STATE OF KANSAS

Office of the Attorney General

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December 22, 1976

ATTORNEY GENERAL OPINION NO. 76- 375

The Honorable Dan Thiessen
State Representative
Route 1
Independence, Kansas 67301

Re: Cities--Franchises--Conditions

Synopsis: A municipality which grants a franchise to a public utility, a gas company, which is subject to the regulations of the State Corporation Commission may not reserve to itself the unlimited right to require the company to make repairs to its lines in such city. Any provision whereby the fixed charge required by K.S.A. 12-2001, *Fifth*, may be amended during the term of the franchise or any extension thereof without opportunity for submission to the voters in accordance with K.S.A. 12-2001, *Sixth*, is void and unenforceable. Acceptance, either formal or implied, is necessary to render a franchise binding upon the grantee thereof.

* * *

Dear Representative Thiessen:

You advise that on August 5, 1976, the City of Lenexa, Kansas, adopted Ordinance No. 2488, granting a 20-year franchise to Union Gas System, Inc., for the purpose of permitting Union to operate its gas distribution system within that city. You pose three questions concerning certain of its provisions.

First, section 3 of the ordinance provides in pertinent part:

> "That in consideration of and as compensation for the right, privilege and franchise hereby granted, the Grantee [Union], its successors and assigns, shall furnish gas at such pressure and of such quality as shall be designated by lawful orders of the State Corporation Commission . . . ; shall furnish free of cost to each consumer a recognized standard meter or other instrument for measurement of gas sold or computation of consumer's bills . . . . The Company shall maintain all lines in good repair and as leak-free as reasonably possible. *The Company shall make repairs requested by the City that the City deems necessary.*" [Emphasis supplied.]

In *Pelican Transfer & Storage Co. v. Kansas Corporation Commission*, 195 Kan. 76, 402 P.2d 762 (1965), the court stated thus:

> "It is abundantly clear that the legislature has vested original, exclusive, primary jurisdiction in the commission to hear and determine all questions with respect to the supervision and regulation of motor carriers operating in this state." 195 Kan. at 80.

Although speaking of motor carriers, the jurisdiction of the Commission over public utilities rests upon the same statutory base, and is likewise original and exclusive.

The question you pose is whether the italicized language in the ordinance quoted above represents an intrusion by the municipality into an area over which the State Corporation Commission has exclusive jurisdiction. K.S.A. 66-1,150 states in pertinent part thus:

> "The state corporation commission is hereby authorized to adopt such rules and regulations as may be necessary to be in conformance with the natural gas pipeline

> safety act of 1968 (49 USCA 1671 *et seq.*) For the purpose of gas pipeline safety such rules and regulations shall be applicable to all public utilities and all municipal corporations or quasi-municipal corporations rendering gas utility service, the exemption provisions of K.S.A. 1970 Supp. 66-104, 66-131 and related statutes notwithstanding."

Violation of such rules and regulations may incur civil penalties of not to exceed $1,000 for each violation. You advise that pursuant to this authority, the Commission has adopted the regulations of the Office of Pipeline Safety of the U.S. Department of Transportation through a series of orders in Docket No. 91,100-U.

You question the italicized language in section 3 of the ordinance quoted above on the assumption that very foreseeably, the city may deem necessary and request repairs to Union's system which, if made, would not be in compliance with the rules and regulations adopted by the Commission. If the city were expressly to reserve to itself the power to govern the interpretation and enforcement of the rules and regulations of the Commission which were adopted pursuant to K.S.A. 66-1,150, it would clearly be invading the province of the Commission. If, *e.g.*, the city were to reserve to itself in the franchise ordinance the right to require repairs which it deemed necessary in accordance with the Natural Gas Pipeline Safety Act or with rules and regulations of the State Corporation Commission, that reservation of authority would impinge upon the exclusive jurisdiction of the Commission to administer and interpret its own rules and regulations. By the same token, the city may not require repairs which would render any portion of the system in violation of the rules and regulations adopted by the Commission under K.S.A. 66-1,150. Within these obvious limitations on the authority of the city, there may remain some repairs which would not offend the jurisdiction of the Commission.

The present power which is reserved to the city to require repairs is entirely unlimited, however, and constitutes the city a separate and independent authority over the maintenance of the company's lines concurrent with the State Corporation Commisison itself. In *Kansas Power & Light Company v. City of Great Bend*, 172 Kan. 126, 238 P.2d 544 (1951), the court stated thus, emphasizing the state preemption of utility regulation:

> "Utilities serving municipalities are not only subject to the above regulatory authority of the State Corporation Commission but their services, facilities, expenditures and contracts as well as the business policies established by their rules and regulations are subject to the authority of such Commission. In the case of gas utilities, the authority extends even to details respecting the installation of regulatory and pressure gauges and so forth. . . . In no other field of business is the authority to regulate so completely reserved to and exercised by the state as in the case of public utilities." 172 Kan. at 129.

There may be some repairs which the city might require which would not compromise compliance with the rules and regulations of the Commission. Indeed, there may be repairs which the city might require which would be entirely unrelated to any matters covered by those rules and regulations. However, whether a requested repair did or did not compromise Commission regulations could only be determined by the Commission itself, and not by the city. And in a very foreseeable instance, whether a requested repair would affect any matter covered by the Commisison's rule and regulations would itself require interpretation of those rules and regulations, and only the Commission has that interpretive authority, subject, of course, to judicial review.

In short, there seems to be little legal basis for the city to assume any regulatory authority whatever over the maintenance and repairs of the lines of the company. Certainly, the language in the present ordinance respecting repairs is clearly overbroad and permits the city to require repairs without regard to the company's compliance with the rules and regulations of the Commission. Ordinarily, if the city believes that certain repairs are needed in the interest of safety or otherwise, it may apply to the Commission for an appropriate order. An attempt by the city to forestall resort to the Commission, and to assume such regulatory authority itself conflicts with the long history of exclusive state regulation of public utilities in Kansas.

So construed, there is in my judgment little legal basis for the municipal exercise of its purported authority over the repairs which are deemed needful to the system or any part thereof in the interests of public safety.

Secondly, you inquire concerning section 5, which provides thus:

> "The city reserves the right and privilege, after giving written notice 90 days prior to the expiration date of the franchise, to change the amount of payment and the time of payment of such sums after the expiration of each five (5) year period."

Under section 1, the franchise is granted for a period of twenty years. Section 4 prescribes the "fixed charge" required by K.S.A. 12-2001, *Fifth*, requiring the grantee to

> "quarterly on May 1, August 1, November 1, and February 1 make a report to the Governing Body of the City of Lenexa of its gross receipts from the sale of gas for all purposes in said City for the three months period ending at the last meter reading preceding March 31, June 30, August 31, and December 31 respectively; and at the time of making such report, pay into the City Treasury a sum equal to five per cent (5%) of said gross receipts from the sale of gas for all purposes, which shall have accrued subsequent to the effective date of this franchise."

K.S.A. 12-2001, *Fifth*, provides in pertinent part thus:

> "No such grant, right, privilege or franchise shall ever be made to any person, firm, corporation or association unless it provides for adequate compensation or consideration therefor to be paid to such city, and regardless of whether or not other

> or additional compensation is provided for such grantee shall pay annually such fixed charge as may be prescribed in the franchise ordinance. Such fixed charge may consist of a percentage of the gross receipts. . . . "

Section 5 purports to reserve to the city the right to change the amount of the "fixed charge" which is provided by section 4 and as required by K.S.A. 12-2001, *Fifth*. Section 5 allows the change to be made by the city at the expiration of each five year period after giving sufficient notice "prior to the expiration date of the franchise," which is presumably twenty years hence. The "fixed charge", which is specified here as a percentage of gross receipts, is a mandatory provision of any franchise granted under K.S.A. 12-2001, one in which the consumers have an obvious interest, and which must be subject to the approval of the voters pursuant to K.S.A. 12-2001, *Sixth*. Indeed, K.S.A. 12-2001 is explicit, that franchises may be granted thereunder "upon the express conditions hereinafter imposed, and not otherwise." Any franchise granted thereunder must specify a "fixed charge," which is subject to approval of the voters. Any provision to immunize that "fixed charge" from voter review, and to permit the governing body to alter it as an administrative or, for that matter, legislative, matter during the life of the franchise or any extension thereof free from the referendum provisions of K.S.A 12-2001, *Sixth*, is absolutely void and unenforceable, in my judgment. Any attempt by the city governing body to exercise the right purportedly reserved to it under section 5 would render the franchise subject to an action for forfeiture.

Lastly, you inquire whether the ordinance is valid and binding on Union unless and until Union gives its written acceptance. At 12 McQuillin, *Municipal Corporations*, § 34.06 at p. 18, the writer states thus:

> "When the right to use the streets is granted and accepted and all conditions imposed incident to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a vested right. . . . *However, until an ordinance granting a franchise is accepted, the franchise lacks the essential elements of a contract. It is a mere proposition.*" [Emphasis supplied. Footnotes omitted.]

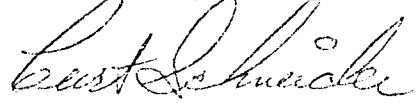
At § 34.32 of the same work, the writer elaborates on the necessity of acceptance:

> "*An ordinance granting a franchise confers no rights and imposes no obligations on the grantee unless it is accepted.* . . . Acceptance of the franchise ordinance by the grantee is usually evidenced in a formal manner by entry upon the municipal records. However, no formal resolution of acceptance is necessary in any case, if the facts show an actual, practical acceptance by the company." [Emphasis supplied. Footnotes omitted.]

The entire weight of authority supports the rule that in order to be effective, a franchise must be accepted. Although the question appears not to have been presented directly to the Kansas Supreme Court, it is my judgment that if presented with the question, it would so hold. The form of the acceptance need not be a written memorandum thereof, but acceptance must be demonstrated either expressly or by conduct of the grantee of the franchise which clearly demonstrates acceptance thereof.

To recapitulate, it is my opinion, first, that the city may not lawfully exercise the power to require repairs as provided in section 3 of the ordinance within the limits described above; secondly, that the provisions of section 5 which permit alteration of the "fixed charge" to be paid by the grantee without submission of any such amended "fixed charge" to the voters is in violation of K.S.A. 12-2001, *Fifth* and *Sixth* and is void and unenforceable; and thirdly, that acceptance in some form is necessary to render the franchise binding upon the grantee.

Yours very truly,



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