



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 13, 1981

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

ATTORNEY GENERAL OPINION NO. 81-160

Mr. Arthur N. Turner
Attorney for the City of Newton
Ice, Turner & Ice
Attorneys and Counselors
713 North Main Street, Box 224
Newton, Kansas 67114

Re: Cities--Public Utilities--Formation of Limited
Partnership to Construct Wind Turbine System

Synopsis: The city of Newton may, pursuant to the home rule powers set forth in Article 12, §5 of the Kansas Constitution, become a limited partner (with no right or obligation to share in partnership profits or losses) in a limited partnership which proposes to construct a wind turbine system and sell electricity to the city of Newton (for use in operating the city's water supply facility) at a rate less than it now pays to a privately-owned electric utility. Cited herein: K.S.A. 10-1202, 10-1203, 12-801, 12-826, 12-842, 12-843, 13-1209, 13-1220, 13-1242, 56-122; Kan. Const., Art. 12, Section 5.

*

*

*

Dear Mr. Turner:

As attorney for the city of Newton, you advise that a wind energy study has shown that it is feasible to utilize wind-generated electricity to provide part of the electrical power required by the water supply facility operated by the city of Newton. Further, you state that it has been proposed that a limited

Mr. Arthur N. Turner
Page Two
July 13, 1981

partnership, composed of private investors and the city of Newton, be formed to construct and own a wind turbine system, and sell electricity to the city at a rate less than it now pays to a privately-owned electric utility. You advise that, under this proposal, the city would be a "nominal, nonparticipating" limited partner with no control in the operation of the partnership, and that the city would have no right or obligation to share in the profits or losses of the partnership. Also, the city would have an option to purchase the system, which is expected to have a service life of twenty years, after a period of seven years. You request our opinion as to the legality of the city of Newton becoming a limited partner in the proposed limited partnership.

A question similar to the one you have raised was considered in Attorney General Opinion No. 73-341. That opinion (a copy of which is enclosed) concerned the legality of the city of Russell entering into a joint agreement with a private power plant for the purpose of constructing additional plant capacity to be utilized jointly by the municipality and the power company. In construing the provisions of K.S.A. 12-842 and 12-843, which statutes are applicable to cities of the second and third class; former Attorney General Vern Miller opined as follows:

"Nothing in the language of either statute implies that such a joint undertaking is prohibited, and it is our view that any power which the city is capable of exercising independently thereunder may be exercised jointly by the city in conjunction with a private company."

Five years after the above-referenced opinion was rendered, the Kansas Legislature specifically authorized certain municipalities to enter into agreements with any privately-owned electric utility for the construction of generating facilities and for the purchase of electric energy produced by such generating facilities, and to issue revenue bonds to pay for the city's share of the cost of such jointly-constructed generating facilities. See K.S.A. 1980 Supp. 10-1202(b). Additionally, numerous legislative enactments establish that the construction of power plants and the generation of electricity is a vital concern of municipalities. See K.S.A. 10-1202 et seq., 12-801 et seq., 12-826 et seq., 13-1209 et seq., 13-1220 et seq., and 13-1242 et seq.

It should be recognized that the existence of a specific enabling statute, authorizing the city of Newton to become a limited partner in the proposed project, is unnecessary, due to Article 12, Section 5 of the Kansas Constitution, which is popularly known as the city home rule amendment. A city's home rule power, which

Mr. Arthur N. Turner
Page Three
July 13, 1981

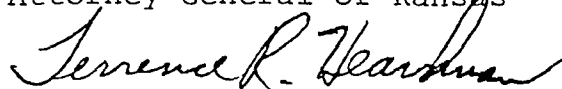
by the terms of this constitutional provision is to be construed liberally, enables a city to determine its local affairs and to enact ordinances even when not specifically empowered to do so by state statute. Claflin v. Walsh, 212 Kan. 1 (1973). This power is restricted only in certain prescribed cases, i.e., when the legislature has enacted a law uniformly applicable to all cities which regulates the subject [City of Junction City v. Griffin, 227 Kan. 332 (1980)] or which expressly preempts the field. [Uhl v. City of Ness City, 590 F.2d 839 (10th Cir., 1979).] In this regard, we are unaware of any uniformly applicable statutory provision which would prohibit the city of Newton from becoming a limited partner in the proposed partnership. Although K.S.A. 10-1203 prohibits municipalities from issuing revenue bonds to construct facilities for the furnishing of any utility service where the same is being furnished by a private utility, except upon approval by the state corporation commission after certain findings (including a finding that duplication of existing utility services will not result), said statutory provision would not appear to be relevant, since there is no indication that the city of Newton will seek to issue revenue bonds in connection with the proposed project. In addition, it has been held that a city may construct an electric generator plant to provide electric energy for its own purposes in competition with a private electric company, where the franchise of the private electric company is nonexclusive. Kansas Gas & Electric Co. v. City of Independence, 79 F.2d 32 (1935). Finally, it appears that the proposed limited partnership would offer certain advantages over the "joint undertaking" which was approved in Attorney General Opinion No. 73-341, in that the city, as a limited partner, would not be bound by the obligations of the limited partnership. See K.S.A. 56-122.

For the reasons stated above, it is our opinion that the city of Newton may, pursuant to the home rule powers set forth in Article 12, §5 of the Kansas Constitution, become a limited partner (with no right or obligation to share in partnership profits or losses) in a limited partnership which proposes to construct a wind turbine system and sell electricity to the city of Newton (for use in operating the city's water supply facility) at a rate less than it now pays to a privately-owned electric utility.

Sincerely,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General