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February 28, 1986

ATTORNEY GENERAL OPINION NO. 86- 26

The Honorable Carl Holmes  
State Representative  
One Hundred Twenty-Fifth District  
P.O. Box 578  
Plains, Kansas 67869

Re: Corporations--Telegraph, Telephone and Transmission  
Lines--Rights, Powers and Liabilities of Telephone  
Companies

Cities and Municipalities--Franchises--Granting of  
Franchises

Synopsis: Under the provisions of K.S.A. 17-1902 and K.S.A.  
1985 Supp. 12-2001, telephone companies may build their  
lines along and upon city streets (in such manner as  
not to inconvenience the public in the use of the  
street), subject to reasonable municipal regulations.  
Accordingly, a city may impose reasonable restrictions  
upon the manner and place of construction of proposed  
telephone lines. Cited herein: K.S.A. 1985 Supp.  
12-2001; K.S.A. 17-1901; 17-1902; 17-1906.

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Dear Representative Holmes:

You request our opinion as to whether a city may require a  
telephone company which serves customers within the city to enter  
into a franchise agreement that contains language which  
regulates the use of the city's right-of-ways by the company.

K.S.A. 1985 Supp. 12-2001 provides, in part, that the governing  
body of any city may permit any person, firm or corporation to

construct and operate telephone lines, and prescribes the procedures and terms upon which such a privilege or franchise may be granted. Under the provisions of K.S.A. 17-1901, the state has conferred authority upon telegraph companies

"to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters." (Emphasis added.)

K.S.A. 17-1902 extends the provisions of 17-1901 to telephone companies, and subjects said companies to all statutory liabilities imposed upon telegraph companies. One such liability is K.S.A. 17-1906, which confers authority upon cities to regulate the location of telegraph facilities and to direct any alteration in the location of such facilities.

In Wichita v. Telephone Co., 70 Kan. 441 (1904), the Kansas Supreme Court was called upon to reconcile the provisions of K.S.A. 17-1902 with a statute authorizing the City of Wichita to "grant the right-of-way" for the erection of telephone posts and wires. The court held that while the latter statute allowed the City of Wichita "to determine and designate the streets and alleys which may be occupied and used" by telephone companies, K.S.A. 17-1902 authorized said companies to set their poles and wires along and upon city streets. Id. at 449.

In Telephone Co. v. Emporia, 81 Kan. 514 (1910), the court construed the provisions of K.S.A. 17-1902 and a statute authorizing second and third class cities to grant the use of city streets for telephone lines. The court held as follows:

"The theory of all these acts appears to be that telephone companies have the right to build their lines into a city and to use the streets for that purpose, under such reasonable regulations as the city council may prescribe. It is contended that, as the act of 1905 requires a telephone company to procure the passage of an ordinance granting the right to enter a city and defining at length the terms upon which the right is to be exercised, it impliedly repeals the general act granting such rights to telegraph companies. The same contention was made in respect to a like statute in Wichita v. Telephone Co., 70 Kan. 441, and it was there held that the later act did not operate as a repeal of the one giving the right, and that it only gave the city a regulating power.

Repeals by implication are not favored, and as these acts, taken together, admit of a construction that the state has directly granted telephone companies the right to build over the streets of cities, subject to such reasonable regulation as the council may prescribe, that construction should be adopted. No company should undertake to enter a city and erect poles and string wires over or along streets, alleys or public grounds without making application and a proper effort to procure the passage of an ordinance defining the manner and place of construction of the contemplated lines. Such an application the council may not deny. It may regulate, but not exclude. The telephone companies get the right directly from the state, and not from the city. The city may prescribe terms and conditions upon which the right granted by the state shall be exercised, but it has no power to annul the right granted by the higher authority." 81 Kan. at 517.

In our judgment, the provisions of K.S.A. 1985 Supp. 12-2001 should be construed together with K.S.A. 17-1902 in the same manner as the franchise statutes which were considered in the Wichita and Emporia cases, supra. Accordingly, it is our opinion that under the provisions of K.S.A. 17-1902 and K.S.A. 1985 Supp. 12-2001, telephone companies may build their lines along and upon city streets (in such manner as not to inconvenience the public in the use of the street), subject to reasonable municipal regulations. Additionally, a city may impose reasonable restrictions upon the manner and place of construction of proposed telephone lines.

Very truly yours,



ROBERT T. STEPHAN  
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