



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 32

The Honorable Neal D. Whitaker
State Representative, Ninety-First District
Room 112-S, Statehouse
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Open Meetings Act -- Kansas Corporation Commission;
Quasi-judicial Deliberations

Public Utilities -- Powers of State Corporation
Commission -- Open Meetings Act; Quasi-judicial
Deliberations

Synopsis: The Kansas Corporation Commission is not exempt
from the Kansas Open Meetings Act during delibera-
tions in rate-making cases since such rate-making
functions are legislative in nature rather than
quasi-judicial. Cited herein: K.S.A. 1982 Supp.
66-101, K.S.A. 66-107, 66-110, 66-113, 66-117,
66-118a, 75-4317, K.S.A. 1982 Supp. 75-4318.

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Dear Representative Whitaker:

You request the opinion of this office regarding application
of the Kansas Open Meetings Act (Act or KOMA), K.S.A. 75-4317
et seq., to certain meetings of the Kansas Corporation Commis-
sion (Commission or KCC). Specifically, you desire to know
if the Commission performs a quasi-judicial function within
the meaning of the KOMA in "setting utility rates." Your
inquiry concerns the exemption in the Act for "any adminis-
trative body that is authorized by law to exercise quasi-
judicial functions" when "deliberating matters relating to a
decision involving such quasi-judicial functions." See K.S.A.
1982 Supp. 75-4318.

Courts of other states have addressed the same issue under a variety of open meetings laws. The Utah Supreme Court implied an exception to that state's open and public meetings statute for deliberations of the public utilities commission in quasi-judicial proceedings. Common Cause of Utah v. Utah Public Service Commission, 598 P.2d 1312 (Utah 1979). The Indiana Court of Appeals held that the deliberations of the state Public Service Commission concerning rate-making functions were not judicial in nature and therefore were not exempt from the Indiana Open Door Law. Citizens Action, Etc., v. Public Service, Etc., 425 N.E.2d 178 (Ind.App. 1981). The Florida Supreme Court ruled that the Florida Public Service Commission was not exempt from that state's "Sunshine Law" even though the rate-making functions could be characterized as quasi-judicial. Occidental Chemical Co., v. Mayo, 351 So.2d 336 (Fla. 1977). See also, Canney v. Board of Public Instr., 278 So.2d 260 (Fla. 1973). Naturally, such differences of opinion arise from the unique language of each state statute, the judicial characterizations of the rate-making function as judicial, administrative, quasi-judicial or legislative and the public policy considerations identified by the courts. Noting that some public utility regulatory bodies are subject to public access during rate-making deliberations while others are not, we turn to the Kansas law and cases.

The Kansas Open Meetings Act is entitled to a liberal construction to effectuate its purpose of providing public access to the conduct of government business. In State ex rel., v. Palmgren, 231 Kan. 524, 531 (1982), the Kansas Supreme Court held that "the KOMA is remedial in nature and therefore subject to broad construction in order to carry out the stated legislative intent." This office has followed this rule of construction in applying the "quasi-judicial" exception to the open meetings law. In Kansas Attorney General Opinion No. 79-225, we held that a board of zoning appeals was exempt from the open meetings mandate only during discussions of quasi-judicial matters and must take any binding action in a public meeting.

Three years later, in Kansas Attorney General Opinion No. 82-266, we opined that the Hazardous Waste Disposal Facility Approval Board did not perform a quasi-judicial function in approving recommended facility permits for the Department of Health and Environment. For the sake of brevity we incorporate by reference the cases and reasoning of this latter opinion where we extensively analyzed the term "quasi-judicial." We note specifically, however, those two most frequently cited cases which put forth the rules for determining a quasi-judicial function as follows:

"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." Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169 177 (1970).

In Thompson v. Amis, 208 Kan. 658, 663 (1922), Chief Justice Fatzer added the following:

"It may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature."

We now apply the term "quasi-judicial," as used in the KOMA and understood by the Kansas courts, to the rate-making functions of the Kansas Corporation Commission, since the KOMA clearly applies to the Commission. See Southwestern Bell Tel. Co. v. Kansas Corporation Commission, 6 Kan.App.2d 444, 459 (1981).

The Public Utilities Act, K.S.A. 66-101 et seq., grants the KCC

"full power, authority, and jurisdiction to supervise and control the public utilities . . . and all common carriers, as hereinafter defined, and is empowered to do all things necessary and convenient for the exercise of such power, authority, and jurisdiction."

While K.S.A. 66-107 requires public utilities to furnish efficient service at reasonable rates, it is the duty of the KCC

"to see that the public interest is served by the rendering of sufficient, nondiscriminatory service at prices that will be fair, equitable and reasonable to customers, yet allow a rate of return on investment that will enable the public utility or common carrier to render continuing efficient service." Adam, Practice and Procedure Before the State Corporation Commission, 41 J.B.A.K. 199 (1972).

The KCC, either upon complaint or upon its own initiative, investigates the rates and service of public utilities and common carriers. K.S.A. 66-110. Many of the proceedings involve applications for general rate increases, pursuant to K.S.A. 66-117. If, after investigation and hearing a rate is found to be unjust, unreasonable or unfair, the KCC is authorized to fix and establish a just and reasonable rate. K.S.A. 66-113. K.S.A. 66-118a provides for judicial review of KCC decisions, in certain cases.

The KCC is clearly not a court or judicial body. But the KCC does conduct administrative proceedings which require a hearing and a determination of questions of law and fact. On occasion Kansas courts have found similar administrative proceedings to be quasi-judicial in nature. In Clear Water Truck Co., Inc. v. M. Bruenger & Co., Inc., 214 Kan. 139, 519 P.2d 682 (1974), a trucking corporation brought action to recover damages resulting from publication of allegedly libelous statements made in a proceeding before the Interstate Commerce Commission (ICC). In finding that the proceedings before the ICC were quasi-judicial in nature, the court relying upon the Thompson v. Amis, supra, rationale, stated:

"[Q]uasi-judicial is a term applied to administrative boards . . . empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature." Id. at 142.

A similar standard appeared in an earlier Kansas case involving the KCC. In Union Pacific Railroad Co., v. State Commission Corporation, 165 Kan. 368, 194 P.2d 939 (1948), the court stated: "[I]n the exercise of its powers to govern rates and service of public utility companies . . . [the KCC's] action with respect thereto is therefore judicial rather than administrative in nature."

However, the Kansas Supreme Court and the Court of Appeals have more often taken a different view. In a long line of decisions the Supreme Court has held that the function of rate-making is legislative and not judicial. See State ex rel., v. Flannelly, 96 Kan. 372, 382 (1915) ("courts have repeatedly declared that the courts can not fix rates, and that fixing rates is a legislative function"); Aetna Ins. Co. v. Travis, 130 Kan. 2, 4 (1930) ("[r]ate making is a legislative function, and this court has consistently and scrupulously refrained from every appearance of exercising rate-making 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"); 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"); and Cities Service Gas Co. v. State Corporation Commission, 201 Kan. 223, 232, 233 (1968) where the Court concluded:

"In the constitutional division of powers, the regulation of public utilities is legislative in nature. [Citations omitted.] To carry out that function, the Legislature enacted the Public Utility Act. The Act is comprehensive in scope. It created the commission and granted it full and exclusive authority and jurisdiction to supervise, control and regulate all public utilities and common carriers doing business in this state. When acting in the exercise of its delegated powers, the commission is not a quasi-judicial body."

The Kansas Court of Appeals recently addressed the issue in Midwest Gas Users Ass'n, v. Kansas Corporation Commission, 5 Kan.App.2d 654 (1981).

In that case, the Gas Service Company had requested permission of the KCC for a retail rate increase. Midwest Gas Users Association objected to the increase granted by the Commission and took issue with the deference previously given by the court to the Commission on matters of policy when reviewing rate structures. *Id.* at 658. In defining a limited scope of judicial review, the court found that the Commission performs

legislative functions in setting utility rates. Because the Court's reasoning is nearly dispositive of the issues herein, the Court's observations are quoted at length below:

"[T]he 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.

"Midwest and Vulcan take umbrage with the decision in Sekan Electric Coop. Ass'n v. Kansas Corporation Commission, 4 Kan. App.2d 477, 609 P.2d 188 (1980). There the court affirmed a rate structure which flattened the utility's existing declining block rate structure and established a minimum charge augmented by a flat kilowatt hour charge for all electricity used. The Commission did so even though there had been no independent testimony in support of the rate structure as ordered. In affirming, the court stated:

"'The rate design adopted here accords with the Commission's apparent policy of "flattening" schedules of rates to be charged for energy. See Midwest Gas Users Ass'n v. Kansas Corporation Commission, 3 Kan.App.2d at 389. This kind of policy decision is legislative in nature, to be exercised by the Commission under legislative mandate. It demands utmost deference from the judicial branch.' 4 Kan. App.2d at 483." 5 Kan.App. at 659, 660.

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 rate-making and Commission decisions certainly rest, in part, on past facts, the KCC is not purely a fact finding body. Rate-making 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

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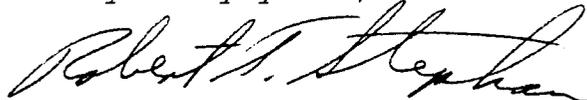
courts have or would be charged to perform in the first instance. In short, setting utility rates by the KCC is not a quasi-judicial function. And more specifically, it is not a quasi-judicial function for purposes of the Kansas Open Meetings Act.

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.

Very truly yours,



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RTS:BJS:hle