



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

May 17, 1985

ATTORNEY GENERAL OPINION NO. 85- 55

Michael B. Brewer
Attorney, Rural Water
District No. 2
Hines & Ahlquist, P.A.
P.O. Box 67
Erie, Kansas 66733

Re: Cities and Municipalities--Franchises--Granting
of Franchises

Synopsis: If, after expiration of a municipal franchise, a rural water district continues to furnish water to city residents and a city accepts such service, an implied contract arises under which the water district may continue to provide service according to the terms of the expired franchise. Cited herein: K.S.A. 12-2001.

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Dear Mr. Brewer:

You advise that Rural Water District No. 2 of Neosho County and Allen County, Kansas, supplies water to residents of the City of Elsmore, and that the franchise granted by the city to the rural water district has lapsed. Additionally, you indicate that the city and the district have reached a stalemate in efforts to negotiate a renewal of the franchise, and pose a number of questions relating to the rights and obligations of the parties in the event a new franchise agreement is not executed. Your questions, and our responses thereto, are set forth below.

1. "May the water district continue to provide service in the absence of a renewed franchise agreement?"

It is a general rule that a utility which continues to operate in a city after a franchise expires does so under an implied contract. The Kansas Supreme Court has noted that generally, upon the expiration of a municipal franchise granted to a utility, there is no longer any contractual relationship between the city and the utility. This would be the case in Elsmore, where the original franchise to Rural Water District No. 2 has expired and a stalemate has been reached in negotiating a new franchise ordinance. However, in Baker v. City of Topeka, 231 Kan. 328, 332 (1982), the court noted that an exception to the general rule occurs when:

". . . the parties to the franchise agreement continue to perform after the expiration of the franchise in the same manner as they did when the franchise was still formally in effect."

In such a case an inference is created that the parties have assented to a new contract containing the same provisions as the old contract. The court continued:

"A number of decisions have applied this principle to contractual relationships existing between municipalities and franchisees, when both continue to accept benefits and burdens of the franchise after the term of the franchise has expired. In Incorporated Town of Pittsburg v. Cochrane, 195 Okla. 593, 159 P.2d 534 (1954), the plaintiff was a holder of a franchise granted by a city under which the franchise holder was to furnish water and lights to the inhabitants of the town for a period of twenty years. After the expiration of the twenty-year term, neither party did anything to continue or discontinue their relationship. The utility continued to furnish water and lights and the town inhabitants continued to pay for such services. The utility defaulted on its taxes, and Cochrane acquired the utility's property at a sheriff's sale. The city brought an action to enjoin Cochrane from removing the assets of the utility. The court held that Cochrane acquired no greater rights than the

original franchise holder, and that the utility's assets could not be removed without first giving the town reasonable notice in which to obtain a new water system. The court stated in effect that the contractual relationship that existed prior to the expiration of the express franchise continued on the same terms and conditions after the date of expiration and said:

"If after termination of the franchise the company continues to furnish and the town accepts the service, an implied contract of indefinite duration arises and the company functions as a quasi-public utility subject to the terms of the former franchise and the rules and regulations of the Corporation Commission. Such arrangement may be terminated by either party by the giving of such reasonable notice as would be consistent with the duty owed by both to the inhabitants of the town. See Ann. 112 A.L.R. 635, 43 Am.Jur.Sec. 79, page 622' pp. 596-597. (Emphasis added.)" Id. at 332-333.

See also McQuillin, Municipal Corporations, §34.51; City of Richmond v. Chesapeake and Potomac Tel. Co., 205 Va. 919, 140 S.E.2d 683 (1965).

While the situation in Elsmore is not entirely the same as that presented in the Baker case, we believe the implied contract reasoning expressed therein is appropriate in justifying the continued operation of Rural Water District No. 2 in the city. Additionally, as indicated in the Baker case, the water district may not terminate service to its customers within Elsmore, nor may the city interfere with such service, until such time as the city or a private utility is prepared to provide comparable service.

2. "What are the potential remedies of water district customers within the city of Elsmore against the rural water district and/or the City of Elsmore in the event of termination arising from non-renewal?"

This question is moot in that the duty owed by both the city and the water district to residents of Elsmore is inconsistent with a discontinuance of service arising from failure to agree upon a new franchise ordinance. See authorities cited above.

3. "May the water district force the city to purchase its water system in the event the franchise agreement is not renewed?"

We are unaware of any statutory or common law obligation which would compel a city to purchase facilities or equipment of a utility upon expiration of a franchise ordinance, although it is difficult to conceive how either the city or another franchisee could avoid purchasing the district's system before instituting new service.

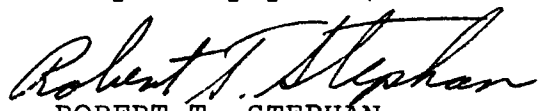
4. "Who owns the water distribution system within the city boundaries, and co-extensive property rights, in the event of non-renewal of the franchise agreement?"

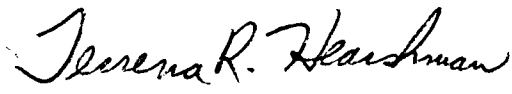
The water district retains ownership of the water system within the city upon expiration of the franchise agreement. See McQuillin, Municipal Corporations §34.51 (3rd ed. 1970).

5. "May the city refuse to renew the franchise agreement in light of the water district's obligation to customers residing within the city."

Under the provisions of K.S.A. 12-2001, a city governing body may refuse to extend a franchise. However, as indicated above, the City of Elsmore may not interfere with water service provided by Rural Water District No. 2 until such time as the city or a private utility is prepared to provide comparable service.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Terrence R. Hearshman
Assistant Attorney General

RTS:JSS:TRH:jm