

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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In the Matter of the Adoption of Policies)
Regarding Commission Internal Procedures.)

by
State Corporation Commission
of Kansas
Docket No. 14-GIMX-190-MIS

COMMENTS OF KANSAS CITY POWER & LIGHT COMPANY

COMES NOW Kansas City Power & Light Company (“KCP&L” or “Company”) and pursuant to the November 7, 2013 *Amended Order Adopting Policies Regarding Commission Procedures* issued by the State Corporation Commission of the State of Kansas (“Commission”) in the above-captioned docket (“Order”), submits the following comments.

I. BACKGROUND

1. The Commission’s Order states that this docket was opened for the purpose of establishing a consistent policy and ensuring compliance with applicable Kansas law regarding certain docket processes.¹ Attachment A to the Order sets forth internal procedures that the Commission is considering for adoption. These internal procedures establish a Summary Proceeding procedure for routine and non-adversarial dockets, for dockets where parties have waived a hearing, and for generic or adversarial dockets early in the case.² These internal procedures also address Commission processes for adjudicatory proceedings with a scheduled hearing.³ Regarding processes for adjudicatory proceedings, Attachment A states that, when a hearing is scheduled in a docket, “the proceeding becomes adjudicatory, triggering the ...

¹ Order, ¶1.

² Order, Attachment A, sections B and C.

³ Order, Attachment A, section C.

deliberation exception to KOMA per K.S.A. 75-4318(a).”⁴ This would include rate case proceedings filed under K.S.A. 66-117, except for the issue of rate design.⁵

2. On November 22, 2013, the Staff of the Commission (“Staff”) filed a *Notice of Filing Staff’s Legal Analysis Involving Quasi-Judicial Deliberations* (“Staff’s Analysis”). Staff’s Analysis was filed for the purpose of setting forth its legal analysis assessing the applicability of the deliberation exemption of KOMA to certain Commission proceedings, as identified above in ¶1. In essence, Staff asserts that (1) KOMA exempts deliberations related to quasi-judicial matters, (2) once the Commission determines that a hearing will be held on a matter, that matter becomes quasi-judicial,⁶ and therefore (3) all post-hearing deliberations and deliberations on substantive prehearing motions by the Commission are not subject to KOMA.

II. COMMENTS

3. KCP&L has no comments regarding the Summary Proceedings recommended in the Order for routine, non-adversarial dockets or dockets where parties have affirmatively waived a hearing in the record. KCP&L also has no comments regarding the Summary Proceedings recommended in the Order for generic dockets or adversarial dockets early in the case. However, KCP&L does not agree completely with the portions of the Order addressing the applicability of certain KOMA and KAPA exceptions to Commission proceedings involving hearings, and provides the following comments on those proposed procedures.

⁴ Order, Attachment A, p. 1. “KOMA” refers to the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.*

⁵ Order, Attachment A, pp. 2-3.

⁶ Staff uses the word “adjudicatory” as a synonym for “quasi-judicial”. KCP&L is unsure whether the choice of terms impacts Staff’s Analysis, but has chosen herein to stay with the term “quasi-judicial” as the term more commonly used in this context by KOMA and the courts.

A. *The Kansas Open Meeting Act's Exception for Quasi-Judicial Deliberations.*

4. The Order and Staff's Analysis indicate that, in any proceeding where a hearing is scheduled, the Commission will consider all deliberations to be "quasi-judicial" except for deliberations related to rate design. As such, these deliberations will not be open to the public under KOMA. This is based upon K.S.A. 75-4318(g) of the Kansas Open Meetings Act ("KOMA") which states,

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; ...

5. A meeting between two or more Commissioners at which there is a discussion of the business or affairs of the Commission falls under the KOMA definition of a "meeting".⁷ Thus, those meetings are subject to the requirements of KOMA unless they fall under the exception of K.S.A. 75-4318(g). To fall under this exception, the matters being deliberated at the meeting must relate to a decision involving the Commission's exercise of its quasi-judicial functions.

6. There is no question that the Commission engages in quasi-judicial activities in some proceedings. However, the scheduling or holding of a hearing is not the factor that determines whether the matter being deliberated is quasi-judicial or legislative; it is the nature of the act itself that determines whether it is legislative or judicial. "In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer or agency which performs it, that determines its character as

⁷ K.S.A. 75-4317a.

judicial or otherwise.”⁸

7. The tests the courts have used in Kansas to determine that an act of an administrative agency is **quasi-judicial** include the following:

- a) The function involves the agency investigating, declaring and enforcing liabilities *as they stand on present or past facts and under laws supposed already to exist;*⁹
- b) The function is one which a court might have been charged with in the first instance or which the court has historically performed or did perform prior to the creation of the agency;¹⁰
- c) The function involves a discretionary act *of a judicial nature* taken by a body empowered to investigate facts, weigh evidence, and draw conclusions as a basis for official actions;¹¹
- d) The function involves the exercise of discretion and *requires* notice and a hearing.¹²

8. Conversely, a function is **legislative** if it looks to the future and changes existing conditions by making a new rule to be applied thereafter within some area of the agency’s power.¹³ “Legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.”¹⁴

⁸ *Union Quarries, Inc. v. Board of County Commissioners of Johnson County*, 206 Kan. 268, 274 (1970), citing *Gawith v. Gage’s Plumbing & Heating Co. Inc.*, 206 Kan. 169, (1970).

⁹ *Union Quarries* at 274 (emphasis added.)

¹⁰ *Brown v. Board of Education, Unified School District No. 333, Cloud County*, 261 Kan. 134, 156, citing *Stephens v. Unified School District No. 500*, 218 Kan. 220, 234 (1975).

¹¹ *Brown* at 156 (emphasis in original).

¹² *Brown* at 156 (emphasis added).

¹³ *Brown* at 156.

¹⁴ *Union Quarries* at 274.

9. The Commission's rate setting function has long been considered the exercise of the agency's legislative powers.¹⁵ This includes determining a company's rate base, a fair rate of return, and an amount for reasonable operating expenses. Although the Commission may look at historical evidence to make these decisions (i.e. test year information), the function the Commission is engaged in is setting rates for the future. It involves policy setting, and changes existing rates because they are no longer just and reasonable on a forward-going basis. Rate setting is not an act normally undertaken by a court. While the Commission may investigate facts, weigh evidence and employ its discretion to draw conclusions in making its decisions, those actions are not *of a judicial nature* when they relate to the legislative function of rate setting. Further, although the Commission may decide to take such evidence at a hearing, a hearing is not *required* under the Commission's statutes.

10. The well-established concept that rate setting is an exercise of the Commission's legislative authority was not overturned by *Mobil Exploration & Producing U.S. Inc. v. State Corporation Commission of the State of Kansas*, 258 Kan. 796 (1995), or *Farmland Industries, Inc., v. State Corporation Commission of the State of Kansas*, 25 Kan.App.2d 849 (1999). *Mobil Exploration* did not involve a proceeding where the Commission was setting rates. In *Mobil Exploration*, the Commission was investigating and determining gas well production rights as between private owners of wells located in the Hugoton Gas Field of Kansas. Such action by the Commission is to prevent "the unfair or inequitable taking of natural gas from a common source of supply."¹⁶ "A proration order attempts to ensure that each owner will recover, without waste,

¹⁵ *Southwestern Bell Telephone Co. v. State Corp. Comm'n*, 192 Kan. 39, 46, (1963); *Cities Service Gas Co. V. State Corp. Commission*, 201 Kan. 223, 232-33 (1968). There is no indication that the adoption of KAPA for Commission proceedings in 1988 intended to overrule the holdings in these cases.

¹⁶ *Mobil Exploration* at 800.

the amount of gas underlying his or her land.”¹⁷ At hearing, the Commission restricted Mobil’s ability to cross-examine certain witnesses and Mobil appealed the decision alleging that it was denied due process for this reason. In evaluating the due process claim, the Kansas Supreme Court considered the proceeding to be quasi-judicial without discussing the basis for this assumption. Whatever the court’s reasoning may have been in this regard, there is an obvious difference between the rights being determined in *Mobil Exploration* and the issues addressed by the Commission in a rate setting docket.

11. *Farmland Industries* did involve a rate setting proceeding. Again, the appealing party was alleging a due process violation because the Commission limited its ability to obtain certain information during discovery. In assessing the party’s due process rights, the Kansas Court of Appeals cited to *Mobil Exploration*’s discussion of the due process rights afforded a party to a quasi-judicial Commission proceeding. *Farmland Industries* did not make a specific finding as to whether the matter it was considering was actually quasi-judicial or legislative, nor did it contain any analysis of prior Kansas Supreme Court decisions in *Southwestern Bell* and *Cities Service* clearly holding that rate setting was a legislative function. *Farmland Industries* certainly cannot be construed as the Court of Appeals overruling the Supreme Court. As further evidence that the *Farmland Industries* court did not intend to upset established case law on this issue, the Court of Appeals recently issued a decision in a Commission rate case appeal wherein it specifically affirmed the law of *Southwestern Bell* and *Cities Service*, stating,

Further, rate making is more than a mere act of discretion by a state agency; it is a part of the legislative function. Again, referring to *Kansas Gas & Electric Co.*, the court held:

“Under the constitutional separation of powers doctrine, the regulation of public utilities is legislative in nature. The legislators created the Kansas

¹⁷ *Mobil Exploration* at 800.

Corporation Commission and granted it full and exclusive authority and jurisdiction to supervise, control and regulate the public utilities of this state and, when acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body. [Citations omitted.]

“Thus, public utility rate making is a legislative function, whether it is regulated by an administrative body or by the legislature itself.”¹⁸

12. Although rate setting is not quasi-judicial, the Commission does, in some cases, exercise quasi-judicial authority. Quasi-judicial functions in which the Commission engages are those proceedings where the Commission is looking back and making a decision based on past facts.¹⁹ When the Commission receives and weighs evidence, finds facts, and applies existing law to those facts to determine rights and obligations under specific past conduct, the Commission is performing functions that a court normally undertakes and those functions are quasi-judicial.²⁰ An example of a Commission quasi-judicial function is a complaint docket where a complainant is alleging a past act of a public utility company violated its tariff or a Commission statute, rule or regulation.

13. In summary, when determining whether a function of the Commission is quasi-judicial for any purpose, including application of K.S.A. 75-4318(g), the nature of the act must be considered. Scheduling a hearing on a matter is not the sole determinant. The Commission must consider all elements of the tests adopted by the courts for this inquiry, and most importantly, the Commission must follow mandatory precedent which clearly states that the Commission’s rate setting activities are legislative. K.S.A. 75-4318(g) acts as an exception to KOMA, and exceptions are to be narrowly construed to carry out the purpose of the law; that

¹⁸ *Citizens’ Utility Ratepayer Bd. v. State Corp. Com’n of Kansas*, 47 Kan.App.2d 1112, 1123 (2012); citing to *Kansas Gas & Electric Co. v. Kansas Corporation Comm’n*, 239 Kan. 483, 491 (1986).

¹⁹ *Stephens v. Unified School District No. 500*, 218 Kan. 220, 235 (1975).

²⁰ *Stephens* at 236.

purpose being to provide public access to the conduct of government business.²¹ If the presence of a hearing were the only determining factor, then rate design would also have to be considered quasi-judicial. There would be no logical basis for classifying rate design different from other matters considered in the rate setting hearing. In fact, the Commission could convert all of its otherwise legislative functions into quasi-judicial by simply scheduling hearings. This is not supported by the purpose or existing interpretations of KOMA.

B. The Kansas Administrative Procedures Act's Exclusion of Hearings from the Definition of "Meeting" Under KOMA.

14. As stated in Staff's Analysis, KAPA provides that any hearing held pursuant to KAPA shall not be deemed a "meeting" pursuant to KOMA. K.S.A. 77-523 states,

At the hearing:

(f) The hearing is open to public observation, except to the limited extent, as determined by the presiding officer, that it is necessary to close parts of the hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure. 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.

While this provision of KAPA exempts from KOMA a Commission hearing held under KAPA, it does not apply to the post-hearing deliberations of the Commission on matters presented at that hearing. Meetings at which such deliberations are conducted are subject to KOMA and must be open to the public.²²

15. K.S.A. 77-523 ensures that hearings are open to the public unless there is a statute that otherwise allows closure for a reason that the legislature has determined outweighs the

²¹ *Murray v. Palmgren* 231 Kan. 524, 530 (1982); and *Memorial Hospital Association, Inc. v. Knutson*, 239 Kan. 663, 669 (1986).

²² This is true unless such meetings meet some other exemption under KOMA. It also assumes that the matters being deliberated are not classified as quasi-judicial. If they are considered quasi-judicial, then the deliberation exemption of K.S.A. 75-4318(g) applies.

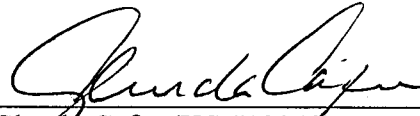
importance of transparency on governmental action. This statute makes it clear that once a hearing is lawfully closed under some other provision of law, no party can argue that it must be opened under KOMA. However, deliberations are not part of a hearing, and therefore, they remain subject to KOMA *unless some other provision of law allows them to be closed to the public*. A KOMA “meeting” includes all gatherings at all stages of the decision-making process.²³ Discussion is what triggers KOMA. Post-hearing deliberations are not exempt from KOMA under K.S.A. 77-523.

IN SUMMARY, it is KCP&L’s position that rate setting proceedings conducted by the Commission are legislative in nature. If there is a matter in a Commission proceeding that could be considered quasi-judicial, that determination would need to be made on a case-by-case basis. Absent a finding that a matter is quasi-judicial or otherwise specifically exempted from KOMA, all deliberations by the Commission on such matter are subject to KOMA and all requirements of KOMA must be complied with before such deliberations can occur.

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²³ *Coggins v. Public Employees Relations Board*, 2 Kan.App.2d 416, 423 (1978).



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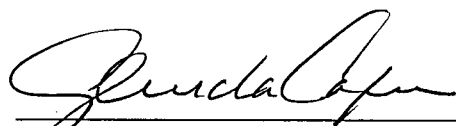
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