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

COMMENTS OF THE

CITIZENS' UTILITY RATEPAYER BOARD

The Citizens' Utility Ratepayer Board (CURB) files the following comments in response to the issues raised by the Kansas Corporation Commission's (KCC or Commission) November 7, 2013, *Amended Order Adopting Policies Regarding Commission Procedures* (Amended Order).

I. INTRODUCTION

A. Brief overview of CURB's position

1. The Kansas Corporation Commission (KCC or Commission), in both its policy statement on its proposed procedures and in its Staff's legal analysis of the proposal, posits that while ratemaking is legislative in nature, with the introduction of the Kansas Administrative Procedure Act (KAPA), the KCC ratemaking process became a quasi-judicial process. Thus, when the KCC gathers evidence to make a decision, it is exercising a quasi-judicial function. In essence, the KCC claims to be both legislative and quasi-judicial at the same time. The KCC then posits, since it is exercising a quasi-judicial function, its deliberative meetings may be closed to the public under the quasi-judicial exemption to the Kansas Open Meetings Act (KOMA). The KCC posits that its function becomes quasi-judicial when, and if, a proceeding is

set for hearing. Proceedings in which no hearing is held remain legislative and subject to KOMA.

2. Unfortunately, following the KCC's logic leads to some illogical conclusions.

3. First, the Commission's assumption that setting a hearing creates the "bright line" between legislative cases (with open deliberations) and quasi-judicial cases (with closed deliberations) is arbitrary and unsupported by prevailing authorities and the intent behind KOMA. To believe this theory, you must believe the legislature intended KOMA to require the Commission to conduct public deliberations in the smallest rate cases, (those without a formal evidentiary hearing) but would permit the Commission to deliberate secretly in the biggest, most complex rate cases with the greatest public impact, simply because formal evidentiary hearings are a part of the proceedings. CURB can find no support for the idea that either the complexity of the case or size of the utility is the bright line dictating whether KOMA applies to administrative action. Further, since the Commission has the discretion to schedule a hearing in almost any rate case that comes before it, the Commission could achieve almost complete exemption from KOMA's requirements to deliberate and decide quasi-legislative matters in open meetings simply by scheduling a hearing in every rate case. CURB sees no support for the notion that the legislature enacted KOMA or KAPA with the intention of allowing the Commission to exempt itself from the requirement of open deliberations in rate cases.

4. Second, every action taken by the Commission must be supported by substantial competent evidence. Regardless of the size of the case or whether the case is set for hearing, the Commission goes through a similar deliberative process in every case, consisting of weighing the facts in evidence and choosing among competing theories, policies and data to arrive at its

conclusions. In every case, whether a hearing is held or not, every party has the same due process rights and the Commission has the same procedural duties. In every case—hearing or not—the Commission's decision is reviewed under the same standards of judicial review. If every decision made by the Commission is subject to the same "substantial and competent" evidence standard, the same procedural due process rights of the parties and the same duties of the Commission, regardless of whether or not a hearing is held, under the Commission's theory every time it gathers evidence to make a final decision, the action would be "quasi-judicial". In fact, the majority of actions taken by the Commission in regulating utilities would be quasi-judicial and thus exempt from KOMA's requirements. Why bother with drawing the KOMA "bright line" at whether or not a hearing was held, if every deliberation of facts, theories and data turns a case into a quasi-judicial proceeding? It's simply illogical that the legislature intended that virtually every KCC utility case would fall outside KOMA. There are better ways to determine whether the Commission at any instance is performing a legislative or quasi-judicial function.

5. Third, in application, the KCC's proposed policy is not consistent with the legal logic used to justify deliberations in private. If the KCC is correct that its actions in a rate case that is set for hearing are quasi-judicial and therefore exempt from KOMA, then why would the KCC be required to make its final vote on a case in a public meeting? The KOMA exemption is comprehensive: in the exercise of a quasi-judicial function, there's no requirement to hold an open meeting of any sort, not even a requirement that the final vote be made in public. Yet, the KCC reasons that while it can deliberate in private, it must vote in public. This reasoning is inconsistent with the actual requirements of KOMA. The Commission's proposed policy

appears to confuse the quasi-judicial exception to KOMA, which is a complete exemption from all KOMA requirements to take agency action in public, with KOMA's provisions that permit a public body to close an open meeting to deliberate in executive session, such as when the Commission discusses a matter that is protected from disclosure by the attorney-client privilege. It appears that the Commission has reasonably fashioned a "semi-quasi-judicial" exception to KOMA that permits it to deliberate secretly in rate cases, but still requires it to make its final decisions in public.

6. However, there is a problem with this reasoning: if the quasi-judicial exception to KOMA applies, it applies to all Commission action that is quasi-judicial. And if it doesn't apply, then KOMA requires that the Commission must also deliberate as well as make its decision in an open meeting, absent one of the justifications listed in KOMA for closing an open meeting. There's no middle ground. Devising a policy that honors the spirit of KOMA's requirement to decide cases in public while creating an exception that virtually swallows the rule that requires deliberation in public may serve the convenience and preferences of the Commission but does not comply with the letter or the spirit of the open meetings law.

7. There is a simpler and more logical way to approach these questions. First of all, everyone agrees that ratemaking is a legislative function—the Commission sets rates to be effective as of a future date, much like the legislature passes laws that will be effective as of a future date. But what exactly is a "function"? The function of the Commission is the role or purpose for which the Commission was created and authorized to perform. The role, or function to be performed, is entirely distinct from the type of proceeding in which the Commission

performs its function and exercises its authority. In each of the areas that the KCC regulates, it performs a variety of functions, some of them legislative, some of them quasi-judicial.

8. So: what is a "quasi-judicial" function? In its simplest sense, it is a function performed by an agency that, if there were no agency, would be performed by a judge. In a more fundamental sense, a quasi-judicial function is retrospective in nature, rather than prospective. A judge looks backward and decides whether a party's past actions violated an existing law, and if so, what the penalty associated with that violation should be. Thus, when the KCC determines whether a motor carrier's past action or inaction violated an existing law, and determines the appropriate penalty if it finds the law has been violated, the KCC performs a role similar to that of a judge: a quasi-judicial, retrospective function.

9. Determining whether a particular function of the Commission is legislative or quasi-judicial is essential to determining whether KOMA applies to the exercise of that function, because KOMA doesn't apply when the KCC is performing a quasi-judicial function, but does apply when it performs a legislative function, such as ratemaking. But what if a ratemaking proceeding—which is clearly an exercise of the Commission's legislative function—includes a hearing governed by KAPA, and looks a lot like a judicial proceeding? The answer, in CURB's view, is that it doesn't matter: the character of the proceeding doesn't change the nature of the function being exercised by the Commission. Ratemaking is a legislative function, and no matter what kind of court-like procedures that are used in performing that function, the ratemaking function of the Commission remains prospective and legislative. The passage of KAPA provided the parties before the KCC certain procedural rights and imposed certain duties upon the KCC to conduct hearings that have many of the trappings and protections inherent in judicial

proceedings, but KAPA did not change the fundamental nature of the function being performed during the proceeding. Neither did the passage of statutory standards of judicial review of agency action. Both provided additional protections for the parties that may not have existed prior to their passage, but they did not alter the fundamental nature of the ratemaking function performed by the Commission.

10. Thus, the most straightforward bright line test for determining whether Commission action is legislative or quasi-judicial for purposes of deciding whether KOMA applies is not whether a hearing is set, how it is conducted, or whether the Commission considers facts, theories and data in coming to a decision. The test is simply to look at the action to be taken in the proceeding and determine whether it is prospective in nature or retrospective in nature. If it is prospective, it is legislative. If it is retrospective, it is quasi-judicial.

11. Obviously, there may be difficulties in analyzing each and every one of the Commission's functions for the applicability of KOMA, but adopting CURB's approach provides a logical framework with which to begin. It is the nature of the function being performed by the Commission—not the particular characteristics of the procedure—that determines whether KOMA applies. Starting the analysis by considering whether the decision the Commission is going to make is prospective or retrospective in nature is a good first step, and usually ends the inquiry. Where it doesn't, other factors to consider in determining whether a Commission function is legislative or judicial in nature are discussed in CURB's comments below.

12. But for practical purposes of analyzing whether utility proceedings, particularly rate proceedings, fit into the quasi-judicial exemption of KOMA, the answer is simple: the vast

majority of the KCC's regulatory authority over utilities is prospective and therefore legislative. The KCC's function is to set rates and declare policy that will be implemented tomorrow and into the future. The prohibition against retroactive ratemaking also is indicative that the KCC's authority is prospective in nature: it has no authority to look backwards and make adjustments to correct an otherwise legal rate. The KCC can only change rates and policy going forward.

13. In making these prospective determinations on rates or policies going forward, the KCC may consider historical data in making its decision, but that does not change the prospective nature of the Commission's action, and does not change the function of ratemaking into a retrospective function. Similarly, in rate proceedings, the KCC may utilize procedures that are similar to those utilized by courts, but the similarity does not alter the function the KCC is exercising. The nature of the function is unaltered by the method or procedure the KCC utilizes to accomplish its purpose. In all such analyses, the policy of the state, as set forth in KOMA, is that decisions of public agencies are to be made in public, and the Commission should always strive for openness. The choice to deliberate or make a final decision outside of an open meeting should be made only when the function performed by the Commission in issuing the decision is unambiguously judicial in nature.

14. The comments below provide a more detailed examination of the analytical framework proposed here by CURB, and provides authority that supports its conclusions.

B. The *Amended Order*'s proposed procedures

15. Recently, in response to the order of the Shawnee County District Court that the Kansas Corporation Commission is subject to the Kansas Open Meetings Act (KOMA or the Act) and that members of the Commission violated KOMA, the Commission reviewed its

procedures and issued a revision of internal procedures that were adopted in an order issued on October 30, 2013 (October 30 Order). Then, on November 7, the Commission *sua sponte* issued an amendment to the order of October 29, stating that the Commission intended to adopt the procedures only after taking comments on the proposed procedures through January 3, 2014.

16. As applied to rate cases, the Amended Order erroneously concludes that the Commission is entitled to deliberate or convene deliberative meetings outside of an open meeting, as defined by the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.*, because KOMA does not apply "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." K.S.A. 75-4318(g). In its proposed procedures, the Commission describes the circumstances that it presumes are "quasi-judicial" as follows:

- If substantive prehearing motions are received, the Commission can deliberate or convene a deliberative meeting outside of KOMA.

- Following hearing, a deliberative meeting is convened: Commissioners may deliberate freely, as they are outside the scope of KOMA. During deliberations, Advisory Counsel obtains Commissioner input on specific findings of fact, conclusions of law and determinations of policy. These deliberations are exempt from KOMA but any binding decision must occur in a Commission Meeting. At the conclusion of the deliberative meeting, Advisory Counsel prepares a first draft of the order and circulates it among the Commissioners to provide an opportunity for additional details and direction until a consensus is reached and the order is finalized. This is still part of the deliberative process.[1]

There is a strong implication in the Commission proposal that whenever the KCC holds a hearing pursuant to the requirements of the Kansas Administrative Procedures Act, K.S.A. 77-

[1] *October 30 Order*, Attachment A, *Commission Docket Procedures Final*, October 29, 2013, at 3; flow chart Attachment A [sic], at 4.

501 *et seq.* (KAPA), the deliberations of the Commission are *per se* quasi-judicial and exempt from open meeting requirements.

17. Additionally, although the Concurring Statement of Chairman Mark Sievers accompanying the original order of October 30 correctly states that "The Commission acts in a quasi-legislative manner when it develops and articulates forward looking policy and/or rates that are prospective in nature," he also concludes that "The Commission acts in a quasi-judicial manner when it presides over hearings and weighs the credibility of witnesses, evidence and arguments,[2] which is indeed a concurrence with the view of the majority as expressed by the Amended Order. However, the latter statement may be literally true in the ordinary sense of the word "act" but not in a legal sense. The Commission may be "acting like a judge" (i.e., acting quasi-judicial) when it "presides over hearings, and weighs the credibility of witnesses, evidence and arguments," but most authorities agree that the function of ratemaking is a quasi-legislative function, even if the Commission's rate case hearings resemble court proceedings. Thus, KOMA applies to deliberations and decisions of the Commission in all phases of the ratemaking proceeding.

18. If the Commission approves and utilizes the proposed procedures, and deliberates privately during rate proceedings, it is CURB's opinion that the Commission will be violating KOMA. It is for these reasons that CURB offers its comments below. CURB's interest is in open government, not in filing complaints. CURB prefers to focus on the issues before the Commission, rather than on whether they were decided in compliance with KOMA. While CURB admits that the jurisprudence on these questions may not be 100% unanimous, the vast bulk of the opinions and the state's firm policy of open government are strongly supportive of

[2] *October 30 Order*, Concurring Statement of Chairman Mark Sievers, at 3.

CURB's positions on these issues. The Commission should reconsider its proposed policies in light of the arguments CURB makes herein.

C. Kansas policy supports transparency and open government

19. The legislative policy behind KOMA is perfectly clear, as stated in the first two sections of K.S.A. 75-4317, entitled "Open meetings declared policy of state":

> (a) 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.
>
> (b) It is declared hereby to be against the public policy of this state for any such meeting to be adjourned to another time or place in order to subvert the policy of open public meetings as pronounced in subsection (a).

KOMA has been in place since 1972, and KAPA since 1987, and over the past century, the vast majority of courts have held that the function of ratemaking is legislative. Yet—contemporaneously with the Shawnee County District Court's pronouncing the guilty verdict in the Commission's KOMA prosecution—the Commission suddenly announced that it has discovered it is exercising a quasi-judicial function in rate case proceedings and other proceedings subject to KAPA requirements, and is therefore exempt from KOMA's requirement that public bodies deliberate in public. The justification—again, newly discovered—for not being required to deliberate in open meetings is that the Commission in rate cases is investigating facts, weighing evidence, and exercising discretion of a judicial nature; and holding discussions on such matters "stifles deliberations and communications on the matters brought before the Commission." *Id.,* at -2, 3, 7.

20. Assuming for a moment that the KCC's new revelations are correct, one must wonder why this new theory was not a defense to the KOMA prosecution. The offense occurred

during a rate proceeding for Howison Heights, a small water utility. The proceeding was considered an "abbreviated" rate proceeding for small utilities, a simpler proceeding that usually often doesn't require an evidentiary hearing, but nevertheless requires the Commission to deliberate the same sort of facts and evidence as in the rate case of a larger utility, and requires the Commission to exercise similar discretion. Under the Commission's theory that when it is investigating facts, weighing evidence and exercising discretion of a judicial nature, as in a rate case, KOMA doesn't apply, the Commission should have been found innocent of the KOMA violation committed in the Howison Heights case. Since the Commission announced the proposed policy changes almost contemporaneously with the guilty verdict announced by the court, the failure of the KCC to employ this theory as a successful defense in the KOMA violation is puzzling.

D. KAPA and KOMA restrict the exercise of the KCC's legislative function

21. Under the Commission's alternate theory that in any proceeding governed by KAPA, it is exercising a quasi-judicial function that is exempt from KOMA, then one would have to be believe that the legislature intended the KCC to deliberate in *public* the facts and evidence in an abbreviated rate case (not governed by KAPA) concerning a tiny utility like Howison Heights with 62 customers, and therefore also intended the KCC to deliberate in *secret* the facts and evidence in the rate cases of the state's largest utilities--like Westar Energy and Kansas Gas Service, both of which have over 600,000 customers—simply because large utility rate cases always require an evidentiary hearing governed by KAPA.

22. CURB does not believe that the legislature intended the bizarre result that the most complex and important decisions the Commission makes should be deliberated behind

closed doors, but its less-complicated, less-controversial decisions must be made in public. CURB does not believe that the Commission's theories of when KOMA applies, if put into practice, would be a successful defense against a KOMA prosecution. CURB does not believe that the function of ratemaking changes its nature depending on the size of the utility or the procedural rules that apply. A century of jurisprudence has established that setting rates is a legislative function, period, whether the utility is large or small. Further, the notion that imposition of due process protections and duties on KCC proceedings by the enactment of KOMA and KAPA has altered the function of ratemaking is simply wrong. KOMA and KAPA impose limitations on the exercise of an agency's legislative function, but do not change it fundamentally into the function of another branch of government.

E. Rate cases are too important to decide in secret

23. CURB's concerns are focused primarily on arguing that the Commission is not exempt from the requirements of KOMA when deliberating decisions in utility rate cases, although the argument CURB makes herein would result in the same conclusion concerning the deliberation of matters of public policy. There are several important reasons why CURB is especially concerned about the conduct of rate proceedings. Proceedings adjusting public utility rates comprise the majority of the dockets in which CURB participates, and affect the greatest number of Kansans and the majority of ratepayers whom CURB represents. Rate decisions generate the greatest public interest, most clearly impact the public interest in general, and directly impact the financial interests of residential and small business ratepayers. Decisions in rate cases also serve to develop and guide policy issues that concern all Kansans. The Commission's proposal to conduct secret deliberations in the majority of the utility decisions it

makes will cloak in secrecy the Commission's most important discussions concerning the public interest and the impact on the lives of hundreds of thousands of customers. For the Commission to deliberate in secret on these important decisions is entirely inconsistent with the intent of KOMA and inconsistent with the interests of ratepayers and the public in general.

24. Further, CURB believes that the Commission's assumption that KOMA does not apply to its deliberations in rate cases except for its deliberations on cost allocation and rate design decisions is misguided. CURB acknowledges that there are a few conflicts in the case law, attorney general opinions and commentary on whether the "quasi-judicial" exceptions to open meetings laws that have been adopted in Kansas and several other states apply to the exercise of quasi-legislative powers in a quasi-judicial proceeding. However, a careful reading of the various opinions and commentary on this subject leads CURB to conclude that setting utility rates is clearly exercising a quasi-legislative function, regardless of what kind of proceeding is used to reach a decision. CURB concludes that the imposition of quasi-judicial procedures in performance of the agency's function confers due process rights on the parties and procedural duties on the agency, but does not alter the nature of the function delegated to the agency. Likewise, the adoption of open meetings laws in all fifty states that apply to most administrative agencies did not alter the nature of the power delegated to administrative agencies, but instead conferred more rights on the public to observe the exercise of those powers. And generally, where there is no clear winner in the balancing of public interests in openness against privacy interests of public bodies, courts have generally come down on the side of the public interest.

25. Additionally, the exceptions to the Kansas policy of conducting the public's business in public are limited to specific and narrow circumstances. Members of the public who make the effort to request notice for open meetings and to attend those meetings are the people for whom KOMA was created to protect and empower with insight into government actions. Closing an open meeting imposes inconveniences on those who attend open meetings, including unexpected delays that leave them with no place to sit to await the conclusion of the executive session. But worse, it denies them the opportunity to see what they came to see. Therefore, the Commission should not close its open meetings to public scrutiny without a clear need for a confidential discussion and a clear legal justification for doing so.

26. Our arguments herein are admittedly in favor of the maximum openness in government, but transparency in government is consistent with state policy and with the policy of the federal government and most states. CURB notes that courts generally resolve disputes over whether a meeting should be closed with a balancing test that weighs the public interest in openness of government affairs and conduct of government business more heavily than the agency's interest in secrecy. The flexibility and discretion accorded the Commission by the legislature to adopt procedures and develop internal policies that help it carry out its duties and obligations do not alter the fundamental nature of the power it is exercising, any more than the limitations of KOMA and KAPA alter the nature of the power. The public interest should be the constant beacon guiding the Commission's decisions concerning the conduct of its business in the open, not a light from which the Commission shrinks.

27. That said, CURB's analysis begins with the analysis of whether ratemaking by the Commission is a legislative function, then proceeds to analyze for purposes of determining

whether the Commission's action in the proceeding is governed by the Kansas Open Meetings Act whether legislation that provides statutory due process protections and court-like procedures convert legislative functions into judicial functions.

II. RATEMAKING IS A LEGISLATIVE FUNCTION

A. Preliminary analysis of quasi-legislative and quasi-judicial functions

28. CURB has developed a couple of checklists from the cases and opinions discussed herein that are helpful in analyzing whether an agency function is legislative or quasi-legislative. The characteristics below are descriptive of a quasi-legislative function:

CHARACTERISTICS OF QUASI-LEGISLATIVE FUNCTION

- ☐ focused on prospective application of forward-looking determinations
- ☐ delegated by the legislature, not the constitution or the executive branch
- ☐ not a function traditionally performed by the courts
- ☐ agency has broad discretion in regulating a particular subject matter area
- ☐ develops new rules and policy from inquiry into complex subject matter
- ☐ decisions may address issues beyond the initial matter raised by a party
- ☐ decisions may be based on facts beyond those presented by the parties
- ☐ decisions do not involve determinations of vested rights or liberty interests
- ☐ decisions do not involve determinations of individual liabilities
- ☐ intervention by interested parties is generally allowed
- ☐ public comment in a proceeding is often solicited or required by statute
- ☐ decisions may affect large numbers of persons who are not parties to the proceeding
- ☐ decisions may address matters of policy broader than the issues raised by parties
- ☐ decisions must be consistent with the public interest, but not necessarily with the specific interests of any given party

☐ decision makers may utilize in-house subject matter experts for advice

☐ absent statutory standards of review to the contrary, appellate review of decisions is narrower and more deferential than review of judicial or quasi-judicial decisions

In analyzing an agency's function, the more characteristics on this list describe the function being analyzed, the more certain that the function is legislative or quasi-legislative. A similar list can be constructed for quasi-judicial functions by turning the items on the list into negatives (i.e., "*not* delegated by the legislature", "intervention by interested parties is generally *not* allowed", etc.), but a short list of positives would look something like the list below. A quasi-judicial function is characterized by the following:

CHARACTERISTICS OF QUASI-JUDICIAL FUNCTION

☐ focus is retrospective

☐ traditionally a function previously performed by the courts

☐ decisions are based on past or present facts and existing law

☐ decisions determine individual vested rights or liabilities

☐ proceeding generally limited to plaintiff(s) and defendant(s)

☐ intervention by interested parties is unusual

☐ decisions must be based on facts and evidence in the record

☐ decisions rarely make public policy or new law

☐ decisions generally only affect parties to the action

☐ public comment in the proceeding is discouraged and usually prohibited

☐ appellate standard of review is usually broader and less deferential to agency

29. The cases cited below will provide insight into where each element of these checklists is derived, and how each fits into existing judicial opinions on the distinctions between

quasi-legislative and quasi-judicial functions. Of course, for those who find it oxymoronic to say that an agency whose powers are conferred by the legislature performs a quasi-judicial function, this analysis may be irrelevant. However, because many courts and commissions have performed this analysis numerous times under the assumption that an agency can perform quasi-judicial functions, it is worthwhile to examine the results of their analyses. These checklists are useful references in making preliminary analyses, and for recognizing the key elements of what makes a function quasi-judicial or quasi-legislative. If the function doesn't seem to have characteristics of either one, it may be an administrative or enforcement function—functions which are discussed briefly below but are peripheral to the issues of most concern to CURB. Before the analysis of cases, let us begin with an overview of the utility regulatory function provided by a prominent expert on utility regulation, Scott Hempling.

B. Scott Hempling: "Regulators are not judges"

30. A utility commission's power and function[3] in regulating the provision of and cost of utility service, as well as developing public policy with regard to public utilities is a power and function delegated by the legislature. Scott Hempling, perhaps the most highly-regarded expert on utility law in the U.S. and a long-time advisor to utility commissions throughout the

[3] A sidebar: Many cases and discussions concerning the distinction between quasi-legislative and quasi-judicial appear to use the terms *function*, *power* and *authority* interchangeably. However, there are slight distinctions in their dictionary definitions that should be noted here. The words *power* and *authority,* when used in discussions of government agencies, appear to have nearly-identical meanings, at least according to *Webster's II New Riverside University Dictionary* (1984), which defines *power* as "The ability or capacity to act or perform effectively" and "The ability or official capacity to exercise control over others, and *authority* as "The right and power to command, enforce laws, exact obedience, determine, or judge," also noting as a synonym for *power*, "'*Authority*' suggests legitimate and recognized power." [italics added]. To the extent that *power* and *authority* to regulate utilities has been conferred on the KCC by the legislature, they amount to the same thing. *Function*, on the other hand, is defined as "The activity for which one is specifically fitted or employed; Assigned duty or activity"; and "Specific occupation or role." Thus, *function* seems to describe more than the raw exercise of legitimate power, as when a utility commission issues an order, grants an injunction or suspends a proceeding, for example, but implies a wider range of activities engaged in by an agency in carrying out its role in regulating the subjects and persons over which it has the *power* and *authority* to act, such as investigations, discussions, consideration of public comments, and other activities which are preparatory or necessary to the exercise of its power and authority.

nation (including ours), has addressed this issue in a short essay entitled, "Commissions are not Courts; Regulators are not Judges"[4]:

> A commission's purpose derives from its origins. The Legislature receives lawmaking powers from the state constitution. The Legislature then creates a commission, delegating to it some substantive slice of those lawmaking powers. That delegation consists of commands coupled with standards; e.g., establish just and reasonable rates, ensure reliable service, allow mergers if consistent with the public interest. Common to these commands and standards is a single legislative purpose: Within a defined substantive space, make policy for the public.

Hempling acknowledges that courts and commissions have attributes in common: "Both make decisions that bind parties. Both base decisions on evidentiary records created through adversarial truth-testing. Both exercise powers bounded by legislative line-drawing." He points out, however, that courts operate within a more rigidly-defined sphere of action than do commissions. Courts must await complaints; they can't seek out issues to rule on. Commissions, on the other hand, must constantly be vigilant and ready to act to protect the public interest, even if no one has filed a complaint. A commission may also broaden the scope of a hearing to consider issues that weren't raised by any of the parties—something a judge can't do. Hempling also notes that commission decisions, even on seemingly insignificant issues, may have wide-reaching impact on the public interest or large groups of customers. While Hempling recognizes that certain judicial decisions can, in essence, develop public policy—he cites decisions on civil rights as an example—most court decisions usually only affect the persons participating in the proceeding.

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[4] Hempling, Scott: *Commissions are not Courts; Regulators are not Judges* (Feb.17, 2008), available through the National Regulatory Research Institute website, Monthly Essays section (searchable by date or title, no pagination provided). *See* http://www.nrri.org/web/guest/home . All subsequent references to Hempling are to this essay.

31. The purpose of Hempling's essay is to encourage commissioners to act less like judges and more like regulators if they want to be more effective in their roles. He admits that utility commissions look like a bit of everything: "like a legislature when promulgating rules; like an executive agency when enforcing those rules; like a court when deciding complaints." However, he cautions that "utility commissions are not 'like' anything; they are what they are: governmental units created to exercise powers delegated to Legislature by Constitution, then re-delegated by Legislature to Commission. Commissions, like the Legislature whose powers they exercise, make policy for the public."[5]

32. Hempling is not a judge, but his intent in comparing the judicial-looking proceedings that some commissions conduct and the source of their powers and authority was focused directly on explaining how commissions may more effectively utilize their power and authority. Most courts that have addressed the question of whether a commission decision is quasi-judicial or quasi-legislative did so in the context of determining the appropriate standard of review on appeal. Additionally, some cases addressing the distinction are focused on determining whether the parties to the proceeding were eligible for attorney fees under a statutory scheme of awarding fees to intervenors in quasi-judicial proceedings. There do not seem to be any court opinions that directly address the issue of whether a commission decision was quasi-judicial or quasi-legislative for purposes of determining whether the state's open meetings law applies.

33. It should be noted that there are a wide range of differences in the scope of issues addressed by each state utility commission, and in what kinds of powers have been delegated to

[5] Hempling acknowledges that some state commissions are created by the state constitution, but maintains that the powers they exercise are defined by the Legislature.

them. The Kansas Corporation Commission regulates utilities (but not all of them), enforces pipeline safety and correlative rights in oil and gas fields, regulates common carriers and is charged with promoting energy efficiency, among other duties. Not all of them are quasi-legislative, and CURB is making no effort here to paint the entire range of the Commission's powers and authority as quasi-legislative. However, CURB has made every effort to read carefully many opinions on the quasi-judicial versus quasi-legislative question to ensure that the cases it cites to actually support or rebut the propositions for which we have cited them. In other words, CURB has attempted to avoid citing to cases where the proceedings and the authority of the commission described in the opinion are significantly different than this Commission's, and has made efforts to ensure that there is no statute involved that renders the decision irrelevant to the regulatory regime in Kansas.

34. That said, CURB believes that most of the Commission's regulatory decisions concerning utilities are quasi-legislative, but these comments do not attempt to identify every power of the Commission that is quasi-legislative. Our comments focus on ratemaking—not only because the Commission plans to change its procedures when deliberating rate cases, but because, as noted above, rate cases most directly impact the public interest and the interest of the ratepayers that CURB represents. Rate decisions are also the kind of decisions that are likely to be appealed, so many of the opinions that discuss the difference between quasi-legislative and quasi-judicial functions, powers or proceedings concern ratemaking, not the myriad of other kinds of powers exercised by state commissions.

35. By focusing the analysis on ratemaking in these comments, CURB is not abandoning its view that most of the utility regulatory powers of the Commission are quasi-

legislative, but believes the analysis of ratemaking presented herein is easily applied in determining whether the other functions of the Commission are quasi-judicial or not, thus determining whether KOMA applies to the deliberations and decision-making in each instance.

36. Although many states now have statutory standards of review, the distinction between the review of quasi-legislative actions and quasi-judicial actions was first developed through common law. Courts typically have reviewed "quasi-legislative" decisions under a deferential "arbitrary and capricious" standard. There is no reweighing of the evidence so long as the decision is neither arbitrary or capricious or inconsistent with the law. Review of quasi-judicial decisions is broader, and may encompass reviewing the commission's findings of fact or its interpretation of the relevant statutes or regulations.

37. Courts have long agreed with Hempling's assessment that ratemaking is legislative, or quasi-legislative. A 1909 U.S. Supreme Court case stated:

> The function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power.[6]

The opinions haven't changed much since then. CURB begins its argument with a review of the law in Kansas on this issue.

C. Kansas cases and A.G. opinions say that ratemaking is a legislative function

38. CURB will demonstrate below that that Kansas law prohibits the Commission from deliberating or convening deliberative meetings outside the Kansas Open Meetings Act in rate proceedings, because ratemaking is a legislative, not quasi-judicial, function. As applied to the proposed procedures in the October 30 Order concerning rate case proceedings, the

[6] *Knoxville v. Knoxville Water Co.*, 212 U.S. 1 (1909).

prehearing and post-hearing deliberative meetings contemplated in the October 30th Order and Commission Docket Procedures are unlawful and contrary to the Kansas Open Meetings Act, because they relate to a decision involving the Commission's legislative functions, not quasi-judicial functions.

39. The Kansas courts overwhelmingly hold that ratemaking is a legislative function using an analysis articulated early in the twentieth century. Stated briefly, judicial action investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.[7] Legislative action looks to the future and changes existing conditions by making new rules to be applied prospectively. *Id.* In looking to the future and changing existing conditions by making a new rule to be applied thereafter within an area of its power, an agency exercises a legislative function.[8]

40. The Kansas Supreme Court noted with approval Justice Holmes' classic statement setting out the abstract test to be applied by courts in distinguishing the judicial power from legislative power when examining administrative agencies in *Gawith v. Gage's Plumbing & Heating Co.*:

> ... A judicial inquiry *investigates, declares and enforces liabilities as they stand on present or past facts* and under laws supposed already to exist. That is its purpose and end. *Legislation,* on the other hand, *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. ... [9] [emphasis added].

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[7] *Gawith v. Gage's Plumbing & Heating Co.*, 206 Kan. 169, 178, 476 P.2d 966 (1970) (citing *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

[8] *Brown v. Board of Education, Unified School Dist. No. 333, Cloud County,* 261 Kan. 134, 156, 928 P.2d 57 (1996).

[9] *Gawith,* 206 Kan. at 178-79, 476 P.2d 966 (1970) (citing *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908) (emphasis added). *See also, Thompson v. Amis*, 208 Kan. 658, 662-63, 493 P.2d 1259 (1972).

The *Gawith* court further discussed the rules for determining whether an agency action is quasi-judicial or legislative:

> There is a distinction between the types of decisions rendered by different administrative agencies; and some such agencies perform judicial or quasi-judicial functions while others do not.
>
> In determining whether an administrative agency performs legislative or judicial functions, the courts rely on certain tests; one being whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make, and another being whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body.
>
> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, whereas 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.
>
> 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 judicial or otherwise." [10]

Versions of this analysis appear repeatedly in court opinions in Kansas and other states. It is the basis for determining that ratemaking is a legislative function.

41. Furthermore, The Kansas courts have been consistent in their opinions that ratemaking by the KCC is a legislative function. "Ratemaking, by its very nature, is prospective..."[11] As such, Commission ratemaking decisions look to the future and change existing conditions by making new rules to be applied prospectively.[12] In looking to the future

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[10] *Gawith,* at *169, Syl.¶2.*

[11] *Narragansett Elec. Co. v. Harsch,* 117 R.I. 395, 416, 368 A.2d 1194 (1977), which was cited with approval in *Kansas Industrial Consumers v. State Corp. Com'n,* 30 Kan.App.2d 332, 343, 42 P.3d 110 (2002); *Gas Service Co. v. State Corp. Com'n of Kansas,* 8 Kan.App.2d 545, 549, 662 P.2d 264 (1983); *Gas Service Co. v. State Corp. Commission,* 4 Kan.App.2d 623, 635, 609 P.2d 1157 (1980); and *Kansas Power & Light Co. v. State Corp. Commission,* 5 Kan. App.2d 514, 517, 620 P.2d 329 (1980).

[12] *Gawith,* 206 Kan. at 178.

and changing existing rates by ordering new rates and tariffs to be applied thereafter within an area of its power, the Commission exercises a legislative function.[13]

42. The Kansas Supreme Court has long held that the regulation of public utilities, and specifically the function of public utility ratemaking, is a legislative and not a quasi-judicial function.[14] In *Kansas Gas.*, a rate case involving the valuation of Wolf Creek nuclear generating facility for ratemaking purposes, the Kansas Supreme Court held:

> Under the constitutional separation of powers doctrine, *the regulation of public utilities is legislative in nature*. The legislature created the Kansas 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.* Cities Service Gas Co. v. State Corporation Commission, 201 Kan. 223, 440 P.2d 660 (1968); Midwest Gas Users Ass'n v. Kansas Corporation Commission, 5 Kan.App.2d 653, 623 P.2d 924.
>
> Thus, *public utility rate making is a legislative function*, whether it is regulated by an administrative body or by the legislature itself. Prior to 1984, the legislature empowered the KCC by broad, non-specific statutes to exercise the rate-making function. By K.S.A. 66–101, the State Corporation Commission was given the authority to supervise and control public utilities and was empowered to do all things necessary and convenient for the exercise of such authority. K.S.A. 66–141 (Weeks), now K.S.A. 66–101g, provided that the statutory provisions granting authority, power, and jurisdiction to the Commission shall be liberally construed. K.S.A. 66–107 (Weeks), now K.S.A. 66–101b, provided the KCC with authority to require a public utility to furnish reasonably efficient and sufficient service and to establish "just and reasonable" rates. [15] [emphasis added].

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[13] *Brown v. Board of Education,* 261 Kan. at 156.

[14] *Kansas Gas and Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063, (1986); *Midwest Gas Users Ass'n v. State Corp. Commission*, 5 Kan.App.2d 653, 623 P.2d 924 (1981); *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 232, 233 (1968) (Under the constitutional separation of powers doctrine, the regulation of public utilities is legislative in nature - when acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body). See also, *Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of State,* 47 Kan.App.2d 1112, 284 P.3d 348 (2012) (rate making is more than a mere act of discretion by a state agency; it is a part of the legislative function); *Quality Oil Co., v. du Pont & Co.*, 182 Kan. 488, 495 (1958) ("[t]he power to fix rates or prices for the sale of services or commodities binding upon all parties whether or not they consent is a legislative power"); *Holton Creamery Co. v. Brown*, 141 Kan. 830, 833 (1935) ("power of the state to fix rates is not a judicial function, but is a legislative one"); *Aetna Ins. Co. v. Travis*, 130 Kan. 2, 4 (1930) (rate making is a legislative function); *State ex rel., v. Flannelly*, 96 Kan. 372, 382 (1915) (fixing rates is a legislative function).

[15] *Kansas Gas and Electric Co,* 239 Kan., at 491.

43. In determining the scope of review, the *Kansas Gas* court adopted the narrower standard of view appropriate to agency decisions made under the legislative function. In noting the wide discretion vested by the legislature with the Commission, the court said,

> Since discretionary authority has been delegated to the commission, not to the courts, the power of review does not give the courts authority to substitute their judgment for that of the commission [citation omitted] . . . . The commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into fixing utility rates. It is aided by a staff of assistants with experience as statisticians, accountants and engineers, while courts have no comparable facilities for making the necessary determinations.

Id., at 496. Thus, the court clearly sees the distinction between the legislative function of ratemaking as compared to the judicial function: the Commission's power comes directly from the legislature; its powers are broad and liberally construed and given wide latitude, unlike that of the courts, which are precisely described; the Commission's decisions are not like judicial decisions because the commission may utilize the assistance of various subject-matter experts in reaching its decisions, while courts must reach their decisions on their own, relying on their own assessment of the facts and knowledge of the law without such expert subject-matter assistants.

44. The *Kansas Gas* decision cited with approval *Midwest Gas Users Ass'n v. State Corp. Commission*, 5 Kan.App.2d 653, 623 P.2d 924 (1981), where the Kansas Court of Appeals held:

> Under the constitutional separation of powers, the regulation of public utilities is *legislative in nature*. 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 and, *when acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body*. Cities Service Gas Co. v. State Corporation Commission, 201 Kan. 223, 232-233, 440 P.2d 660 (1968).[16] [emphasis added].

[16] *Midwest Gas Users,* 5 Kan.App.2d at 658.

The *Midwest Gas Users* Court further held:

> As with the FPC, the Kansas Corporation Commission is empowered to require "just and reasonable" rates. K.S.A. 66-107. In carrying out this function, the Commission is "empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction" (K.S.A. 66-101), and the statutory provisions granting such power, authority and jurisdiction are to be liberally construed (K.S.A. 66-141). Clearly, the Commission may consider matters of policy in establishing a "just and reasonable" rate structure. *Its doing so is a legislative function* [emphasis added].

Id., at 659.

45. Ratemaking is not a function with which the courts could have been charged in the first instance, with such broad responsibility of making the kinds of decisions the Commission must make, nor is it a function that courts historically have been accustomed to perform or had performed prior to the creation of the Commission's ratemaking authority.[17] Under the constitutional separation of powers doctrine, the regulation of public utilities is legislative in nature.[18] The Kansas Corporation Commission was created by the Legislature and granted full and exclusive authority and jurisdiction to supervise, control, and regulate the public utilities of this state. *Id.* As a result, when acting in the exercise of its delegated powers, the Commission is not performing a quasi-judicial function, and is not a quasi-judicial body.

46. The longstanding rule that regulation of public utilities and ratemaking by the Commission is a legislative and not a quasi-judicial function was affirmed by an on-point conclusion reached by Attorney General Robert Stephan in Attorney General Opinion No. 83-32. Attorney General Stephan was asked to render an opinion (1) regarding whether the Kansas Corporation Commission performs a quasi-judicial function within the meaning of the KOMA in setting utility rates and (2) whether the exemption to the requirements of KOMA under K.S.A.

[17] *Gawith,* 206 Kan. at 169, Syl.¶2.
[18] *Kansas Gas*, 239 Kan. at 491.

75-4318 (for administrative bodies authorized by law to exercise quasi-judicial functions when deliberating matters relating to a decision involving such quasi-judicial functions) applied to Commission deliberations in rate cases.[19]

47. Attorney General Stephan concluded that "the Kansas Corporation Commission is not exempt from the Kansas Open Meetings Act during deliberations in rate making cases since such rate-making functions are legislative in nature rather than quasi-judicial." *Id.*, at 7.

> Having concluded that rate-making is a legislative function, *we think the action of the KCC in setting rates fails the tests outlined in Gawith, supra, for determining whether a particular administrative function is quasi-judicial in nature.* Although some investigation is done by the Commission in ratemaking and Commission decisions certainly rest, in part, on past facts, the KCC is not purely a fact finding body. *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.*
>
> The KOMA is intended to cover bodies performing legislative functions. K.S.A. 1982 Supp. 75-4318. That intent can best be carried out where the entirety of the KCC decision-making process in rate design cases is open to public view. Indeed, it may be during the deliberation stage of the KCC proceedings, where the policies and facts are weighed, that the public can learn the most about the real basis for the utility rates it must pay. In this regard, the decision is not wholly unlike a decision of a legislature or city council to levy a tax. And in our judgment both should be open to full public view.
>
> Hence, we think it entirely consistent with the above cases and the purposes of the KOMA to conclude that *the exception for deliberations of bodies performing quasi-judicial functions contained in the Act is inapplicable to deliberations of the KCC in rate-making cases. Therefore, it is our opinion that the Kansas Corporation Commission is not exempt from the Kansas Open Meetings Act during deliberations in rate making cases since such rate-making functions are legislative in nature rather than quasi-judicial.*
>
> *Id.*, at 5-7 [emphasis added].

[19] Attorney General Opinion No. 83-32, at 1.

This opinion is takes into account the fact that the KCC makes complex decisions on fact and policy, and explicitly finds that the "quasi-judicial" procedures in ratemaking proceedings do not transform the KCC's legislative function into a "quasi-judicial" function.

D. Opinions in other states say ratemaking is legislative, too.

48. As noted above, the prevailing view in Kansas is that ratemaking is legislative in nature. Most other states agree, and in a variety of contexts—such as when determining the appropriate standard of review on appeal. The same sort of analysis described in the previous sections was used in all of them.

49. In a California Supreme Court case in which two Public Utility Commission (PUC) cases were consolidated for review, two consumer advocacy groups appealed the denial by the PUC of attorney fees, with different results.[20] In the first case, a group called the Consumers Lobby against Monopolies (CLAM) filed a complaint against a utility claiming that the company was unfairly shifting costs of commercial customers to other ratepayers by failing to collect tariff charges for services relating to the removal and replacement of equipment on the premises of commercial customers. The case was settled, with the utility agreeing to pay $400,000 for a "public benefit" to be approved by the PUC. *Id.*,at 897. In the second case, a group named Toward Utility Rate Normalization (TURN) intervened in a much-contested rate case and ultimately succeeded in winning several key issues in the case. *Id.*, at 898. The Commission in the TURN case had earlier approved interim rates subject to refund, and TURN's successful arguments led to the PUC's approval of refunds to ratepayers in its final order. The

[20] *Consumers Lobby Against Monopolies v. Public Utilities Commission, Pacific Telephone and Telegraph Company, Toward Utility Rate Normalization v. Public Utilities Commission, Pacific Telephone and Telegraph Company*, 25 Cal.3d 891, 603 P.2d 41, 160 Cal.Rptr. 124 (1980), hereinafter referred to as *CLAM v. PUC.*

PUC denied the requests of both CLAM and TURN for reimbursement of attorney fees on the grounds that the PUC had no statutory or equitable power to award attorney fees and costs for the services of consumer groups. Both groups appealed. The court distinguished the facts of the two cases, ordered a remand for a determination of attorney fees to be paid to CLAM, but upheld the denial of attorney fees to TURN.

50. The court had to first determine whether the PUC, with its broad authority, had the equitable power to award attorney fees. It first noted that the PUC had the statutory power to award reparations to ratepayers for a utility charging an illegal rate—or as in the CLAM case, for *under*charging a tariff rate to a certain class of customers and passing those costs to other customers. The court also noted that the Commission's broad authority to regulate utilities included several equitable powers, such as the power to reform contracts and issue injunctions or cease and desist orders. *Id.,* at 907. The court found that the proceedings considering reparations in the CLAM case closely resembled court proceedings: the PUC was acting in determining whether the utility had wrongly undercharged commercial customers, and its decision created clear winners and losers. *Id.,* at 908. The court observed that in many PUC reparation decisions, a common fund is created from which attorney fees may be paid. *Id.* The court deemed the CLAM proceeding was a quasi-judicial proceeding, and decided that the PUC had equitable powers to award attorney fees to CLAM.

51. In the TURN case, however, the court decided the proceeding was a quasi-legislative proceeding. It reasoned that the PUC's equitable powers to award attorney fees in a quasi-judicial reparation proceeding did not extend to the refund of interim rates, because ratemaking is quasi-legislative; the refund was simply an extension of the PUC's quasi-

legislative powers. "There is a distinction between the power to fix rates and the power to reward reparation. The former is a legislative function, the latter is judicial in its nature." *Id.*, at 909 [citations omitted]. "The fixing of a rate and the reducing of that rate are prospective in application and quasi-legislative in character. In contrast, reparation looks to the past with a view toward remedying primarily private injury, and is quasi-judicial in nature." *Id.*, [citations omitted].

52. The court went on to note other important differences between quasi-legislative and quasi-judicial proceedings:

> In adopting rules governing service and in fixing rates, (the) commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions . . . (*Wood v. Public Utilities Comm'n,* 481 P.2d 823, 825 (1971). The rules of practice and procedure promulgated by the commission are liberal in allowing public participation in ratemaking proceedings [citation omitted]. Hence there may be a number of interveners in such matters, representing a wide variety of public positions. The commission's primary task is to assimilate those views into a composite "public interest," a give-and-take process often producing a result that cannot be deemed a clear-cut victory for any party.

CLAM v. PUC, at 909. The court went on to reason that these differences "illustrate why certain concepts developed for the courts for use in an adversary system are not easily transplanted outside the adjudicatory context." *Id.* Further, it noted that the decision would not further complicate the PUC's already-complex duties: determining the appropriate attorney fees for multiple intervenors in ratemaking proceedings would make the "cumbersome ratemaking procedure" even more cumbersome. *Id.*

53. The court also distinguished the difference between reparations and refunds. The utility had been ordered to charge the interim rates subject to a potential refund pending a final determination of another issue. "The refunds therefore were prospective in nature, ordered in a

quasi-legislative proceeding, akin to a reduction in rates. Because they were ordered collected subject to refund, they were not remedial for past injuries; as we have noted, a prospective reduction in rates is quasi-legislative in nature, unlike an award of reparation." *Id.,* at 910 [citation omitted].

54. In the wake of the CLAM and TURN decisions, the California PUC created a fund from which attorney fees could be awarded in quasi-judicial proceedings. In 1996, in a proceeding to seek recovery of costs through a "memorandum account", which is similar to this Commission's process of seeking recovery for extraordinary expenses through an accounting order, a water system sought recovery of water-hauling fees incurred during a severe drought.[21] A park district that assisted with the water-hauling operation intervened in the case and sought reimbursement of attorney fees. *Id.,* at 1. Although the PUC acknowledged that the park district's participation had been helpful to the PUC in determining the costs of the water-hauling, the PUC rejected the park district's argument that it should receive attorney fees because the PUC was making a quasi-judicial determination by looking into the past to determine the costs of hauling water during the drought. Relying on the court's analysis in the CLAM and TURN decisions, the PUC found that the determination of the costs of water-hauling fees and reimbursement of the water system through the memorandum account was not retrospective, and therefore was not quasi-judicial in nature. *Id.*, at 2, 3. The Commission found that because its previous order allowing the water system to seek recovery of these costs in a future proceeding was prospective in nature, and the recovery of the costs would be through rates, the proceeding was a ratemaking procedure and quasi-legislative. *Id.* The Commission noted that no water-hauling expenses

[21] *Re Camp Meeker Water System*, 68 CPUC 2d 21, 1996 WL 531545 (Cal.P.U.C.) (1996).

incurred before the memorandum account was approved would be eligible for inclusion in rates, so that the argument that this was a retrospective, reparation-type of case was incorrect. *Id.*

55. In a non-utility context, in deciding the appropriate standard of review, the California Supreme Court found that the California Insurance Code's requirement that the Insurance Commissioner use quasi-judicial procedures to determine the rates to be charged by each insurer in response to a uniform statewide rollback of insurance rates adopted by referendum did not alter the fact that the Commissioner was exercising quasi-legislative powers in setting rates.[22] "The 'presence of certain elements usually characteristic of the judicial process' does not 'mean that the' commissioner's 'action' is quasi-adjudicative." *Id.*, at 845. Similarly, the court noted that the commissioner's adoption of rate regulations to implement the rollbacks required the "finding" of "facts", but that did not change its conclusion that the regulations were quasi-legislative:

> . . . the "finding" of such "facts" does indeed belong to the quasi-legislative function. That is the case when, as here, the administrative agency's task "was to receive and consider economic and social data, as well as opinion and argument, covering large numbers of people and wide sectors of the economy; to select a series of positions aimed at the statutory objectives but shaped by discretion and policy; finally to express its selection in rules regulating the future conduct of relatively broad classes of persons. *Riviera v. Division of Industrial Welfare* (1968) 265 Ca.App.2d 576, 586, 71 Cal.Rptr. 739).

Id., at 845-846. In the footnote to this passage, the court supplemented this citation by stating

> Not only does the "finding" of such "facts" belong to the quasi-legislative function. The "facts" "found" must themselves be viewed as quasi-legislative in nature. All are informed with legal, policy and technical considerations, including those implicated in the generic determinations concerning the efficiency standards, rate of return, leverage factor, etc. Consequently, none is similar to the sort of "historical or physical facts [citation omitted] typically found in the course

[22] *20th Century Insurance Company v. Garamendi, 20th Century Insurance Company, v. Garamendi, Hartford Steam Boiler Inspection and Insurance Company, v. Garamendi*, 8 Cal.4th 216, 878 P.2d 566, 32 Cal.Rptr.2d 807 (1994).

> of administrative adjudication. Any similarity, however, would not defeat their quasi-legislative nature.

Id., at 846, FN 12.

56. This case and many of the cases cited in this opinion support CURB's conclusion that adoption of a quasi-judicial procedure to exercise a quasi-legislative function does not alter the legislative nature of the function or the power being exercised. They also support CURB's conclusion that the fact-finding portion of the rate case and the deliberation by the KCC of those facts to make rate case and public policy decisions is a quasi-legislative function, not a quasi-judicial function, and is therefore subject to KOMA. The case above finds that making determinations on efficiency standards, the appropriate rate of return, and the leverage factor are quasi-legislative in nature. *Id.*, at 845-846. Thus far, CURB has discovered only one court, the Minnesota Supreme Court, that has held that the determinations in a rate case on cost allocation and rate design are quasi-legislative and the balance of the determinations are quasi-judicial, thereby justifying different standards of review in different phases in the case.[23] The vast majority of opinions of other courts consider the various determinations that are involved in the function of setting rates as prospective determinations, whether involving policy or fact-finding: as part and parcel of the ratemaking function, they are almost universally regarded as legislative in character.

57. A Florida case that shall be referred to here as the *General Telephone* case concurs with the conclusion that adoption of quasi-judicial procedures does not transform the quasi-legislative act of rulemaking into a quasi-judicial procedure.[24] The appellants had

[23] *Hibbing Taconite Co. v. Minnesota Pub. Service Commission,* 302 NW2d 5 (1980),
[24] *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063 (1984) [citations herein are to the Westlaw version's page number; the original pagination of the opinion is not provided].

requested a hearing under a statutory provision in a rulemaking proceeding before the Public Service Commission. *Id.*, at 5. At the hearing, parties presented evidence and cross-examined witnesses, presenting their views on the proposed rule. *Id.* Appellant appealed the rule on several grounds. In determining the appropriate standard of review of the issues, the court stated,

> As a quasi-legislative proceeding, our review of the rulemaking is more limited than would be review of a quasi-judicial proceeding. The standard of review for a quasi-legislative proceeding must differ from that for a quasi-judicial proceeding, as a qualitative, quantitative standard such as competent and substantial evidence is conceptually inapplicable to a proceeding where the record was not compiled in an adjudicatory setting and no factual issues were determined.

Id., at 6. The court also noted that it adopted the standard of review that had been adopted in a previous Court of Appeal review of a similar rulemaking proceeding: "Where the empowering provision of a statute states simply that an agency may 'make such rules and regulations as may be necessary to carry out the provisions of this Act,' the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious." *Id.* The fact that "interested parties made statements under oath and were subjected to limited cross-examination" did not change the proceeding's quasi-legislative character. *Id.*

58. There are a few cases that disagree with the view expressed in *General Telephone*. This issue was considered in a Maryland case where the question that prompted the quasi-legislative/quasi-judicial analysis was whether the PSC had improperly usurped the power of the judiciary in determining what constitutes the practice of law in promulgating a rule that required a party to be represented by an attorney when the PSC was exercising its quasi-judicial functions, "as distinguished from a legislative, executive, or a ministerial function." *Id.*, at 6. The question arose on review whether the Commission actually exercised quasi-judicial functions at

all, resulting in considerable discussion in the opinion on what constitutes a "quasi-judicial function" of an agency that is primarily quasi-legislative in nature.

59. The majority on the Maryland Court of Appeals found that the public service commission "exercises quasi-judicial functions" when the PUC must determine "adjudicative facts and choose the applicable law," after oral and written arguments on the record, to produce a decision that can be appealed.[25] The majority held that the PSC could require a party to be represented by an attorney during quasi-judicial proceedings because a layman representing a party would be practicing law without a license.

60. A powerful dissent to this holding questioned, however, whether the PSC exercised any quasi-judicial functions at all. Judge Barnes wrote, "There is . . .no definition [in the rule] of what the 'quasi-judicial function' is. As I am not able to know what it is, I believe that parties before the Commission may have the same difficulty." *Id.,* at 16. In discussing a couple of previous Maryland cases which indicated that a county council exercised "quasi-judicial functions," Barnes said,

> In my opinion, this is unfortunate language . . . As I see it, in both cases the county council was exercising a '*restricted legislative function,*' not a '*quasi-judicial function.*' It has been my observation that when the prefix 'quasi' is appended to a well-defined word, distinctions are blurred, fuzzy thinking is invited, and error often results. Its use should be avoided. If the restrictions placed upon the exercise of legislative power are those usually associated with the exercise of judicial functions, one may inquire if the characterization of the function as 'quasi-judicial' really does any harm and if the suggest difference in characterization is not merely a semantic exercise? I think not. There are quite different concepts and result in different applications of the requirements of due process of law, depending on whether a function is 'legislative' on one hand, or 'judicial' on the other.

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[25] *Maryland Public Service Commission v Hahn Transportation, Inc.*, 253 A.2d 845 (1969) [citations herein are to the Westlaw version's page number; the original pagination of the opinion is not provided].

Id., at 9 [emphasis added]. He concludes by saying, "the commission has not been and could not be, delegated any judicial or quasi-judicial powers by the general assembly. All of its powers are legislative and regulatory in nature . . . [the rule promulgated by the PSC] purports to regulate a non-existent function of the commission and is void on its face." *Id.*, at 10. This dissent, granted, is not the opinion of the court, and is not cited here as authority. It is included here for its eloquent argument that it is a futile mission to attempt to definitively sort out which functions of an administrative agency are "quasi-judicial" or "quasi-legislative," regardless of where one comes down on the issue. Barnes' dissenting opinion that a "quasi-judicial function" carried out by a quasi-legislative body is more properly characterized as a 'restricted legislative function," may not be ruling authority, but his view is nevertheless consistent with the reasons for the adoption of the federal Administrative Procedure Act (APA).

III. ADOPTION OF ADMINISTRATIVE PROCEDURES DO NOT ALTER THE FUNCTIONS EXERCISED BY ADMINISTRATIVE AGENCIES

A. Administrative procedures are adopted to reign in the broad powers of agencies

61. In the wake of the proliferation of administrative agencies created during the Depression to implement President Franklin Roosevelt's New Deal, there was much complaining about the lack of due process in administrative procedures.[26] Among fans of the administrative state, there was much faith that technical and scientific progress could be fostered by removing judgments on such matters from the influence of politics by putting them in the hands of

[26] Richard E. Levy and Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. Kan. L. Rev. 473 (2003), at 477-78.

"neutral" subject matter experts who were also free to make decisions without the restrictions of the slow judicial process. *Id.,* at 476-77. However, the complaints about agency abuses of process continued, and Congress' first attempt to impose some due process on agency procedures was the Walter-Logan Act in 1939, which Roosevelt promptly vetoed. *Id.,* at 478. Our nation's involvement in the wars in Europe and Japan apparently scuttled the reform effort during the early- to mid-Forties. However, the proponents of imposing due process on regulatory agencies eventually won out in 1947 with the passage of the Administrative Procedure Act. Shapiro and Levy state that "The ultimate adoption of the APA stilled the crisis over the legitimacy of the administrative state. *It signaled that broad delegations of power and combined functions would be tolerated as long as they were checked by more extensive procedures*". *Id.,* at 478 [emphasis added]. Thus it is clear that the imposition of procedures on administrative agencies was meant to restrict the exercise of their functions and powers to protect the rights of the parties, not to expand those powers or functions or alter their fundamental nature.

B. KAPA restricts the exercise of agency functions and confers statutory due process on the parties to agency proceedings

62. A provision of the Kansas Administrative Procedure Act (KAPA) hints at the same premise articulated above that changing the procedure does not change the nature of the powers exercised. K.S.A. 77-506 addresses the conversion of proceedings at state agencies to another type of proceeding. Under Section (a)(1), an agency may at any time convert the proceeding to another type "if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of any party; and (2) if required by any provision of law, shall convert the proceeding to another type of agency proceeding". While there is no stated standard

of what kind of conversion is "appropriate" or "in the public interest", it is clear that the concern that the conversion "does not substantially prejudice the rights of any party" is a provision that provides some due process protection to the participants. More on point, however, is Section (c) which provides, "If the presiding officer or other state agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, that officer or official, in accordance with state agency procedure, shall secure the appointment of a successor to preside over or be responsible for the new proceeding." This indicates that the authority of the agency and its officials is not converted to some other kind of authority by adopting another kind of procedure.

63. This premise is also consistent with one of the first Kansas Court of Appeals opinions concerning KAPA following its adoption in 1987, which stated "The Act creates only procedural rights and imposes only procedural duties."[27] This case addressed the issue of whether a party could appeal an order of an agency if the agency had failed to issue an order within 30 days, as provided by K.S.A. 77-526(g). *Id.*, at 57. The appellant had argued that the agency lost its jurisdiction over the matter when it failed to issue its order by the 30-day deadline provided in KAPA and maintained that there should be no requirement in such circumstances to file a petition for reconsideration prior to filing an appeal with the Court of Appeals. *Id.* The court disagreed, stating that until the agency ruled on a petition for reconsideration of the final order, the agency retained jurisdiction over the matter. *Id.*, at 59. While this case did not directly address the issue of whether KAPA's procedural requirements alter the function of an agency during a KAPA proceeding from quasi-legislative to quasi-judicial, the court unambiguously stated that the Act created only *procedural* rights and *procedural* duties. Again, this is another

[27] *Expert Environmental Control, Inc. v. Walker,* 13 Kan.App.2d 56, 761 P.2d 320 (1988).

statement from the courts indicating that the imposition of procedural requirements on agency proceedings only alters the rights of the parties and the duties of the agency, not the nature of its function or power.

C. Cases cited by the Chairman do not support the KCC's proposed procedures

64. To further address the Commission's assumption that its proceedings determining the rate of return, the revenue requirement and other issues prior to the cost allocation and rate design phase have, by virtue of being subject to KAPA, added a quasi-judicial function to the Commission's legislative functions raises an obvious question: why, after KAPA was adopted in 1987, Kansas courts[28]—and indeed, the Commission itself[29]—have consistently proclaimed since its adoption that ratemaking is a legislative function? In October 2011, the current Chairman of the Commission filed a concurrence with an order in a KCPL rate case "providing insight into how I view and analyze utility regulatory matters" which stated,

> Based on my review of Kansas case law, it seems clear that Kansas Courts have consistently recognized that when the Commission set rates it acts in a delegated legislative role. As the Kansas Supreme Court noted:
>
> > Under the constitutional separation of powers doctrine, the regulation of public utilities is legislative in nature. The legislature created the Kansas 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 .....

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[28] See *e.g., Mitchell v. City of Wichita,* 270 Kan. 56, Syl. ¶3, 12 P.3d 402 (2000); *Eudora Development Co. of Kansas v. City of Eudora,* 276 Kan. 626, Syl. ¶2, 78 P.3d 437(2003).

[29] See *e.g., Order No. 9,* KCC Docket Nos. 193,306-U/96-KG&E-100-RTS and 193,307-U/96-WSRE-101-DRS, at 9 (1998); *Non-confidential Order Setting Revenue Requirements,* KCC Docket No. 01-SNKT-544-AUD, at 8 (Sept. 11, 2001); *Order,* KCC Docket Nos. 99-GRLG-405-GIG, 99-UNCG-406-GIG, 99-UTCG-408-GIG & 99-KGSG-477-GIG at 34 (May 3, 2001); *Order Setting Revenue Requirements,* KCC Docket No. 02-S&TT-390-AUD, at 9 (Oct. 14, 2002); *Order,* KCC Docket No. 04-GNBT-130-AUD, at 8 (June 1, 2004); *Order on Petitions for Reconsideration and Order nunc pro tunc,* (Sievers concurrence), KCC Docket No. 11-KCPE-581-PRE, at I-2 (Oct. 5, 2011); *Order on Petition for Reconsideration and Clarification of Mid-Kansas Electric Company, LLC and Staff's Petition for Reconsideration and/or Clarification,* KCC Docket No. 12-MKEE-380-RTS, at 13 (2012).

> Thus, public utility rate making is a legislative function, whether it is regulated by an administrative body or by the legislature itself. [cites omitted].[30]

KCC hearings have been subject to KAPA for over 25 years, and CURB knows of no change in opinion of the appellate courts of Kansas that would prompt an abandonment of this view. Even Chairman's Sievers' remarks above reflect the general agreement that ratemaking is a legislative function. The only logical explanation for viewing ratemaking now as "quasi-judicial" is that the Commission's long-time practice of notational voting has been declared a violation of the open meetings act, and the Commission is seeking another way to justify not having to deliberate most of its important and complex decisions in public.

65. Unfortunately, the opinions cited by Chairman Sievers in his concurrence with the October 30 Order[31] supporting the proposed changes to KCC procedures do not support the Commission's new theory that it may deliberate secretly in rate cases. The *Mobil Exploration*[32] finding referenced in the Concurring Statement of Chairman Sievers, which found that the KCC was exercising a quasi-judicial function in proration case, is simply irrelevant to the question of whether the function of ratemaking is quasi-judicial. The KCC, like many utility commissions, performs more than one kind of function. *Mobil Exploration* simply confirms that the Commission does indeed, exercise quasi-judicial and enforcement functions when amending the Basic Proration Order (BPO) controlling the Hugoton Gas Field in Kansas.

66. Reading the *Mobil Exploration* court's brief description of the history behind the enactment of the laws that empowered the KCC with authority over production in the field is

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[30] KCC Docket No. 11-KCPE-581-PRE, *Concurrence of Chairman Mark Sievers,* at 1-2 (2011).

[31] *October 30 Order, Concurring Statement of Chairman Mark Sievers*, at 6.

[32] *Mobil Exploration & Producing U.S. Inc v. Kansas Corporation Comm'n, 258 Kan. 796*, 908 P.2d 1276 (1995).

sufficient to establish that the Commission's function to prevent waste, avoid uncompensated drainage, and assure orderly development and production of natural gas and oil in Kansas is partly an enforcement function, and partly a quasi-judicial function:

> The gas in the Hugoton Field comes from a common pool. In the absence of any statutory regulation, the common-law rule of capture applies to a common pool. At common law, the owner of a tract of land acquired title to the oil and gas which the owner produced from wells drilled thereon even though it could have been proved that part of such oil or gas migrated from adjoining lands. The rule promotes excessive drilling and production, resulting in economic waste and damage to reservoirs. Kansas enacted the Natural Gas Conservation Act in 1935 to prevent such waste and to protect the rights of adjoining owners. G.S. 1935, 55-701 *et seq.*
>
> The statutes governing the production and conservation of natural gas in Kansas empower the KCC to prevent waste, avoid uncompensated drainage, and assure orderly development and production of natural gas in Kansas. Along with the prevention of waste, the KCC is directed to prevent the unfair or inequitable taking of natural gas from a common source of supply. This concept of equitable recovery of a common pool is known as correlative rights. Correlative rights means that each owner or producer in a common source of supply is privileged to produce that source only in a manner that will not (a) injure the reservoir to the detriment of others, (b) take an undue proportion of the obtainable oil or gas, or (c) cause undue drainage between developed leases. K.A.R. 82-3-101(17) (1992).

Id., at 800. In these two paragraphs we learn that oil and gas production in Kansas was *originally governed by common law, i.e. the courts*; and that the producer of oil and gas produced from a piece of the producer's property acquired title, i.e., a *vested property right*, in the production. We learn that the law passed in 1935 was intended to protect the rights of adjoining owners, which are *property rights or vested rights to produce the oil and gas* on one's own property. Next, we learn that the KCC is empowered to *prevent waste*, which is in the nature of an enforcement function. We learn that the term "correlative rights" embodies a concept of *equitable* recovery of a common pool, recalling that a proceeding in equity is a judicial proceeding.

67. So, referring back to the checklists for analysis of agency action provided earlier in these comments, the KCC's function under the 1935 Act is to enforce correlative rights in oil fields, ensure equitable production that does not harm others' rights, and to prevent one producer from unduly draining the lease of another. In other words, the legislature has assigned the KCC to perform a function that originally belonged to the courts of equity and courts that adjudicated property rights: clearly a quasi-judicial function. It is authorized to limit the exercise of one's production rights to the detriment of another or to prevent waste: these are in the nature of actions in equity, a sort of judicial enforcement power. These are not the kinds of powers that the legislature normally performs.

68. That the court in *Mobil Exploration* found that the proration proceedings at the KCC were quasi-judicial is not only unsurprising, but well-reasoned. And *Mobil Exploration* can be compared favorably with the *CLAM v. PUC*[33] case discussed above, where the court held that the utility commission had equitable powers to award attorney fees to CLAM in ordering the utility to make reparations for undercharging a tariff rate to commercial customers and passing the costs along to other classes. The court there found that the legislature had granted the PUC the statutory power to order reparations, which was traditionally an act in equity performed by the courts, and that courts had the discretion whether to award attorney fees.

69. So, like the KCC, the PUC in California has been assigned to perform more than one kind of function. And, in reading the complex set of claims and complaints that the KCC was addressing in the *Mobil Exploration* proceeding, it's no surprise that the legislature believed it was appropriate to assign the courts' function of developing formulas for determining each producer's correlative rights to an administrative agency with expertise to perform the task: we

[33] *CLAM v. PUC,* 25 Cal.3d 891.

suspect that the courts sent up a little prayer of thanks when they were relieved of the duty of adjudicating these disputes. In any case, the *Mobil Exploration* case provides no support for the proposition that the KCC is performing a quasi-judicial function in ratemaking proceedings.

70. The *Brown v. Board of Education*[34] case (a Cloud County case, not the famous separate-but-equal decision) is no support for this proposition, either. While Chairman Sievers says this case concluded that "an agency acts in a quasi-judicial manner when elements of due process are involved,"[35] that is not the holding of the case. In fact, the *Brown* court determined that the procedures provided by the Kansas Administrators Act (K.S.A. 72-5451 *et. seq.*) provide "state procedural rights" that "do not invoke the protections of the Due Process Clause."[36]

71. The question of due process and how much is due to an administrator whose contract is not renewed arose when the school board in Cloud County determined that it did not intend to renew a school principal's contract of employment. Following the procedures required by the Kansas Administrators Act, the board timely notified Principal Brown of the board's intention not to renew her contract, held a timely meeting at Brown's request to give the board's reasons for nonrenewal and afforded Brown an opportunity to respond, and made its final decision to not renew her contract only after the meeting was concluded. *Id.,* at 141-42. Neither party was represented at the meeting by counsel, also in accordance with the Act. *Id.*

72. Even though the Act did not provide a right to appeal, Brown argued that she should have a right to appeal the board's decision because the board's "action of nonrenewing her contract was made 'quasi-judicial' by the procedures required by the Act, which designation, in turn requires procedures beyond those required by the Act." *Id.,* at 148. (Under the Code of

[34] *Brown v. Board of Education,* 261 Kan. 134.
[35] *30 Order, Concurring Statement of Chairman Mark Sievers*, at 8.
[36] *Brown v. Board of Education*, 261 Kan. at 134, Syl. ¶7.

Procedures in effect at the time, parties could appeal quasi-judicial decisions made by agencies: see *id.*, at 153). The court called Brown's circular argument an example of "boot-strapping": she wrongly assumed the action of nonrenewal was rendered quasi-judicial because the legislature provides *some* statutory due process protections to district administrators when their contracts aren't renewed, and then wrongly assumed that if the proceeding is quasi-judicial, then the full range of constitutional due process protections should provide her the right to a hearing. But the court determined that the "meeting" that an administrator may request with the board was not a "hearing" and had "none of the formalities of a hearing or any other judicial-type proceeding." *Id.*, at 149.

> The term quasi-judicial, used to describe the nature of the decision-making *process* required by statute or constitutional due process, is descriptive rather than prescriptive. *Any rights Brown may have to certain procedures come not from the label applied to the decision-making power the Board uses, but from a statute or contract imposing certain procedures invoking the protections of the Due Process Clause.* In addition, *even if the Board were exercising a quasi-judicial function, which we hold it was not, it would not be subject to inquiry concerning its mental processes in reaching a decision.* [citation omitted]. Thus, the *merits of Brown's argument* that she was entitled to have evidence presented, receive advance notice of the reasons for nonrenewal, and have a record of the meeting and deliberations of the Board *do not hinge on whether the Board was exercising a quasi-judicial power, but whether Brown had a property interest* in contract renewal secured either by statute or contract, invoking *constitutional due process* protections.

Id., [emphasis added]. The court held that no property interest existed in contract renewal for administrators, and that the court had no jurisdiction to hear Brown's appeal. The court emphasized the importance of this holding by restating it in the Syllabus:

> The term quasi-judicial, used to describe the nature of the decision making process, is descriptive rather than prescriptive. Any rights a party to a school board decision-making *process* may have to certain procedures *come not from the label applied to the decision-making power the board uses, but from a statute imposing certain procedures or the Due Process clause.*

Id., at 261, Syl. ¶7 [emphasis added].

73. The court noted that the legislature had provided a hierarchy of due process protections in school employment that accorded the most protection to tenured teachers, who have little policy-making authority; less protection to administrators, who have a larger policy role within the school district; and virtually no due process protection to superintendants, who are the major policy-makers within school systems throughout the state. *Id.*, at 144. The court found that the legislature intended to provide adminstrators only the opportunity to meet with the board, and not the hearing to which tenured teachers were entitled, indicating the intent not to provide the same procedural protections to administrators as tenured teachers enjoy. *Id.*, at 143-44. The court decided that previous Kansas cases that had found that nonrenewal decisions were quasi-judicial because they were more "judicial than legislative" had not taken into account that school board personnel decisions can be considered executive in nature rather than quasi-judicial, especially when employment is at-will and there are no legislative standards to limit the reasons for nonrenewal. *Id.*, at 156. The court held that "a discretionary decision after a hearing based on substantive standards is quasi-judicial in nature, but the specific wording of the Act provides for a "meeting" between an administrator and a school board where no substantive standards restrict the board's discretion, which is not quasi-judicial in nature. Thus, Brown had no right to appeal. *Id.,* at 157.

74. In reading the *Brown v. Board of Education* case, it is clear that the court focused on the function being exercised as well as the level of due process provided to the employee—but the level of discretion the board had in making its decisions was a necessary element of its holding: where the board has broad, unguided discretion to fire an employee—as it does in

firing a superintendant—the court viewed this function as unambiguously executive in nature. In firing an administrator after two years of employment, the only restriction on the board's discretion was that it had to articulate its reasons for nonrenewal, but the board was not limited to finding good cause for nonrenewal. The function of the school board, which is largely legislative in nature, is less legislative in personnel matters and more like an executive function—and becomes more judicial in character as the discretion of the board is more limited by the legislature in making its decisions.

75. This principle is evident in the consistent rulings that the KCC's ratemaking power is quasi-legislative rather than quasi-judicial. Although rate proceedings have many of the "trappings" of due process that are characteristic of quasi-judicial proceedings, within the realm of setting rates the Commission has broad discretion to make the prospective determination of what constitutes a "just and reasonable rate", and has broad discretion to employ the methods of its choice in reaching its conclusions. Such broad discretion has much more in common with the legislative branch than the courts. The protections afforded parties to Commission proceedings under KAPA and KOMA are brethren to the protections afforded school district employees in the Kansas Administrators Act. All three provide procedural protections to the participants in proceedings, and all three prescribe duties of the agency to the participants and to the public. But none of these laws alter the nature of the function exercised in the proceeding. The additional layers of procedures under KAPA do make rate proceedings "look like" adjudication, but the essential nature of the function performed is purely legislative.

76. Finally, the KCC does have quasi-judicial and enforcement functions, such as when it fines trucking companies for transportation law violations and orders oil operators to seal

up abandoned well sites, but very little of what the Commission does in its proceedings regulating utilities is quasi-judicial. The KCC also exercises an executive function when it dismisses at-will employees without a requirement of good cause, and is a bit more "judicial" when it must jump through the statutory procedural hoops to dismiss an employee with civil service protections. But when the KCC sets policy and sets rates, it is exercising a quasi-legislative function, whether or not KOMA or KAPA now prescribe duties and protections for the benefit of participants and the public.

77. Chairman Sievers in his Concurring Statement also cited Kansas Attorney General Opinion No. 91-31 as support for the KCC exercising a quasi-judicial function when it sets rates. The opinion addressed a grievance determination by a grievance committee of the City of Junction City.[37] Again, thinking back to our checklists, a grievance committee examines alleged instances of wrong-doing in the past, under past or present law. Thus, a grievance committee, unlike the Commission considering a rate case, is clearly an administrative body that is authorized by law to exercise quasi-judicial functions. *Id.*, at 4. Quasi-judicial action investigates and enforces liabilities as they stand on present or past facts, and under laws supposed already to exist.[38] Legislative action looks to the future and changes existing conditions by making new rules to be applied prospectively. *Id.* Ratemaking is a legislative function,[39] and Commission deliberations in rate cases are thus not exempt from the

[37] Kansas Attorney General Opinion No. 91-31, at 2.
[38] *Gawith,* 206 Kan. 169 at 178.
[39] *Kansas Gas and Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063, (1986); *Midwest Gas Users Ass'n v. State Corp. Commission*, 5 Kan.App.2d 653, 623 P.2d 924 (1981); *Cities Service Gas Co. v. State Corporation Commission*, 201 Kan. 223, 232, 233 (1968) (Under the constitutional separation of powers doctrine, the regulation of public utilities is legislative in nature - when acting in the exercise of its delegated powers, the Commission is not a quasi-judicial body). *See also, Citizens' Utility Ratepayer Bd. v. State Corp. Com'n of State,* 47 Kan.App.2d 1112, 284 P.3d 348 (2012) (rate making is more than a mere act of discretion by a state agency; it is a part of the legislative function); *Quality Oil Co., v. du Pont & Co.*, 182 Kan. 488, 495 (1958) ("[t]he power to fix

requirements of the Kansas Open Meetings Act.[40] The fact that a grievance committee exercises a quasi-judicial function is no support for the proposition that the Commission may deliberate in secret when it is exercising its quasi-legislative function.

78. Likewise, the *McPherson Landfill* case[41] cited by the Chairman does not support the proposition, either. This case stated that ordinarily, when a city or county commission makes a zoning decision for the entire city or county, the function exercised is quasi-legislative but when the zoning change is targeted at a particular tract, then the County Commission's function "becomes more quasi-judicial in nature than legislative." *Id.,* at Syl. 2. Nothing in this case supports the proposition that the KCC's ratemaking function is quasi-judicial.

79. The *Farmland* cases cited by the Chairman in his Concurrence are problematic. They seem to support the notion that a KCC rate case is a quasi-judicial proceeding, but a close reading of the cases reveals that the court in neither of the *Farmland* appeals made an unambiguous ruling that ratemaking is quasi-judicial. CURB has concluded that the court in both appeals made errors that bring into question the wisdom of citing to the cases to support the proposition that ratemaking is a quasi-judicial function.

80. In the first *Farmland* case[42] (*Farmland I*), Western Resources filed an application to adopt an integrated rate plan that would reduce rates to its customers. *Id.*, at 174. Late in the proceeding, the company moved to amend its application to support its current rates and to file cost-of-service studies supporting those rates. *Id.* The KCC granted the amendment and

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rates or prices for the sale of services or commodities binding upon all parties whether or not they consent is a legislative power"); *Holton Creamery Co. v. Brown*, 141 Kan. 830, 833 (1935) ("power of the state to fix rates is not a judicial function, but is a legislative one"); *Aetna Ins. Co. v. Travis*, 130 Kan. 2, 4 (1930) (rate making is a legislative function); *State ex rel., v. Flannelly*, 96 Kan. 372, 382 (1915) (fixing rates is a legislative function).

[40] Kansas Attorney General Opinion No. 83-32.

[41] McPherson Landfill, Inc. v. Board of County Comm'rs of Shawnee County, Opin. 88,075 (July 12, 2002).

[42] *Farmland Industries, Inc. v. State Corporation Comm'n*, 24 Kan.App.2d 172, 943 P.2d 470 (1997) (*Farmland I).*

"restarted" the 240-day clock for concluding the case, and transformed the proceeding into a traditional rate case proceeding. *Id.* On appeal, some of the appellants argued that the nature of the proceeding had changed so much since notice had been provided of the initial proceeding that the notice did not satisfy the due process requirements for a quasi-judicial proceeding under the standards set forth in *Suburban Medical Center v. Olathe Community Hospital.*[43] Some of the appellants cited to other cases supporting similar arguments. In deciding the issue of notice, however, the court relied most heavily on the KCC's own rules for rate cases and the requirements for notice in KAPA proceedings, K.S.A. 77-518, to analyze whether notice was adequate, and found that it was. *Id.,* at 180-83. The court did not rely on the holding in the *Suburban Medical Center* case (a pre-KAPA appeal), which set forth a standard for determining whether a proceeding is quasi-judicial or quasi-legislative for purposes of determining whether certain due process requirements attached to the proceeding. The standard of the *Suburban Medical Center* is only mentioned in the court's recitation of the appellants' claims, and was not cited by the court in determining the issue. Nowhere does the opinion explicitly state that the ratemaking function of the KCC is quasi-judicial. Granted, the court does not point out the flaws in the appellants' reliance on the common-law requirements for notice set out in the *Suburban Medical Center* case, even though the court clearly relied on the KAPA provision and the KCC's own rules to determine that notice was adequate. It's fair to say that the *Farmland I* court *assumed* that a formal proceeding under KAPA is quasi-judicial, but the opinion as a whole makes no positive determination that because a quasi-legislative ratemaking proceeding includes a formal KAPA hearing that the KCC is exercising a quasi-judicial function in setting rates.

[43] *Suburban Medical Center v. Olathe Community Hospital*, 226 Kan. 320, 597 P.2d 654 (1979).

81. In the second *Farmland* case[44] (*Farmland II*), the first case had been remanded back to the Commission for rehearing on the rate design proposal. Again, the case returned to the Court of Appeals for review of several issues—the relevant issue here being whether an appellant had been denied its due process right to cross-examine witnesses. Oddly, although the court draws its description of the KCC's role from one of the major Kansas cases establishing that the KCC exercises a quasi-legislative function when setting rates[45], the Syllabus includes the following:

> The full rights of due process present in a court of law do not automatically attach to a quasi-judicial hearing. Nevertheless, the right to the cross-examination of witnesses in a quasi-judicial or adjudicatory proceeding is one of fundamental importance and is generally, if not universally, recognized as an important requirement of due process.

Id., at 849, Syl. ¶3. The court also cited to the *Mobil Exploration*[46] case discussed earlier in these comments, which was the Hugoton Field proration case that was clearly a quasi-judicial proceeding. However, much like in *Farmland I,* having mentioned the standard in *Mobil Exploration,* the court in its analysis relied mostly on statutes and other cases to make its determination that the appellant had not been deprived of due process. *Id.,* at 858-59. The court, again, can be characterized as having *assumed* the KAPA hearing that was a part of the rate proceeding was a quasi-judicial proceeding, but the opinion never states that ratemaking by the KCC is a quasi-judicial *function*. Even giving the widest deference to the Commission's reliance on the *Farmland* opinions (penned by the same three-judge panel in both appeals), the most that can be said is that this pair of opinions is unique; they stand absolutely alone in Kansas

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[44] *Farmland Industries, Inc., v. State Corporation Comm'n*, 25 Kan. App.2d 849, 971 P.2d 1213 (1999), aka *Farmland II*.
[45] *Kansas Gas and Elec. Co. v. State Corp. Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986)
[46] 258 Kan. 796 (1995).

jurisprudence in their assumption that ratemaking proceedings at the Commission are quasi-judicial. Virtually every other opinion that has directly addressed the issue has concluded that ratemaking is a legislative function, and that KCC ratemaking proceedings are legislative as well. The *Farmland* opinions are in opposition to the collective wisdom of the vast majority of courts in the land.

V. CONCLUSION

82. CURB has presented above a comprehensive analysis of the most relevant case law and learned opinions on whether ratemaking is a legislative function. The weight of authority agrees conclusively that ratemaking is a legislative function. As to the question of whether the legislature's provision of statutory due process protections to participants in ratemaking proceedings and imposition of "court-like" procedures on those proceedings transform the KCC's legislative function of ratemaking into a judicial function, the answer is conclusively "No": authorities agree that statutory laws such as KAPA and KOMA protect the rights of the participants and the public, and limit the exercise of the agency's functions rather than transforming them into quasi-judicial functions. The Commission in ratemaking proceedings is exercising exclusively a quasi-legislative function, thus its deliberations and decisions are subject to KOMA's requirement that these functions must be exercised in an open meeting. The proposed procedures presented in the Commission's *Amended Order*, if put into practice, would violate KOMA.

83. In these comments, CURB has provided a useful framework for analysis of the Commission's functions that is consistent with the opinions in the cases cited by CURB as well

as the cases cited by the Commission. CURB has attempted to reconcile the contradictions in some of the cases, and believes it has succeeded to the extent possible. While CURB acknowledges that the *Farmland* cases are seemingly contrary to CURB's conclusions, close scrutiny reveals that the cases are at best poorly-reasoned and ambiguous in their conclusions concerning the quasi-judicial nature of rate case proceedings. CURB does not believe that their rulings are conclusive, and notes that they are countered by the vast majority of well-reasoned cases that reach the conclusion that a change of procedure does not change the nature of the function exercised by an agency.

Kansas has a clear and strong policy in favor of transparency and open government. The procedures proposed for adoption by the Commission will, when put into practice, result in further violations of the Kansas Open Meeting Act and violate the strong Kansas policy of transparency and open government. Therefore, CURB strongly recommends that the Commission revisit the proposed procedures in light of the analyses presented herein and develop procedures that will enable it to exercise its various functions consistent with the requirements of the Kansas Open Meetings Act.

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 2nd day of January, 2014.

DELLA J. SMITH
Notary Public - State of Kansas
My Appt. Expires January 26, 2017

Notary Public

My Commission expires: 1/26/2017

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 2nd day of January, 2014 to the following parties:

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