



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83-183

Mr. Steven L. Boyce
Coffey County Attorney
514 Neosho
P.O. Box 452
Burlington, Kansas 66839

Re: Corporations--Electric Cooperative, Nonprofit,
Membership Corporations--Easements

Synopsis: K.S.A. 17-4627 does not bar action by a county against an electric cooperative for relocation of transmission lines and poles located within the right of way of a county road, where the board of county commissioners has determined that it is necessary to widen the road, and such poles and lines must be moved to accomplish the same.

County approval of the location, upon the right of way of a county road, of transmission lines and poles of an electric cooperative does not obligate the county to bear the cost of any future relocation of the lines, if the same becomes necessary. If such lines must be relocated in order to improve the road, the electric cooperative must bear the expense of relocation. Cited herein: K.S.A. 17-4601, 17-4604, 17-4627.

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Dear Mr. Boyce:

You request our opinion regarding responsibility for expenses to be incurred in relocating poles and transmission lines of an electric cooperative. You advise that said poles and lines are located within the right of way of a county road, and must be moved in order to improve (widen) the road. You indicate that the poles and lines have been continually maintained in their present location for over 15 years, but that the cooperative, which is operating under authority of K.S.A. 17-4601 et seq., has no easement granting authority to construct and maintain the same. However, you advise that the minutes of a 1939 Coffey County Board of Commissioners meeting state as follows:

"L. J. Pilcher requested and received permission for the Rural Electrification Assn. to set poles for their lines on roads, where necessary to do so"

You advise that the electric cooperative denies liability for relocation expenses, and you specifically request our opinion as to the following questions:

"1. Is K.S.A. 17-4627 applicable to public bodies and land that is dedicated as a public road, and can a cooperative thereby acquire statutory rights that would require relocation of lines to be at the expense of a public body where the electric lines have been maintained on county road right of way property without the grant of an easement?

"2. Does the excerpt from the board of commissioner's meeting shown above constitute a binding agreement that the R.E.C. may locate its lines on county rights of way where it is, to quote the minutes, 'necessary to do so,' and if so, is the county then financially responsible if it becomes necessary to use the county road area where the lines are situated?"

In regard to your first question, K.S.A. 17-4627 establishes a two-year statute of limitation when an electric cooperative places transmission lines on real property. Specifically, the statute provides as follows:

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"No action or suit may be brought against a cooperative doing business in this state pursuant to this act, or against any agent, servant or employee thereof, by reason of the maintenance of electric transmission or distribution lines on any real property after the expiration of a period of two years of continuous maintenance of such lines without the consent of the person or persons legally entitled to object to such maintenance."

The above-quoted provision does not specifically exclude the right of way of a county road from its operation. However, subsection (i) of K.S.A. 17-4604 grants an electric cooperative the power

"to construct, maintain and operate electric transmission and distribution lines along, upon, under and across publicly owned lands and public thoroughfares, roads, highways, streets, alleys, bridges and causeways in conformity with the laws of the state of Kansas."

K.S.A. 17-4604 and 17-4627 deal with the same subject matter, and, therefore, must be construed together as statutes in pari materia. See Gnadt v. Durr, 208 Kan. 783 (1972). Applying this principle, it appears that the right of a cooperative to locate its lines on a public highway emanate from the specific provisions of K.S.A. 17-4604(i), and that the provisions of K.S.A. 17-4627 were not intended to apply where transmission lines are maintained on such a highway. Also, it should be noted that the Kansas Supreme Court has not countenanced claims based upon adverse possession or laches in highway cases. Specifically, in City of Emporia v. Humphrey, 132 Kan. 682 (1931), the court stated as follows:

"As was said in Eble v. The State, supra:

"This court is already committed to the doctrine that a private individual cannot obtain title to a public highway by adverse possession; that lapse of time will not bar the remedy of the state against encroachments upon a highway; that an obstruction to the public use of a highway is a continuing nuisance; and that no equities in favor

of a person committing such a nuisance can be founded upon the acquiescence of the highway or other officials, or upon their laches in taking steps to punish or abate it. (McAlpine v. Railway Co., 68 Kan. 207, 75 Pac., 73, 64 L.R.A. 85; Webb v. Comm'rs of Butler Co., 52 Kan. 375, 34 Pac. 973, and cases cited in those opinions.)' (p. 184.)" 132 Kan. at 693.

In accordance with the above authorities, it is our opinion that K.S.A. 17-4627 does not bar an action or lawsuit by a county against an electric cooperative for relocation of transmission lines and poles located within the right of way of a county road, where the board of county commissioners has determined that it is necessary to widen the road, and such poles and lines must be moved to accomplish the same.

In regard to your second question, the Kansas Supreme Court has held that a property right is not created by city approval of the location of a transmission line of a utility holding a franchise to maintain power lines in public places, and that no negotiated compensation or condemnation is required when relocation of such a line is necessitated by public improvements. City of Wichita v. Kansas Gas & Electric Co., 204 Kan. 546, 556 (1970). In the last-cited case, the Court noted with approval the following general rule regarding responsibility for expenses incurred for relocating utility facilities maintained on a public way:

"Charters, franchises, statutory grants and permits affording the use of public ways to utility locations are subservient, expressly or by implication, in the exercise of governmental functions, to public travel and to the paramount police power and relocation of utility facilities in public streets or ways are at utility expense, a common law liability unless abrogated by the clear import of the language used in a particular statute." (Footnotes omitted.) [Emphasis added.] Nichols, Eminent Domain (Revised Third Edition) §15.22.

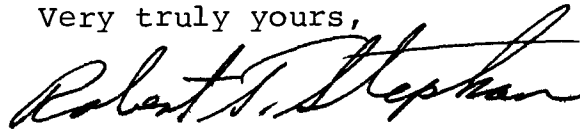
Additionally, in the same case, the Court cited with approval, regarding the obligation of utilities to relocate at their own expense, the case of Port of N.Y. Auth. v. Hackensack Water Co., 195 A.2d 1 (N.J. Sup. Ct., 1963). Id. at 556. In said case, it was held that the utility's obligation to relocate at its expense existed even in the absence of a delegation of authority over relocation from the state to the subdivision thereof which undertook the improvement which required relocation. 195 A.2d at 4.

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Although the City of Wichita case, supra, concerned a utility holding a franchise to occupy city streets, we discern no reason why the principles enunciated therein would not be equally applicable to an electric cooperative which maintains transmission lines on a county road pursuant to the provisions of K.S.A. 17-4604(i). In this regard, we are unaware of any Kansas case which considers the obligation of a utility to relocate lines located on a county road, but at least one other jurisdiction has held that the same implied obligation to relocate, which exists under a franchise agreement, also applies where facilities are located on a county road pursuant to statutory authorization. See County of Contra Costa v. Central Contra Costa Sanitary Dist., 225 C.A.2d 701 (Cal., C.A. 1st Dist., 1964). In our judgment, this rule would be followed by Kansas courts.

In accordance with the above-cited authorities, it is our opinion that county approval of the location (upon the right of way of a county road) of transmission lines and poles of an electric cooperative does not obligate the county to bear the cost of any future relocation of the lines, if the same becomes necessary. In our judgment, if such lines and poles must be relocated upon the right of way easement of the county road, in order to improve the road, the electric cooperative is liable for expenses associated with the relocation.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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