

MINUTES OF THE SENATE UTILITIES COMMITTEE

The meeting was called to order by Chairman Jay Emler at 9:30 A.M. on February 12, 2008 in Room 526-S of the Capitol.

Committee members absent: Senator Mark Taddiken - excused
Senator Roger Pine - excused
Senator Roger Reitz - excused

Committee staff present: Raney Gilliland, Kansas Legislative Research Department
Cindy Lash, Kansas Legislative Research Department
Mike Corrigan, Revisor of Statutes
Ann McMorris, Committee Secretary

Conferees appearing before the committee:
Secretary Roderick Bremby, Kansas Department of Health and Environment

Appearance of Secretary Roderick Bremby, Kansas Department of Health & Environment

Transcript of tape recording on February 12, 2008 when Secretary Bremby, KDHE, appeared before the Senate Utilities Committee

EMLER:

Bring the meeting to order we don't have a quorum, we cannot take any action today, and some of the folks that are missing today, Mr. Secretary, are the ones who specifically asked that you be here so my apologies for them not being here today. With that I would ask you to come forward and make any statement that you'd like to make.

BREMBY:

Good morning, Mr. Chairman, members of the committee, I appreciate your letter of invitation to join you this morning, despite the letter, asking for my views on the Holcomb case and I will be referring those questions to general counsel. I have general counsel here with me and having said that, I'm here to try and answer any questions you might have.

EMLER:

Committee have any questions? Senator Pyle.

PYLE:

Thank you, Mr. Secretary. My first question concerns the fact that when you made this opinion, were you given any kind of statement from your staff to make such a decision? Do you have any kind of document that we can get a hold of?

BREMBY:

Absolutely not. What we do is our staff prepares what they believe would be a permit, how a permit would look, and forward that up to me. I then meet with the executive team and then I make the decision or I ask for additional information. That's typically how we process all permits. The technical staff forwards up what they believe a good permit or what a final document would look like and then I go from there.

PYLE:

So there is a document that says you should recommend or you should deny the permit?

BREMBY:

No, there is not. There is a draft document that has what a permit would look like in their best opinion or recommendation. There's also a draft document that would also look, ah, would help to show what a modified permit would look like as well.

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PYLE:

No other questions Mr. Chairman.

Senator Pyle if I may, you shared a document with me

PYLE:

Yeah, well I want to get to that but I was wanting

Can you let Senator Peterson, and Senator Apple already indicated he does not have any questions at this point, do you have questions?

Senator Pyle, gotta take minutes and I'm going to take a statement that's germane from I'm assuming Nov 6, 2007, of the Electric Generation Review Committee.

Is that right Mr. Chairman, it has yourself and Chairman Holmes, and Rep Phelps, Senator Lee, Senator Morris, (Unintelligible)

EMLER:

That is correct.

EMLER:

The generation panel or something, I don't remember the exact name.

PYLE:

That is correct.

In this document Mr. Secretary, you say my position is just to not in terms of economic development it also is not energy policy but is to look out after health and environment in Kansas. I guess my question is, isn't this also part of our responsibility as a legislative body?

BREMBY:

Absolutely it was, in that conservation we were having that day, there were a lot of questions about why didn't I pursue energy policy questions, policy of other sorts what I was saying was that I'm not the energy Secretary but this issue of climate seems to butt up against a lot of different functions in state government. Few of which I am responsible for, and I was just trying to clarify that my goal in looking at this was clearly only from the perspective of health and environment. I did not look at it from an economic development point of view.

PYLE:

So, do you have the recommendations from staff for that viewpoint?

BREMBY:

Absolutely not. Their viewpoint is in a technical viewpoint in terms of whether different application processes met the technical standards of the Federal government and, the state government issues a permit. There was a Supreme Court decision in April which we knew, may effect that permitting process but I had the technical staff continue the work they were currently doing, not given any guidance, any review of that whatsoever. I wanted our technical staff to continue proceeding through the work that they were doing. We were under a time line to try and get done as quickly as possible, I didn't want to confuse or delay that process any more.

PYLE:

Did you (unintelligible) Legislature (unintelligible)

BREMBY:

Absolutely, absolutely. That has not been a question of mine at all. And I hope that the legislature knows that I do care about Kansas.

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PYLE:

I want to jump to page 18 of the same minutes and where your response to is according to the minutes "Not knowing the amount of CO₂ that is harmful for one human being, does not negate the fact that CO₂ contributes to climate change, which contributes to global warming, which is harmful to all human beings." Now before I handed you this, you said you had not seen this. But I have to say for just now seeing, would your response remain the same?

BREMBY:

It would, this is a KU professor who appeared before the AGU (American Geophysical Union) and the date of this was December 13th. Later, and I know that they were taking testimony, what I did do I looked up the AGU's statement, because January 24th the AGU finalized and summarized by saying, "that the world climate is clearly out of balance and is warming. The world's largest society of earth and space scientists put that in a statement. It goes on to say it the warming changes to the earth climate system is not natural that changing the temperature sea levels, rainfall will best explain how you increase greenhouse emissions from human activities it added. Then called for carbon emissions to be reduced by more than 50% by 2100. It is the first time the AGU has updated their policy position since 2003. So no doubt I did not know in this case that the professor had talked to the AGU to give testimony. But I did know we had two Kansas academicians (unintelligible) at KU and also Dr. Chuck Rice (?). at K-State who served on the IPCC who came the same conclusion as the AGU did, which is that climate changes is largely the result of human activities. So I appreciate you sharing this but

PYLE:

So the AGU did not really agree with him.

BREMBY:

They did not.

PYLE:

That's why (unintelligible)

EMLER:

Senator Lee.

LEE:

Thank you, Mr. Chairman. Secretary Bremby, we are all aware that your actions, and I don't really want to discuss that, and only in reference to that brought the issue of CO₂ to the forefront in Kansas. We are also all aware that to date the Department of Health and Environment has brought no proposal to the legislature which is the body we would agree that makes those, that passes the law, to allow you to make the rules and regs in your estimation. Do I get an agreement out of that?

BREMBY:

I'm checking to see if that was a question or a statement.

LEE:

That is the first question. I'm sorry.

BREMBY:

In response to that question Senator, a 117 days ago was when that decision was made and in the material that was released prior to that to the first step of a multiple step process in which I said that we were interested in working with all stakeholders in trying to address this issue. Subsequently to that there have been two other statements publically, written statements, where it was said that we need to this action planning process. In fact the Governor, I believe, in her State of the State address that she was calling for people to begin this process. I've not had one single phone call engaging us in that process or interest expressed in that process. So if we, you know, if you're asking me to come forward to the legislature with a proposal to start that

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process, I certainly can and will.

LEE:

A follow up question. My question was going to be is the agency preparing such a document to bring to us, and you have said "No, but you are willing to" as I understand your answer

BREMBY:

Well let me be very clear about this. Our agency not only is preparing, but has not done so but we also initiated a process which is a first step in a planning process and that is to categorize and to identify how much CO₂ we have in all of our centers. That applying process, that contractual process, has already begun. We expect that final product to be available within the next two months. In which case, when do sit down, if we do sit down, we will have definitive information for once about Kansas specific numbers about CO₂ emissions so I don't have a document ready to give you today. We have a draft document that's prepared, we have already begun the work so when we sit down, we can do something together. I'm excited about the opportunity to do so, in fact, from what I'm hearing.

LEE:

What, where, do you get the authority to deal with CO₂?

BREMBY:

The authority to deal with CO₂, Senator, I believe comes from or is derived from the Supreme Court decision of April of 2007 which classifies CO₂ as a pollutant, and then under the Kansas Clear Air Act, it talks about addressing pollutants, we hadn't had that definition before April. That CO₂ was a pollutant, and so.

LEE:

So does the US Supreme Court make the laws or does Congress make the laws?

BREMBY:

The U.S. Congress makes the laws, the Supreme Court interpreted the law by Congress which another federal agency did not believe existed. So, the Supreme Court told the EPA that they did need to follow that substance in its air pollution guidelines.

LEE:

Is the EPA now dealing with that issue?

BREMBY:

That's very difficult to say, in my last discussion with the regional staff administrator, he indicated that they were looking at it, but in terms of the time line to do so, I really don't know.

LEE:

So your assumption then is that the authority that the Dept. Of Health & Environment had is derived from that Supreme Court ruling?

BREMBY:

No Ma'am, let me clarify, I believe that our authority is derived from state statute, which has the Kansas Air Act as part of it, and in that act it talks about pollutants. The definition of pollutants, clarified by the Supreme Court in its decision in April. So our authority is based upon what the legislature authorizes through the Kansas statutes which talks about pollutants.

LEE:

Using the definition by the US Supreme Court? Ok, and so then, do you have a proposal that is ready to bring to this legislature?

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BREMBY:

We are currently in litigation. We believe what is currently on the books in terms of the statutes, suffices for guidance, but in terms of rules and regulations, we believe, that there needs to be a public process, so we have input from all stakeholders before then we can offer back to you rules and regulations to help Kansans conform with the law. That's how we've always,

LEE:

Your view then is the legislature comes in after the fact, you do not believe the appropriate method is to bring proposed legislation to the legislature and have the legislature be the forum? Do you understand what I'm asking?

BREMBY:

I think I understand what you're asking, and I'm trying to work through this in a way that I don't, I don't want to be argumentative, but

LEE:

And I'm not trying to be argumentative sir, I want to understand the process you're going through. My assumption is usually, KDHE determines if there is need for rules and regs and they bring those or proposed legislation to the legislature and then we have a discussion. And the public is involved in that discussion and then at the end of that discussion a decision is made. So it appears to me that what you're saying is that you're going to have meetings outside this process first and then bring proposed legislation to us?

BREMBY:

I think we defer or depart from agreement in that. I believe that there already are existing laws and we would try and modify those laws. For example, let me take something from yesterday, child care licensing, those laws are already in the Kansas State Statutes, but before we begin to modify those, we have a public process, where we get stakeholder involvement, we share concerns, we hear those and then we bring back to you, the legislature, changes in those laws, or proposed rules and regulations to adhere to those laws. In this instance, there's a belief that the law doesn't exist as it relates to CO₂, I believe that, our meeting suggests that it does in the context of air pollutants. And so this will parallel the child care scenario that I just mentioned, where we would have a public meeting, stakeholder involvement, so we would know what type of rules and regulations to bring back to you. So that we can get on a path to reaching some consensus in agreement about how to reduce CO₂ emissions in the state.

LEE:

Does that mean though, you don't anticipate bringing legislation but rather rules and regs, and you and I understand the difference in that?

BREMBY:

You and I understand the difference in that, I would not discount the law needing to come forward as well, I know that in this bill, that net metering was a proposed initiative. Had we had the process that net metering might have been a suggested change in law that would have also addressed this issue. So it could be a combination of law and rules and regulations, Senator, where law doesn't exist.

LEE:

And would the (unintelligible) I hope that in this discussion will you can answer and give me some better understanding. If the court should rule against you, then what will your, what are you proposing to do at that point in terms of how you are looking at CO₂?

BREMBY:

We have not even thought about that, to be honest with you.

LEE:

OK

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EMLER:
Senator Apple.

APPLE:
Thank you Mr. Chairman. Mr. Secretary thank you for being here with us today. I want you to expand a little bit on the proposed study, the CO₂ study, that would be completed within a couple of months.

BREMBY:
The study that I was talking about was that we have contracted with a third party so that we can catalog and assess the levels of CO₂ emitted in Kansas across all sectors. What we currently have are people self reporting to the EPA. So we have some sense of what that number is but we truly don't know what the actual amount is and so that study has begun and we should expect a final report within a few months.

APPLE:
That will include ethanol plants, livestock, automobiles.

BREMBY:
It would include all sectors of the environment. Transportation sector, agriculture sector, the energy sector, all sectors, so we know what we're dealing with. In most states in terms of the action plan process, a significant amount of reduction is achieved through efficiency. And so, if the building efficiencies much of what we proposed in a previous version of the bill as much as use, different sort of lighting in homes. So that's what we're trying to do, is figure out how big is this issue here in Kansas.

APPLE:
Thank you.

EMLER:
Senator Peterson.

PETERSEN:
Yes, thank you for being here, Mr. Secretary. In this study, are you looking for a substantial level of endangerment I know you are cataloging the CO₂ that's coming out from the various sectors. Are you trying to establish that and also does the Federal government have already established federal guidelines?

BREMBY:
Good question. This contract would simply only look at a catalog of the amount of CO₂ in the state. We know that there are various proposals that those 6 pieces of legislation for Congress that look at a reduction of various levels. Most call for somewhere between 70 to 80% reduction of existing CO₂ in the U.S. by 2050. If, for example, the Werner Lieberman bill is enacted, there would be a cap placed on Kansas emissions, and what that number is we don't know. But hypothetically if, for example, it is a hundred million tons, how we then get below that hundred million to what would be 68% by 2050 that would then set a glide path, a set of goals for us but where that is and how we get there, that's really a public process.

PETERSEN:
So right now we really don't know what those level of endangerment is, there are still folks looking at that for our environment, but we just know that something is probably coming.

BREMBY:
Actually, the IPCC did establish a threshold, a number that we need to stay below. Currently that's about 380 parts per million CO₂ within the atmosphere. There was a number about 540. Right now, in fact in the latest New York Times story I read about this, they are suggesting that 540 is too much and we still need to stay on the down side for 380 parts per million. That doesn't mean anything to a layperson, nor does that translate well to the state in what they are trying to do. What we are looking at is the gross number - which is how much do we currently have being emitted to the state, and that's what the cataloging function is really

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performing. Now if we have goals to reduce that and how we might be able to reduce it.

PETERSEN:

Thank you.

LEE:

Thank you, Mr. Chairman. A couple more questions, if I may. Does your agency believe that you have the authority to deal with current emitters of CO².

BREMBY:

We believe that we have the means to engage in voluntary reductions of CO². When I was last before you, I believe I indicated that we were going to be having those conversations with current emitters (large emitters, those who are up for renewal this year) and go through a voluntary process. We do not believe that we have the authority to mandate the reduction in CO² by those current emitters.

LEE:

Are you aware that the Governor's legal counsel now believes that you do.

BREMBY:

The Governor's Council on Energy?

LEE:

No, the Governor's legal counsel said in a meeting recently that they believe that the state does have the authority.

BREMBY:

I did not know that.

LEE:

How do you believe that you can have the agency voluntarily, if there is no legal parameter, assuming the Governor's legal counsel is incorrect at this point, how can you encourage when you have no stick (forgive the statement) to enforce this and how would you encourage?

BREMBY:

We believe the stick rests in future permits, we believe the stick is available as we begin to renew changes in the makeup of the plants. Modifications to a plant require permits as well. I think the stick rests there. We believe that there is interest, in fact we know there is interest, to engage in conversations about reductions. Most can see some changes through changes in orders; efficiency. So there are ways to reduce CO² emissions. We believe that the good will is there if not the stick.

LEE:

I might have seen one study (I don't have it with me) in terms of cost versus the health issues. This particular study indicated that if the cost of electricity becomes too high, that in itself is a health risk. Has your agency taken into consideration that issue – in other words - how expensive electricity may be because of regulations?

BREMBY:

No, We did not take into consideration the cost of electricity in addressing this permit issue.

LEE:

Well I'm not talking about the current permit issue, and I thought we weren't supposed to talk about that, I'm talking about looking at current polluters as you call them and requiring some sort of control on them or negotiation of lowering the CO². Has your agency ever or will you at any point look at the issue – we're doing this I assume because of the health issue– and therefore have you ever looked at the cost or will you look at

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the cost of electricity versus the health issue as well?

BREMBY:

I have not heard the issue of cost of electricity being a health consideration but it is certainly something we should begin to review.

LEE:

I would be glad to share the article I have with you.

BREMBY:

I would appreciate that.

EMLER:

Senator Francisco

FRANCISCO:

Thank you very much, Mr. Chair. Paraguay and partners are here. Being in Kansas and Lawrence so I apologize for being late to the committee. What I'm hearing from the discussion one about sort of the order of rules and regs and talking with the public and coming to the legislature. I'm remembering that before the legislature looked at changing rules such as Jessica's Law there was a group that went out and spent about a year talking with the public before that was ever brought to the legislature so this might be that same kind of situation in terms of getting some input on policy before coming to the legislature and then again we have hearings at the legislature.

BREMBY:

That's similar. Since I have been with the agency we've had several really major pieces of regulatory change that we pretty much operate in the same way. In that we have gone out and had stakeholder engagements. One was the ground water regs actually when I came to the agency in 2003. There was a draft reg that had been sitting for quite some time that we decided to go back around and visit with industrial clients, agricultural, municipal - the stakeholders - just to make sure those regs fit to protect ground water and it was only then that we forwarded those regulations for consideration. Foster care was another issue that we really needed a review of the law or the rules and regs and so we set about a stakeholder process in doing that and those rules are being put up for adoption. We are currently out with child care rates and in fact, there were eight cities that we went around this summer to visit with people about what's going on with child care in the state. And so whenever there is a major change in rules and regulations considered, we like to have a public process so we can get all the input and adopt something to make the best proposal possible before we go forward. The very first meeting we had this summer Chairman Holmes was exercised about the ability of whether KDHE could operate or issue rules and regs on its own - unilaterally - and I took him at his word. I understand that concern. We did not consider a modified permit because it would have been establishing some standards that had no relevance in any kind of stakeholder process. There is a process that we like to go through. We like to get engagement around that before we go forward.

FRANCISCO:

Another issue you talked about is working voluntarily with stakeholders or groups. I am assuming in terms of health issues, you've been working a lot voluntarily since we don't have limits on how much corn fructose should be allowed in soda pop. A lot of that work has actually been done in terms of not sticks but encouragement and explaining to people and trying to share the issues and the opportunities with people.

BREMBY:

That also has been a approach we've taken as an agency. We are very much involved in health reform proposals that are before this body and in that there are two measures, particularly one which talks about finding body mass index and weighing children - that is not a requirement that we are proposing. We are just suggesting that some schools might want to consider that as they begin to address obesity. The other thing that we propose has to do with competitive vending in the schools. We know that some schools are

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taking more the leadership role in outlawing that: others are not. And so we're just suggesting that those are mechanisms that can be used to address this issue that we all believe is an important issue. If voluntary compliance does not exist, then we have to look for other measures. Before we do that again, we would have stakeholder involvement.

FRANCISCO:

Thank you.

EMLER:

Further questions. Senator Lee

LEE:

Thank you. This discussion makes me think of further questions. Are you saying that some point, the state might find it necessary to close down schools that didn't ultimately, a BMI or watch what vendors were allowed in their schools?

BREMBY:

Depending on what the risk is, identify appropriate measures, I think that to close down the schools because they don't do BMI or allow competitive vending, is way beyond what I believe might be appropriate. In fact, it is not even within my agency's responsibilities to take this tack. But this case for your situation, we are talking about a 40-50 years decision.

LEE:

In your earlier comments, in our discussion you indicated that you were looking at voluntary compliance and yet the next step you talked about withholding future permits. I am having trouble justifying or rectifying those two statements.

BREMBY:

What I'm trying to do to draw the continuum of options. You talked about a stick. I guess the biggest stick that you have is not to issue a permit on the far side of that you would try to get some voluntary compliance. There's a lot of space in between to make some things happen and hope that you see some improvements.

LEE:

But they really aren't voluntary if the ultimate end is that the permit will not be reissued.

BREMBY:

That is... I'm not going to argue that.

LEE:

And we talked about the child care rules and regulations changing. When you do make those changes in terms of child day care centers, or whatever, do you grandfather in the old ones and let them continue in the same manner as we're doing currently with the old electric plants or do the new rules affect everybody the same?

BREMBY:

Typically, the new rules affect everyone the same way. But with child care, we really don't have federal laws that have already stepped in. The Clean Air Act established grandfathering and so we're not superseding federal law in that context. But in child care, if grandfathering exists, everyone abides by the same rules for those new permits that are issued.

EMLER:

Are there further questions?

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PYLE:

Mr. Secretary, I want to go back to your statement on page 6 of those minutes ...says "my position is just to design terms of economic development and it also is not an energy policy but is to look out for the health and environment of Kansas." You mentioned using the permitting process as a big stick. My question is: If you are going to do that, how high can I expect my energy rates to go in the next 15 years as you take initiatives to deny permits because you believe the CO² levels are too high?

BREMBY:

That's an excellent question. Many states have an EUC that has something like a cost driver around certificate of need. We don't have such a mechanism in this state. What I have responsibility for is just the issues of the permit around the emission. I am almost certain that in due time we will reach an agreement and I will take that direction from the legislature and execute that.

PYLE:

If I understand you correctly what you are telling me is, you aren't too concerned about how high my energy rate is as long as the mechanism that you are using to pay for the health care of Kansas for clean air.

BREMBY:

I wouldn't say that I don't care, I would say that the latitude or the threshold of the opportunity I have to do something about that is extremely limited. There's another body that addresses rates.

PYLE:

Teddy Roosevelt said "speak softly and carry a big stick" - What I'm hearing today is that you have given that a whole new meaning. I'll stop with that.

EMLER:

Senator Francisco

FRANCISCO:

I'm also interested in the issue of rates - that's part of what our citizens expect. When people have been talking to me, they have been concerned about the cost of cap and trade or the cost of a tax on the federal level on carbon. And are assuming those may be added to all our existing rates. In fact, taking a little time right now to looking over all energy policy and try to understand where rates might go could be most helpful to protecting the rates of Kansans. If we implement coal, we don't have full control over what those rates will be in the future? Is that the case?

BREMBY:

If I were to just select one of the six pieces of federal legislation that are out there, the Werner- Lieberman bill that Senator McCain helped draft a similar piece of legislation (unintelligible) But having said that (unintelligible) Cap and trade will more likely cap our emissions. ² Let's say hypothetically let's look at a plant that emits 10 million tons a year. At \$20 a ton, which we believe is the downside of what that amount might be, they would have to come up with \$200 million in order to continue emitting at that level. How they spread that cost or where they spread that cost I have no idea. But again, that's federal law and that will affect rates. But that again is nothing that our agency addresses. I do care about energy costs but in terms of what I have to regulate, it's truly only the emissions that come out of that permit. But there are bigger sticks, if you will, that are out there.

EMLER:

Mr. Secretary, I know you have to leave. We certainly want to express our appreciation to you for coming forward today and being willing to answer questions for us. We are grateful you had time to do that and accepted the invitation. Thank you very much.

(End of Transcript)

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Senator Lee introduced her three pages from Logan and Russell.

Approval of Minutes

Moved by Senator Francisco , seconded by Senator Petersen, approve the minutes of the meetings of the Senate Utilities Committee held on January 29, 2008, January 30, 2008, February 4, 2008, February 5, 2008., February 7, 2008. Motion carried.

Respectfully submitted,
Ann McMorris, Secretary