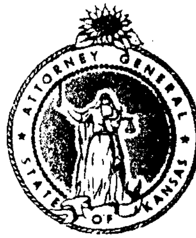

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

June 13, 1977

ATTORNEY GENERAL OPINION NO. 77-194

The Honorable William M. Eddy
State Representative
8009 Belinder
Leawood, Kansas 66206

Re: Cities--Utilities--Rates

Synopsis: Charges for municipally-owned utility services are not per se unreasonable and excessive merely because the revenues therefrom are sufficient to provide a surplus which may be transferred as authorized by the Kansas Legislature to the general fund of the city for application to general municipal expenses.

* * *

Dear Representative Eddy:

You inquire whether under the laws of Kansas relating to municipal utilities, a city may raise gas or electric rates for the sole purpose of raising funds to transfer into the general operating fund of the city, to be used for purposes unrelated to operation of the utility, and thus avoid the aggregate levy limitations of the "tax lid."

K.S.A. 12-825d provides in pertinent part thus:

> "In any city of the first, second or third class owning a waterworks, fuel, power or lighting plant, the revenue derived from the sale and consumption of water, fuel, power or light shall not be paid out or disbursed except for the purpose of operating, renewing

> or extending the plant or distribution system from which such revenue was derived, the payment of interest on outstanding bonds issued for the construction, extension or purchase thereof, and the payment of the salaries of the employees; and at any time that there may be a surplus of such fund, it shall, if needed to redeem bonds, be quarterly placed in a sinking fund . . . . Provided, That when any surplus of either the operating fund or sinking fund is not needed for any of the above stated purposes, said surpluses:
> (a) May be transferred and merged into the city general revenue fund or any other fund or funds of such city . . . ." [Emphasis supplied.]

In Holton Creamery Co. v. Brown, 137 Kan. 418, 20 P.2d 503 (1933), the court stated thus, in its syllabus:

> "The regulation and control of utility rates and services supplied by an electrical power . . . plant owned and operated by a municipality is vested in the city government, subject to judicial review of the reasonableness of the city ordinances pertaining thereto."

However, "the city cannot exact any rates it sees fit to impose. Such rates must be reasonable; and persons and corporations dependent on these utilities are entitled to judicial protection against excessive or confiscatory rates." 137 Kan. at 419. The court quoted with approval from 5 McQuillin, Municipal Corporations, 2d ed., 64, 65, as follows:

> "Where a municipality owns its water or light works, it is settled that it has the right to charge rents against consumers who make use of its service. However, the rates must be reasonable, although the municipality may charge a rate which will yield a fair profit, and need not furnish the supply or service at cost; and the same rules in regard to the reasonableness of rates apply as in case of the rates of private companies

> owning a public utility. Otherwise stated, where the municipality owns its plant, the rates for water, light, or any other product, furnished by it must be fair, reasonable and just, uniform and nondiscriminatory." [Emphasis supplied.]

See also 12 McQuillin, § 35.37c (3d ed.), and cases cited therein. In City of Niles v. Union Ice Corporation, 133 Ohio St. 169, 12 N.E.2d 483 (1938), the court discussed at length various contentions which were raised against the transfer of surplus revenues derived from electric rates of the city-owned utility to other city funds:

> "Appellants . . . contend that if a municipal utility is permitted to charge a rate in excess of the cost of furnishing the service or product, and if such excess were used to finance the cost of municipal government, that such excess, so used, would assume the nature and be used in lieu of taxes and the municipality would thereby be enabled to evade the constitutional limitations upon its power of taxation, and that municipalities would be free to impose the cost of municipal government upon the consumers of light and power.
>
> This contention proceeds on the theory that a municipality has no right to charge for its utility service or product a rate in excess of cost, i.e., that it has no right to make a profit. Nevertheless, we are not referred to any statute or constitutional provision denying this right. In the absence of such prohibition, a municipality, no less than a private corporation engaged in the operation of a public utility, is entitled to a fair profit. In the operation of a public utility, a municipality acts, not in a governmental capacity as an arm or agency of the sovereignty of the state, but in a proprietary or business capacity . . . In its proprietary capacity it occupies the same 'posture' as that occupied by a private corporation engaged in business . . . .

* * *

> So long as the rate is reasonable, the courts cannot prohibit a municipality from making a profit on the operation of its electric light and power system, in the absence of any restriction in the statute which enables it to operate such system." 12 N.E.2d at 488-489.

And in Western Heights Land Corporation v. City of Fort Collins, 362 P.2d 155 (Colo. 1961), the court stated thus:

> "The rates adopted by the city with reference to the facilities involved here cannot be considered as taxes even though imposed and collected by the city. The ordinances involved are not revenue measures. A revenue measure is one levying a tax to defray general municipal expenses. If its principal object is to defray the expense of operating a utility directed against those desiring to use the service, the incidental production of revenue does not make it a revenue measure. 362 P.2d at 158.

Thus, to respond specifically to your question, a rate fixed by a city for gas or electric service furnished by a municipally-owned utility to residents within the territory of such city may be deemed reasonable and proper by a court reviewing such rates notwithstanding the rates are fixed in such amounts as to produce surplus revenue which may be transferred to the city general fund as the legislature has authorized in K.S.A. 12-825d. Stated otherwise, a particular rate is not per se unreasonable and excessive merely because it is fixed so as to provide the city surplus revenues which may be applied to other purposes. A city which operates a public utility is entitled to a profit on such operations just as a privately owned utility, and the profits so derived from the utility revenues may be applied to the general municipal expenses of the city.

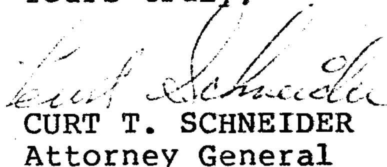
You indicate concern that in doing so, a city may avoid the aggregate levy limitations of K.S.A. 1976 Supp. 79-5001 et seq. That act imposes limitations upon ad valorem property tax levies, and not upon utility rates or revenues derived from non-tax sources, and thus has no application to the question you pose.

Lastly, you inquire whether a "city may levy a special sewer service charge based on water consumption for the express purpose of raising funds for transfer into the general operating fund of the city, such funds to be used for purposes other than the operation of the utility." K.S.A. 12-631g provides that a city which operates a sewer system may establish "just and equitable rates . . . for the use of such sewage disposal system . . . ." The disposition of revenues derived from charges fixed under the authority of this section is fixed by K.S.A. 12-631L. K.S.A. 12-3104 authorizes cities to adopt by ordinance or resolution "sewer service charges based on a per unit volume of water used and based on the strength and volume of sewage contributed . . . ." K.S.A. 12-631L provides in pertinent part thus:

> "All revenues derived from sewage service charges shall be deposited in the treasury and credited to a separate fund to be known as the sewage disposal fund and such revenues shall be used exclusively for the administration, operation, maintenance, repair, replacement, extension, enlargement, betterments, depreciation and obsolescence of said sewage disposal system [and may be applied to general obligation and revenue bonds issued for said system] . . . ."

It is not clear from your letter whether you are referring to a sewer service charge now assessed by a Kansas city. It would be premature for us to offer any view regarding that charge without more information, and particularly, a copy of the ordinance or resolution authorizing such charges, and the use of proceeds therefrom.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj