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Subject

Utilities Public
Regulations

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STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

April 15, 1974

Opinion No. 74- 100A

Honorable Fred W. Rosenau
Representative, Thirty-Ninth District
3050 South 65th Street
Kansas City, Kansas 66106

Dear Representative Rosenau:

In your letter of recent date, you inquired concerning "the legal right for the BPU to contribute large sums of money for local Chamber of Commerce activities." Our response, opinion No. 74-100, was prepared without the benefit of a 1954 opinion issued by Attorney General Harold Fatzer dealing with this general question. That opinion was issued to Charles W. Lowder, counsel for the Board, on April 19, 1954. It was missing from our files, and has since been furnished us by Mr. Ben Franklin, counsel for the Board, having been spread on the minutes of the Board April 21, 1954. Attorney General Fatzer stated thus, in pertinent part:

"You request our opinion as to whether the Board of Public Utilities may make a pecuniary contribution to the Chamber of Commerce commensurate with the service rendered and benefit received. It is our view that the Board of Public Utilities may, consistent with the provisions of law, expend moneys under its control for the purpose of enlarging the market for electric power in the Kansas City area, and thus increasing the receipts from the operation of the municipally-owned power plant Under these circumstances, we believe that it is proper for the Board of Public Utilities to make a reasonable payment to the local Chamber of Commerce in consideration of the service rendered by that agency."

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The information furnished us by the Board, referred to in opinion no. 74-100, makes clear that the payment you incorrectly characterize as a contribution is in fact payment for services to be performed pursuant to an agreement between the Board and the Kansas City, Kansas, Chamber of Commerce, through its Economic Development Division. Since the 1954 opinion of Attorney General Fatzer has been furnished us, we are prompted to reconsider our own conclusions, which were based upon a somewhat detailed and restrictive examination of the organic statutes of the Board.

The question you raise is not altogether without difficulty. In an opinion issued in 1949, also addressed to Mr. Lowder, Attorney General Fatzer reached conclusions contrary to those set forth in his 1954 opinion. The latter contains no reference to the earlier. His 1954 opinion has been extant for twenty years, and in this circumstance, we are reluctant to disturb those conclusions absent a compelling reason to do so.

During the two decades during which the Board has been free to rely on that opinion, the Legislature has made no amendment to the organic act of the Board which would alter the conclusions set forth therein. For twenty years, under Attorney General Fatzer's opinion, the power to contract for industrial promotion and development has been regarded as one of the "powers which may be necessary for the proper discharge of its [the Board's] duties." See K.S.A. 13-1223. Our own opinion was based purely on statutory construction of the organic act, and without reference to the officially sanctioned construction the act had enjoyed for two decades, and the actual exercise of powers in reliance thereon.

A determination of what "powers . . . may be necessary for the proper discharge of its [the Board's] duties" is one of mixed fact and law. If the question were today a completely open one, we might be disposed to rest on the conclusions set forth in our letter to you of March 26, 1974. The question is not completely open, however. Two decades ago, it was the judgment of the then Attorney General, Harold Fatzer, that the exercise of powers by the Board which you question was "necessary for the proper discharge of its duties." The Board has relied upon and apparently vindicated this judgment during that period. The Legislature has not seen fit to intercede and strip the Board of the powers thus historically sanctioned.

Thus, in consideration of the history of the treatment as set out above, we feel compelled to reconsider our opinion to you of March 26, 1974, and to withdraw its conclusions. Upon reconsideration, the contract in question here entails the exercise of

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powers by the Board of Public Utilities which this office has historically approved, which has apparently been sanctioned by the Legislature, and which the Board itself has found necessary and proper in the discharge of its statutory duties. Thus, we cannot but conclude that the execution of the contract in question falls within the historically sanctioned authority of the Board, based upon all the foregoing facts and circumstances.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm

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