

STATE OF KANSAS

## Office of the Attorney General

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*Curt T. Schneider*  
Attorney General

March 2, 1978

### ATTORNEY GENERAL OPINION NO. 78- 104

Mr. Steven D. Harris  
Director  
Kansas Energy Office  
503 Kansas  
Topeka, Kansas 66603

Re: Kansas Energy Office--Powers--Jurisdiction

Synopsis: That portion of K.S.A. 1977 Supp. 74-6806 which authorizes the governor to declare an energy emergency subject to approval by six members of the State Finance Council is constitutional under *State ex rel. Schneider v. Bennett*, 219 Kan. 286, 547 P.2d 786 (1976) and *State ex rel. Schneider v. Bennett*, 222 Kan. 11, 564 P.2d 1281 (1977). The governor has no specific statutory powers to respond to an energy emergency which he declares under K.S.A. 1977 Supp. 74-6806, unless and except a state of disaster emergency is declared under K.S.A. 48-924, in which event the governor may exercise the powers enumerated therein. During a period of energy emergency declared under K.S.A. 1977 Supp. 74-6806, the jurisdiction of the Kansas Energy Office to establish priorities of use for the allocation of available energy supplies supersedes the general jurisdiction of the Kansas Corporation Commission to establish and enforce similar priorities.

\* \* \*

Dear Mr. Harris:

You inquire concerning certain questions which arise as a result of the report of December 1, 1977, of the Kansas Energy Emergency Management Task Force.

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First, you inquire concerning that portion of K.S.A. 1977 Supp. 74-6806, which authorizes the governor to declare that an energy emergency exists in the state "subject to six (6) members of the state finance council approving such proclamation." The section provides thus, in pertinent part:

"Whenever it appears from an evaluation of conditions in the state by the governor that the supply of energy resources, other than agricultural fertilizers, is inadequate to meet the demand for such energy resources in the state or any geographic areas of the state and that the public health, safety and welfare are threatened thereby, the governor may proclaim that an energy emergency exists within the state, subject to six (6) members of the state finance council approving such proclamation."

In *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976) and *State ex rel. Schneider v. Bennett*, 222 Kan. 11, 564 P.2d 1281 (1977), the court reviewed the powers of the State Finance Council. In the former case, the court held that many of its powers over the Department of Administration were invalid. The power of the Council to approve or disapprove gubernatorial proclamations of an energy emergency was not challenged in either case. Following *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 308 P.2d 537 (1957), the court reiterated its approval of the power of the State Finance Council to authorize expenditures from the state emergency fund:

"[W]e uphold [these powers] as a cooperative effort between the executive department and the legislative department of the state. The powers granted there may be exercised only for the limited purposes specifically set forth in the statute. They are concerned with extraordinary conditions involving the public health or the protection of persons and property and were granted to insure prompt state action in the event of a major disaster. The powers of the finance council in relation

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to the state emergency fund were fully considered and upheld in State v. Fadely, supra. In view of the fact that such powers can be exercised only by the unanimous vote of the finance council we cannot say that the exercise of such powers by the council constitutes a usurpation of executive power." 219 Kan. at 299.

In my judgment, the historical separation of powers is seriously threatened when members of the legislature, by virtue of their office, are granted an official voice in the exercise of the powers of the executive in periods of civil emergency. Nonetheless, the court has upheld the powers of the state finance council over the emergency fund on precisely such grounds, the existence of emergency and extraordinary conditions. The power of the State Finance Council to approve or disapprove the governor's proclamation of an energy emergency is supportable, given the expressed rationale of the court, on precisely the same grounds, and accordingly, I am constrained to conclude that the quoted provision of K.S.A. 75-6806, authorizing six members of the council to approve a gubernatorial energy emergency proclamation, remains constitutionally intact.

Secondly, you inquire concerning the powers which are vested in the governor under K.S.A. 1977 Supp. 74-6806 and -6807, under other express statutory or constitutional provisions or under the inherent power of the office to protect the public health, safety and welfare, in the event it is deemed necessary to implement particular mandatory actions, such as moving persons from affected areas, allocating available fuel supplies within the state, and restricting hours of nonessential businesses.

The effect of an energy proclamation is specified by K.S.A. 1977 Supp. 74-6806 thus:

"The emergency proclamation of the governor shall recite his or her findings, shall declare that an energy emergency exists, shall specify the area of the state in which such emergency exists, and shall specify the period of time during which a system of priorities for the allocation of available energy resources, other than agricultural fertilizers, and/or the curtailment of consumption of such energy resources may be imposed."

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So far as concerns the express statutory authorization, the sole effect of the proclamation is to prescribe the period of time during which the allocation priorities established by the director of the energy office shall be in force. K.S.A. 1977 Supp. 74-6801 et seq. vests no other powers, either express or implied, in the governor empowering him to respond otherwise to an energy emergency.

I find nothing in the state constitution to support a conclusion that the governor enjoys any inherent constitutional powers to adopt and enforce such measures as described above. Article 1, § 3 provides that the "supreme executive power of the state shall be vested in a governor, who shall be responsible for the enforcement of the laws of this state." Under Article 8, § 4, the governor is the commander in chief of the state militia, and "shall have power to call out the militia to execute the laws, to suppress insurrection, and to repel invasion." There is no inherent power in the office of the governor other than that expressly granted by the constitution or statutes of the state or that which is expressly or reasonably to be implied therefrom. I find nothing in the state constitution which vests in the office of governor any general executive power to respond to the needs of an energy emergency as described above.

However, K.S.A. 48-904 et seq., deals in broad and detailed fashion with the exercise of legislative and executive powers during periods of "disaster." The term is defined in K.S.A. 48-904(d) to mean

"the occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or manmade cause, including but not limited to fire, flood, earthquake, wind, storm, epidemics, air contamination, blight, drought, infestation, explosion, riot or hostile military or paramilitary action . . . ."

The term is defined with sufficient breadth to include an energy emergency which causes or threatens widespread or severe damage, injury or loss of life or property. Under K.S.A. 48-924, the governor is authorized, upon finding that a disaster has occurred or is imminent, to issue a proclamation declaring a state of disaster emergency, which may not continue for longer than fifteen days unless ratified by concurrent resolution of the legislature,

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save for an extension which may be approved by the State Finance Council. K.S.A. 48-925 enumerates the powers of the governor vested in that office during and only during a state of disaster emergency. Those powers are enumerated both in some detail and with great breadth. E.g., the governor may commandeer or utilize any private property which he finds necessary to cope with the disaster, subject to certain compensation requirements; he may compel the evacuation of any area of the state afflicted or threatened by disaster, prescribe routes and modes of transportation therefor, control the movement of persons and the occupancy of premises within the disaster area, and in addition to these and all other express powers,

"perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population."

The governor is authorized to declare an energy emergency under K.S.A. 1977 Supp. 74-6806 when energy supplies are inadequate to meet the demand therefor, and the "public health, safety and welfare are threatened thereby." Circumstances which may support the declaration of an energy emergency under this section may not at the same time warrant the declaration of a state of disaster emergency under K.S.A. 48-924. In my judgment, the governor is vested with the emergency powers described in the latter section when and only when a state of disaster emergency has been declared, and that the governor has no similar extraordinary powers to respond to the exigencies of an energy emergency which falls short of a state of disaster emergency.

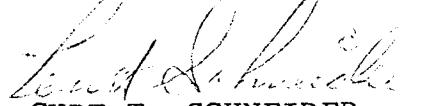
Lastly, you ask concerning the jurisdictional relationship between the natural gas curtailment order of the Corporation Commission and the regulations of the Kansas Energy Officer adopted under K.S.A. 1977 Supp. 74-6807, establishing priorities for the allocation and curtailment of energy resources. The Corporation Commission is

"given full power, authority and jurisdiction to supervise and control the public utilities . . . doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." K.S.A. 66-101.

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It is given no specific jurisdiction comparable to that of the Kansas Energy Office, however. The system of priorities for the allocation of available energy resources established by rules and regulations of the Director of the Kansas Energy Office are specifically applicable during periods of energy emergencies proclaimed by the governor. There is surely little question that the Corporation Commission has jurisdiction to establish priorities of use to govern the curtailment of service by public utilities subject to its jurisdiction. When, however, the governor specifically finds that the "public health, safety and welfare" are threatened by inadequate energy supplies and proclaims an energy emergency, the system of priorities established by the Kansas Energy Office supersedes the general jurisdiction of the Corporation Commission for the duration of the energy emergency.

Yours truly,



CURT T. SCHNEIDER  
Attorney General

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