

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

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

**COMMISSION STAFF'S RESPONSE TO FILED COMMENTS
OF CURB AND KCP&L**

1. On November 7, 2013, the Commission issued its Amended Order Adopting Policies Regarding Commission Procedures. In its Order, the Commission set forth proposed internal procedures and invited interested entities to file written comments on the procedures by January 3, 2014. The Commission also noted, "The proposed internal procedures are subject to modification following receipt of public input and comments on those procedures. They shall not become effective until after comments are received and reviewed. Therefore, the effective date shall be January 17, 2014, unless otherwise stayed."¹

2. On November 22, 2013, Commission Staff (Staff) filed its Legal Analysis Involving Quasi-Judicial Deliberations. Staff's legal analysis concluded the Commission is authorized by law to exercise a quasi-judicial function and, therefore, the Kansas Open Meeting Act's (KOMA's) exemption for quasi-judicial deliberations is available to the Commission at such times.²

3. On January 2, 2014, the Citizens' Utility Ratepayer Board (CURB) filed Comments in response to the Commission's Order. In its Comments, CURB argued the Commission will violate KOMA if it adopts and utilizes the proposed internal procedures. In general, CURB contended the Commission exercises solely a legislative function during rate

¹ Amended Order Adopting Policies Regarding Commission Procedures, November 7, 2013, ¶ 3.

² Staff's Legal Analysis, November 22, 2013, p. 5.

proceedings, and KOMA's exemption for quasi-judicial deliberations is inapplicable to the Commission during such proceedings.³

4. On January 3, 2014, Kansas City Power & Light Company (KCP&L) filed Comments in response to the Commission's Order. In its Comments, KCP&L reached similar conclusions to those of CURB. Like CURB, KCP&L argued the Commission is only exercising a legislative function in rate-setting proceedings, and KOMA's exemption for quasi-judicial deliberations is not available in such proceedings.⁴

5. Staff appreciates the efforts of the commenters in this docket. Staff has reviewed the filed comments and remains confident in the validity of its legal analysis. Like CURB and KCP&L, Staff will limit this Response to rate case proceedings. Staff agrees with many of the legal statements asserted by CURB and KCP&L – principally, that the Commission exercises legislative power when setting rates. However, both commenters stop short of addressing the foundation of Staff's legal analysis. Though the Commission exercises legislative power in setting rates, it is also authorized by law to exercise a quasi-judicial function in such cases.

6. Black's Law Dictionary provides the following definition and guidance regarding the term "quasi-judicial":

Of, relating to, or involving an executive or administrative official's adjudicative acts...Quasi-judicial is a term that is...not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency – the test is the nature of the tribunal rather than what it is doing.⁵

7. Staff agrees with CURB's assertions that KAPA does not convert rate-setting into a judicial act. The power to set rates is legislative. However, the Kansas legislature intended to

³ Comments of CURB, January 2, 2014, ¶¶ 83-84.

⁴ Comments of KCP&L, January 3, 2014, ¶ 13.

⁵ Black's Law Dictionary (9th ed. 2009), quasi judicial, citing George Whitecross Paton, *A Textbook of Jurisprudence* 336 (G.W. Paton & David P. Derham eds., 4th ed. 1972).

authorize state agencies to exercise quasi-judicial functions and, when acting under KAPA, the Commission uses an adjudicatory or judicial process to determine such rates. Though the Commission is exercising legislative power, the nature of the tribunal is quasi-judicial. Therefore, Commission is authorized to exercise a quasi-judicial function because it is authorized to sit as a quasi-judicial body.

8. CURB and KCP&L also assert that the scheduling an evidentiary hearing is not the appropriate test for when a Commission proceeding becomes quasi-judicial. Staff agrees that a hearing is not always necessary for a proceeding to be considered quasi-judicial. KCP&L recognizes that complaints and other proceedings may be quasi-judicial without a hearing. However, hearings under KAPA strongly implicate a quasi-judicial function. Most statutes referring to a hearing in the Kansas Public Utilities Act require the hearing to be held in accordance with KAPA. KAPA specifies that when a statute provides for a hearing in accordance with KAPA, the hearing shall be governed by K.S.A. 77-513 to K.S.A. 77-532, and amendments thereto, except as otherwise provided by: a statute other than the KAPA , or K.S.A. 77-533 through K.S.A. 77-542 , and amendments thereto. K.S.A. 77-533 through K.S.A. 77-542 address conference hearings (K.S.A. 77-533), emergency proceedings (K.S.A. 77-536), and summary proceedings (K.S.A. 77-537).

9. In developing Commission procedures, Staff chose to draw a bright line at an evidentiary hearing in rate case proceedings for purposes of applying the quasi-judicial deliberation exception. KAPA hearing procedure states that to the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford the opportunity for all parties to respond, present evidence and argument, conduct cross-examination, and submit

rebuttal evidence, except as otherwise limited. It is in those hearings that the Commission is also exercising a quasi-judicial function – weighing the credibility of witnesses, finding facts, etc.⁶

10. Likewise, the hearings covered in Staff's deliberation process also allow for due process considerations. 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 legislative actions or purely executive acts.⁷ Hypothetically, under a purely legislative function, the Commission could limit rate case proceedings to a written statement. Rather, the Commission chooses to hold KAPA authorized evidentiary hearings, involving due process (i.e., cross examination, etc.).⁸ This bright line test in rate case proceedings is a helpful guideline for the Commission and parties to determine when proceedings become quasi-judicial in nature.

11. KOMA and KAPA reference each other and should be read in *pari materia*. KOMA provides ... "all meetings for the conduct of the affairs [the agency] ... shall be open to the public..."⁹ 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."¹⁰ Because the Commission is authorized to exercise a quasi-judicial function by requiring hearings to be held in accordance with the KAPA, KOMA allows the Commission to deliberate regarding those functions outside a public meeting.

⁶ K.S.A. 77-523(b).

⁷ *Reifschneider v. State*, 266 Kan. 338, 344, 969 P.2d 875, 878 (1998).

⁸ K.S.A. 77-513; 77-523.

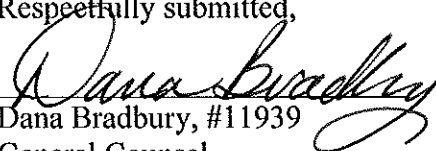
⁹ K.S.A. 75-4318(a).

¹⁰ K.S.A. 75-4318(g).

12. As initially stated in Staff's original legal analysis, this legal analysis does not address what policy, if any, the Commission should adopt. Rather, Staff is analyzing the legal bounds of KOMA.

WHEREFORE, Staff requests the Commission accept Staff's Response to Filed Comments of CURB and KCP&L for Commission consideration and for such other relief as the Commission deems just and proper.

Respectfully submitted,



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I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Commission Staff's Response to Filed Comments of CURB and KCP&L was served by electronic service on this 13th day of January, 2014, to the following parties who have waived receipt of follow-up hard copies.

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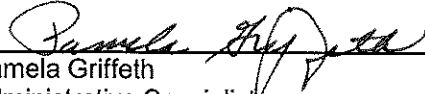
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