



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

April 25, 1978

ATTORNEY GENERAL OPINION NO. 78-152

The Honorable Robert H. Miller
State Representative
3rd Floor - State Capitol
Topeka, Kansas 66612

Re: Utilities--Generating Capacity--Jurisdiction

Synopsis: No provision of 1976 power plant siting act, K.S.A. 1977 Supp. 66-1,158 *et seq.* prohibits the sale of generating capacity in a plant constructed without a permit which is exempt from the permit process because of K.S.A. 1977 Supp. 65,-1,169, the grandfather clause. The Kansas Corporation Commission appears to have no authority to compel by affirmative order the merger of two utilities holding certificates of convenience and necessity in this state, or to compel the sharing of generating capacity, in the exercise of its general supervision and control of electric utilities in this state.

* * *

Dear Representative Miller:

You request my opinion, first, whether any provision of K.S.A. 1977 Supp. 66-1,158 *et seq.*, the so-called power plant siting act, prohibits the sale of generating capacity of a power plant which has been exempted from the permit requirement of that act by the grandfather clause, K.S.A. 1977 Supp. 66-1,169.

K.S.A. 1977 Supp. 66-1,159 commences thus:

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"No electric utility may begin site preparation for or construction of an electric generation facility or an addition to an electric generating facility . . . without first acquiring a permit from the state corporation commission."

If the electric utility establishes to the Corporation Commission by a preponderance of the evidence the necessity for and the reasonableness of the proposed location and size of the electric generation facility or addition thereto, the permit shall issue. I find nothing in the permit process, or indeed in the entire act, which prohibits the sale of generating capacity of an act which has been exempted from the permit process under K.S.A. 1977 Supp. 66-1,169. Similarly, I find no express provision or no necessary and reasonable implication thereof which would operate to bar a sale of a portion of the generating capacity of a plant for which a permit had been issued thereunder.

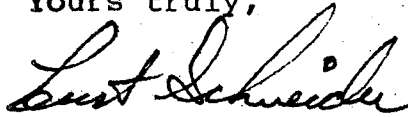
Secondly, you ask whether the Kansas Corporation Commission may mandate the merger of two or more electric utilities holding certificates of convenience and necessity to operate in this state, or to compel one such utility to share generating capacity with another such utility, so as to avoid the need for the construction of a new plant or addition thereto. The siting act is strikingly silent as to the matters which the Commission may take into consideration in assessing the "necessity for and . . . reasonableness of" a proposed new plant or addition thereto. Arguably, of course, the Commission might find that adequate power supplies from existing generating capacity of other utilities are available to the permit applicant, and deny a permit on that ground. The legislature has failed entirely to articulate the considerations which are relevant to a determination of the "necessity for and reasonableness of" a proposed power plant, and an applicant might argue very persuasively that the Commission may look only to the applicant's own generating capacity, its own needs and projected demand in assessing the reasonableness of and necessity for the proposed plant or addition. The act furnishes altogether too little guidance to support a confident judgment that the plant siting permit process furnishes the Commission a device whereby it may indirectly encourage an applicant for new plant capacity to purchase available capacity from another utility by denying a permit because of its failure to agree to do so.

I find no provisions in the general statutory provisions vesting the Corporation Commission with jurisdiction over the public

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utilities of the state whereby it might by affirmative orders
compel the merger of two utilities holding certificates of con-
venience and necessity however.

Yours truly,

A handwritten signature in cursive script, appearing to read "Curt Schneider".

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj