

Approved: Carl Holmes  
Date 1-26-93

## MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson Carl Holmes at 3:30 p.m. on January 14, 1993 in Room 526-S of the Capitol.

All members were present except: Representative Lloyd, excused

Committee staff present: Raney Gilliland, Legislative Research Department  
Dennis Hodgins, Legislative Research Department  
Cindy Garland, Committee Secretary

Conferees appearing before the committee: David Pope, Kansas State Board of Agriculture,  
Division of Water Resources  
Steve Hurst, Kansas Water Office  
Darrell Montei, Department of Wildlife and Parks  
Judith McConnell, Kansas Corporation Commission

Others attending: See attached list

Chairperson Holmes welcomed all who were present and announced that on Wednesday, January 27, there would be a tour given of Wolf Creek Nuclear Generating Station. The bus would be leaving when Session is over at approximately 11:30 a.m. and returning around 5:00 p.m.

Chairperson Holmes called on David Pope of the Division of Water Resources to present an overview of division responsibilities.

David Pope, Chief Engineer, Division of Water Resources, briefly explained the composition and primary duties and responsibilities of the Division of Water Resources. The responsibilities can be divided into three primary areas: I) Water Structures, II) Interstate Water Matters and III) Water Rights. The Division of Water Resources regulates the construction of dams, levees and stream channels modifications from structural, public safety and environmental perspectives. He stated that the Chief Engineer serves as Kansas' representative on four interstate river compacts and plays a significant role in protecting those and other interstate stream flows. He further stated that the Division of Water Resources is the primary agency responsible for regulating water use from a quantity or availability standpoint. (Attachment 1)

Steven Hurst, Director, Kansas Water Office appeared before the committee to provide information about the Kansas Water Plan and the State Water Planning Process. Mr. Hurst stated the Kansas Water Office is the state's water resources planning and coordination agency, and by statute is charged with formulation of a state water plan for the management, conservation and development of the water resources of the state. One of the key functions of the Kansas water planning process is the coordination of the activities of state water-related agencies and discussion of issues in a non-regulatory setting. In 1983, the Legislature amended the Kansas Water Resources Planning Act and assured that the water planning process in Kansas was established on a continuous basis. Mr. Hurst continued with information about the Kansas Water Plan stating that it is a dynamic process that is updated as new needs are identified and deemed implemented when current needs are met. (Attachment 2)

Darrell Montei, Department of Wildlife and Parks, distributed handouts and presented an overview of the Department of Wildlife and Parks. In 1987 The Department of Wildlife and Parks was created through the merger of the former Kansas Park and Resources Authority and the Kansas Fish and Game Commission. He stated that the department is made up of the Secretary, appointed by the Governor, an Assistant Secretary,

## CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 526-S Statehouse, at 3:30 p.m. on January 14, 1993.

appointed by the Secretary and a seven member Commission, appointed by the Governor. The commission has the authority by law to approve, amend and approve, or reject regulations. Operations is organized under basically five divisions: 1) Law Enforcement, 2) Fish and Wildlife, 3) Parks and Public Lands, 4) Administrative Services, 5) Education and Public Affairs. The department operates under a comprehensive planning system involving three primary components: strategic planning, operational planning, and a detailed cost accounting process. Mr. Montei stated that funding for the department is through sale of licenses, permits, stamps, boat registrations, a restitution fund, income tax check-off, and receipts from production on department lands. Federal and State funding is also received. (Attachment 3).

Judith McConnell, Kansas Corporation Commission, briefed the Committee on the Kansas Corporation Commission and introduced the members who were present at today's meeting. Ms. McConnell stated that the Commission's responsibilities were very broad, very diverse and very complex. The agency is a regulatory agency and combines legislative, judicial and executive powers. The services that are regulated by the KCC include electric, gas, telephone, water and transportation companies. Regulatory agencies are vested with authority to regulate the economic discretion of individuals and businesses where it has been determined that the enterprise affects the public interest. The KCC is considered an "independent regulatory commission." The Commission is not protected in the sense that courts are. The Legislature may rescind any or all of its delegated authority, cut off appropriations or reorganize the agency. The Commission is accountable to the courts in that it must comply with the mandates of the law and work within its statutory authority. Ms. McConnell also spoke of the various divisions within the Commission including the Conservation Division, Utilities Division, Transportation Division and Administrative and Legal Division. (Attachment 4)

After the presentations were presented Chairperson Holmes opened the floor for questions to the representative of each agency.

The meeting adjourned at 5:00 p.m.

The next meeting is scheduled for January 19, 1993.

# GUEST LIST

COMMITTEE: ENERGY & NATURAL RESOURCES

DATE: Jan 14/1993

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bob Totton	Topeka	Ks Contractors Assn
Alan Steppat	Topeka	Pete McGill & Assoc.
Bill Anderson	Mission	Water Dist #1 of Jo Co
Tom Wfulatan	TOPEKA	Ks Motor Carriers Assn
BLAKE WATERS	LIDERS	PAWA TV
Ludwig	Topeka	WESTERN RESOURCES
Theresa Shively	Topeka	KS LEGAL SERVICES
ED SCHAUB	"	WESTERN RESOURCES
Nancy Heinz	Topeka	K.C.C.
Jim McManis	Kiowa	Baker County
Bill Fuller	Manhattan	Kansas Farm Bureau
STEVE KEANEY	TOPEKA	CONSTAL
Alan Holmer	Topeka	DOB
<del>Patricia L. Smith</del>	<del>Topeka</del>	<del>Hill, Ebert &amp; Tolan</del>
TOM DAY	TOPEKA	KCC
Robert A. Fox	Topeka	KCC
JACK TIERCE	Topeka	KCC
Bill Bryson	Topeka	KCC
Jack Alexander	Topeka	K.C.C.
James McConnell	Topeka	KCC
DARRELL MONTEI	PRATT	KDWP
Steve Hurst	Topeka	KLWO
CR Ruff	"	Ks Petro Council
Leland & Rolf	Topeka	DWR-KSBA
Edward R. Moses	✓	Ks Ag Prod Assn

## GUEST LIST

COMMITTEE: ENERGY & NATURAL RESOURCES

DATE: 1-14-93

[illegible]

KANSAS STATE BOARD OF AGRICULTURE  
DIVISION OF WATER RESOURCES

David L. Pope, P.E.  
Chief Engineer - Director

OVERVIEW OF  
DIVISION RESPONSIBILITIES

Presented to the House Energy  
and Natural Resources Committee

January 14, 1993

*House En NR 1-14-93*  
*Attachment 1*

Chairman Holmes, and members of the committee, thank you for this opportunity to appear and explain the role of the Division of Water Resources.

The Division of Water Resources is a division of the Kansas State Board of Agriculture. The Chief Engineer of the Division of Water Resources is responsible for administering 28 state laws including 4 interstate river compacts, and several other assigned programs, such as the National Flood Insurance Program. All of these duties relate to the management, distribution and regulation of the water resources of the State of Kansas.

The Division of Water Resources is not to be confused with the Kansas Water Office, which primarily does water planning; the Kansas Water Authority, which develops water policy; or Kansas Department of Health and Environment, whose water related functions deal primarily with the safety of public water supplies, preventing pollution and other water quality issues.

The Division of Water Resources has 93.5 permanent FTEs, 3 special project workers and a few temporary and intermittent employees. The Division of Water Resources headquarters is located at 901 S. Kansas Avenue, a block east of the capitol building. The Division also has four field offices located in: South Topeka, Stafford, Stockton, and Garden City, with a regional office in Chanute.

The Division's responsibilities can be divided into three primary areas: I) Water Structures, II) Interstate Water Matters and III) Water Rights.

#### I. WATER STRUCTURES

First, in the area of Water Structures, the Division of Water Resources' jurisdiction and authority is provided primarily by two acts. The first is the Stream Obstruction Act, K.S.A. 82a-301 et seq., which requires anyone desiring to construct: a dam, an obstruction in a stream or to change the course, cross-section, or current of any stream to obtain a permit from the Chief Engineer. While the Act originally did not grant enforcement authority to the Chief Engineer, the Act was amended in 1978 to provide for the exclusive regulation of the construction, operation and maintenance of dams or other water obstructions to the extent required for the protection of public safety under the jurisdiction of the Division of Water Resources of the State Board of Agriculture and the Chief Engineer.

What this means is that anyone desiring to build a dam which impounds more than 30 acre feet of water, as measured at the top of the dam, or who desires to significantly alter a stream channel by placing an obstruction in it or relocating it, must receive the prior permit of the Chief Engineer. The Division of Water

Resources reviews and approves the plans for these projects and inspects the construction of these projects primarily to ensure public safety, protect the property interests of others who might be affected by the projects and assure that the project is environmentally sound.

For instance, the Division of Water Resources reviews plans for dams and field inspects certain aspects of the construction of dams to ensure that they are properly designed and constructed so that they will not fail and pose a hazard to the public safety. Proposed modifications to stream channels are evaluated to determine whether the project would unreasonably increase the velocity of the stream channel flow or otherwise cause undue impact on upstream or downstream neighbors.

The Division of Water Resources also regulates the construction of levees along streams in the State of Kansas. This is done under the authority of K.S.A. 24-126. Any plans for proposed levees are reviewed by the Division of Water Resources to ensure that the levees: will be properly constructed, meet statutory and regulatory guidelines, will not impose unreasonable effects on other landowners and that the public safety is protected.

For construction of dams, levees and stream alteration projects, the Division of Water Resources also serves as the coordinator for the Environmental Coordination Act, K.S.A. 82a-

325 et seq., which allows key state agencies to review all proposed projects and submit comments to help eliminate or minimize significant adverse impacts on the environment. The Division then reviews these comments from state agencies and, if necessary, conditions the permits to ensure that the project is environmentally sound.

## II. INTERSTATE WATER COMPACTS

The second major area of the Division of Water Resources' activity relates to interstate water compacts and other interstate water activities.

By statute, the Chief Engineer serves as Kansas' representative on four interstate river compacts pertaining to the apportionment of waters and rivers which flow through Kansas and another state. These compacts are as follows: the Republican River Compact (Colorado, Kansas and Nebraska), K.S.A. 82a-518; the Arkansas River Compact (Kansas and Colorado), K.S.A. 82a-520; the Arkansas River Compact (Kansas and Oklahoma), K.S.A. 82a-528; and the Big Blue River Compact (Kansas and Nebraska), K.S.A. 82a-529.

The Chief Engineer also has been appointed by the Governor as the State of Kansas' representative to the Missouri River Basin Association, which consists of eight of the ten states which are tributary to the Missouri River and various Indian tribes and

federal agencies. The Missouri River is the largest non-compacted river in the United States. There are many issues being raised in the basin. Currently, the most important issue is the management of the large mainstem Missouri River Basin reservoirs for competing interests such as recreation, hydro-power, water supply and navigation. Other issues, such as the quantification of Indian water rights and the protection of endangered species are also being discussed.

The duties relating to the interstate compacts range from routine meetings and administrative duties to extensive involvement in the Kansas v. Colorado litigation in the United States Supreme Court. The Division of Water Resources' staff provide considerable technical and legal support to the case, including input of local knowledge and testimony. After 140 days of trial over a two and a half year period, the trial phase (the presentation of evidence) has been completed and all parties are in the process of preparing briefs, which are expected to be completed by May 15 of this year. After that time, the Special Master, who is the judge appointed by the United States Supreme Court to actually hear the case, will present his recommendations to the United States Supreme Court, which will ultimately decide the matter. A decision in this phase of the trial, the liability phase, will hopefully be made sometime in the spring of 1994.

Another compact which has had received attention in recent years is the Republican River Compact. Issues range from the operation of Harlan County Reservoir in Nebraska to use of water by Nebraska in excess of its compact allocations, primarily due to post compact well pumping.

### III. WATER RIGHTS

The third major area of involvement of the Division of Water Resources is in the area of water rights administration. Since January 1, 1978, it has been illegal in the State of Kansas for anyone, other than a domestic user and certain other minor exceptions, to appropriate water without a permit. This means that anyone using water in the State of Kansas for municipal, industrial, irrigation or other non-domestic purposes, must apply for and obtain a permit to use water for that purpose whether it is groundwater or surface water, or on public or private land. To use water without a water right or permit is a Class C misdemeanor.

The Division of Water Resources has determined over 2,200 vested rights to the use of water. Over 40,900 applications to appropriate water have been filed since June 28, 1945, the date the Kansas Water Appropriation Act became effective. The Kansas Water Appropriation Act is the basic legal framework under which the Division of Water Resources processes, approves, certifies and regulates the use of water within the State of Kansas.

In addition to the maintenance of the mainframe computer system which keeps track of the over 42,000 water right files in the State of Kansas, the Division of Water Resources is involved with many other activities concerning these water rights. These include: (1) administration of water rights during times of shortage to determine which water users have the right to use that water, (2) protection of minimum desirable streamflows on the 23 streams and rivers designated by the Legislature, and (3) working in partnership with the groundwater management districts by reviewing revised management plans, adoption of regulations or creation of intensive groundwater use control areas.

Beginning in 1988, the legislature passed K.S.A. 82a-732, which made the owner of a water right accountable for filing an annual water use report to the Chief Engineer not later than March 1 of each calendar year. Any person failing to file such a complete and accurate report by March 1 is subject to a civil penalty. Any person who files a report knowing it contains false information is guilty of a Class C misdemeanor. In 1988, the Division of Water Resources significantly increased its enforcement of the water use reporting requirement. This effort has paid off because for the last several years compliance with filing water use reports has exceeded 99%. Better water use information was needed by various agencies for research, planning and management.

At the present time, it is estimated that large portions of the State of Kansas are considered to be fully appropriated. In other words, no new permits to appropriate water are being issued in these areas. If someone desires to appropriate water in those areas, the only way a water right can be acquired is by obtaining one from someone who already has one. This may be done by gift, inheritance, purchase, lease or condemnation. Whenever a water right is acquired from another owner, an approval from the Division of Water Resources must be obtained if the new owner desires to change the authorized place of use, the authorized point of diversion, or the type of beneficial use. The Division of Water Resources is seeing a significant increase in the filing of change applications. In areas where new permits to appropriate water are still available, they are analyzed on a safe yield basis so that the water supply can be sustained indefinitely.

The Chief Engineer also serves as the chairman of the Water Transfer Hearing Panel which plays an important role in determining whether water transfers should take place in the State of Kansas. Currently, a "water transfer" is defined as the diversion and transportation of 1,000 acre feet of water or more per year more than 10 miles. I understand that yesterday this committee introduced a bill which proposes various changes to the Water Transfer Act.

## SUMMARY

The Division of Water Resources regulates the construction of dams, levees and stream channels modifications from structural, public safety and environmental perspectives.

The Chief Engineer serves as Kansas' representative on four interstate river compacts and plays a significant role in protecting those and other interstate stream flows.

Finally, the Division of Water Resources is the primary agency responsible for regulating water use from a quantity or availability standpoint.

In the 14 years I have been with the Division, and in the 10 years I have been Chief Engineer, I have seen the Division's role shift from one of development to one of conservation and management through vigorous enforcement. The complexity of review of all types of applications has increased dramatically, along with the workload. The Division of Water Resources has become more efficient and taken advantage of advances in technology to do the best job it can with the resources it has available. With the competition for the finite water supply in Kansas continuing to increase, I predict the difficulty and complexity of our work to continue to increase dramatically. The availability of water

molded the settlement of this State, and its continued availability in quantity and quality will most definitely shape its future too.

**Testimony of  
Stephen A. Hurst  
Director, Kansas Water Office  
Before the  
House Energy and Natural Resources Committee**

**January 14, 1993**

Thank you, Mr. Chairman, I am Stephen A. Hurst, Director of the Kansas Water Office. I also serve as Secretary for the Kansas Water Authority.

I would like to thank the committee for inviting me here today to visit with you briefly about the *Kansas Water Plan* and the State Water Planning Process. As most of you know, the Kansas Water Office is the state's water resources planning and coordination agency, statutorily charged with formulation on a continuing basis of a state water plan for the management, conservation and development of the water resources of the state. We also act as coordinators and facilitators among the state water-related agencies. The *Kansas Water Plan* and water planning process is considered a national leader. It has been used as a model by several states including Montana, Oregon, Michigan, Utah and New Mexico.

The Kansas Water Office and the Kansas Water Authority, our board, pride ourselves in our grassroots, public input planning process. We have formed 12 basin advisory committees, one in each of the 12 river drainage basins of the state. We use these 12 basins as our geographic planning areas and the 132 members of the basin advisory committees, with 11 members in each basin, as our eyes and ears across the state giving us input as to basin water issues that need addressing.

Over the past 10 years, the Kansas Water Office and the basin advisory committees have identified many issues for inclusion in the State Water Plan. A lot of recommendations have been made in the plan as to legislative or administrative actions needed to address these issues,

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Attachment 2*

and many State Water Plan recommendations have been implemented resulting in new programs, and funding to address serious water issues across the state. We are not perfect, however, in that many issues that have been identified through the planning process and developed into State Water Plan recommendations remain unimplemented. One of my main goals as Director of the Kansas Water Office is to develop as effective an implementation process as we have a planning process.

To accomplish this, I have established, with the approval of the Kansas Water Authority, area coordination teams across the state composed of the top field office staffs of the various water-related agencies. These area coordination teams enhance the planning and implementation process by adding professional expertise in the identification of issues and available state, local and federal programs to address the issues. This enhances the ability of the basin advisory committees, the Kansas Water Office and the Kansas Water Authority to prioritize issues for implementation and will result in our providing better advice to the Governor and to you in the Legislature in the Kansas Water Authority's annual report.

One of the key functions of the Kansas water planning process is the coordination of the activities of state water-related agencies and discussion of issues in a nonregulatory setting. Thus, the Kansas Water Office and Kansas Water Authority can maintain credibility across a broad political spectrum and can work equally well with cities, agricultural groups, environmental groups, contractors and other entities because the water issues impacting these groups and discussions of policy changes needed to address these issues are discussed in a roundtable, multiagency forum that is nonregulatory. I believe that there is great strength in the diversity of the water-related agencies in this state. Their discussions of water issues in the forum of the Kansas Water Authority where these agencies are ex officio, nonvoting members, leads to a

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healthy debate of statewide water issues and policies from different perspectives unique to the interests of the different water-related agencies. If any of you have attended a Kansas Water Authority meeting, you know that none of the ex officio members or the regular voting members of the Kansas Water Authority are shy in going around the table and providing their unique perspective on an issue up for discussion.

The Kansas Water Office and the Kansas Water Authority are proud of our ten-year track record of success in developing this grassroots public input process for state water planning. In addition to the input from the 12 basin advisory committees and the five area coordination teams, the Kansas Water Authority conducts 12 public meetings a year, one in each basin, and two public hearings for input on the State Water Plan. This process results in what I believe is the most open public input and public participation process of any state agency.

In 1983, the Legislature amended the Kansas Water Resources Planning Act and assured that the water planning process in Kansas was established on a continuous basis. Once plans are formulated, programs are implemented and operated for a period of time and ultimately the outcomes are evaluated. Information from operating experiences are used to modify and improve the plan. Consequently, planning, by its nature, must be a continuous process constantly adapting to new conditions and information. A plan set in concrete is an obstacle to effective management instead of a useful tool. I believe that the state water planning process comes the closest to the "total quality management" concept, of any planning process in state government, in that we track expenditures from the State Water Plan Fund to make sure those expenditures are applied to the specific, identified state water plan program recommended in the *Annual Implementation Plan* and follow-up on how those programs are doing in addressing the issues identified in the State Water Plan.

The Kansas Water Office and Kansas Water Authority are also very proud of our accomplishments in working with the Legislature in establishing new programs to address critical water quantity and quality issues such as:

- The Local Environmental Protection Program that provides grants to county health departments to develop sanitary codes and non-point source pollution plans.
- Water use conservation provisions that encourage municipal, industrial and agricultural water use efficiency.
- The establishment of a Non-Point Source Pollution Fund to aid local conservation districts in developing non-point source pollution plans as a part of their annual management plans.
- The establishment of the Assurance District Act which allows for state management of releases from federal reservoirs in which we own storage during low flow periods for the benefit of water right holders downstream, to name just a few.

The *Kansas Water Plan* is a dynamic process that is updated as new needs are identified and deemed implemented when current needs are met. The establishment of the permanent dedicated State Water Plan Fund in 1989 now allows Kansas to address needs in a timely and effective manner. Water is the most critical resource for quality of life and for economic viability in Kansas. I believe that the ten-year track record of success of the state water planning process is due in good part to a combination of the grassroots public input process, and the creative solutions developed in the forum of the Kansas Water Authority by the voting members and by the diverse input of the various water-related agencies, each lending to the discussions their unique perspective on key issues from their particular area of expertise.

Thank you for giving me the opportunity to visit with you here today. I would be pleased to stand for questions.

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## DEPARTMENT OF WILDLIFE AND PARKS

### AGENCY OVERVIEW

The Department of Wildlife and Parks was created in 1987 through the merger of the former Kansas Park and Resources Authority and the Kansas Fish and Game Commission. The Secretary, appointed by the Governor, is the department head and maintains an office in Topeka. An Assistant Secretary, appointed by the Secretary, maintains an operations office in Pratt, Kansas. A seven member Commission, appointed by the Governor, has the authority by law to approve, amend and approve, or reject regulations. The Commission also has an advisory role to the Secretary and to the Governor in other Department matters.

Including classified and unclassified positions, the agency complement of personnel is 410 positions. The majority of these positions are in the operations portion of the department and scattered throughout the state depending on facility locations and type of work involved. Operations is basically organized under the following five divisions:

- Law Enforcement
- Fish and Wildlife
- Parks and Public Lands
- Administrative Services
- Education and Public Affairs

Each Division is headed by a Director with staff support in the Pratt Operational Office. The state is divided into five regions for the law enforcement, fish and wildlife, and parks and public lands divisions. Field operations are conducted within that regional concept. Regional administration for those three divisions is performed under the direction of a regional supervisor, one for each division.

The department operates under a comprehensive planning system involving three primary components: strategic planning, operational planning, and a detailed cost accounting process. The strategic plan is a long range document developed with public involvement and establishes general direction for the department.

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*Attachment 3*

The operational plan is developed annually and is made up of projects which encompass all activities of the department. The annual budget request of the department is developed through compilation of those projects.

Funding for the department is through sale of licenses, permits, stamps, boat registrations, and specific items (merchandise); a restitution fund, income tax checkoff, and receipts from production on department lands. Federal program funds are also involved and include: P.R. and D.J., land and water conservation, federal boating and clean lakes. State funding primarily through EDIF, water plan, road development, and the general fund is received.

The department is primarily a fee fund agency, but it is becoming increasingly evident that fee revenue cannot keep pace with increasing demands. The fee base is not increasing and in some cases is actually decreasing. Constantly raising the fee amounts must occur, but in so doing, buyers are lost and sometimes not recovered. A lesser number of people are also becoming involved in certain outdoor recreation activities for many reasons and there is a growing number who are involved, but not as paying individuals. The entire funding issue as it applies to natural resource management and to outdoor recreation presents a current challenge and will become increasingly so in the near future.

Briefing to  
HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE  
January 14, 1993

**KANSAS CORPORATION COMMISSION**

The Kansas Corporation Commission (KCC) is, like most regulatory agencies, something of a hybrid in state government. Because they combine legislative, judicial and executive powers, promulgate rules and regulations having the force of law, "adapt" and sometimes ignore the rules of evidence, administrative agencies such as the KCC have been a traditional source of frustration to practitioners, academics, legislators and judges; they developed as a governmental reaction, a countervailing force to the large scale economic enterprise that rapid industrialization brought.

The administrative process emerged primarily because the logical governmental alternatives, the legislative and judicial processes, had historically proven unable or unwilling to provide the desired degree of regulation on those private businesses infected with a public interest. Legislative bodies soon discovered that they are at their best in determining the broad outlines and general direction of major policy. Legislatures are singularly ill-suited for handling masses of detail or for sifting the often conflicting ideas presented by scientists or other professional advisors. Gradually, legislatures developed the custom of legislating only the main outlines of programs, and leaving to administrative agencies the task of working out subsidiary policies. This system facilitated not merely the promulgation of law through rules and regulations but also the correlation of rule making with such other necessary activities as adjudication, investigating, prosecuting and supervising.

Neither was the judicial branch particularly well suited to handle the type of business regulation an industrial society required. Courts clearly could not investigate, supervise, fix rates, grant or deny licenses or perform any of the myriad regulatory tasks without an organization of accountants, engineers, rate specialists, economists and assorted other disciplines.

The administrative agencies did not emerge without serious opposition, much of which still echoes today. To begin with, the fundamental structure of the agencies would seem at first glance to violate one of the most basic principles of American government. Since the agencies are often investigator, prosecutor, judge, jury and executioner, the hallowed notion of separation of powers seems consistently breached. The agencies often act on evidence that has not been formally presented, relying frequently on extra record specialized knowledge; the rules of evidence are not consistently followed. Finally, some observers have long been concerned at the extent of the discretionary power exercised by administrative agencies.

Since the modern administrative agency often combines executive, legislative and judicial powers, various authorities have from time to time taken the position that the fundamental structure of the administrative system is unconstitutional.

The U.S. Supreme Court, however, has never held that the combination in a single agency of legislative, judicial and executive powers is unconstitutional, the Court has, in fact, specifically upheld dozens of delegations of legislative power. On the federal level, a steady line of judicial decisions has rendered practically obsolete the notion that the legislative power of Congress cannot be delegated.

On a state level, however, courts have been somewhat more cautious. While generally following the federal trend, many states have refused to validate what they view as unnecessary, arbitrary or excessive power to individuals or agencies.

Regulatory agencies are vested with authority to regulate the economic discretion of individuals and businesses where it has been determined that the enterprise affects the public interest. The agencies have the power to prescribe or prohibit activity in a given situation, to determine whether the law has been violated in discrete cases, to institute proceedings against violators and even impose sanctions in certain circumstances. It is this combination of

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Attachment 4*

legislative, judicial and executive power in one agency that has spawned endless scholarly debate and spirited litigation over the legitimacy of the regulatory agencies.

Two of the most important characteristics of the regulatory agencies are their independent status and the use (and alleged misuse) of discretion in decision making. In his authoritative work on administrative law, Kenneth Davis maintains that the lifeblood of the administrative process is informal discretionary action. In more formal administrative proceedings, discretionary power is governed by statutes, rules, procedural codes and judicial decision. Informal administrative actions are characterized by a broader use of administrative discretion. Most of the enabling legislation that created federal and state administrative agencies mandated vague, general goals which inevitably gave rise to broad discretionary powers to implement the mandate.

Informal discretionary powers, according to Davis, include such positive functions as initiating, prosecuting, negotiating, settling, contracting, dealing, advising, threatening, publicizing, planning, recommending and supervising. Of course, the most awesome discretionary power exercised by the agencies is the power to do nothing at all. Through failing to act or by delaying decisions, administrators can use their discretionary power to ensure end results conducive to particular values.

Because discretionary decisions involve a subtle interplay of factors and processes which are extremely difficult to discern and evaluate, the proper role of discretion has become one of the most heated topics in the literature.

The most important and certainly most controversial of the functions of the KCC is the setting of rates for jurisdictional utilities. Unfortunately, a great deal of misinformation exists about the rate setting process. Informed observers, and even some participants, are often unaware of the dynamics of the proceedings.

The Legislature has mandated that the Commission establish just, reasonable, fair and non-discriminatory utility rates. The Legislature has also mandated that the Commission set rates that will enable an utility company to earn a reasonable and fair rate of return on its investment. Contrary to popular belief, the law does not mandate, nor is the Commission required, to guarantee a profit; only a fair opportunity to earn a profit.

A utility company usually files for rate relief under one or more of three circumstances. First, the company is dedicating additional investment that is used or required to be used to furnish the particular commodity. Second, the company is not achieving the rate of return on investment already deemed fair and reasonable by the Commission in prior rate proceedings. This can occur for a variety of reasons including customer conservation, mandatory or voluntary curtailment or loss of customers (particularly industrial customers with full switching capability). Third, the company believes the current rate of return is no longer reasonable or sufficient to attract investors due to fluctuations in the capital markets.

The rate setting process is divided into two phases-revenue requirement and rate design. By revenue requirement, we mean the additional money, if any, that the company needs to meet its obligations and have an opportunity to earn a fair profit. By rate design, we mean the process by which the revenue requirement will be spread over the various classes of customers.

In order to arrive at the revenue requirement, three factors must be carefully and critically analyzed:

- 1) rate base;
- 2) operating expenses;
- 3) the percentage rate of return to be applied to rate base.

Once the revenue requirement in terms of dollars is decided, the commission must then address the issue of rate design; that is, which classes of customers and, indeed, which customers within the respective classes will bear what proportional share of the needed revenue requirements.

Rate design is rapidly becoming the most contested issue in rate proceedings due to changed circumstances brought about by such events as the Arab oil embargo, the scarcity of natural gas and oil, double digit inflation, environmental pressures, high cost of money, the declining importance of economies of scale, and many other factors.

Rate design is an important part of the rate proceedings, and proposals are espoused by various experts including lifeline rates, flat rates, inverted rates, rates based on marginal costs of service, rates based on embedded costs of service, time of usage rates, and many others. Like cost of equity considerations, rate design proposals and variations thereof all have advantages and disadvantages to various groups and sub-groups of customers.

Generally, it would be agreed that an appropriate rate design proposal should:

- 1) permit the utility an opportunity to recover the revenue requirement;
- 2) reflect cost of service between classes of customers and within the class;
- 3) reflect sound conservation principles.

After reviewing all the evidence, the Commission must decide the revenue requirements and select an appropriate rate structure to recover it. This is done through a detailed, written Order, which is subject to formal judicial, and informal legislative, review.

## **AGENCY HISTORY**

KANSAS was one of the first state regulatory bodies in the nation.

**March 1883**

### **BOARD OF RAILROAD COMMISSIONERS**

**(three member board--elected)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines.

**1911**

### **PUBLIC UTILITIES COMMISSION**

**(three member board--appointed)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines. Also regulated were telegraph and telephone companies, pipeline companies, water, light, heat, all power companies (except municipally owned), mutual telephone companies and public utilities and common carriers situated and operated wholly or principally within any city.

**1920**

### **KANSAS COURT OF INDUSTRIAL RELATIONS**

**(three member board--appointed)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines. Also regulated were telegraph and telephone companies, pipeline companies, water, light, heat, all power companies (except municipally owned), mutual telephone companies and public utilities and common carriers situated and operated wholly or principally within any city.

Also the Court of Industrial Relations had authority to arbitrate wages, hours, and other industry-labor disputes.

**1921**

### **PUBLIC UTILITIES COMMISSION**

**(three member board--appointed)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines. Also regulated were telegraph and telephone companies, pipeline companies, water, light, heat, all power companies (except municipally owned), mutual telephone companies and public utilities and common carriers situated and operated wholly or principally within any city.

**1925**

### **PUBLIC SERVICE COMMISSION**

**(five member board--appointed)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines. Also regulated were telegraph and telephone companies, pipeline companies, water, light, heat, all power companies (except municipally owned), mutual telephone companies and public utilities and common carriers situated and operated wholly or principally within any city.

**1933**

### **STATE CORPORATION COMMISSION**

**(three member board--appointed)**

Jurisdiction: rates and services of common carriers (railroad). Regulate all steam-operated railroads, express companies, sleeping car companies and inter-company electric lines. Also regulated were telegraph and telephone companies, pipeline companies, water, light, heat, all power companies (except municipally owned), mutual telephone companies and public utilities and common carriers situated and operated wholly or principally within any city.

The jurisdiction of the PSC was extended to include the regulation of motor carriers, intrastate sale of speculative securities, and oil proration. Gas conservation and supervision of plugging abandoned wells to protect fresh and usable water from pollution by oil field practices were later added to Commission jurisdiction. In the late 1970's, mined land reclamation was also put under the jurisdiction of the Commission. In 1988, mined land reclamation was transferred to the Kansas Department of Health and Environment. In 1982, the Securities Division was severed from the Commission and made a separate regulatory agency.

The Public Utilities Law of 1935 provided that the Kansas Corporation Commission be composed of three members. To date there has been no change in that provision and the Kansas model appears to fulfill the theoretical ideal as far as commission size.

Commissioners are appointed by the governor with the advice and consent of the state senate. Kansas law provides for staggered terms of four years to the Corporation Commission. Political party membership is explicitly recognized in the qualifications imposed upon appointees to the Kansas Corporation Commission. Kansas law provides that no more than two of the three commissioners may belong to the same political party. To the extent that one member of the minority party provides balance to the Commission there is independence from gubernatorial influence.

The activities of the commissioners during their term of office are subject to statutory restriction. Neither the commissioners, the executive director, attorneys, division heads and others specified may have interests in any activity regulated by the Commission. Where members of the Commission do have an interest in any enterprise subject to Corporation Commission regulation, they are required to divest themselves within thirty days after their appointment or forfeit their office.

Kansas law provides that the commissioners shall choose one of their colleagues as Chairperson; however, by custom, the Governor indicates his/her choice, which is usually ratified by the majority.

The KCC, like most federal and state regulatory agencies, is considered an "independent regulatory commission." The Commission is not independent in the highly protected sense that courts are. The Legislature may rescind any or all of its delegated authority, cut off appropriations, or reorganize the agency. The Commission is accountable to the courts in that it must comply with the mandates of the law and work within its statutory authority. But the commissioners are not popularly elected and have no direct accountability to the voters. They are not directly accountable to the Governor since once they are appointed they cannot be removed except for cause.

Like most state regulatory bodies, the Kansas Corporation Commission is financed through fees and assessments. No general fund revenues are involved. Regulatory commissions are generally financed through two types of assessment: the general assessment and the special assessment. Under the general assessment plan, the costs of commission regulation are quarterly distributed among the jurisdictional companies on some proportionate basis. Under the special assessment scheme, the costs of regulation are assessed against those companies whose rates, practices or policies the commission investigates at a particular time. Kansas uses both plans. All expenses of commission regulation not covered by special assessment are apportioned on the general assessment principle.

#### CONSERVATION DIVISION

The oil and gas regulatory activities of the Conservation Division were first enacted by the Kansas Legislature in 1931 under the Public Service Commission which later became known as the State Corporation Commission. These responsibilities included prevention of waste and protection of all fresh and usable water. In 1935 and 1939 legislation was passed which recognized the principles of correlative rights. NGPA well classification responsibilities were added in 1978. In 1982 Senate Bill 498 was passed which expanded the Division's enforcement powers for the protection of fresh and usable water and mandated joint field operations with the Department of Health and Environment. Under the joint KCC/KDHE program, specific responsibilities of the two agencies were set out in a memorandum of agreement. In 1984, the division assumed primacy for the federally-mandated underground injection control program. In 1986, the Kansas Legislature passed House Bill 3078 which abolished the Joint Field Program with KDHE that was created with Senate Bill 498 in the 1982 legislative session. KCC was given sole authority for regulating oil and gas activities, including the Class II Underground Injection Control (UIC) wells. As a result of H.B. 3078, KCC and KDHE act cooperatively in the cleanup of pollution from oil and gas activities pursuant to a newly rewritten memorandum of agreement dated March 21, 1988 (updated in March, 1992), and a remediation manual formalized on January 12, 1989. KCC and KDHE hold regular meetings at the administrative level to address new issues which impact efficiency of program development and implementation.

#### UTILITIES DIVISION

The Utilities Division of the State Corporation Commission was established at the same time the agency was created in 1933 (see K.S.A. 74-601 et seq.). In addition to the original statutory framework in the Public Utilities Act of 1911 (See K.S.A. 66-101 et seq.), there have been numerous statutory changes generally broadening the

powers of the agency and increasing program responsibility. Significant legislative changes include jurisdiction over electric generating facilities siting (KSA 66-177) and over natural gas pipeline safety (KSA 66-1,150). Authority granted under KSA 66-1,150, 1970 allows jurisdiction over natural gas pipeline safety, jurisdiction over electric generating facilities siting kilovolts or more (K.S.A. 66-1,177, 1979), compilation and maintenance of a comprehensive statewide electric generation forecast (K.S.A. 66-1,169a, 1979), authority to carry out requirements of the provisions of the Federal Natural Gas Policy Act of 1978 and the provisions of the Public Utility Regulatory Policy Act of 1978 and such rules and regulations as are adopted by federal agencies pursuant to such acts (K.S.A. 66-1,185, 1979), the amendment to K.S.A. 66-177 (1980) requiring, among other things, the Commission to take action on requested changes in utility rates and practices within 240 days from the date of filing and providing for an incentive rate of return of between one-half and two percent for energy conservation and load management capital investment, designation of the Commission as the rate review agency for the State of Kansas for purposes of Article III of the Central Interstate Low-level Radioactive Waste Compact (K.S.A. 65-34a04, 1982), the amendment to K.S.A. 66-125 concerning issuance of securities by utilities and the enactment of House Bill No. 2927 amending K.S.A. 66-128 and adding numerous provisions spelling out Commission authority and responsibilities relating to electric and other utilities, especially with reference to excess capacity. In 1985, the legislature passed an amendment to K.S.A. 66-104a deregulating mobile communications services for a two year period beginning January 1, 1986 and in 1987, the legislature extended from December 31, 1987 to July 1, 1988 the termination date for the deregulation of radio common carriers. During the 1990 legislative session, the Utilities Division introduced legislation for approval of electronic filing requirements for rate case and expedited filings. New rules and regulations went into effect July 23, 1990.

#### TRANSPORTATION DIVISION

The Transportation Division of the State Corporation Commission of Kansas, as authorized by Chapter 66, Kansas Statutes Annotated, assists the Commission in the regulation of approximately 22,491 motor carriers of persons and property (common, contract and private carriers), railroads, and liquid pipelines. This Division is responsible for implementing and administering related regulations and policies adopted by the Commission for the above modes of regulated transportation in the state.

The Transportation Division assists the Commission in carrying out its responsibilities by: (1) processing motor carrier applications for new operating authority, transfers, extensions, consolidation and discontinuances of service, (2) registering motor carrier equipment, (3) processing formal and informal rate requests, (4) reviewing required annual accounting reports filed by railroads and motor carriers, and (5) conducting investigations and administering the safety program related to the railroads and motor carriers engaged in the transportation of persons and property in the State of Kansas.

The purpose of the Division is to assist the Commission in the administration of the railroad, liquid pipeline and motor carrier statutes and regulations. The Division ensures that the motor carrier, liquid pipeline and rail transportation systems of the State are adequate in meeting the needs of the state in the most efficient and safe manner. The Division works to assure that services offered and rates charged by these regulated transportation industries in Kansas are fair and reasonable to the carriers, shippers and the consuming public.

The State Corporation Commission, as authorized by K.S.A. 66-103, 66-1,216 and 66-1,108 et seq., has regulatory jurisdiction over transportation systems operating in Kansas as defined by K.S.A. 66-104. In compliance with authority granted the Commission by the above statutes, the Transportation Division's activities have been structured to assist the Commission by implementing Commission policies and establishing procedures in regulating these areas of responsibility.

#### ADMINISTRATIVE AND LEGAL DIVISION

The Chairman and Commissioners determine regulatory policy. The Executive Director is responsible for accurately reflecting this policy in carrying out the duties and responsibilities of the Administrative Division. The Executive Director supervises the preparation of the agency budget and the supervision of the administrative service units, including Fiscal, Personnel, Information Resources, Public Affairs and Consumer Protection, and Support Services. The Executive Director is the official recording officer for all official documents of the Commission including notices, orders, citations, and related documents as well as agency contracts.

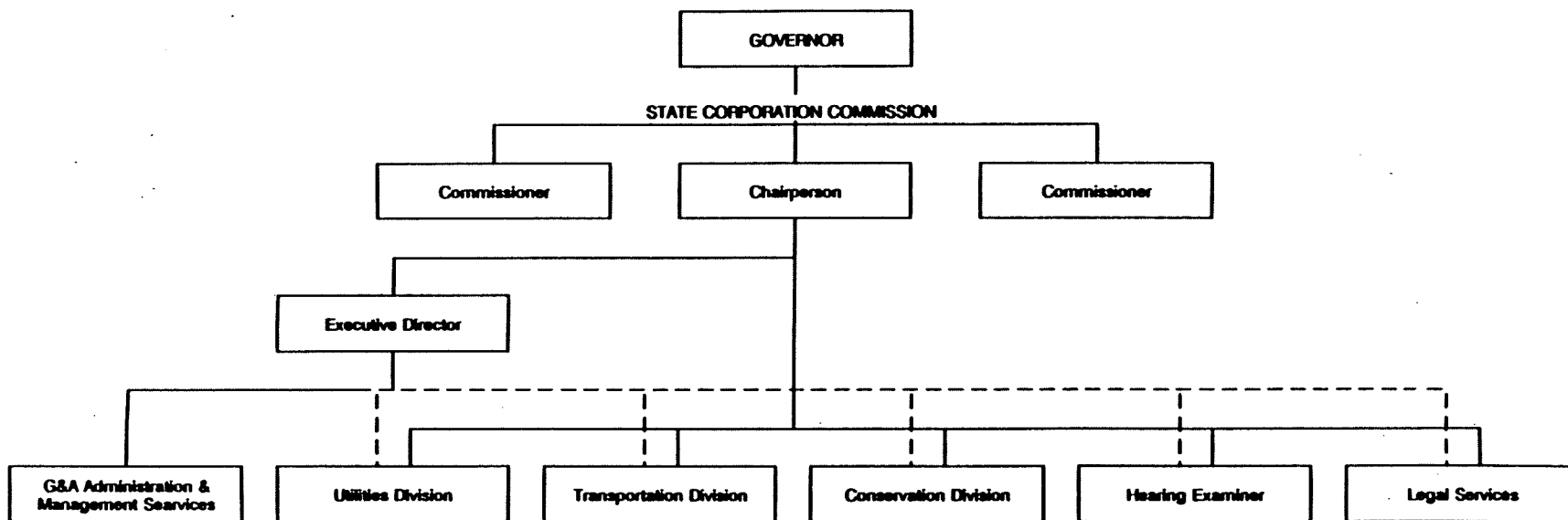
The Legal section, headed by the General Counsel, has multiple duties and obligations. The Legal section acts as legal advisor to the Commission and to each of the regulatory divisions of the Commission on legal matters pertaining to regulatory duties and mandates prescribed by statute. In addition, the legal staff is mandated by statute to represent the public generally on all complaints and applications before the Commission and various federal and sister state commissions and administrative agencies. The Legal section represents the Commission in federal and state courts, and the various federal regulatory bodies, such as the Federal Energy Regulatory Commission (FERC), the Department of Energy (DOE), the Interstate Commerce Commission (ICC), and the Federal Communications Commission (FCC). In addition, the Legal section prepares and assists the Commission in drafting orders and memorandum opinions in regard to matters decided by and pending before the Commission.

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Excerpts used in this briefing paper taken from "Regulation in Transition-Evolution of the State Corporation Commission", monograph by Brian Moline, Capitol Complex Center-The University of Kansas, 1984.

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# ORGANIZATIONAL STRUCTURE OF THE KANSAS STATE CORPORATION COMMISSION



-- -- Indicates Supervisory & Management Responsibilities for Administrative Matters