STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 80-106

The Honorable J. Scott Love
Mayor of Lebo
City Hall
105 East Main
Lebo, Kansas 66856

Re: Cities and Municipalities--Public Utilities--Deposits to Secure Payment of Bills

Synopsis: K.S.A. 1979 Supp. 12-822 imposes a statutory obligation on a city which provides utility services generated by facilities owned and operated by said city to credit and pay interest on security deposits collected from its customers. Cited herein: K.S.A. 12-801, 12-817, K.S.A. 1979 Supp. 12-822, K.S.A. 1979 Supp. 66-104.

* * *

Dear Mayor Love:

On behalf of the governing body of the City of Lebo, City Clerk Carol Linden has requested the opinion of this office whether the city is required by law to pay interest on deposits collected from city utility customers, which deposits are collected as security for the payment of bills for utility service rendered by the city.

K.S.A. 1979 Supp. 12-822 provides, in pertinent part:

> "It shall be unlawful for any public or municipally owned utility doing business in the state of Kansas to receive or collect a deposit from any customer as security for the payment of bills for service rendered, unless such public utility shall keep a separate account of the date on which deposit is received, the name of the depositor,

> and the amount thereof, and shall pay to the customer making the deposit interest at the rate of not less than five percent per annum, such interest to be credited on the first day of January succeeding such deposit and on the first day of January thereafter, to the credit of such customer's outstanding account. . . .
>
> "The amount of deposit required shall at all times be reasonable, and shall be based upon the value of the maximum service rendered, and such advance deposit, together with the interest due thereon, may be applied to the payment of any accrued bills, or bills due on discontinuance of service." (Emphasis added.)

In our judgment, the foregoing imposes a statutory obligation on cities which own and operate public utility services to credit and pay interest on security deposits collected from their customers. In reaching this conclusion, we respectfully record our disagreement with the contrary opinion expressed by former Attorney General Vern Miller. In Attorney General Opinion No. 73-139, dated April 5, 1973, General Miller determined that because a "city itself provides the [utility] services . . . and the services are not provided by a separate entity deemed to be a public or municipally owned utility . . . there is no statutory obligation of the city . . . to require the payment of . . . interest" on security deposits. Opinions of the Attorney General, Vol. VIII, pp. 113-114. We disagree. Hence, Attorney General Opinion No. 73-139 is hereby disapproved and withdrawn.

In our opinion, if a city produces and provides utility services to municipal consumers from a municipal facility, the city is therefore subject to the provisions of K.S.A. 1979 Supp. 12-822, since such facility may be appropriately considered a "municipally owned utility" within the meaning of 12-822. In our judgment, it is of no consequence that utility services may be provided by a city through one of its own departments or agencies rather than by a separate entity owned by the city since, in either case, the utility is "municipally owned" and, accordingly, subject to the provisions of 12-822.

Though the statute does not define the term "municipally owned utility," the Kansas Supreme Court's construction of the term in other statutes reinforces our conclusion. In Kansas Gas & Electric Co. v. City of McPherson, 146 Kan. 614 (1937), the Court determined that a municipality which owns and operates a municipal electric plant has no statutory obligation to obtain a certificate of public convenience and necessity from the corporation commission in order to extend its transmission lines to supply electricity to another city. In reaching that conclusion the Court gave effect to the language of G.S. 1935, 66-104 (now K.S.A. 1979 Supp. 66-104) which provided as follows:

> "'Nothing in this act [utilities act of 1911] shall apply to any public utility in this state owned and operated by any municipality.'" (Emphasis added.) 146 Kan. at 617.

The Court distinguished between public utilities which were "municipally owned" (syl. 3) and public utilities which were "privately owned." In consideration of the plaintiff utility company's argument that the defendant city's extension of service in competition with a private company was contrary to public policy, the Court elaborated upon the distinction between "municipally-owned" and "privately owned" public utilities, as follows:

> "It is . . . true, as argued by plaintiff, that the general policy of this state throughout its history has been and is for its municipalities and other subdivisions of the state to perform governmental functions, and that it is contrary to such public policy for the subdivisions of the state to go into business generally in competition with private capital . . . . With respect, however, to utilities furnishing such things as water, gas and electricity, a different public policy has grown up, namely, that these be furnished or may be furnished, by municipalities. This has developed in part at least from necessity; that is to say, privately owned public utilities were not available in many localities, and the people of the cities and of rural districts were unable to have the benefit of such things unless they could be furnished by municipalities." 146 Kan. at 621-622.

The Court also made particular reference to several statutes "conferring authority upon municipalities with respect to utilities owned or operated by them," including inter alia G.S. 1935, 12-801 (now K.S.A. 12-801) which section refers to city-owned "works" supplying "gas, water, electric light, heating, street-railway, bus or telephone service," and 12-817 (now K.S.A. 12-817) which section refers to city-owned waterworks plants. (Emphasis added.) 146 Kan. at 622.

In another context, the Court has more recently distinguished between municipally owned and privately owned public utilities in similar fashion in City of Wichita v. Kansas Corporation Commission, 225 Kan. 524, 531-532 (1979).

A "public utility" is generally defined as "a business or service which is engaged in regularly supplying the public with some commodity or service of public consequence, such as electricity, gas, water, transportation, or telephone or telegraph service" and the term generally contemplates that the services are provided by an entity characterized as a "public service corporation" or a "quasi-public corporation." 64 Am.Jur.2d, Public Utilities, §1. Thus, the statute quoted above pertains to such separate entities, as General Miller correctly noted in the above-referenced opinion. But, the statute is not limited in its application to such separate entities, for by its express terms also applies to utilities which are "municipally owned" and requires such municipally owned utilities to pay interest on the security deposits made by its customers in the amount prescribed.

In summary, we conclude that K.S.A. 1979 Supp. 12-822 imposes a statutory obligation on a city which provides utility services generated by facilities owned and operated by said city to credit and pay interest on security deposits collected from its customers.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Steven Carr

Steven Carr
Assistant Attorney General

RTS:SC:phf
CC: Carol Bloodworth
City Clerk
205 E. 8th, City Hall
Horton, Kansas 66439