THE STATE CORPORATION COMMISSION

OF THE STATE OF KANSAS

In the Matter of the Adoption of Policies Regarding Commission Internal Procedures.	))	Docket No. 14-GIMX-190-MIS

CURB'S RESPONSE TO STAFF REPORT OF MAY 1, 2014

The Citizens' Utility Ratepayer Board (CURB) submits below its response to *Staff's Report in Response to Commission Request for Further Investigation*, filed in the above-captioned docket on May 1, 2014.

I. Attorney General Opinion 14-07 is wrongly reasoned

1. In CURB's opinion, Attorney General Opinion 14-07 is wrongly reasoned. The opinion concludes that a 2009 amendment to the Kansas Administrative Procedure Act (KAPA) has eliminated the obligation of a public body to meet the requirements of the Kansas Open Meetings Act in a broad set of circumstances. The opinion interprets the statement in K.S.A. 77-523(f), "Notwithstanding any other provision of law to the contrary, any hearing held pursuant to this act shall not be deemed a meeting pursuant to K.S.A. 75-4317a [the Kansas Open Meetings Act or KOMA], and amendments thereto" means that KOMA does not apply to "any stage" of the entire set of proceedings governed by KAPA. (*AG Opin.*, at 7). Instead, the logical conclusion should be that the statute means that hearings governed by KAPA are not "meetings" that are governed by KOMA.

2. The Kansas Administrative Procedure Act (K.S.A. 77-501 *et seq.*) is a set of roughly 50 statutes that establish due process and notice requirements for proceedings conducted

by state agencies. Throughout the Act, the word "proceedings" refers to an entire gamut of procedures: alternative dispute resolution, proceedings conducted entirely on paper, informal hearings, formal hearings, summary proceedings. Each individual statute of the Act has a title identifying the specific topic it addresses, such as "*Intervention*", "*Notice of hearing*", "*Hearings, not required in certain circumstances*", etc.

3. K.S.A. 77-523, the provision of KAPA at issue here, is entitled "*Hearing procedure*". One must assume that each of the provisions the Legislature placed under that title are intended to describe the procedures to use in hearings conducted under KAPA—and in fact, they all do. Each provision from (a) to (f) provides directions to the presiding officer about how a hearing should be conducted. The last provision in section (f) of K.S.A. 77-523 simply makes clear that the presiding officer, in conducting a KAPA hearing, is not obliged to conduct the hearing in accordance with the Kansas Open Meetings Act. That's all it means.

4. The Attorney General (AG) errs in broadly interpreting this provision as exempting "any stage" of the entire KAPA proceeding, from its initiation to the final order, from the requirements of KOMA. If that was what was meant, then the provision should be worded, "KOMA does not apply to any stage of a KAPA proceeding". But that's not what it says. Moreover, if it was meant to apply to every stage of a KAPA proceeding, this provision would not be included in a statute that addresses "*Hearing procedure*" but instead would be grouped with other general procedural provisions of the Act. The AG opinion exaggerates a simple directive that indicates which procedural laws apply during a KAPA hearing into a broad nullification of the application of KOMA to every stage of the entire KAPA proceeding from the opening of a docket until its closure.

5. There is no reason to expand the meaning of this provision when a more straight-forward interpretation makes perfect sense. The first step is to look at the relevant KOMA provision. KOMA defines a "meeting" as "any gathering or assembly in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency." K.S.A. 75-4317a. A "hearing" under KAPA clearly fits this definition of a meeting. However, KAPA provides different procedural and notice requirements for a hearing than KOMA does for open meetings. This provision is clearly intended to resolve the dilemma of the presiding officer as to whether the statutory requirements of KOMA regarding "meetings" of a public body apply to "hearings" conducted under KAPA. This provision, added in 2009 as part of a bill making several modifications to KAPA, provides that, even though a KAPA hearing clearly fits the definition of "meeting" in KOMA, it isn't a "meeting" for purposes of applying KOMA. A straight-forward interpretation is that hearings under KAPA should be governed by the procedures set out in KAPA, not KOMA. To conclude that this provision exempts every stage of a KAPA proceeding from its beginning to its end from the requirements of KOMA is not a reasonable, straight-forward interpretation.

6. While Attorney General opinions are sometimes useful when there are no appellate opinions on the correct interpretation or application of a statute, they are not binding authority and not the work product of the courts. While reliance on an Attorney General opinion might be a successful defense to prosecution for a KOMA violation that requires a "knowing" violation of the law, state officials who are also attorneys would be well-advised to make their own assessment of the quality of the Attorney General's analysis of K.S.A. 77-523(f), as well as

assessing the risk of relying on an opinion that interprets the word "hearing" so broadly that it converts the state's policy of government in the sunshine to government behind closed doors. CURB does not believe that it would be wise to rely on this interpretation to be adopted by a court of law.

II. Only the Kansas Legislature can authorize the KCC to deliberate rate cases in secret

7. *Staff's Report* presents a variety of evidence both for and against requiring utility commissions to deliberate rate cases in public, and then concludes that in Kansas, "The Commissioners have the option of holding public deliberations in rate cases, and the KOMA's intent provides grounds for a policy of openness. Some states have found that policy compelling. Other states remain leery of open deliberations and question the purposes to which access to deliberative speech will be put." *Report,* at 8.

8. The *Comments of the Citizens' Utility Ratepayer Board*, filed in this docket on January 2, 2014, offered a comprehensive argument that ratemaking is quasi-legislative, and not exempt from the requirement that the Commission's deliberations in rate cases shall be conducted in open meetings; the argument will not be repeated here. It is available for review in the record. However, it is appropriate to repeat here that no court in Kansas has held that the Commission may deliberate rate cases in secret. No court in Kansas has held that the "quasi-judicial exception" to KOMA applies to the Commission's deliberation of rate cases. One court, however, has found that the Commission was guilty of an open meeting violation when it made decisions concerning a rate case outside an open meeting. *State of Kansas ex.rel. Chadwick J.*

Taylor, District Attorney for the Third Judicial District of Kansas v. Kansas Corporation Comm'n, et al, Case No. 13C702, Nov. 8, 2013. While the opinion of the Shawnee County District Court does not carry the weight of an appellate opinion, its ruling would likely carry more weight with the appellate courts than an Attorney General opinion that does not directly address this issue.

9. *Staff's Report* fails to recognize the significance of the difference between Kansas and the states that have enacted explicit statutory or constitutional provisions that exempt such deliberations from their open meetings statutes or define rate case deliberations as "quasi-judicial" to make them qualify under the quasi-judicial exception to their open meetings requirements. The Kansas Legislature has not granted an explicit exception to deliberation in rate cases, nor has it redefined ratemaking as quasi-judicial to make it possible for the Commission to deliberate rate cases in secret. There is no exception in KOMA for contested cases, as in Maryland (*Report,* at p. 3 of Attachment 1), and our statutes don't even define "contested cases" or identify them as "quasi-judicial". Because there is no statutory exception that applies, the Commission does not have the "option" to hold public deliberations in rate cases, as *Staff's Report* concludes; instead, the Commission has the explicit legal obligation to deliberate in open meetings.

10. The Maryland Public Service Commission is "able to square its understand of rate case hearings as quasi-judicial—determined through private deliberations—with the Court's [Maryland Court of Appeals] determination that ratemaking is a legislative function" (*Report,* at p. 4 of Attachment 1) because the Maryland legislature defines the "determination of a contested case" (such as a rate case) is a quasi-judicial function exempt from its open meetings laws—not,

as *Staff's Report* implies, because Maryland courts recognize that agencies "at times perform some activities which are legislative in nature and thus have been dubbed as quasi-legislative duties, [while] they in addition take on a judicial coloring in that frequently, within the exercise of their power, they are called upon to make factual determinations and thus adjudicate, and it is in that sense that they are also recurrently considered to be acting in a quasi-judicial capacity." *Dep't of Nat. Res. v. Linchester Sand and Gravel Corp.* 275 Md. 211,222, (1975). *Staff's Report* neglects to mention that the *Linchester* court was not describing ratemaking in that passage. The court noted later in the opinion that the Workmen's Compensation Commission is a perfect example of an agency whose duties are clearly quasi-judicial: it provides a substitution for common law procedures and provides remedies that are similar to those provided in tort actions. *Id.,* at 227. And the opinion explicitly found that ratemaking is not a quasi-judicial function. *Id.*, at 227-28. So, the Maryland Public Service Commission does not deliberate in secret because it is able to "square its understanding" that rate case deliberations are quasi-judicial with Maryland courts' view of them as quasi-legislative: the legislature expressly provided "the understanding" by passing a law that defines contested cases as quasi-judicial and thus exempt from the open deliberation requirement under Maryland's quasi-judicial exception. (*Report,* at p. 3 of Attachment 1).

11. Other Commissions in states with open meetings laws must deliberate in open meetings unless a statutory provision exempts them from the requirements. Every state cited by Staff where all the deliberations in rate cases are not required to be held in public, legislation provides the authorization—not judicial opinions, attorney general opinions, or the opinions of the counsels or administrative law judges of the various utility commissions. One must logically

conclude that until the Kansas Legislature provides such authorization, the Commission's deliberations in rate cases are governed by the requirement to deliberate in an open meeting conducted pursuant to KOMA.

III. Does a commission's opinion on the issue really matter?

12. *Staff's Report* includes some remarks made by other state's utility commission employees that frankly, provide more support for public deliberation of rate cases than they were presumably intended to convey. "Private deliberations are more efficient," says the Michigan Public Service Commission's Director of Regulatory Affairs. Dictatorship is more efficient, too, but we here in America like our government conducting its business—however inefficiently—out where we can see it. Furthermore, the inefficiency complained of is created by commissions trying to get around open meeting requirements, not the requirements themselves. The "problem" is not that utility commissioners can't talk to each other; they can talk to each other any time they convene an open meeting. The inefficiencies arise from adopting the practice of avoiding deliberating in public altogether by individually and privately discussing the issues with advisory counsel serving as an itinerant scribe, who returns to each commissioner's office as many times as it takes to gather enough information to draft an order. KOMA didn't create this "inefficiency"; the desire to avoid its requirements has created it. Adopting the practice of public discussion, deliberation and decision of the issues of a rate case would be considerably more efficient than the arcane practices that have been adopted to avoid public deliberation.

13. That same Michigan official states that private deliberations "stop people from focusing on why there is a change from a specific Commissioner statements [sic] during

deliberations to what the final order says." CURB asks: Why shouldn't they be concerned about that? If the public deliberations don't include the portion of the deliberations that includes one or more of the commissioners indicating a change of mind that will affect the final vote, then the commission isn't conducting all of its deliberations in public. "Deliberations" are not simply the final votes of "yea" or "nay": the intention of making deliberations public is so that the public can observe not just the final votes but to observe and learn about the process through which the public body makes its decisions.

14. Furthermore, conducting deliberations in public tends to dispel the suspicions that our laws and policies are actually dictated to policymakers by unsavory special interests with lots of cash to spread around. Although it is the trend of late to pounce on policymakers for changing their minds [*i.e.*, "flip-flopping"], one would think the thoughtful citizen would be relieved to discover that some policymakers are actually capable of formulating a different opinion when confronted with new or surprising evidence, or after giving the entire issue some serious thought. That a commissioner may occasionally be persuaded by evidence or reasoned argument to take a different position than he or she originally held is cause for celebration in a democracy where many citizens suspect that all policymakers come to their duties laden with predetermined biases and unsavory obligations to special interests. Nevertheless, the interest of the public in open government trumps the interest of policymakers in being free of critics who are more interested in catching them in a "flip-flop" than in whether the outcome of the final decision is reasonable.

15. A comment common to the Michigan and Idaho correspondents is puzzling: a concern that observers of public deliberations may obtain "inside information". If deliberations are held in the public view, how in the world can an individual gain "inside information"? By

definition, information open to public disclosure is not "inside" information. Furthermore, all public bodies have obligations to protect from disclosure certain kinds of private confidential information; like our KOMA statute, virtually all open meetings acts permit public bodies to honor those obligations by recessing the open meeting to deliberate confidential information in an executive session. It is CURB's experience that utilities are very vigilant in protecting such information from disclosure prior to its disclosure to the SEC and the public, and that the Commission and the parties have honored their obligations to protect it in Commission proceedings. We should not be willing to sacrifice our right to observe decision-making of our public bodies in response to the actions of a few naïve citizens who may imagine that they have acquired "inside information" at an open meeting of the utility commission.

16. The "chilling effect on Commissioner statements and opinions during deliberations" when they are conducted in public is another problem, according to Staff's Michigan correspondent. (*Report,* at p. 4 of Attachment 1). His Idaho counterpart agrees, saying that "Commissioners do not want interested parties attempting to scrutinize their deliberations about each component" of a rate case decision. (*Report,* at p. 2 of Attachment 1). Are these cases of stage fright, or perhaps a reluctance to reveal to the public one's most unrehearsed thoughts? If so, do such emotions actually justify secrecy in the conduct of the public's business? Kansas law provides, "In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the policy of this state that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public." K.S.A. 75-4317(a). One must presume that anyone who takes a seat on a public utility commission is aware of the nature of the job as a public official, a public policymaker, and a

public decider of issues that can have significant impact on the public and the utilities he or she regulates. Perhaps some commissioners believe that the harm of the potential embarrassment of being caught saying something stupid or incorrect outweighs the public's right to observe our government in action. Fortunately CURB can assure them that such is not the case. The pain of humiliation haunts every attorney who has ever committed a verbal blunder in public, but the condition is temporary, and is only very rarely fatal.

17. Lastly, the Michigan correspondent assures Staff that "If there is any pushback against private deliberations, it comes almost exclusively from the press." It is unsurprising that the Michigan commission spokesperson said he was unaware of any "pushback" other than that of the press, for it is the perennial and thankless job of the press to be the steadfast protector of the public's right to know what our government is doing, even to the extent of complaining about duly-enacted state laws that abridge that right. Further, CURB has firsthand experience with the trepidation a party experiences in making the decision to make a complaint against the forum in which it practices every day, and so is not surprised to find there "is no outcry" in Michigan against private deliberations—especially because the law supports them. The incentive to cry out or push back is greatly diminished when the commission deliberating in private is simply complying with state law.

18. While the comments from various commission officials in other states that Staff presented in its report were interesting, they really don't add up to persuasive evidence in favor of secret deliberations, but instead reflect a general dislike of public bodies of being observed in the often-messy business of making decisions. Whether or not this Commission agrees with the

comments and sentiments expressed by its compatriots around the country, it should be mindful of its obligation to follow the law as it is written in Kansas.

IV. Conclusions

Therefore, CURB concludes that:

- the Kansas Corporation Commission is required by the Kansas Open Meetings Act to deliberate and decide rate cases in public;
- legislative action would be required to exempt deliberations and decisions in rate cases from this requirement; and
- the 2009 amendment of the Kansas Administrative Procedures Act at K.S.A. 77-523(f), which provides simply that hearings conducted pursuant to KAPA are not "meetings" subject to the procedures set forth for the conduct of open meetings in KOMA, applies only to hearings under KAPA and does not apply to any other stage of a rate case proceeding.

Respectfully submitted,

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VERIFICATION

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

I, Niki Christopher, of lawful age, being first duly sworn upon her oath states:

That she is an attorney for the above named petitioner; that she has read the above and foregoing document, and, upon information and belief, states that the matters therein appearing are true and correct.

Niki Christopher

SUBSCRIBED AND SWORN to before me this 12th day of May, 2014.

Notary Public

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 28, 2017

My Commission expires: 01/26/2017

CERTIFICATE OF SERVICE

14-GIMX-190-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was served by electronic service on this 12th day of May, 2014, to the following parties:

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