

Citizens' Utility Ratepayer Board

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Testimony of the Citizens' Utility Ratepayer Board (CURB) in support of HB 2618 Before the House Judiciary Committee by Niki Christopher January 29, 2008

The Citizens' Utility Ratepayer Board (CURB) is a state agency that represents residential and small commercial customers of the regulated utilities in proceedings before the Kansas Corporation Commission and the state's courts. We support HB 2618.

CURB is one of the few state agencies that practices almost exclusively before another state agency—the KCC—and that regularly appeals another agency's decisions to the courts. We know firsthand how deferential the courts are to agency decisions, and we support the proposed amendment to K.S.A. 77-621(d) [beginning at line 35] because it will restore the appropriate standard of judicial review of agency action that was intended by the federal act and the Kansas act, which was modeled after the federal act.

The standard of review of agency action that has developed in Kansas courts since the adoption of the judicial review act has become so deferential to agency decisions that judicial review often amounts to no real review at all. Only if a decision is "so wide of the mark" that no reasonable person would have so ruled will a court overturn an agency decision. So long as there is some evidence in the record that supports it, even if there is overwhelming evidence that contradicts it, the court must affirm. The court will not review the record as a whole.

This standard of review gives the agency an unfair advantage. The agency can simply ignore evidence that detracts from its decision, knowing that an appellant will not be able to convince the court to review the evidence that the agency ignored. An agency can decide that 2 plus 2 equals 5, and write up an order that cites the testimony of one witness who proposed that 2 plus 2 equals 5, ignoring completely the evidence presented by five reputable mathematicians who testified that 2 plus 2 equals 4—and be upheld, because the reviewing court found some evidence in the record that 2 plus 2 equals 5. There is no point in providing review of agency decisions if all the judges are going to do is check whether the facts cited by the agency are in the record.

This bill will restore the court's obligation to review the entire record when an appellant challenges a decision as arbitrary and capricious. The court will have to consider, in the example above, whether the weight of all of the evidence in the record supports the agency's decision that 2 plus 2 equals 5. This restores the balance that was intended by judicial review legislation, and protects us from bad decisions.

Review of the whole record of agency action is especially important because agency decision makers are subject to more influences than judges generally are. For example, because the KCC has an investigative function, the commissioners are not barred from communicating outside of the courtroom with the utilities they regulate. The utilities regularly seek out meetings with the commissioners to present their

positions on issues that they will be litigating at the Commission. Long-term relationships develop between the regulators and the regulated.

Judges are different. Judges are expected to avoid efforts to lobby them. Judges don't meet with the parties to hear their point of view before they file their cases. Judges generally don't develop long-term friendships with the parties who repeatedly appear in their courtrooms. If they once worked with one of the parties, the case is usually moved to another judge. The rules governing judicial conduct are much stricter, and are designed to protect the neutrality of the judicial process and protect it from undue influences.

These differences between judges and commissioners are very important to those of us who advocate for the public interest. It is a real concern to CURB whether the influences on the KCC are reflected in its decision making. Judicial review provides us the only forum where we are assured of neutrality. Judicial review of the whole record protects us all from decisions that may be products of influence rather than evidence. But if a reviewing court does little more than verify whether the facts the agency cited are in the record, none of us are protected from the influence that may have been brought to bear on the agency to ignore the competing evidence. That may be the best reason of all to support this bill. That is why the availability of a thorough and balanced review of the entire record by the courts is so important.

We would urge you to read Judge Steven Leben's article, *Challenging and Defending Agency Actions in Kansas* [64-JUL J. Kan. B.A. 22 (June/July 1995, at §II(B) ¶8], in which he makes a very good argument for restoring review of the whole record, not just the parts that support the agency's action. This bill will simply revive the standard of review that Judge Leben argues was originally intended by the legislature. Please do not wait for the courts to evolve back to this standard. Passing this bill would assure uniform, across-the-board adoption of this standard by all 31 judicial districts and the appellate courts. Courts are a lot like people: they will keep doing what they are used to doing, unless you tell them directly "Do this differently."

We expect other agencies will testify that this bill is going to create extra work for them, and will result in more overturned agency decisions, which will lead to uncertainty, delays, etc. However, we firmly believe that, under the standard to be restored by this bill, an agency could decide that 2 plus 2 equals 5 and be upheld on appeal, so long as it identifies support in the record for this decision, and articulates a rational reason for rejecting contradictory evidence in the record. This is particularly important when a decision makes dramatic changes in law or policy, and especially when there is a lot of evidence in the record that directly contradicts the agency's decision.

This legislation will simply encourage agencies to do their jobs. An agency is supposed to give fair consideration to all of the relevant evidence in the record, and make a rational choice among the options. It should articulate the facts and reasons that support its decision so that the reviewing court doesn't have to go looking for them. If the agency does what it is supposed to do, its decisions won't be overturned very often, even if the court reviews the entire record. If an agency has done its job, review of the entire record will confirm that the agency's decision was rational in light of all the evidence. If the review of the entire record reveals that the agency's decision was not rational, then judicial review protects the appellant and the public from an irrational decision. That is a desirable outcome for all of us who value good government.