each party in the manner prescribed by K.S.A. 77-531, and amendments thereto.
(j) Unless a petition for reconsideration is a prerequisite for seeking judicial review, a final order under this section shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.

77-514, 77-525, 77-527,

Sec. 4. K.S.A. 77-512, 77-620 and 77-621 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

Citizens' Utility Ratepayer Board

Board Members:
Gene Merry, Chair
Randy Brown, Vice-Chair
Carol I. Faucher, Member
Laura L. McClure, Member
A.W. Dirks, Member

State of Kansas
Kathleen Sebelius, Governor

David Springe, Consumer Counsel
1500 S.W. Arrowhead Road
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Testimony of the Citizens' Utility Ratepayer Board (CURB) in support of HB 2618
Before the House Judiciary Committee
by Niki Christopher
January 29, 2008

The Citizens' Utility Ratepayer Board (CURB) is a state agency that represents residential and small commercial customers of the regulated utilities in proceedings before the Kansas Corporation Commission and the state's courts. We support HB 2618.

CURB is one of the few state agencies that practices almost exclusively before another state agency—the KCC—and that regularly appeals another agency's decisions to the courts. We know firsthand how deferential the courts are to agency decisions, and we support the proposed amendment to K.S.A. 77-621(d) [beginning at line 35] because it will restore the appropriate standard of judicial review of agency action that was intended by the federal act and the Kansas act, which was modeled after the federal act.

The standard of review of agency action that has developed in Kansas courts since the adoption of the judicial review act has become so deferential to agency decisions that judicial review often amounts to no real review at all. Only if a decision is "so wide of the mark" that no reasonable person would have so ruled will a court overturn an agency decision. So long as there is some evidence in the record that supports it, even if there is overwhelming evidence that contradicts it, the court must affirm. The court will not review the record as a whole.

This standard of review gives the agency an unfair advantage. The agency can simply ignore evidence that detracts from its decision, knowing that an appellant will not be able to convince the court to review the evidence that the agency ignored. An agency can decide that 2 plus 2 equals 5, and write up an order that cites the testimony of one witness who proposed that 2 plus 2 equals 5, ignoring completely the evidence presented by five reputable mathematicians who testified that 2 plus 2 equals 4—and be upheld, because the reviewing court found some evidence in the record that 2 plus 2 equals 5. There is no point in providing review of agency decisions if all the judges are going to do is check whether the facts cited by the agency are in the record.

This bill will restore the court's obligation to review the entire record when an appellant challenges a decision as arbitrary and capricious. The court will have to consider, in the example above, whether the weight of all of the evidence in the record supports the agency's decision that 2 plus 2 equals 5. This restores the balance that was intended by judicial review legislation, and protects us from bad decisions.

Review of the whole record of agency action is especially important because agency decision makers are subject to more influences than judges generally are. For example, because the KCC has an investigative function, the commissioners are not barred from communicating outside of the courtroom with the utilities they regulate. The utilities regularly seek out meetings with the commissioners to present their

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positions on issues that they will be litigating at the Commission. Long-term relationships develop between the regulators and the regulated.

Judges are different. Judges are expected to avoid efforts to lobby them. Judges don't meet with the parties to hear their point of view before they file their cases. Judges generally don't develop long-term friendships with the parties who repeatedly appear in their courtrooms. If they once worked with one of the parties, the case is usually moved to another judge. The rules governing judicial conduct are much stricter, and are designed to protect the neutrality of the judicial process and protect it from undue influences.

These differences between judges and commissioners are very important to those of us who advocate for the public interest. It is a real concern to CURB whether the influences on the KCC are reflected in its decision making. Judicial review provides us the only forum where we are assured of neutrality. Judicial review of the whole record protects us all from decisions that may be products of influence rather than evidence. But if a reviewing court does little more than verify whether the facts the agency cited are in the record, none of us are protected from the influence that may have been brought to bear on the agency to ignore the competing evidence. That may be the best reason of all to support this bill. That is why the availability of a thorough and balanced review of the entire record by the courts is so important.

We would urge you to read Judge Steven Leben's article, *Challenging and Defending Agency Actions in Kansas* [64-JUL J. Kan. B.A. 22 (June/July 1995, at §II(B) ¶8], in which he makes a very good argument for restoring review of the whole record, not just the parts that support the agency's action. This bill will simply revive the standard of review that Judge Leben argues was originally intended by the legislature. Please do not wait for the courts to evolve back to this standard. Passing this bill would assure uniform, across-the-board adoption of this standard by all 31 judicial districts and the appellate courts. Courts are a lot like people: they will keep doing what they are used to doing, unless you tell them directly "Do this differently."

We expect other agencies will testify that this bill is going to create extra work for them, and will result in more overturned agency decisions, which will lead to uncertainty, delays, etc. However, we firmly believe that, under the standard to be restored by this bill, an agency could decide that 2 plus 2 equals 5 and be upheld on appeal, so long as it identifies support in the record for this decision, and articulates a rational reason for rejecting contradictory evidence in the record. This is particularly important when a decision makes dramatic changes in law or policy, and especially when there is a lot of evidence in the record that directly contradicts the agency's decision.

This legislation will simply encourage agencies to do their jobs. An agency is supposed to give fair consideration to all of the relevant evidence in the record, and make a rational choice among the options. It should articulate the facts and reasons that support its decision so that the reviewing court doesn't have to go looking for them. If the agency does what it is supposed to do, its decisions won't be overturned very often, even if the court reviews the entire record. If an agency has done its job, review of the entire record will confirm that the agency's decision was rational in light of all the evidence. If the review of the entire record reveals that the agency's decision was not rational, then judicial review protects the appellant and the public from an irrational decision. That is a desirable outcome for all of us who value good government.

KANSAS
CORPORATION COMMISSION

Kathleen Sebelius, Governor
Thomas E. Wright, Chairman
Michael C. Moffet, Commissioner
Joseph F. Harkins, Commissioner

SUMMARY OF TESTIMONY
BEFORE THE HOUSE JUDICIARY COMMITTEE
PRESENTATION OF THE
KANSAS CORPORATION COMMISSION

HB 2618
January 29, 2008

Thank you, Chairman and members of the Committee. My name is Martha J. Coffman. I appreciate the opportunity to testify on behalf of the Kansas Corporation Commission on HB 2618. The Commission opposes this bill and asks the Committee to clarify language that attempts to change the scope of judicial review under the KJRA.

I am Chief Advisory Counsel for the Kansas Corporation Commission and have written about the KJRA. My concerns, and those of the Commission, are the language proposed in § 3 of HB 2618, which adds a new subsection (d) to K.S.A. 77-621.

Language in § 3 of HB 2618 could be read to change the scope of judicial review to allow courts to exercise de novo review of all administrative proceedings. The Commission urges against such a change. Unlike the Commission, courts do not have experts to assist in evaluating applications and determining appropriate utility rates, mergers and acquisitions, or siting of high-powered electricity lines. Under a de novo review standard, courts would decide these issues without advice from engineers, accountants, and economists trained to assist in balancing and weighing of competing interests of shareholders, utility customers – large business, small business and residential – as well as the interest of the public generally. The KCC fulfills this role as delegated by the Legislature.

The first clause of proposed new (d) to K.S.A. 77-621 directs the court to consider the entire administrative record but not the agency's explanation of why it concluded relevant

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evidence in the record supported its decision. The KCC has proposed language that will require a reviewing court determining whether agency action is supported by substantial evidence to consider the agency's reasons for its decision. Such consideration is of paramount importance. A court is not free to weigh and balance the evidence anew; it must rely upon the factfinder to hear the testimony and judge the credibility of witnesses. A reviewing court should consider why the agency found testimony reliable and witnesses credible.

The second clause of new (d) to K.S.A. 77-621 requires a reviewing court to give deference to determinations by a factfinder originally receiving the evidence. It should also require a reviewing court to give judicial deference to an administrative agency that has decided a question of law on a subject for which that agency has special expertise. The Draft Model Act recognizes this deference and specifically states that its judicial review standard "is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate." Draft, p. 79. Any changes to the scope of review under the KJRA should require this judicial deference to insure decisions by agencies with special expertise – such as the KCC – will be evaluated properly under the KJRA.

Finally, I have proposed language that would exempt the KCC from the scope of review proposed in HB 2618. This bill is directed at insuring decisions by hearing officers at the Office of Administrative Hearings are given proper consideration. The KCC acts as the hearing officer in its dockets. This bill is not intended to apply to the KCC.

I appreciate your interest in this issue. I am happy to address any questions you might have about the KJRA or the Commission's administrative proceedings.

KANSAS
CORPORATION COMMISSION

Kathleen Sebelius, Governor
Thomas E. Wright, Chairman
Michael C. Moffet, Commissioner
Joseph F. Harkins, Commissioner

BEFORE THE HOUSE JUDICIARY COMMITTEE
PRESENTATION OF THE
KANSAS CORPORATION COMMISSION

HB 2618
January 29, 2008

Thank you, Chairman and members of the Committee. I appreciate the opportunity to testify before you. My name is Martha J. Coffman, and I appear on behalf of the Kansas Corporation Commission on HB 2618. The Commission opposes HB 2618. Clarifying language is needed to address changes in HB 2618 that will modify the scope of judicial review of agency action under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (the KJRA). Also, the Commission asks the Committee to exempt it from this change.

By way of introduction, I am Chief Advisory Counsel for the Kansas Corporation Commission. Also, in addition to writing numerous briefs under the KJRA, I have written an article on the KJRA. *Procedures Under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601, et seq.*, 76 J. KAN. BAR ASSN 2, 19 (2007). The Commission's Advisory Counsel Office has primary responsibility for defending the Commission's decisions when challenged under the KJRA. We currently have four cases under the KJRA pending at the Kansas Court of Appeals and five cases pending in Kansas District Courts across the state; thus, we have a total of nine cases pending under the KJRA. We also have one case pending in the United States District Court for the District of Kansas under the Federal Telecommunications Act of 1996. This is a typical number of court cases for the Commission to have pending at any one time throughout the year.

The Commission takes no position on changes proposed in Sections 1 and 2 of HB 2618. Section 2 suggests that the initial order of a presiding officer has not been included in the administrative record of some agencies under K.S.A. 77-620. I assure you this is not a problem at the KCC. In my view, a presiding officer's order should be part of the administrative record.

My purpose in coming before you today is to discuss changes to K.S.A. 77-621 proposed in Section 3 of HB 2618 by adding a new subsection (d). I attended the hearing of the Interim Special Committee on the Judiciary and have reviewed testimony submitted at that hearing, as well as subsequent written testimony by the Judicial Council's Administrative Procedure Advisory Committee. I am concerned about the impact of proposed change to the scope of review set forth in HB 2618. These changes may have consequences beyond those anticipated by this Committee.

The change in § 3 of HB 2618 adds a new subsection (d) to K.S.A. 77-621 to define the term "viewed in light of the record as a whole." This term is in the KJRA in one of the grounds under which a litigant can seek judicial review of an agency decision. That provision, subsection (c)(7) of K.S.A. 77-621, reads:

> (c) The court shall grant relief only if it determines any one or more of the following:
>
> (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act[.]

Under the language stated above, to overturn agency action on this ground, a litigant must establish that the agency's decision is not supported by substantial evidence when the entire

record is taken into account. As stated, the statute as it now reads already requires the court to review the entire record.

In my opinion, the added language in Section 3 of HB 2618 is not needed. I know my colleagues have cited cases holding that courts are not required to review the entire record but can look merely at evidence supporting an agency's decision. However, the Kansas appellate courts are moving away from this standard. I point you to decisions in *Home Telephone Co. v. Kansas Corporation Comm'n*, 31 Kan. App. 2d 1002, 76 P.3d 1071 (2003) *rev. denied* Jan. 6, 2004, and *Western Resources v. Kansas Corporation Comm'n*, 30 Kan. App. 2d 348, 42 P.3d 162 (2002). There, the court clearly reviewed the entire record in reaching its decision. Also, two Commission cases were argued earlier this month before the Court of Appeals. I can assure the Committee that during both oral arguments the judges asked detailed questions about the ENTIRE administrative record, not just questions on evidence supporting the agency's decision.

Kansas appellate courts have recently interpreted the Legislature's intent in adopting the KJRA by turning to the 1981 Model Act that was the basis for K.S.A. 66-721, which is amended in § 3 of HB 2618. I direct the Committee's attention to *Bruch v. Kansas Dept. of Revenue*, 282 Kan 764, 148 P.3d 538 (2006). In reviewing a particular provision of the KJRA, the Kansas Supreme Court pointed to an article by Professor David Ryan regarding adoption of the KJRA. Professor Ryan pointed out the KJRA was modeled after Article 5 of the Model State Administrative Procedure Act of 1981; as a result, the Court turned to this Model Act for guidance in interpreting the KJRA. Parties continue to urge Kansas courts to consult the Model Act when interpreting specific provisions of the KJRA. With these trends, the clarifying language is not needed.

To the extent this Committee concludes it does need to clarify how a court should review an administrative record, the Commission urges caution. The language proposed in Section 3 of HB 2618 omits two key statements contained in the current draft of the revised Model Act. The KCC has attached proposed revisions to Section 3 of HB 2618 that make reference to those two points. KCC Exhibit A. Both points are central to a court's role in reviewing agency action.

The first clause of proposed new (d) to K.S.A. 77-621 emphasizes to the reviewing court that the entire record must be considered. The KCC's first insertion – "including the agency's explanation of why the relevant evidence in the record supports its material findings of fact" – clarifies the reviewing court must take into account the agency's reasons for its decision when determining whether agency action is supported by substantial evidence in the entire record. Without this additional language, the reviewing court might assume it has an unlimited ability to reweigh the evidence and decide questions of fact. This is not the case and, in fact, is contrary to long-standing case law in Kansas. *Kansas Industrial Consumers*, 36 Kan. App. 2d 83, 86-87, 138 P.3d 338, 344 (2006) ("The Commission is granted broad discretion by the legislature in weighing the competing interests involved in utility rate cases. The court does not have the authority to substitute its judgment for that of the Commission."); Western *Resources*, 30 Kan. App. 2d at 372 (The Commission "is the trier of facts [and] had the expertise through its staff to sift and evaluate . . . conflicting testimony [of expert witnesses]." [citations omitted]).

The second clause in proposed new (d) to K.S.A. 77-621 requires deference be given to determinations made by the factfinder originally receiving the evidence. The Commission is the factfinder in its dockets. While this proposed change recognizes deference for decisions by the factfinder, the language should also recognize judicial deference that is given an administrative agency on questions of law for which that agency has special expertise. The courts have

recognized that interpretation of a statute by an administrative agency charged with the responsibility of enforcing that statute is entitled to judicial deference. *Auten v. Kansas Corporation Comm'n*, 27 Kan. App. 2d 252, 254, 3 P.3d 86 (2000) ("Deference to an agency's interpretation is particularly appropriate when the agency is one of special competence and experience. Such interpretation may, in fact, be entitled to a controlling significance in judicial proceedings."). See *In re Appeal of Director of Property Valuation*, 284 Kan. 592, 599, 161 P.3d 766, 761 (2007) (BOTA is "a recognized administrative agency with known expertise in taxation matters"). In addition, the Draft Model Act recognizes this deference. Notes accompanying the Model Act's section on judicial review, § 509, state that this provision "is not intended to preclude courts from according deference to agency interpretations of law, where such deference is appropriate." Draft, p. 79. The Judicial Council's Administrative Law Committee failed to discuss this note and did not propose language to recognize the presence of judicial deference, which has been part of Kansas jurisprudence for nearly 100 years. This deference, referred to as the doctrine of operative construction, is not unlimited, with appellate cases making clear that the final interpretation of a statute is a question of law over which the court's review is unlimited. *Auten*, 27 Kan. App. 2d at 254. Recognition of this judicial deference is critical to assuring agencies employing technical expertise – such as the Corporation Commission – that its agency action will be properly considered during judicial review under the KJRA.

Finally, the Commission asks the Committee to specifically recognize expertise the Legislature has delegated to the Commission in supervising utilities, article 66, as well as oil and gas production, article 55. The Commission is consistently the factfinder in its dockets. The Committee should exempt the Commission from the proposed changes to the scope of review of

the KJRA, as reflected in the third proposed change to HB 2618. In addition, the Commission has proposed language amending K.S.A. 2006 Supp. 77-551 to clarify this change. Appendix B.

I appreciate your interest in this issue. I understand that you may feel compelled to clarify administrative procedures in order to remedy concerns experienced before agencies and to make agency proceedings more transparent. But I urge you to proceed with caution. Be sure that your attempt to correct one problem does not undermine the role of agencies and make their efforts meaningless. I am happy to address any questions you might have about the KJRA or the Commission's administrative proceedings.

Kansas Corporation Commission
EXHIBIT A

Session of 2008

HOUSE BILL No. 2618

By Special Committee on Judiciary

1-10

AN ACT concerning administrative procedure; amending K.S.A. 77-512, 77-620 and 77-621 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 77-512 is hereby amended to read as follows: 77-512. A state agency may not revoke, suspend, modify, annul, withdraw, refuse to renew, or amend a license ~~unless the state agency first gives~~ *except by a decision supported by clear and convincing evidence after providing* notice and an opportunity for a hearing in accordance with this act. This section does not preclude a state agency from (a) taking immediate action to protect the public interest in accordance with K.S.A. 77-536, and amendments thereto, or (b) adopting rules and regulations, otherwise within the scope of its authority, pertaining to a class of licensees, including rules and regulations affecting the existing licenses of a class of licensees.

Sec. 2. K.S.A. 77-620 is hereby amended to read as follows: 77-620. (a) Within 30 days after service of the petition for judicial review, or within further time allowed by the court or by other provision of law, the agency shall transmit to the court the original or a certified copy of the agency record for judicial review of the agency action, consisting of any agency documents expressing the agency action~~,~~; other documents identified by the agency as having been considered by it before its action and used as a basis for its action; *any materials concerning a hearing conducted by, or initial order issued by, the office of administrative hearings related to the agency action;* and any other material required by law as the agency record for the type of agency action at issue, subject to the provisions of this section.

(b) If part of the record has been preserved without a transcript, the agency shall prepare a transcript for inclusion in the record transmitted to the court, except for portions that the parties stipulate to omit in accordance with subsection (c). Unless otherwise ordered by the court, the cost of the preparation of the transcript shall be paid by the appellant.

(c) By stipulation of all parties to the judicial review proceedings, the record may be shortened, summarized or organized.

(d) The court may tax the cost of preparing transcripts and copies for

the record against a party who unreasonably refuses to stipulate to shorten, summarize or organize the record.

(e) Additions to the record pursuant to K.S.A. 77-619, *and amendments thereto*, shall be made as ordered by the court.

(f) The court may require or permit subsequent corrections or additions to the record.

Sec. 3. K.S.A. 77-621 is hereby amended to read as follows: 77-621. (a) Except to the extent that this act or another statute provides otherwise:

(1) The burden of proving the invalidity of agency action is on the party asserting invalidity; and

(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it was taken.

(b) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based.

(c) The court shall grant relief only if it determines any one or more of the following:

(1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) the agency action is otherwise unreasonable, arbitrary or capricious.

(d) *For purposes of this section, "viewed in light of the record as a whole" means that the reviewing court shall evaluate all of the relevant evidence in the entire record before it, including all relevant evidence that detracts from the agency's determination as well as all relevant evidence that supports the agency's determination, and shall give deference to any determination of the credibility of any evidence made by the authority that originally received such evidence into the record unless such credibility determination is shown to be clearly erroneous.*

(e) In making the foregoing determinations, due account shall be

including the agency's explanation of why the relevant evidence in the record supports its material findings of fact,

to agency interpretations of law, where such deference is appropriate, and

This definition of "viewed in light of the record as a whole" will not apply to the Kansas Corporation Commission.

taken by the court of the rule of harmless error.

Sec. 4. K.S.A. 77-512, 77-620 and 77-621 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

Kansas Corporation Commission

EXHIBIT B

K.S.A. 2006 Supp. 77-551. Hearing of state agencies; presiding officer.

(a) Except as provided in subsection (b), in all hearings of any state agency specified in subsection (h) of K.S.A. 75-37,121, and amendments thereto, that are required to be conducted in accordance with the provisions of the Kansas administrative procedure act, the presiding officer shall be the agency head, one or more members of the agency head or a presiding officer assigned by the office of administrative hearings.

(b) The provisions of this section shall not apply to the employment security law, pursuant to K.S.A. 44-701 et seq., and amendments thereto, *or to* article 5 of chapter 44 and amendments thereto, except K.S.A. 44-532 and 44-5,120 and amendments thereto, concerning the workers compensation act, *or to article 66, and amendments thereto, and article 55, and amendments thereto, as supervised by the state corporation commission*.

(c) Notwithstanding subsection (a) the agency head or one or more members of the agency who will serve as a presiding officer may designate any other person to serve as a presiding officer to determine procedural matters that may arise prior to the hearing on the merits, including but not limited to conducting prehearing conferences pursuant to K.S.A. 77-516 and 77-517 and amendments thereto.

(d) This section shall be part of and supplemental to the Kansas administrative procedure act.