February 14, 2023

Opponent ORAL in-person Testimony on SB 88

For the Senate Committee on Utilities

Marc Spitzer, Steptoe & Johnson, LLP

mspitzer@steptoe.com | 202-429-6479

I. Introduction

Mr. Chairman, Members, my name is Marc Spitzer, and I am an attorney representing the Edison Electric Institute. I am a Partner at Steptoe & Johnson LLP. My office address is 1330 Connecticut Avenue NW, Washington, DC 20036. I was admitted to the State Bar of Arizona in 1982 and to the District of Columbia Bar in 2012. I have practiced law for more than 40 years and have served as a commissioner on both the Arizona Corporation Commission (ACC) and the Federal Energy Regulatory Commission (FERC). Although I represent the Edison Electric Institute, the views I express today are my own.

II. I Appear Before You Humbly

I am here to testify regarding the Kansas Corporation Commission (KCC) and the potential impact of House Bill No. 2154 and Senate Bill No. 88. I am a visitor to Kansas and a guest in this Chamber. As a four-term member of the Arizona State Senate, I know each legislature has unique strengths. As a federalist, I respect sovereign states' rights and prerogatives. I am here today to offer my own opinions with the understanding that each jurisdiction is different and that this Legislature will ultimately decide what is in the best interests of Kansans. It is my opinion that the election of KCC Commissioners is not.

III. Regulation of Public Utilities and the Regulatory Compact

Mr. Chairman, with your indulgence I will provide an overview of how and why the KCC regulates public utilities. As I am here today for the Edison Electric Institute I will focus on the power sector, but these principles apply to all utilities.

Thomas Edison invented the electric light bulb on October 21, 1879. Shortly thereafter he developed the concept of an electric utility, initially to compete with private gas light companies. The generation, transmission and distribution of electricity is challenging and at times dangerous. As the use of electricity spread, it became apparent that stringing electric lines from power plants to homes and businesses could not be left to haphazard chance and should be regulated as a natural monopoly. For ubiquitous and necessary utilities (telephone, water, gas, electricity) there

emerged the bargain known as the Regulatory Compact. *See generally*, J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings & Breach of the Regulatory Contract*, 71 N.Y.U. L. Rev. 851 (1996), https://www.nyulawreview.org/issues/volume-71-number-4/deregulatory-takings-and-breach-of-the-regulatory-contract/.

The Regulatory Compact obligates the utility to reliably serve all customers within a franchised service territory at just and reasonable prices. The obligation is universal, meaning that service must be provided to all customers, even if the costs to serve some exceed either the revenues derived therefrom or "market" prices. In return for these obligations the investor-owned utility may recover its prudently incurred operating costs as well as a fair return on its capital. At first, these utility franchises were granted and enforced by cities and townships. As electricity service expanded exponentially in the early 1900s, regulatory "gaps" arose outside and then between municipalities. The regulatory gap was filled in Kansas and by state legislatures across the country with the creation of state utility commissions. A hallmark of the Progressive Era was the protection of the public from the corporate exercise of market power, most notably by utilities. Dr. Richard Hirsh, *Emergence of Electrical Utilities in America* (Sept. 2002), https://americanhistory.si.edu/powering/past/history1.htm.

The legacy of the KCC exemplifies the history of Progressive Era regulation of public utilities. While the KCC was established to regulate railroads in 1883, this Legislature created the Kansas Public Utilities Commission in 1911 to regulate investor-owned utilities. The present KCC was formed in 1933 and essentially replaced the earlier regulatory bodies. Kansas Corporation Commission, *About the KCC*, https://kcc.ks.gov/about-us/the-commissions-s-role; Kan. Stat. Ann. § 74-601, https://www.ksrevisor.org/statutes/chapters/ch74/074_006_0001.html. I have not appeared before the KCC as an attorney, but throughout my own public service I have met KCC Commissioners and Staff at meetings and conferences. The KCC is held in high esteem.

During World War I, and in the years thereafter, Americans' appetite for electricity service grew to become central to our way of life. Two new "regulatory gaps" emerged. First was the need to regulate the transmission of power, oil and natural gas across state lines and the wholesale prices of such commodities in interstate commerce. The second was the unavailability of electric power in rural America due to the high cost of moving electricity to those regions of the country.

In the 1930s Congress addressed these challenges by enacting, among other laws, the Federal Power Act (FPA) and the Rural Electrification Act (REA). Brandon McBride, *Celebrating the 80th Anniversary of the Rural Electrification Administration*, USDA (Feb. 21, 2017), www.usda.gov/media/blog/2016/05/20/celebrating-80th-anniversary-rural-electrification-administration. The FPA of 1935 empowered the Federal Power Commission as the wholesale regulator for electric power. The REA responded to the failure of market mechanisms to provide electricity to rural America.

IV. Regulation Balances Competing Interests

The KCC's regulation of electricity is now far more challenging than in 1911. The early investor-owned utilities were local or at most regional operations. Utilities produced electricity within their service territory and then distributed it to nearby customers over low voltage power

lines. Regulatory commissions across the country set customers' electric rates in adjudicatory proceedings that determined each utility's cost of service and appropriate return on capital. The Commission would determine the prudency of investments to maintain reliable service, largely an engineering determination, and the correct return on equity (ROE), an economic/accounting issue. The Commission balanced the competing interests of customers within the service territory with those of a utility's investors. At times Commissioners invoked the Goldilocks Principle—electric rates must be neither too low, nor too high, but just right. Over time, this dynamic evolved.

V. Increasing Complexity of the Regulatory Compact

Until the early 1970s electric utility regulation was largely an accounting exercise to set the lowest possible rate consistent with reliable service. The parties to the cases were generally limited to the utility and load (residential, commercial and industrial customers) and the contested issues at trial were often confined to disputes over, for instance, 100 basis points in ROE or whether the reserve margin should be 14% or 18%. The Middle East Oil Embargo of 1973-74 (the "Oil Shock") created the first great U.S. energy commodity price shock. Around the same time, and for the first time, public debate in the United States arose over the environmental impact of energy production, transmission and consumption. President Richard Nixon established the Environmental Protection Agency (EPA) by executive order in 1970, and that year Congress enacted the Clean Air Act, followed in 1972 by the Clean Water Act. So the regulatory questions of reliability and affordability dramatically changed. Power plants fueled by oil had historically been inexpensive, but now fuel availability, geopolitics and environmental impacts muddied the waters. U.S.-sourced fuel for electricity was more politically stable and environmentally cleaner but also costlier. As energy policy considered previously unforeseen circumstances, the regulation of public utilities soared in complexity.

The price spikes from the Oil Shock produced changes in the law and economics of U.S. electricity markets. The most significant long-term change was the introduction through federal action of market forces to the traditional, vertically integrated utility model. In response to energy shortages, price spikes and lines at gasoline pumps, Congress created the U.S. Department of Energy in 1977 as a cabinet-level federal agency. That legislation also established FERC to replace the Federal Power Commission as an independent agency with enhanced authority over wholesale energy markets. One year later, Congress enacted the Public Utility Regulatory Policies Act (PURPA), which for the first time allowed independent power producers to generate and sell electricity at wholesale to the incumbent utility under regulations promulgated by FERC and jointly enforced by FERC and the State Commissions.

The federal policies introducing competition into energy markets arose from the changed circumstances described above. The Oil Shock drove home that electricity prices were subject to global political and economic factors outside the control of the utilities, states and even Congress. Fuel for electric generation was the lifeblood of the U.S. economy, so the law began to favor domestic sources such as nuclear and coal. Next, the Reagan administration deregulated the wellhead price of natural gas, and technological innovations both in gas exploration and production and power plant design produced substantial customer cost savings from electricity

fueled by U.S. natural gas. Congress repealed the ban on natural gas power plants, the Fuel Use Act, in 1987.

The trend toward competitive wholesale markets governed by FERC, in conjunction with state oversight of retail prices, continued into the 1990s and the present. By statute and regulation independent power producers achieved non-discriminatory access to the high-voltage transmission lines of the incumbent utilities. FERC now oversees Regional Transmission Organizations (RTOs) to ensure the safe and efficient interstate transfer of electricity to reduce prices to consumers and bring new nuclear, solar, wind and gas-fired electricity to American homes and businesses.

Perhaps one place to continue to chart this story is my own personal journey beginning my career in utility regulation—though my State is of course unique, as are my circumstances. After years of political activity starting as a youngster, I was elected to the Arizona State Senate in 1992. I enjoyed my four terms in the Senate and after reaching my term limit in 2000 I considered a race for the ACC. The ACC was established as part of the Arizona Constitutional Convention that preceded statehood in 1912. The minutes of that convention reflect a roughhewn Western populism suspicious of large corporations and "Eastern" influences. The Convention Delegates harbored a mistrust—bordering on animosity—toward large railroads and utilities and established the ACC as a separate and elected "Fourth Branch of Arizona Government." The Framers dreaded the political influence of large corporations over the legislature. The three ACC Commissioners to be elected statewide were viewed collectively as an independent bulwark to protect consumers from monopolies. The ACC, as opposed to the legislature, was granted exclusive jurisdiction over utility rates. *See* Ariz. Const. art. XV, www.azleg.gov/constitution/?article=15; *Minutes of the Constitutional Convention of the Territory of Arizona* (1910), azmemory.azlibrary.gov/nodes/view/135959.

In 2000, the ACC represented an opportunity to continue public service. The ACC's reputation had been tarnished by allegations of misconduct committed by two of the three sitting Commissioners, and one was in fact removed by the Arizona Supreme Court for violating the State Constitution. I felt I could do better. Moreover, the issue of deregulation of retail electricity was at the forefront. In the 1990s I had been involved in defeating legislation in the Arizona Senate proposed by Enron. Finally, I had always enjoyed campaigning and the political process, and my family was supportive. They agreed to campaign with me across the state in the 2000 election.

I served on the ACC through the turbulent times of the California energy crisis when the lights flickered throughout the West. Our interconnected grid meant events in California affected electric reliability and affordability in my state. My duties at the ACC accordingly required meetings outside Arizona with other Western commissioners and federal officials. FERC issued orders to ensure fair wholesale markets during the crisis. FERC later proposed rules governing interstate transmission to ensure dispatch of the least-cost electricity to customers. These and other federal actions increased the complexity of the regional power markets and expanded the obligations of the ACC.

Increasing interaction and sometimes litigation with FERC is now a recurring theme of service on a state regulatory commission. The Energy Policy Act of 2005 granted FERC broad authority over: 1) electric and gas market manipulation, 2) electric reliability in the wake of the 2003 blackout, 3) PURPA facilities authorized by state commissions, 4) RTOs with state commissions as formal stakeholders and 5) cost recovery and planning for interstate transmission. These Congressional mandates to FERC directly affect states and their electricity customers. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, https://www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf; FERC, *Energy Policy Act of 2005 Fact Sheet* (Aug. 8, 2006), www.ferc.gov/sites/default/files/2020-04/epact-fact-sheet.pdf. The joint responsibility of federal and state governments to ensure delivery of safe, reliable and affordable electricity to citizens is a paradigmatic example of cooperative federalism. From the perspective of a state and FERC Commissioner from 2000 through 2011, I would describe that relationship as generally amicable, although differences of opinion, and sometimes litigation, arise between states and FERC or between states. In 2021, in an effort to head-off such disputes, FERC established a Joint Federal-State Task Force on Electric Transmission. KCC Commissioner Andrew French serves as one of the ten State Commissioner members of that body.

In short, the regulatory landscape of 2023 is far removed from that of 1911.

VI. Utility Regulators Are Better Selected by Appointment Than by Election

Mr. Chairman, the question before this Committee is whether KCC Commissioners should be appointed or elected. Let me say first I have lived in the regulatory world now for many years and have encountered outstanding public servants both elected and appointed to regulatory commissions. It is my opinion, from a citizen's perspective, that an appointed Commission is better on balance.

a. An election is a good thing, not a bad thing, but not the right thing to add to utilities regulators' dockets.

I am deeply respectful of the political process, stood for public office and never have and never will apologize for having been a "politician." But the demands of time and effort in the political world are substantial and ever-increasing. Elected state commissioners bear burdens not borne by the those appointed. I was gladly willing to attend political events, respond to questions and return constituent calls unrelated to the job, and fundraise appropriately—in essence campaign. The Legislature and the ACC as well as the KCC are very different jobs. Political activities are legislative meat and potatoes but, to an economic utility regulator, at best distractions from the tasks on their plate. Not only would campaigning and fundraising occupy time better-suited to delving into the complex matters in front of the KCC, but it would also dissuade otherwise qualified candidates who might be wary of political activities.

And what sort of campaign finance activities does this involve in the modern era? To take Arizona as an example of which I am familiar, in recent years out-of-state billionaire "environmentalists" airdropped multi-million-dollar donations into the state in order to sway ACC elections.

b. Utilities regulation should function independently of the electoral process.

The Legislature has plenary authority before which come all manner of issues. By contrast, the KCC's jurisdiction is narrow in scope but where granted by statute comprehensive in authority. *See* Kansas Legislative Research Department, *Kansas Legislator Briefing Book 2019: Utilities and Energy*, http://www.kslegresearch.org/KLRD-web/Publications/BriefingBook/2019_briefing_book.pdf. In many states, the rules governing Commission proceedings are governed by the state judicial codes. In Arizona, ACC hearings were subject to the Rules of Evidence and the Commissioners to the State Open Meeting law, so even social gatherings of more than a quorum of Commissioners were required to be noticed. While the Arizona Legislature was subject to the Public Records law, it was statutorily exempt from the Open Meeting law, and wisely so in my opinion.

The point here is that the way utility commissions hear electric rate cases is contrary to the political process in, for example, a legislature. The KCC decides rate cases based on an evidentiary record and outside input is limited to evidence presented by the parties. In major cases numerous parties participate on behalf of a wide variety of interests. That participation consists of docket filings served upon all parties and written and live testimony, under oath and subject to cross-examination, all inside the building. For the KCC there is no evidence adduced at campaign events, town halls, *ex parte* emails, phone calls or private conversations.

During my ACC tenure I received "pressure" outside the record on contested proceedings hundreds of times. Most such episodes were harmless. "Please vote no on this rate case," "Vote against the Coconino County wind projects and protect the bats," "Increase the compensation for solar energy," *etc*. Such communications are virtually never nefarious nor underhanded. The First Amendment rightly protects communications by citizens to express their opinions to their elected representative. Unlike the Justices on the Supreme Court, however, I was attending Lincoln Day Dinners, Town Halls and campaign events, delivering speeches, soliciting nominating signatures, endorsements and campaign contributions (but not from anyone appearing before the ACC).

Vanishingly rare is the everyday citizen with an otherwise unknown insight into electric ratemaking. While legislators necessarily operate within a realm where all manner of constituent commentary is at least useful to take a district's temperature, utility regulators function within a different sphere in which the docket is dominated by complex engineering and economic facts on the ground. In a rate case, nongermane complaints are not even admissible. But for a deliberative body of general jurisdiction, these constituent insights rightly drive the agenda. In short, recognizing the functional context of utility commissions shows why they are better appointed than thrown into electoral turbulence.

To be sure, I never felt my "political" activities or receiving *ex parte* constituent communications prevented me from faithfully executing the duties of my office nor from rendering fair decisions in contested proceedings. Occasionally I would thank a constituent for sharing an opinion but admonish that the case was contested and that no response from me would be appropriate.

But my FERC tenure was utterly distinct from my ACC experience. As a federal employee under the Hatch Act I was barred from engaging in political activity, and I did not even attend political events. The *ex parte* rules were strictly adhered to by those inside FERC and those appearing before the Commission. I served under two White House administrations and two Chairs of the Senate Energy and Natural Resources Committee. While there were conversations regarding energy policy, at no time did anyone from the White House or Congress direct or even suggest how I should vote on any contested proceeding. The positions of the parties in proceedings before FERC were expressed solely in pleadings they filed in the docket and in hearings. Yet even though the "pressure" I received during my ACC tenure failed to shift my votes, the advantage of the independence fundamental to an appointed commission is that it also avoids the *appearance* that political activities can shift votes. The legitimacy of a regulatory commission depends on this perception—stakeholders will spend the time and resources to make the best possible presentation of their arguments if they believe each commissioner will give them a fair shake.

c. Utilities regulation is an adjudicatory process ill-suited to partisan political campaigns.

Retired Supreme Court Justice O'Connor has spent much of her retirement on the work of the Sandra Day O'Connor Institute for American Democracy (https://oconnorinstitute.org/). A principal focus of the Institute is judicial independence, a long-standing cause of the former Justice. Justice O'Connor won three elections to the Arizona State Senate. In 1974, while serving as Senate Majority Leader she successfully sponsored a Joint Resolution to put before Arizona voters an amendment to the State Constitution to appoint rather than elect state judges. The initiative was approved by Arizona voters. In 1994, while I held the Majority Leader position, the Senate rejected a resolution to reverse that amendment. In a personal conversation that year, a member of my caucus complained that "the Arizona judges are not representing me." But a judge's job, I responded, was to decide cases, while ours was to represent the people.

Recently, while on a bus near the U.S. Capitol a woman boarded and sat next to me carrying a large placard expressing her view on *Roe v. Wade*. She explained that she had been protesting at the Supreme Court and asked whether I thought the Supreme Court could be "pressured" to change its mind on *Roe v. Wade*. After some reflection, I said that if pressure were to be applied it should be in the political arena, such as to the state legislature or perhaps Congress, but not to a court. I then asked her if she wanted to live in a country where courts decided cases based upon placards being waved, say, in a criminal or child custody proceedings. I said that judges rule in specific cases of specific parties based on evidence in the record and the law, and that outside "pressure," while understandable from those exerting pressure, would be unfortunate and in my view ugly, no matter from which side it emanated.

As with elected Commissioners, I know many fine elected judges throughout the country. However, I have observed too many instances of politicization of the judiciary. And in ACC campaigns I observed too many instances of unwise and injudicious campaign promises. Some were trivial. In 2000 a candidate attacked an opponent's Senate votes on abortion and pledged to be Arizona's pro-choice Commissioner. As to the more prosaic, it is one thing to promise to protect ratepayers from excessive electricity rates. It is quite another to pledge to vote against a

pending rate application before the evidence is submitted. It is one thing to express support for dispatchable electric power and quite another to promise to oppose all line-siting applications for wind and solar farms notwithstanding the facts to be adduced in those future proceedings. Further, rather than merely reveal the positions of a candidate, a campaign can ossify those positions due to the tribalism inherent in partisan elections. An appointed commission is more likely to be collegial, deliberative and receptive to multiple viewpoints.

VII. Conclusion

The mission of the KCC as to electricity is a complex regulatory undertaking spanning electrical engineering, finance, economics, rate design and coordination with nearby states and FERC. An electoral process could introduce unwarranted confusion into KCC proceedings and potentially undermine public confidence in the integrity of its decisions. An elected KCC would be a round peg in a square hole. In Kansas, policy directives come from the elected Legislature exercising its collective political judgments. The KCC decides rate cases based upon a trial record in accord with the law. These institutions are both right where they should be.