

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

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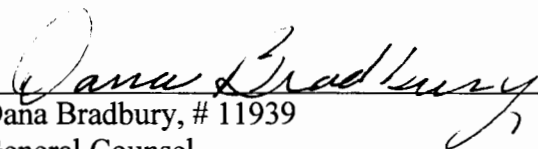
In the Matter of the Adoption of Policies ) Docket No. 14-GIMX-190-MIS  
Regarding Commission Internal Procedures. )

**NOTICE OF FILING STAFF'S LEGAL ANALYSIS INVOLVING  
QUASI-JUDICIAL DELIBERATIONS**

COMES NOW the Staff of the State Corporation Commission of the State of Kansas (Staff and Commission, respectively) and files its legal analysis assessing applicability of the KOMA deliberation exemption to certain KCC proceedings, attached as "Attachment A." Staff is not filing this document as a Comment and the document does not contain policy arguments or a recommendation for Commission action. Rather, this is a purely legal analysis that supports the legality of proposed Commission Docket Procedures issued on November 7, 2013 .

WHEREFORE Staff requests the Commission accept its Legal Analysis regarding Quasi-Judicial Deliberations for information purposes and for such further relief as the Commission deems just and proper.

Respectfully submitted,

  
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**KCC Staff Legal Analysis Involving Quasi-Judicial Deliberations**  
**November 22, 2013**

**Overview**

Under the Kansas Open Meetings Act (KOMA)<sup>1</sup> the state legislature exempted quasi-judicial deliberations from the law's scope. The following is KCC Staff's legal analysis assessing applicability of the KOMA deliberation exemption to certain KCC proceedings. Staff's recommended process elects to treat every docket as a summary proceeding and open under KOMA unless the Commission determines an evidentiary hearing should be held. Once a hearing is scheduled, the proceeding becomes adjudicative in nature, triggering the *ex parte* rule and the KOMA deliberation process.

Both the *ex parte* rule and KOMA deliberation exemption apply during an adjudicative or quasi-judicial proceeding. The KCC *ex parte* rule states: "a) This section applies to adjudicative proceedings before the state corporation commission...(b)(1) After the Commission has determined and announced that a hearing should be held...."<sup>2</sup> Likewise, KOMA provides..."all meetings for the conduct of the affairs [the agency]... shall be open to the public."<sup>3</sup> However, the provisions of the open meetings law shall not apply: 1) To any administrative body that is authorized by law to exercise quasi-judicial functions when such body is deliberating matters relating to a decision involving such quasi-judicial functions.<sup>4</sup>

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<sup>1</sup> K.S.A. 75-4317, *et seq.* Enacted 1972.

<sup>2</sup> K.S.A. 77-545.

<sup>3</sup> K.S.A. 75-4318(a).

<sup>4</sup> K.S.A. 75-4318(g).

**The Commission is a Legislative Body Exercising Both Legislative and Quasi-Judicial Functions at the Same Time, in Some Situations.**

**Analysis**

**I. The Legislative Nature of the KCC**

Whether the KCC is exercising a "quasi-judicial function" is a difficult question, and one on which Kansas case law is mixed. In 1963, the Kansas Supreme Court stated,

The regulation of public utilities, including the fixing of rates, is a legislative function. The legislature has seen fit to delegate its authority, with broad powers, to the State Corporation Commission...The only statutory standard controlling the Commission in fixing rates for public utilities is that the rates must be just and reasonable...<sup>5</sup>

This standard has been addressed and generally followed by a line Kansas cases, beginning with the 1968 *Cities Service* case. Those cases do not address the applicability of KOMA, but generally state the following legal conclusion:

In the constitutional division of powers, the regulation of public utilities is legislative in nature. [Citation Omitted.] To carry out that function, the Legislature enacted the Public Utility Act. (K.S.A. 66-101 et seq.) The Act was comprehensive in scope. It created the commission and granted it full and exclusive authority and jurisdiction to supervise, control and regulate all public utilities and common carriers doing business in this state. When acting in the exercise of its delegated powers, the commission is not a quasi-judicial body. The Act made full provision for procedure before the commission, and provided an orderly system of judicial review by the district courts and by this court on appeal.<sup>6</sup>

A discussion of KOMA's applicability to KCC rate proceedings appears in a 1983 AG's Opinion by Brad Smoot.<sup>7</sup> The 1983 Opinion provides a traditional analysis of legislative and quasi-judicial functions and ultimately concludes the act of setting utility rates is legislative in

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<sup>5</sup> *Southwestern Bell Telephone Co. v. State Corp. Comm'n*, 192 Kan. 39, 46, 386 P.2d 515, 523 (1963).

<sup>6</sup> *Cities Service Gas Co. v. State Corp. Commission*, 201 Kan. 223, 232-33, 440 P.2d 660 (Kan. 1968).

<sup>7</sup> Kansas A.G. Opinion 83-32.

nature and not exempt from KOMA. The Opinion states, "Ratemaking is prospective in its application. It clearly involves policy making and the consideration of issues beyond the evidence submitted by the parties. Moreover, it is not a function which has historically been performed by courts or which courts have or would be charged to perform in the first instance. In short, setting utility rates by the KCC is not a quasi-judicial function. And more specifically, it is not a quasi-judicial function for purposes of the Kansas Open Meetings Act."<sup>8</sup>

KCC Staff agrees the legislature created the Commission and granted it full and exclusive authority and jurisdiction to supervise, control, and regulate the public utilities of this state. When acting in the exercise of these delegated powers, the Commission is certainly exercising legislative authority.

## **II. The Quasi-Judicial Nature of the KCC**

In 1984, following AG's Opinion cited above, the Kansas Legislature enacted the Kansas Administrative Procedures Act (KAPA), KSA 77-501, et seq.<sup>9</sup> KAPA creates procedural rights and duties.<sup>10</sup> KAPA and KOMA are statutorily intertwined and should be read *in pari materia*. For example, any hearing pursuant to KAPA shall not be deemed a meeting under KOMA.<sup>11</sup> Also, KOMA requires open meetings..."but any administrative body that is authorized by law to exercise quasi-judicial functions shall not be required to have open meetings when such body is deliberating such involving such quasi-judicial functions."<sup>12</sup>

"Quasi-judicial" is defined "as a term applied to the action, discretion, etc., of public administrative officers or bodies, which are required to investigate facts, or ascertain the

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<sup>8</sup> Kansas A.G. Opinion 83-32, pp. 6-7.

<sup>9</sup> The Kansas Judicial Review Act, K.S.A. 77-601, et seq., was also enacted in 1984.

<sup>10</sup> K.S.A. 77-503(b).

<sup>11</sup> K.S.A. 77-523.

<sup>12</sup> K.S.A. 2012 Supp. 75-4318(g)(1).

existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action and to exercise discretion of a judicial nature.”<sup>13</sup>

KAPA provisions only apply when expressly provided by statute.<sup>14</sup> In 1988, the Kansas Legislature amended nearly all of the Commission’s statutes, requiring hearings to be conducted in accordance with KAPA<sup>15</sup>. When the KCC conducts an evidentiary hearing under KAPA, it is exercising a quasi-judicial function.<sup>16</sup> As such, the Commission has been authorized by law to exercise a quasi-judicial function, an adjudicatory procedure requiring due process.

The Kansas courts have not addressed whether an administrative body, using a quasi-judicial procedure falls within the deliberative exemption to KOMA. However, both the Kansas Supreme Court and Kansas Court of Appeals support the proposition that KCC proceedings are quasi-judicial in nature.<sup>17</sup> In fact, one such case specifically determined that even a *rate-setting* determination qualified as a quasi-judicial proceeding, requiring certain due process rights.<sup>18</sup> The Kansas Supreme Court has also stated, "...as a general rule, due process trial requirements are applicable to actions which are quasi-judicial in nature while such trial-type requirements are not applicable to quasi-legislative actions or purely executive acts."<sup>19</sup>

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<sup>13</sup> Black’s Law Dictionary, 6<sup>th</sup> Ed (1990).

<sup>14</sup> K.S.A. 77-503(a).

<sup>15</sup> Cf. KSA 66-101d (addressing general investigations).

<sup>16</sup> See, *Cook Texas Properties, LLC v. City of Coffeyville*, 239 P.3d 114 (Kan. App. 2010); *In re Trickett*, 27 Kan. App. 2d 651, 655 (2000) (When BOTA conducts a hearing under K.S.A. 1974 Supp. 74-2438, it is performing a quasi-judicial function. Quasi-judicial function is defined as an action by an administrative agency which is required to ascertain facts, hold hearings, weigh evidence, make conclusions from the facts as a basis for its official action, and exercise discretion of a judicial nature).

<sup>17</sup> *Mobil Exploration & Producing U.S. Inc. v. State Corp. Com'n of State of Kan.*, 258 Kan. 796, 821, 908 P.2d 1276, 1294-95 (Kan. 1995); *Farmland Industries., Inc. v. State Corp. Comm'n of State of Kan.*, 25 Kan. App. 2d 849, 858, 971 P.2d 1213, 1220 (1999).

<sup>18</sup> *Farmland Industries., Inc. v. State Corp. Comm'n of State of Kan.*, 25 Kan. App. 2d 849, 858, 971 P.2d 1213, 1220 (1999); see also, *Glustrom v. Colorado Public Utilities Commission*, 280 P.3d 662, Util. L. Rep. p. 27, 186, 2012 CO 53 (2012) (Colorado PUC performed both legislative and quasi-judicial functions in a rate case involving an evidentiary hearing)..

<sup>19</sup> *Reifschneider v. State*, 266 Kan. 338, 344, 969 P.2d 875, 878 (1998).

This case law stands in stark contrast to the cases cited in the section above. However, KCC Staff thinks the following to be a nuanced and well-reasoned interpretation of Kansas law: The Commission is created by the legislature, and, when acting in its authorized capacity, it is performing a legislative function. However, when the Commission holds an evidentiary hearing under KAPA, it is also performing a quasi-judicial function for KOMA purposes and its pre-decision deliberations are exempt from KOMA.<sup>20</sup>

### **Conclusion**

The Commission was created by the Kansas Legislature and granted full and exclusive authority and jurisdiction to supervise, control, and regulate the public utilities of Kansas. When acting in the exercise of these delegated powers, the Commission is exercising a legislative function. However, when the Kansas Legislature required the Commission's hearings to be conducted in accordance with KAPA, in 1988, the Commission was authorized by law to exercise a quasi-judicial function, an evidentiary procedure requiring due process. Thus, when the Commission holds an evidentiary hearing requiring due process in a rate proceeding, it is performing both legislative and quasi-judicial functions. Further, the Commission is not required to conduct its related quasi-judicial deliberations in an open meeting.<sup>21</sup> Although the Commission may elect to conduct its quasi-judicial deliberations in an open meeting, it is not legally required to do so.

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<sup>20</sup> Staff's Deliberation Procedures attempted to draw a bright line so that parties would not get caught in the legislative/quasi-judicial conundrum but did recommend that, while a majority of the rate case procedure was quasi-judicial, the actual construction of rates involves so much public policy that those deliberations should be open to the public.

<sup>21</sup> K.S.A. 2012 Supp. 75-4318(g)(1).

## CERTIFICATE OF SERVICE

14-GIMX-190-MIS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Notice of Filing Staff's Legal Analysis Involving Quasi-Judicial Deliberations was served via e-mail this 22nd day of November, 2013, to the following:

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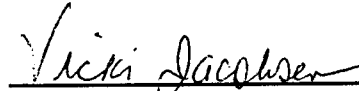
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