

# Primer on Practicing Before the Kansas Corporation Commission

By Frank Caro

Polsjelli  
Shughart<sub>PC</sub>

Redefining the Business of Law.<sup>SM</sup>

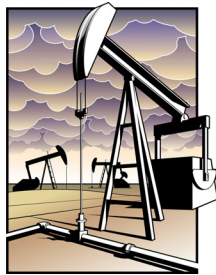
# History of the Kansas Corporation Commission

- The Kansas Corporation Commission (KCC) was one of the first state regulatory bodies in the nation, established as the Railroad Commission in 1883.
  - The Railroad Commission regulated steam-operated railroads, express companies, sleeping car companies, and inter-company electric lines.
  - The members were elected by a popular vote.
- In 1911, the Kansas Legislature created a three member Public Utilities Commission
  - Regulated telegraph and telephone companies, pipeline companies, common carriers, water, electric, gas and all power companies with the exception of those owned by municipalities.
  - Members of the Commission were appointed by the Governor.
- The present regulatory body, The State Corporation Commission of the State of Kansas was established by the Legislature in 1933.

# Regulatory Authority

- The KCC regulates six cornerstone industries in Kansas:

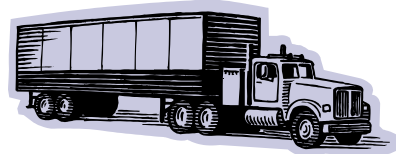
Oil and Natural Gas  
(K.S.A. Chap. 55)



Pipeline Safety  
(K.A.R. 82-10 & 11)



Motor Carriers  
(K.A.R. 82-4)



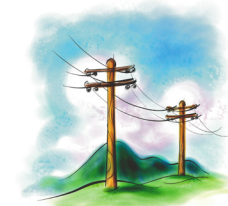
Railroads  
(K.A.R. 82-5,6,7 & 9)



Public Utilities  
(K.S.A. Chap. 66)



Telephone  
(K.A.R. 82-13)



# Regulatory Authority (Cont.)

- Specifically, the KCC regulates rates, service and safety of:
  - public utilities
  - common carriers
  - motor carriers
  - Telecom
  - Railroads
- Also, the KCC regulates oil and gas production by protecting correlative rights and environmental resources.

# Exempt Entities

- The KCC does not regulate the following:
  - Most electric cooperatives;
  - Water cooperatives;
  - Municipalities;
  - Wireless telephones;
  - Long-distance phone services;
  - Cable companies; or
  - Internet.

# Structure & Organization

- The three member Commission is appointed by the Governor with the approval of the Senate.
- Commissioners serve staggered four-year terms.
- No more than two commissioners may belong to the same political party.
- Commissioners elect one of their colleagues as Chair. The Chair acts as agency head with input from the other members.
- The Commission acts independently as a quasi-judicial branch of the government with authority to render judgments and decisions on regulated utilities.

# Main Commission Utility Actions

- Reviewing and granting Certificates of Convenience
- Reviewing and approving Rate Tariffs
- Rate of Return regulation

# The Commissioners

- Thomas E. Wright
- Ward Loyd
- Joseph F. Harkins (retired)



# Thomas W. Wright

- Appointed to the KCC by Governor Kathleen Sebelius on May 23, 2007.
- Elected Chair of the on June 20, 2007, and appointed for a second term by Governor Mark Parkinson on January 8, 2010.
- Former partner at Wright, Henson, Clark, Hutton, Mudrick & Gragson, LLP, in Topeka, Kansas.
- Served as Chair of the Governor's Gaming Committee and of the Consolidation Commission of Topeka-Shawnee County in 2005
- President of the Kansas Bar Association from 2008-09.

# Ward Loyd

- Appointed to the KCC by Governor Mark Parkinson on February 24, 2010.
- He engaged in a general law practice from 1968 until being appointed to the Commission in 2010.
- Served in the Kansas House of Representatives from 1999 to 2007, including as a member of the House Utilities Committee

# Joseph F. Harkins (recently retired),

- Was appointed to the KCC by Governor Kathleen Sebelius on July 11, 2007.
- Commissioner Harkins' successor has yet to be appointed

# Practicing Before the Commission

- **Primer on Administrative Law.**
  - KCC's Rules of Practice and Procedure are found in K.A.R. 82-1.
  - Technical Rules of Evidence may or may not be applied. K.S.A. 77-524 (a).
    - Hearsay can be allowed
    - Foundation may not be necessary for each document
    - Practice Pointer:
      - Even though the Rules of Evidence are not strictly followed, this does not mean that prejudicial matters must be admitted.
      - Hearsay objections can be used to show that there was not reliable substantial evidence.

# Practicing Before the Commission

- *Stare decisis* (being bound by prior precedent) does not necessarily apply to agency decisions
  - *Stare decisis* is a strong factor in building up internal administrative law, and in influencing the judiciary in its reviews of the administrative determinations.
  - However, an agency may refuse to follow its prior ruling when its action is not oppressive, arbitrary, unreasonable, or capricious.
    - *Women's Club of Topeka v. Shawnee County*, 235 Kan. 175, 183, 853 P.2d 1157 (1993).

# Opening a Docket

- Dockets opened by filing an application, complaint, or petition, or by the issuance of an order of the commission initiating a proceeding on its own motion. KAR 82-1-214.
- An application must be filed for cases involving a request for the approval, determination, consent, permission, certificate or authorization of the commission.
- Applications must state facts upon which the application is based and reference the laws or regulations of the commission requiring or providing for the request.
- All current dockets before the Commission, and the public versions of documents posted in those dockets, are available on the Commission's website at <http://kcc.state.ks.us/docket/docket.htm>

# Typical Pre-Hearing Progression

- Docket is opened
- Scheduling and Pre-Hearing Conferences
- Procedural Orders
- Discovery
  - Data Requests
  - Motions to Compel
  - Protective Orders
- Pre-filed Testimony

# Hearings

- Kansas Administrative Procedures Act (“KAPA”) (K.S.A. 77-501 *et seq.*) is vague as to the actual presentation of evidence at hearing. K.S.A. 77-523
- All evidence available must be produced at the administrative level.
  - Appellant cannot produce part of his evidence before an administrative agency and then produce the balance on judicial review. *Olathe Hospital Foundation, Inc.*, 217 Kan. 546, 560, 539 P.2d 1 (1975); *Rickard v. Fundenberger*, 1 Kan. App. 2d 222, 223, 563 P. 2d 1069 (1977).
- Battle of the Experts
  - Engineers
  - Accountants
  - Economists



# Pleadings, Motions and Objections

- Each Party is allowed to file pleadings, motions and objections at the appropriate stages of the proceedings. K.S.A. 77-519.
  - All of the standard types of Pleadings and Motions may be used.
  - Filings of all original pleadings with the Commission should be made to the official records custodian within the agency.
  - Objections **MUST** be placed on the record to preserve the issue.

# WHO MAY PARTICIPATE AT A HEARING?

- Any party may participate in a hearing in person.
- Any party that is a corporation or other artificial person may participate in a hearing by a duly authorized representative.
- Any party may be represented by legal counsel, or if permitted by law, by a "other representative". This legal representation is at the expense of the party.
- A state agency may require a corporation or other artificial person to participate by counsel.

# Post-Hearing Progression

- Post-Hearing Briefs
- Administrative Notice
- Order
- Petitions for Reconsideration

# Appeals

- KAPA and the Kansas Judicial Review Act (KJRA) (K.S.A. 77-601 *et seq.*) govern appeals of agency decisions.
  - Rules are slightly different between appeals of Rate Cases and all other types of appeals.
  - A “rate case” is the proceeding that a public utility must go through in order to set the rate at which they are allowed to charge consumers for their service.

# Appeals

## – Exhaust Administrative Remedies

- File a Petition for Reconsideration with the Commission within 15 days of the Order. K.S.A. 77-529(a)
- The Commission then has 30 days to issue an Order on Reconsideration. K.S.A. 66-118b
- Once the Commission has issued a final Order, parties have 30 days to file a Petition for Judicial Review with the Court of Appeals or District Court. K.S.A. 77-613(c)
- Upon appellate review, the petitioner is only permitted to appeal the Commission's order based upon the grounds set forth in its PFR. K.S.A. 66-118b.
- The Commission then has 30 days from the date of the filing of the PFR to act on the Petition for Reconsideration. K.S.A. 66-118b

# Appeals

- Once the administrative remedies have been exhausted, the matter can be taken up by the courts.
  - For rate cases, the Kansas Court of Appeals has exclusive jurisdiction to review the agency action. K.S.A. 66-118a(b).
    - The appeal timeline is accelerated as compared to regular cases. A final decision is reached within 120 days. K.S.A. 66-118g(b).
  - For other cases, the Kansas District Courts have jurisdiction. K.S.A. 77-609.
- A petition for review must be filed with the Court of Appeals within 30 days of the issuance of the KCC's final Order. K.S.A. 77-613.

# Appeals

- Standard of Review
  - Recent amendments to the KJRA modify the appellate court's scope of review of a Commission order.
  - Prior to the recent amendments, the review focused upon whether there was evidence supporting the Commission's action.
    - Thus, an order would be upheld as long as the supporting evidence met the "substantial competent evidence" standard, regardless of the contrary evidence.
  - The KJRA now requires that the courts determine whether the evidence supporting the agency's factual findings is substantial when considered in light of *all* the evidence.

# Contact Information

**Frank A. Caro Jr.**

**fcaro@polsinelli.com**

**6201 College Blvd.**

**Suite 500**

**Overland Park, KS 66211**

**tel: 913.234.7409**

**fax: 913.451.6205**