

House Energy, Utilities and Telecommunications Committee
Testimony of Citizens' Utility Ratepayer Board
Neutral Written Testimony
House Bill 2154
February 14, 2023

Chairman Delperdang and members of the House Energy, Utilities and Telecommunications Committee, thank you for this opportunity to testify regarding House Bill (HB) 2154. My name is David Nickel. I am the Consumer Counsel for the Citizens' Utility Ratepayer Board (CURB). CURB is the advocate for residential and small commercial ratepayers before the Kansas Corporation Commission (KCC or Commission) and the Kansas Legislature. My testimony principally reflects how CURB would be affected by HB 2154.

HB 2154 provides for the election of three Commissioners of the KCC on four-year, staggered terms. The general election to fill the position for Commission position one established pursuant to K.S.A. 74-610, and amendments thereto, would initially occur in November 2024. For Commission position two established pursuant to K.S.A. 74-610, and amendments thereto, the general election to fill that position would initially occur in November 2026, with the initial general election of the last position on the Commission being held in November 2028. For each Commission position, a primary election would occur in August of each pertinent year. Subsequent primary and general elections for Commission positions would be conducted every four years.

HB 2154 also provides for the creation of a utilities regulation division in the office of the Kansas Attorney General to represent all utility customers in KCC matters, specifically requiring that division to advocate for regionally competitive utility rates. In order to do so, HB 2154 calls for all staff of the KCC who litigates, argues, or participates in public utility rate proceedings (other than in telecommunication rate proceedings) for the purpose of making non-binding recommendations to the KCC on behalf of ratepayers ("KCC rate hearing staff") to be transferred to the new division, subject to the discretion of the attorney general, commencing January 1, 2024. CURB believes that all other KCC staff would remain with the KCC and that the KCC could employ additional staff to advise it on utility matters. Thus, CURB believes that the intent of HB 2154 is to make Commissioners politically accountable to the Kansas electorate and to take measures that create an independent KCC advisory staff that is not part of the KCC rate hearing staff to advise the Commission on rate cases. These proposals constitute substantial policy decisions.

Representations have been made to CURB that HB 2154 is not intended to and will not materially affect CURB and its representation of residential and small commercial ratepayers before the KCC. This is important since CURB was created by the Kansas legislature to provide clear-throated advocacy for these particular classes of ratepayers who cannot afford the time and capital investment to represent themselves before the KCC. Indeed, as contemplated by HB 2154, CURB's positions in KCC cases differ significantly from industrial customers, large commercial customers and customers generally. CURB's independent role is important, as it would be impossible to zealously advocate for a position favoring all customers generally and still advocate for a contrary position that favors residential or small commercial ratepayers.

In regards to carrying out its duties, CURB believes that it is important for the Kansas Legislature to know that CURB staff has a good working relationship with KCC staff as the KCC is now organized. On several issues, including those that arise in utility rate cases, CURB staff and KCC staff converse and try to find common ground. Yet, CURB does not always agree with KCC staff — CURB has taken positions that are diametrically opposed to KCC Staff, for example, in the current energy efficiency docket filed by Evergy. CURB also has good working relationships with other stakeholders in KCC hearings and often seeks to arrive at reasonable solutions to regulatory issues with those parties. Regardless of whether HB 2154 is enacted, CURB believes that CURB's working relationship with KCC rate hearing staff, the KCC staff that is retained in the KCC, and all other stakeholders will continue to thrive.

CURB does not perceive that HB 2154 is intended to be an affront to the KCC staff. In fact, CURB believes that KCC staff are among the very best that Kansas has to offer in terms of service to the State of Kansas. KCC staff works diligently on all utility matters entrusted to it, is highly skilled, is very dedicated to protecting ratepayers and other stakeholders in utility cases, and attempts to present evidence that it believes balances the interests of stakeholders in utility issues. Further, CURB believes there is mutual respect between CURB's and KCC's analysts and attorneys. CURB appreciates the time and effort expended by KCC staff to work with CURB on finding mutual solutions to regulatory issues. CURB will continue to work with KCC staff, no matter where situated, on regulatory issues when doing so promotes the interests of CURB's particular and unique constituency.

Moreover, CURB believes that it is important for the Kansas Legislature to know that regardless of whether HB 2154 is enacted, CURB will continue to add value for its unique constituency in all KCC cases, as it has successfully done in the past. Indeed, the Commission has acknowledged in several dockets that CURB adds value through its representation of residential and small commercial ratepayers in KCC cases. CURB has prevailed on a number of positions in which it advocated on behalf of these ratepayers.

It would not serve the Kansas Legislature to list all of the various cases where CURB has made a difference as part of this testimony. However, to briefly illustrate, consider CURB's involvement in Docket No. 20-GIMX-393-GIV, a KCC docket dealing with protections afforded ratepayers during the COVID emergency. In a Report and Recommendation filed by KCC staff on December 2, 2022, in that docket, the KCC staff recommended immediately discontinuing the minimum customer protections for COVID-19 currently in place. CURB disagreed with the immediate discontinuance of customer protections and instead suggested that these protections be extended until the Cold Weather rule lapsed on March 31, 2023. CURB's reasoning for recommending the delayed implementation was to allow time for customers to receive adequate notification of the forthcoming changes. The KCC agreed with CURB. In its January 10, 2023, Order, the Commission stated:

“The Commission realizes that COVID-19 may continue to impact Kansans indefinitely. Thus, the Commission believes CURB's comments strike the proper balance by waiting until March 2023 to end the additional protective measures.”

By agreeing with CURB on this issue, the Commission provided additional time and notice for affected consumers that COVID protections are about to end. This illustrates the quality of decisions that result from a comprehensive review of all positions before the KCC.

When CURB is able to find other stakeholders with mutual interests, it can fare even better for its constituents. In the Winter Storm Uri fuel cost recovery dockets, CURB and the Natural Gas Transportation Customers' Coalition (NGTCC) mutually sought to lower the carrying cost of the outstanding balances for Kansas Gas Service (KGS) customers allowed by the KCC until securitization could be accomplished. The KCC's initial order, which required utilities to create a deferral account for pertinent energy charges which would be collected from ratepayers once they were determined to be just and reasonable, contemplated that these costs could be carried at KGS's weighted average cost of capital (WACC). Even though KCC staff advised that the Commission could adhere to that concept at hearing, CURB and NGTCC sought and obtained, through settlement with KGS, KCC staff and others, a much lower carrying cost than WACC, saving millions of dollars for NGTCC and CURB's constituents.

CURB's healthy relationship with the KCC and its staff notwithstanding, CURB is aware that there are misgivings about how the Commission has decided cases in the past few years. Some stakeholders believe that the Commission is extremely tied to the positions taken by KCC rate hearing staff. In particular, some believe that Commissioners fail to exercise their independent judgment and simply defer to KCC rate hearing staff on most issues. Regardless of whether these perceptions are completely accurate, the mere perception can have a significant effect upon the efficacy of the KCC.

Indeed, an administrative tribunal, like the Commission, works best when it has a large palette of information and/or evidence available from which it can fashion a solution to issues confronting it. However, when stakeholders perceive that their evidence and opinions will not be considered unless they align with KCC staff's position in cases, it chills their involvement. At the extreme, stakeholders either decline to take positions that are contrary to KCC staff or do not participate at all in KCC hearings, due to the cost involved and the perception of a small likelihood of success. This perception is amplified when, during KCC hearings, the Commissioners ask friendly, open-ended questions to KCC staff witnesses about their position and why that position is just and reasonable, while showing considerably less interest in the positions taken by other stakeholders. While this could be explained as a matter of familiarity, litigants view that familiarity as conflicting with the Commission's duty to be fair and impartial. For an example, one could view the transcript of the hearing before the KCC in 22-EKME-254-TAR, which is located at the following link:

https://www.youtube.com/watch?v=D0NB_9crX90&list=PL3bfgkxiuDtfDHAZhi4P1ZYfi4XyC6pr2&index=10

This transcript is an example where, influenced by the KCC staff's prefiled testimony, the Commission seemingly had already concluded at the time of the hearing that Evergy was seeking exorbitant profit through its proposed energy efficiency program — to the extreme detriment of ratepayers. Some perceived the Commission's involvement in the hearing as a signal that Evergy's energy efficiency program, which had the support of several stakeholders, but not the KCC staff, was not going to be approved by the Commission no matter the evidence produced during the hearing.

The role that KCC staff has in KCC dockets must be multi-faceted and that must be apparent to stakeholders and the general public. The roles that KCC staff occupies throughout the pendency of applications filed with the Commission must differ depending upon where the applications are in the process of being determined.

Prior to hearing, the KCC rate hearing staff engages in an evidence discovery phase to determine the facts that are pertinent to the docket and the relief being sought (usually by the utility as applicant). The KCC rate hearing staff then evaluates those facts to determine what result would, in their opinion, best serve the entire public, which would include all current and future ratepayers, the utility involved, and other stakeholders such as environmental groups. This is a much broader view than those held by CURB, representing solely residential and small commercial ratepayers, and other stakeholders such as industrials or large commercial ratepayers. As an aside, CURB was created in part due to the fact that industrials, large commercial ratepayers and utilities can afford the time and monetary commitment to engage in KCC hearings, while individual residential and small commercial ratepayers cannot — leading to the need for an advocate on their behalf.

During KCC hearings, the KCC staff is an advocate for its own position. At these times, it is certainly reasonable to expect KCC staff to be zealous in presenting its side of the case. Other parties, including CURB, also zealously present their evidence and positions. In these regards, the Commissioners are best served by exploring, as fully as necessary, the various positions of the parties. An open mind and curiosity serves well in those regards. In CURB's view, the Commissioners should ask open questions of all key witnesses on important issues to allow those witnesses to fully vet their positions. To do so will create a broad record from which an optimal solution can be fashioned. Indeed, Kansas jurisprudence relaxes the rules of evidence for the Commission to allow such a record to be created.

After the hearing has been conducted, KCC rate hearing staff should be expected to engage in a different role than an advocate. Since the KCC rate hearing staff has expertise that the Commission could not generally be expected to have, it is important that the KCC rate hearing staff act as an impartial advisor to the Commissioners. Although it may be difficult to do, but certainly not impossible, KCC rate hearing staff must step away from its position to attempt to advise the Commission how it can best meet the public interest in a case. It is obvious that no party to a case can be correct 100 percent of the time. All parties present valid and compelling interests. When the Commission adopts the KCC rate hearing Staff's position as often as it does, some question whether a fully balanced and reasoned result is being obtained in KCC cases. Significantly, it is the Commission, not its staff, who have been appointed by the Kansas Governor and confirmed by the Kansas Senate to independently determine how to meet the public interest. When acting in an advisory role, KCC rate hearing staff simply cannot make Commission cases a matter of wins and losses; rather, for the Commission and its staff, meeting the public interest should always be the only goal.

Whether the KCC staff is expected to honorably perform in each of these roles can be a matter of organizational culture. In CURB's view, the KCC should have a culture that incentivizes its staff to find the optimal solution to regulatory issues, taking into consideration the entirety of the evidence, rather than centering on wins and losses of the KCC rate hearing staff. The culture should encourage creative thinking to arrive at a result that is a best fit for all parties at the proceeding and affected stakeholders. CURB cannot earnestly state whether that culture is not present at the KCC, but when several stakeholders believe that their positions are routinely not being duly considered, the culture is not readily apparent. It needs to be.

In presenting the above paradigm, CURB is not suggesting that the Commission or its staff do not take seriously the KCC's statutory obligations to determine the public interest in each and every

case. CURB is familiar with each of the Commissioners and knows that they are intelligent and dedicated professionals. Commissioners are presently vetted by the Kansas Senate and confirmed. This review has helped to ensure that Commissioners are well qualified to perform the, sometimes, unenviable job of determining utility rates pursuant to Kansas statutes and construction thereof by the Courts. It is clearly a thankless job. CURB has already commented on the professionalism and dedication of KCC staff.

Rather, in CURB's view, HB 2154 is an inflection point. HB 2154 presents the issue of what could be done legislatively, if at all, to help the KCC to better meet its obligation to determine the public interest. HB 2154 presents one potential solution. The election of Commissioners could potentially lead to public accountability. However, it is naïve to assume that the general public fully understands the regulatory covenant set forth by Kansas statutes and numerous court precedents. Utility law and practice are very complicated and require considerable education. Just to become acquainted with the most basic industry concepts, regulatory analysts and regulatory attorneys endure a week of utility rate school and substantial reading and study thereafter. Given the difficulty in understanding utility regulatory principles, one could reasonably assert that general elections may not yield the quality of candidates that Kansas enjoys through the appointment process. On the other hand, the electoral model is followed by certain states, and CURB does not know how successful that model is relative to the Kansas regulatory model which has been in existence and followed for over 100 years.

Likewise, separating the Commission from its KCC rate hearing staff by transferring the KCC rate litigation staff to a new division of the office of the Kansas Attorney General may cause the Commission to rule independently from its own staff. However, that is certainly not assured. State agencies adopt the opinions of other state agencies frequently, especially when one agency begins to trust the good judgment of the other. The goal of HB 2154 appears to be providing assurance that the Commissioners divorce themselves from KCC rate hearing staff when it comes to decision-making. The perceived problem is that the Commissioners does not do so, leaving stakeholders without their opinions being duly considered.

The potential solution to the problem seen by the proponents of HB 2154 is a very stark one. It changes the fundamental organization of the KCC that has endured successfully for over 100 years. It could introduce a political element into decisions made by the Commission, where the public policy has been to depoliticize the agency in order that it can make independent decisions to accord with the public interest rather than a political whim. And, most importantly, changing the organization of the KCC will not necessarily lead to lower electric and gas prices.

In fact, high electric and gas prices are not simply the result of the KCC's organizational structure. High utility prices are not solely a Kansas issue. Utility regulatory structures in other states vary substantially. The Wall Street Journal prints several articles monthly that show that high gas and electric prices, as well as reliability issues plague utilities and utility regulatory commissions throughout the United States, including states in SPP, MISO, PJM and other regional transmission organizations.

Rather, students of utility regulation would recognize that Kansas's electric utility prices are, in part, due to regulatory models that were prevalent during the 1950s and 1960s. Those models assumed steady economic growth, and consequent load growth for utilities of approximately 7%, year by year. The models assumed that utilities would increase capital investment to meet that growth,

resulting in ever increasing economies of scale. Yet, when that assumption failed in the late 1970s and beyond, the models also failed. We now have a model that arguably incents utilities to continue to invest in capital projects even though that capital growth may not actually be necessary. Nonetheless, we continue to expect that model to work without a meaningful adjustment for present circumstances. It is akin to attempting to till a garden using a tiller with all of the tines broken. Not only is the work frustrating and ineffective, the garden suffers as a result.

Indeed, in CURB's view, Kansans need to work together to attempt to find a regulatory model that benefits the ratepayer and the utility in a reasonable manner and in consideration of economic circumstances. We cannot come to a mutually beneficial solution by continuing to throw rocks at each other. We can solve more problems together than through division.

Those points aside, CURB recognizes that the organizational changes to the KCC proposed by HB 2154 are vast, but that it is clearly a matter of policy best decided by the Kansas Legislature. CURB will continue to meet its statutory obligations regardless of whether HB 2154 is enacted. Therefore, CURB remains neutral at this time. Nonetheless, CURB would offer two alternatives.

If the purpose of HB 2154 is to ensure that the Commission makes decisions wholly independent of its utilities regulation staff, as it appears to be, then one solution could be to provide the tools necessary for the Commission to do so. One way would be to increase the number of Commissioners on the KCC panel. This would allow more diversity of thought among Commissioners. Another potential solution would be to simply provide the Commissioners with a robust advisory staff that is kept independent from litigation staff, without moving the KCC rate hearing staff to the Office of the Kansas Attorney General. That independent advisory staff would be made up of engineers, accountants, economists, attorneys, and other professionals. This advisory team would ideally be outside, independent consultants retained by the Commission to evaluate the evidence and advise the Commission on rate cases. Both of these solutions do not require the complete reorganization and perhaps politicization of the KCC.

CURB is neutral on HB 2154 since it entails a significant policy change that belongs exclusively to the Kansas Legislature. Thank you for considering CURB's thoughts on HB 2154.