

Subject

State of Missouri
Legislative General

Copy to



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER

Attorney General

November 8, 1974

Opinion No. 74- 356

The Honorable Fred L. Weaver
State Representative-First District
Cherokee County
R. R. No. 1
Baxter Springs, Kansas

Dear Representative Weaver:

You inquire concerning the potential liability of the State of Kansas under Article VI, "Mutual Aid" of the Midwest Nuclear Compact, K.S.A. 1973 Supp. 48-2001, et seq. You are concerned specifically with the construction of sub-articles (a), (d) and (e) and wish to know whether the compact may prohibit recourse by the state against a utility or other individual whose facilities cause a "nuclear incident," requiring the state to request, under the compact, costly assistance from another state or states. As explained below, we believe that it does.

Kansas entered the Midwest Nuclear Compact with the 1972 legislative session and, when consented to by the Congress pursuant to Article I, Section 10 of the United States Constitution, the compact will become enforceable by the various member states through the federal court system. (United States Constitution, Article III, Section 2.)

Article VI, "Mutual Aid," subarticle (a) states:

"Whenever a party state, or any state or local governmental authorities therein, request aid from any other party pursuant to this compact in coping with a nuclear incident, it shall be the duty of the requested state to render all possible aid to the requesting state which is consonant with the maintenance of protection of its own people."

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Subarticle (d) states:

"All liability that may arise either under the laws of the requesting state or under the laws of the aiding state or under the laws of a third state on account of or in connection with a request for aid, shall be assumed and borne by the requesting state."

Subarticle (e) states:

"Any party state rendering outside aid pursuant to this compact shall be reimbursed by the party state receiving such aid for any loss or damage to, or expense incurred in the operation of any equipment answering a request for aid, and for the cost of all materials, transportation, wages, salaries and maintenance of officers, employees and equipment incurred in connection with such request: *Provided*, That nothing herein contained shall prevent any assisting party state from assuming such loss, damage, expense or other cost or from loaning such equipment or from donating such services to the receiving party state without charge or cost." [Emphasis supplied.]

Your inquiry is based on the following hypothetical situation: A "nuclear incident" occurs in Kansas involving the widespread release of radiation as a result of a malfunction in a future nuclear power plant, or a transportation accident involving nuclear materials. The State of Kansas finds that it is beyond its capabilities to evacuate, decontaminate and provide emergency medical care, shelter and the like, and requests assistance from other Midwest Nuclear Compact member states, who render the requested assistance and then present bills to the State of Kansas for the costs of such assistance. You wish to know whether the State of Kansas, which is specifically liable to pay those bills under subarticle (e), may ultimately recover from the utility or other person whose facilities caused the "nuclear incident" in the first place.

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Subarticle (e) establishes a duty for the member states to render "all possible aid," when requested, "which is consonant with the maintenance of protection of its own people." Subarticle (e) gives rise to a legal liability on the part of any requesting state to pay for the aid it receives. Subarticle (d) provides that "[a]ll liability that may arise" under the laws of either the requesting, aiding or a third, state, "on account of or in connection with a request for aid" shall be assumed and borne by the requesting state."

This language, which requires the requesting state to assume and bear any liability arising on account of a request for aid, as between the requesting state and the aiding state, and perhaps as between the requesting state and a third state, does not explicitly address the fixing of liability as between the requesting state and a utility or other party responsible for a nuclear incident, for costs incurred by the state in providing governmental services to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state. Indeed, whether there exists any legal basis for liability of a responsible party to the state for such costs in the event of a catastrophic disaster is entirely unsettled. Limited research discloses no case in which the question has been raised. Assuming *arguendo* that a basis for such liability exists, or may be found to exist in the future, and a party responsible for a disaster of substantial magnitude, such as a nuclear incident, could be held to respond to the state or its political subdivisions for the costs of preserving civil order and the like, the question would then arise whether the state was foreclosed from its right to assert such liability by the language of subarticle (d) merely because it chose not to rely upon its own resources, or was unable to do so, and called upon party states under the compact for aid, thus invoking subarticle (d) that "[a]ll liability...in connection with a request for aid.... shall be assumed and borne by the requesting state." As we view this provision, it is but an argument to indemnify any aiding party state against all liability arising in connection with a request for aid, and does not speak to the right, if any, of the requesting state to challenge any liability that might exist of a utility or other party responsible for the disaster in the first instance, for the costs of protecting the public peace, order, health

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and safety incurred as a result of a nuclear incident.

Dealing with questions of conjectural and hypothetical liability is, of course, a hazardous and not particularly productive task in such an unchartered area of the laws. Suffice it to say, in response to your specific question, it would be the position of this office that subarticle (d) operates only as an agreement to indemnify against liability as between the party states, and not as any waiver of unforeseen and unforeseeable liability that might be asserted by the requesting state against any party responsible in the first instance for a nuclear incident, for costs of civil defense and like efforts needed as a result of such an incident.

We are advised that the State of West Virginia is presently involved in litigation to recover from certain parties, including a mining company, the costs of the state's emergency assistance to victims of the Buffalo Creek disaster, in which a community was virtually destroyed by the failure of a pile of overburden which had impounded a large body of water. If, as the law evolves in this area, the state is found to have recourse against a party responsible for a disaster of catastrophic magnitude for needful emergency assistance provided by the state, it is our view that subarticle (d) should not be construed to foreclose such claims by the state against other than states party to the compact, as, e.g., against the manufacturer of a nuclear reactor, or an owner and/or operator, found to be responsible for a nuclear incident.

Secondly, you inquire concerning section 30 of the new legislative article approved by the voters at the recent general election, which provides that:

"The legislature may confer legislative powers upon interstate bodies, comprised of officers of this state or its political subdivisions acting in conjunction with officers of other jurisdictions, relating to the functions thereof. Any such delegation, and any agreement made thereunder shall be subject to limitation, change or termination by the legislature, unless contained in a compact approved by the congress."

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It is questionable that a constitutional amendment is necessary to empower the Legislature to delegate legislative power to any body as it deems proper. This section appears to confer no powers upon the legislative branch which it does not already enjoy, for except so far as restricted by the constitution, the legislature may, by the adoption of a proper delegatory statute, confer upon a public body such powers as it deems proper. This section does not appear to enhance or enlarge any existing power of the legislature. We are advised that this section was included in the article with a view to ratify, by its adoption, certain compacts into which the state has heretofore entered, lest there remain any question that by any such compact the legislature has approved a delegation of power too expansive. This section, of course, operates only from its adoption by the people, and it is silent as to ratification of any improper delegation which antedates its enactment.

Yours very truly,



VERN MILLER
Attorney General

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