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November 29, 1978

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ATTORNEY GENERAL OPINION NO. 78- 376

The Honorable Robert H. Miller
State Representative
Rural Route 2
Wellington, Kansas 67152

Re: Public Utilities--Corporation Commission--Powers

Synopsis: If a public utility constructs an electrical generating facility in violation of the terms and conditions of a permit issued by the Kansas Corporation Commission under K.S.A. 1977 Supp. 66-1,158 *et seq.*, the Commission may seek to enjoin construction which does not comply with the permit. If, however, the project is one for which no permit is required under the "grandfather" clause of that act, K.S.A. 1977 Supp. 66-1,169, the Commission has no authority to seek to enjoin the project on the ground that it believes the additional generating capacity to be unnecessary or unwarranted.

* * *

Dear Representative Miller:

You request my opinion whether, if the Kansas Corporation Commission should determine that further electric generating capacity in the state is unnecessary or unwarranted, the Corporation Commission, under its broad grant of authority to supervise and control public utilities under K.S.A. 66-101 *et seq.*, or elsewhere, has the authority to stop any or all electric generation plant projects presently or imminently under construction.

K.S.A. 66-101 states thus:

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"The state corporation commission is given full power, authority and jurisdiction to supervise and control the public utilities, including radio common carriers, and all common carriers, as hereinafter defined, 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."

This grant of authority is deceptively broad and comprehensive. Standing alone, this section provides no clear statutory basis for regulation as broad as its language facially might appear to permit. A host of decisions and judgments which might conveniently be classed as management decisions remain entrusted to the public utilities themselves. For example, it is extremely unlikely that the statute permits the Commission to determine the level of annual dividends which a public utility corporation subject to its jurisdiction might declare. It is equally unlikely that it permits the Commission to prescribe the levels of executive compensation of public utility management. The Commission likewise is not the forum for the resolution of labor disputes involving employees of public employees.

Without needless multiplying examples, it is clear that the "supervision and control" vested in the Commission is not so unlimited as the statute suggests. It has been in force for a half century, and in virtually every case in which the regulatory jurisdiction of the Commission has been asserted over a public utility, some additional and more specific statutory authority has been invoked, most typically its jurisdiction over rates, K.S.A. 66-107. The grant of regulatory authority by this section, standing alone, is so general, so undefined, and so overbroad in its literal wording, that it furnishes no readily supportable independent statutory basis for jurisdiction of the Commission over activities of public utilities for which there is not an additional and more carefully defined statutory basis of jurisdiction.

Indeed, the legislature has recognized the inadequacy of K.S.A. 66-101 as a separate and independent basis for the regulation of power plant siting and construction, for in 1966, it adopted an entire act, specifically vesting in the Commission some limited authority to regulate the siting and construction of electrical generating facilities by public utilities. Under K.S.A. 1977 Supp. 66-1,158, no public utility may begin site preparation for or construction of an electric generation facility without a permit from the Commission. The applicant must introduce evidence

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"of the necessity for and of the reasonableness of the proposed location and size of the electric generation facility or addition to an electric generation facility."

The Commission may grant a permit

"[u]pon a determination that a necessity exists for the proposed electric generation facility or the addition to an electric generation facility and that the proposed location and size of such facility or addition thereto are reasonable."

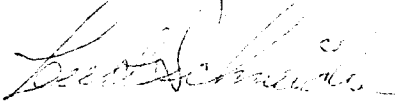
Obviously, it may be argued that in the exercise of its supervision and control under K.S.A. 66-101, the Commission might have promulgated regulations requiring such a permit procedure. As indicated above, however, whether such regulations would have been upheld on the basis of that general authority is highly arguable. The legislature having proceeded to specifically delineate the authority of the Commission over the siting and construction of electrical generating authority, that jurisdiction extends no further, in my judgment, than K.S.A. 1977 Supp. 66-1,158 permits. The last section of that act, found at K.S.A. 1977 Supp. 66-1,169, contains an expansive "grandfather clause," thus:

"The provisions of this act shall not apply to any electric utility which has commenced construction of an electric generation facility or addition to an electric generation facility prior to the effective date of this act [July 1, 1976] or to any electric utility which had acquired one-fourth (1/4) of the total amount of land contemplated by the electric utility to be used in connection with the construction, operation and maintenance of a proposed electric generation facility or addition to an electric generation facility prior to July 1, 1974."

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thus, if a public utility is constructing generating facilities in violation of the terms and conditions of a permit which the Commission has issued, the Commission may take appropriate steps to enjoin construction which does not comply with the permit. If, however, the project is one for which no permit is required by this act, the Commission has no jurisdiction to seek to enjoin completion of the project on the ground that it believes the additional generating capacity to be unnecessary or unwarranted.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj