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June 12, 1984

ATTORNEY GENERAL OPINION NO. 84-54

Mr. Robert J. Watson
Kansas City City Attorney
Municipal Building
One Civic Center Plaza
Kansas City, Kansas 66101

Re: Public Utilities--Powers of State Corporation
Commission--Municipal Franchises and Ordinances

Synopsis: The Kansas Corporation Commission's limited right under K.S.A. 66-133 to evaluate a proposed franchise ordinance in light of the public welfare and interest does not include authority to "advise and recommend" against the adoption of such an ordinance based upon an adverse impact the ordinance might have upon a public utility already holding a certificate of convenience and necessity to transact business within the city. Further, as there are no statutory factors which a city governing body must take into account in exercising legislative discretion to approve or disapprove a franchise ordinance, such a governing body is not required to investigate the effect granting a gas franchise (to an applicant seeking to become a one-city public utility) would have upon the rates of a certificated natural gas public utility now operating within the city.
Cited herein: K.S.A. 12-2001, 66-104, 66-107, 66-110, 66-111, 66-117, 66-131a, 66-133, L. 1911, ch. 238, §§3, 33, L. 1978, ch. 263, §1, K.A.R. 82-1-231.

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Dear Mr. Watson:

You request our opinion regarding the statutory requirements which guide the City Council of Kansas City, Kansas in considering an application by Fairfax Gas Company, L.P. (hereinafter referred to as "Fairfax") for a franchise to operate as a natural gas public utility. You have provided a copy of the franchise application and a copy of a letter of May 3, 1984, from Mr. Martin J. Bregman, Senior Attorney for Gas Service Company. These documents disclose the facts which are pertinent to the requested opinion.

Fairfax has applied for a franchise to operate as a natural gas public utility wholly within the corporate limits of the city. Gas Service Company and Union Gas System currently have gas franchise agreements with the city. Initially, Fairfax proposes to construct and operate a natural gas distribution system which would serve, among others, industrial users of natural gas. Gas Service Company contends that these industrial gas users are presently customers of Gas Service Company, and that service of these customers by Fairfax would amount to "cream skimming," which would necessitate a "significant increase in the rates charged Kansas City commercial and residential customers" by Gas Service Company.

You indicate the essence of Gas Service Company's protest is that the granting of the requested franchise would have an adverse impact on the "rates charged to Kansas City, Kansas citizens by Gas Service Company," and that the city's governing body is obligated to consider such adverse impact in determining whether to grant the franchise. Therefore, the principal issue for consideration is whether a city's governing body, in considering a proposed franchise agreement, must take into account the effect it will have on the rates charged by other franchisees.

The question presented is essentially one of statutory construction, and there are several statutory provisions of relevance to this issue. One such statute is K.S.A. 12-2001, which, as described by the Kansas Supreme Court, "relates to the granting of a franchise by ordinance to any person, firm or corporation, to supply, among other things, natural gas, and prescribes conditions upon which the franchise may be granted." Kansas Public Service Co. v. State Corporation Commission, 199 Kan. 736, 747 (1967).

Also pertinent is K.S.A. 66-104, which defines "public utility" for purposes of circumscribing the jurisdiction of the Kansas Corporation Commission (KCC). Since Fairfax proposes to operate as a natural gas public utility wholly within the corporate limits of Kansas City, the following provisions of K.S.A. 66-104 are applicable:

"Except as herein provided, the power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to the corporation commission as hereinafter provided in K.S.A. 66-133 and to the provisions of K.S.A. 66-131a."

The foregoing provisions have remained essentially unchanged since the section's enactment (L. 1911, ch. 238, §3), except for the amendment (L. 1978, ch. 263, §2) to reference K.S.A. 66-131a, which is not relevant here. Thus, in plain terms, the legislature has declared that the regulation of a public utility operating wholly or principally within one city shall be "vested exclusively in such city," subject only to the right to relief provided in K.S.A. 66-133.

The latter statute authorizes a city to contract with a one-city utility and sets forth the parameters of such authority. A concise statement thereof is provided in Kansas Public Service Co. v. State Corporation Commission, *supra*, as follows:

"K.S.A. 66-133 referred to above authorizes the city to contract with a public utility situated and operated wholly or principally within any city or principally operated for the benefit of such city or its people by ordinance or resolution. Such authority includes the right to contract as to the kind of service to be rendered by the utility, the maximum rates and charges to be paid therefor, provides for the extensions to its physical plant necessary for the benefit of the public, and provides for a reasonable and lawful penalty for noncompliance with the provisions of such ordinance." *Id.* at 747.

K.S.A. 66-133 also provides the KCC with a right of review upon complaint by the one-city utility or by ten or more of the city's taxpayers. Such right of review is for the purpose of determining whether "any right, privilege or franchise granted, or ordinance or resolution or part of any ordinance or resolution adopted, by any municipal council or commission is unreasonable, or against public policy, or detrimental to the best interests of the city,

or contrary to any provisions of law" In substance, Gas Service Company contends that, pursuant to its right of review under K.S.A. 66-133, the KCC is vested with the power to consider the "likely adverse impact" on Gas Service Company's rates to its Kansas City customers as a result of a franchise granted to Fairfax, and that the City Council of Kansas City "must be bound" to this same standard of review in considering whether to grant the franchise. In our judgment, however, such an interpretation of this statute cannot be supported by established rules of statutory construction.

A summary statement of the rules pertinent here is found in Brown v. Keill, 224 Kan. 195 (1978), as follows:

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statute, even though words, phrases or clauses at some place in the statute must be omitted or inserted. (Farm & City Ins. Co. v. American Standard Ins. Co., 220 Kan. 325, Syl. ¶3, 552 P.2d 1363 [1976].) In determining legislative intent, courts are not limited to a mere consideration of the language used, but look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various constructions suggested. (State, ex rel., v. City of Overland Park, 215 Kan. 700, Syl. ¶10, 527 P.2d 1340 [1974].) In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the literal import of words or phrases which conflict with the manifest purpose of the legislature. Kansas Commission on Civil Rights v. Howard, 218 Kan. 248, Syl. ¶2, 544 P.2d 791 [1975].)" 224 Kan. at 199, 200.

Of similar import is the maxim that effect must be given, if possible, to the entire statute and every part thereof. Harris v. Shanahan, 192 Kan. 629, 635 (1964). Furthermore, it is well established that statutes in pari materia should be construed together so as to harmonize their respective provisions, if reasonably possible to do so [Callaway v. City of Overland Park, 211 Kan. 646, 650 (1973)]. Statutes need not be enacted at the same time in order to be in pari materia. Claflin v. Walsh, 212 Kan. 1, 8 (1973).

With these rules in mind, it should first be recognized that to the extent each of them pertains to the supervision and control of one-city utilities, K.S.A. 12-2001, 66-104 and 66-133 must be regarded as statutes in pari materia, even though they were not enacted at the same time. 212 Kan. at 8. Hence, they must be construed together so as to harmonize their respective provisions in order to give effect to the legislature's intent. 211 Kan. at 650. K.S.A. 66-104 and 66-133 were originally enacted in 1911 as sections 3 and 33, respectively, of the Public Utilities Act (L. 1911, ch. 238, §§3, 33). As previously noted, the provisions of K.S.A. 66-104 which vest in a city the power to control public utilities situated and operated wholly or principally within such city are substantially unchanged since their enactment, and the statute has always qualified such grant of authority with a reference to the right to apply for relief under K.S.A. 66-133. Within this context, the Kansas Supreme Court, in Street Lighting Co. v. Utilities Commission, 101 Kan. 774 (1917), reached the following conclusions regarding the power of cities to control local utilities:

"The act which creates the public utilities commission and clothes it with power to supervise, regulate, and control all important public service companies doing business in Kansas reserves to the cities of this state the control and regulation of certain local utilities" Id. at 776.

The Court further concluded:

"The cities of this state have always had the power to regulate and control their local public service corporations . . . Cities still have the power except where they have been stripped of it by the public utilities act. (Laws 1911, ch. 238, §40 Gen. Stat. 1915, §8368; Humphrey v. City of Pratt, 93 Kan. 13, 418, 144 Pac. 197.) And where the utility

service is furnished wholly or principally within one city, the power of control is expressly reserved to the city. (§§3 and 33, public utilities act.) If the local utility company and the city come to loggerheads, then the public utilities commission may take jurisdiction by a proceeding somewhat in the nature of an appeal or right of review. (Laws 1911, ch. 238, §33, Gen.Stat. 1915, §8361.)" Id. at 778.

This judicial pronouncement is pertinent to an appropriate construction of K.S.A. 66-104 and 66-133. As these are sections of a comprehensive act, legislative intent cannot be ascertained by considering them in isolation, but must be determined within the context of the entire act. See Brown v. Keill, supra. The foregoing statements of the Court in Street Lighting Company v. Utilities Commission, supra, provide assistance in this regard. From these statements, it is apparent that the Public Utilities Act removed from the cities some of their prior powers regarding the supervision and control of public utilities operating within their corporate limits. However, sections 3 and 33 of that act, now codified at K.S.A. 66-104 and 66-133, respectively, are viewed by the Court as expressly reserving to each city the power to control a public utility operating wholly or principally within such city.

The principles enunciated in the Street Lighting case have been restated with approval in subsequent cases. See, e.g., City of Hutchinson v. Hutchinson Gas Company, 125 Kan. 346, 350 (1928) and Kansas Public Service Co. v. State Corporation Commission, supra at 749. In the latter case, the Court considered the validity of a KCC order granting a public utility a certificate of convenience and necessity to operate in territory in which a one-city utility had been granted a franchise by a city to provide utility services. In concluding that the one-city utility was legally entitled to serve its franchised territory, the Court stated:

"In the instant case, both regulatory bodies have issued authorization to different public utilities to serve the same territory. A city is a creature of the Legislature, the same as the Commission, which may exercise only such powers as the Legislature confers. The state gives, and the state can take away, but until the Legislature changes the policy of the regulation of 'one-city' public utilities as are situated and operated wholly or principally

within any city, the city's regulation of the utility is as lawful and exclusive as is the Commission's regulations of other public utilities doing business in the state." 199 Kan. at 749.

As a consequence, there is a dual system of public utility regulation, which the Court described as follows:

"As indicated, the Legislature has placed the power and authority to control and regulate all privately owned public utilities in two different regulatory bodies: one, the [State Corporation] Commission, and the other, the city, in which a public utility serves wholly or principally therein and territory immediately adjoining such city, with a limited review vested in the Commission. With respect to the former, the Legislature empowered the Commission to supervise and control all public utilities and to issue certificates of convenience to transact their business in the state. In the same Act, however, the Legislature placed the control and regulation of all public utilities situated and operated wholly or principally within any city, exclusively in such city, subject to limited review by the Commission." 199 Kan. at 748.

Also of significance is the Court's self-imposed duty to liberally construe the KCC's and the cities' powers within their respective spheres of authority. This duty was enunciated in Street Lighting Company v. Utilities Commission, supra, as follows:

"This court will always extend a very liberal interpretation of the public utilities act so as to give the public utilities commission effective use of its lawful powers over the utility companies lawfully subject to its control. Even where it is strongly debatable whether the utility's business is or is not confined principally to one town or city, this court is inclined to resolve the doubt in favor of the commission's authority. (The State, ex rel., v. Water Co., 92 Kan. 227, 231, 140 Pac. 103.) This is wisely so, because wherever the business of a public utility company extends outside the limits of one city, even in a relatively small degree, complications as to the control of that service are likely to arise, or such out-

side service may go unregulated altogether unless the supervision of the state commission is recognized. But where the utility is subject to city control, and not to the state commission's control, the court's support of the city's powers must be just as liberal, so that the city may effectually exercise its governmental powers and discharge the duties entrusted to it by the legislature." 101 Kan. at 777.

See also, Kansas Public Service Co. v. State Corporation Commission, supra at 749, where the Court quoted the foregoing statement and emphasized the Court's duty to liberally construe a city's powers over a utility subject to its control.

These judicial pronouncements serve to clarify the legislative intent and purpose underlying the Public Utilities Act. By that Act the legislature has vested in a city the power to control public utilities operating wholly or principally within the city, and such power is as lawful and exclusive of the KCC's interference as KCC's regulation of the other privately-owned utilities is free from interference by the cities. [As to the exclusive nature of the KCC's power, see City of New Strawn v. Kansas Corporation Commission, 5 Kan.App.2d 630 (1981).] It is within the context of these independent regulatory systems, therefore, that the extent of the KCC's right of review under K.S.A. 66-133 must be determined.

Here, we note that Kansas courts have consistently regarded K.S.A. 66-133 as providing a "limited review" by the state's utility regulatory agency. See, e.g., Kansas Public Service Co. v. State Corporation Commission, supra at 748. In City of Hutchinson v. Hutchinson Gas Co., supra at 349, the Court noted that this statute "provides for a review of public-utility rates and service regulations prescribed by a city government." And in Street Lighting Co. v. Utilities Commission, supra, the Court found this statute made available "a proceeding somewhat in the nature of an appeal or right of review" (Id. at 778) in those instances where a "local utility company and the city come to loggerheads." Id. It also noted that an "unfair contract between the city and the utility company may be corrected" by this section. Id. at 781.

Beyond what these cases have specifically stated regarding the right of review under K.S.A. 66-133, it is important to recognize what the courts have not said. Nowhere has the court stated or intimated that the KCC's right of review under this statute

includes the authority to pass upon the wisdom of the city in granting the franchise in the first instance. Rather, it is clear from these cases that the courts regard this statute as providing a means for resolving disputes arising under the franchise ordinance. It authorizes the KCC to review a city's supervision and control of a single-city utility to determine compliance with the statutory requirements attending the franchise agreement. And in many respects, the courts have viewed this statute as providing protection for the single-city utility itself.

The provisions of K.S.A. 66-133 itself support a conclusion that the KCC's right of review thereunder is very limited in scope. As required by Harris v. Shanahan, supra, and Brown v. Keill, supra, the meaning of these provisions must be derived from a determination of legislative intent, which is to be ascertained from a consideration of the statute in its entirety. Hence, an examination of this statute's provisions discloses that it authorizes a city to contract with a public utility situated and operated wholly or principally within the city, or operated principally for the benefit of the city, with respect to the quality and character of the service to be provided, the maximum rates and charges to be imposed by the utility, the terms and conditions pertaining to the utility's use of the city's streets or other public property, the location, nature and terms and conditions regarding construction of the utility's physical plant and extensions thereof, and provision for a penalty for the utility's non-compliance. In short, the statute authorizes the city to contractually provide for the details of the utility's operations within the city, and it is from this perspective that the complaint procedure, which is prescribed in the balance of the statute, must be considered.

The statute provides that the authority conferred on the city shall be exercised pursuant to ordinance or resolution, but the statute delays the effectiveness of the ordinance or resolution for 30 days after its publication, in order to allow a complaint to be made with the KCC. Either the one-city utility or ten or more of the city's taxpayers may make a timely complaint in the manner prescribed, and the nature of the complaint is that

"any right, privilege or franchise granted, or ordinance or resolution or part of any ordinance or resolution adopted, by any municipal council or commission is unreasonable, or against public policy, or detrimental to the best interests of the city, or contrary to any provisions of law"

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The statute then prescribes an abbreviated time frame within which the complaint is to be heard, and after the hearing, if the KCC finds

"that any provision of any such ordinance or resolution is unreasonable, or against the public welfare or public interest, or has reason to believe that the same may be contrary to law, said corporation commission shall, within ten days, advise and recommend such changes in the ordinance or resolution as may be necessary to meet the objections set forth in the complaint and protect the public interest, and to remove any unreasonable provision therefrom"

Should the city fail to heed the KCC's advice and recommendations, the KCC is empowered to institute legal proceedings "to set aside any ordinance or resolution, or part thereof, because of its unreasonableness or illegality, or because the same is not for the promotion of the welfare and best interests of said municipality"

From this summary review, it is to be observed that: (1) the statute authorizes a city, by ordinance or resolution, to provide for the details of the one-city utility's operations; (2) the one-city utility and the city's taxpayers are authorized to file a complaint with the KCC regarding the provisions of the ordinance or resolution; and (3) pursuant to an expedited procedure, the KCC is to determine whether said provisions are unreasonable, against the public welfare or public interest or are contrary to law. In essence, it is our opinion that the statute is designed to insure a prompt determination of the fairness of the franchise agreement, from the standpoint of both the one-city utility and its ratepayers, with the fairness being measured with reference to the elements of the agreement specified in the statute. There is no express requirement, either with reference to the city or the KCC, that the ordinance must be considered in light of its impact on other public utilities.

Notwithstanding the absence of an express requirement to this effect, we will examine the contention that the statute should be construed so as to require the city and the KCC to consider, in determining whether a franchise ordinance is against the public interest or public welfare, the effect the ordinance will have on the rates of other utilities operating within the city. In recognition of the principles of statutory construction which provide for ascertaining legislative intent by considering "the

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effect the statute may have under the various constructions suggested" (Brown v. Keill, supra), it is appropriate to consider the consequences of this interpretation.

Since Gas Service Company contends that cities are "bound to" the same standards imposed on the KCC by K.S.A. 66-133, the first assumption would be that K.S.A. 66-133 requires the KCC, in its review of a city's franchise ordinance, to consider the effect such ordinance would have on the rates of other utilities franchised by the city.

Proceeding on that assumption, Gas Service Company's argument suggests the KCC might determine that the one-city utility's rates proposed under the franchise ordinance would be less than those in effect for a KCC-certificated utility already serving the proposed franchised territory, and that granting the franchise under such conditions would have an adverse impact on the certificated utility's revenues, thereby necessitating an increase in its rates. If the KCC were to conclude that the adverse impact on the certificated utility renders the proposed franchise ordinance "unreasonable, or against the public welfare or public interest, or . . . that the same may be contrary to law," what action might the KCC take? Could it "advise and recommend" to the city that the proposed franchise be denied and subsequently commence the prescribed court proceeding, if the city ignores such advice and counsel? In our judgment, such a result runs afoul of the above-cited authorities. To suggest that the KCC can deny the city's right to grant a franchise in the first instance is directly contrary to the judicially-established principle that cities are vested with the lawful and exclusive power to control public utilities situated and operated wholly or principally within their respective boundaries. Moreover, it can scarcely be argued that such action would be in concert with the courts' consistent interpretation that K.S.A. 66-133 provides the KCC with only a "limited" right of review. In our opinion, the power to deny the city's authority to grant the franchise under any circumstances cannot be considered as a "limited" review.

On the other hand, if the KCC recognizes the city's right in the first instance to grant the franchise, but determines that the adverse impact on the certificated utility is against the public welfare or public interest, could it "advise and recommend" that the proposed rates be increased so as to eliminate the one-city utility's competitive edge? The absurdity of such possibility is particularly evident if it is assumed that the rates proposed in the ordinance already allow the one-city utility to recover its costs of service and provide it with a reasonable rate of return on its investment. To increase the rates beyond

this level would contravene established rate-making principles applied by the KCC to certificated utilities, as well as unjustly enriching the one-city utility to the detriment of its ratepayers.

It would serve no useful purpose here to speculate as to other possible consequences resulting from the equation of "public welfare" or "public interest" with the prevention of a public utility being placed at a competitive disadvantage as a result of a franchise granted to a one-city utility. Suffice it to say that in our opinion the KCC's limited-right of review under K.S.A. 66-133, to measure a proposed franchise ordinance against the public welfare and public interest, does not include authority to "advise and recommend" against the adoption of such ordinance based upon any adverse impact the ordinance might have upon a public utility holding a certificate of convenience and necessity to transact business within the city adopting the ordinance.

Having concluded that the KCC's power of review under K.S.A. 66-133 does not include authority to insulate a certificated public utility against competition from a "one-city" utility, it is necessary to determine whether a city considering the franchise application of a "would-be one-city utility" may take into account allegations that granting such a franchise would have an adverse impact upon rates of a competing certificated public utility operating within the city. In this regard, it is clear that while K.S.A. 12-2001 and K.S.A. 66-133 grant permissive authority to cities to enter into franchise contracts with public utilities, neither of said statutes dictates that the governing body of a city must approve a franchise application. Further, an authority on the law of municipal corporations indicates that a municipality has power to refuse to allow a public utility to use its streets. See 12 McQuillin, Municipal Corporations §34.19 (3rd ed. 1970). For these reasons, and in recognition of the fact that adoption of a franchise ordinance requires legislative action by the governing body, it is our opinion that there are no constraints (statutory or otherwise) upon a city governing body as to matters which it may take into account in exercising its legislative discretion to approve or disapprove a franchise application.

Although it is our opinion, as stated above, that the governing body of the city of Kansas City is not foreclosed from considering an alleged adverse impact upon the rates of Gas Service Company in acting upon the franchise application of Fairfax, we are impelled to observe that an investigation by the city of the impact upon Gas Service Company rates may be neither feasible nor appropriate. In this regard, it should be noted that the KCC

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has the authority, either upon complaint, application or its own initiative, to investigate the rates established by public utilities, (see, e.g., K.S.A. 66-107, 66-110, 66-111, 66-117), but no such authority has been provided cities, either expressly or by implication.

Thus, a city has no legal basis for compelling a public utility under the KCC's jurisdiction to furnish the city with the books, records, documents and information necessary to investigate the effect the franchising of a one-city utility would have on the public utility's rates. Any such investigation would necessarily be of a scope and extent similar to the KCC's investigation of a utility's application for a change in its rates, and merely a cursory review of the KCC's regulation (K.A.R. 82-1-231) prescribing the contents of a utility's rate application provides insight as to the magnitude and complexity of the investigation necessary to establish just and reasonable rates. As indicated by this regulation, such investigation includes a consideration of the utility's rate base, operating income and expenses, plant investments (including provisions for depreciation, amortization and depletion) and rate of return thereon, capital and cost of money, taxes and other financial and operating data. Thus, the governing body of the city must consider whether it is in a position to undertake an investigation of this magnitude and complexity.

Moreover, even if the public utility were to voluntarily provide a city's governing body with the foregoing data and information, it would be presumptuous at best for the city to undertake such an investigation, for the city would be intruding in an area that is the exclusive province of the KCC. It can scarcely be argued that the findings emanating from the city's investigation would be conclusive upon either the KCC or the public utility. Thus, arguably, such investigation would result in an unwarranted expenditure of time and money by both the city and the utility.

In summary, it is our opinion that the Kansas Corporation Commission's limited right under K.S.A. 66-133 to evaluate a proposed franchise ordinance in light of the public welfare and interest does not include authority to "advise and recommend" against the adoption of such an ordinance based upon an adverse impact the ordinance might have upon a public utility already holding a certificate of convenience and necessity to transact business within the city. Further, as there are no statutory factors which a city governing body must take into account in exercising legislative discretion to approve or disapprove a franchise ordinance, such a governing body is not required to investigate the effect granting a gas

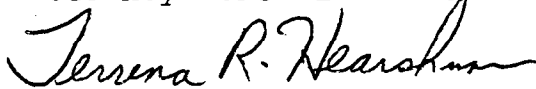
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franchise (to an applicant seeking to become a one-city public utility) would have upon the rates of a certificated natural gas public utility now operating within the city.

Very truly yours,



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