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February 29, 1980

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ATTORNEY GENERAL OPINION NO. 80- 57

Mr. Don Matlack, City Attorney
Clearwater, Kansas
301 North Market
Wichita, Kansas 67202

Re: Cities and Municipalities--Public Utilities--
Charges on Overdue Accounts

Synopsis: A city may impose a late payment charge on overdue accounts involving the purchase of services from a municipally-owned utility. However, the charge must not be unreasonable or excessive, and must be reasonably related to the purpose to be achieved.

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Dear Mr. Matlack:

As City Attorney for the City of Clearwater, you have requested the opinion of this office regarding the imposition of a late payment fee by the City on overdue water bills. Specifically, Section 13.04.080 of the Clearwater Municipal Code imposes a penalty fee on those accounts remaining unpaid for ten (10) days after the due date, with said fee equal to 10% of the amount outstanding. In addition, interest of 8% per annum is charged from the "date of delinquency" until the account is paid. Once penalty and interest charges are imposed, a customer has an additional fifteen (15) days until service will be discontinued. However, the right to a hearing before service interruption is afforded by the ordinance.

Mr. Don Matlack
Page Two
February 29, 1980

Historically, cases from both Kansas and other jurisdictions recognize that there is often ample justification for imposing a late payment charge. City of Columbus v. Gas Co., 96 Kan. 367 (1915), Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1914). The most recent Kansas decision dealing with this question is Jones v. Kansas Gas & Electric Co., 222 Kan. 390 (1977). In that case, a number of arguments were raised against the legality of such charges, including a contention that they constituted the charging of interest at a usurious rate. At \$5 of its syllabus, the court rejected this position, stating:

"A late payment charge on a public utility bill is not interest. It is a charge against a customer to encourage prompt payment, to cover extension of credit, and to defray the expense involved in securing payment of the bill."

However, the court did conclude that the practice of assessing the same penalty against all delinquent customers, regardless of how long they had been delinquent, was unfair and discriminatory. 222 Kan. at 402. The opinion goes on to say:

"Our decision does not condemn the use of a late penalty. There is ample justification for imposing a late payment charge The charge which is levied, however, must be reasonably related to the purpose to be achieved; and if the purpose is to recover collection costs the utility company must collect from the class of consumers creating the costs. The penalty charged the late payer who causes the utility company to incur collection costs should reflect those costs and should be more than the penalty charged the late payer who does not cause collection costs and should be limited to an amount which encourages prompt payment and covers the cost of extending credit." 222 Kan. at 402.

Mr. Don Matlack
Page Three
February 29, 1980

It would be our conclusion that the penalties imposed by the City of Clearwater would meet the test set out in Jones, in that the "first class" of late payers are assessed less than those whose bill is outstanding for a long period of time. While both groups are assessed the 10% penalty initially and then at an 8% per annum rate, someone who pays three days after the delinquency period begins would obviously pay less than someone who waits for three months. Therefore, different penalties are assessed to different types of delinquent customers.

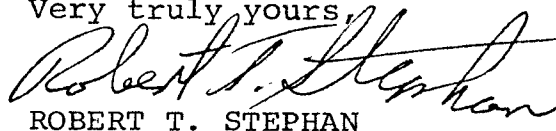
Furthermore, it is our opinion that the decision of the court in Jones regarding reasonableness of late charges applies to municipal utilities as well as those subject to regulation by the Kansas Corporation Commission. The court noted in this regard:

"The appropriate basis for regulation of late charges by a public utility is neither the usury statute nor consumer credit laws; regulation of late charges rests solely with the agency of the state vested with the authority to supervise operation of the utility, subject to judicial review of the reasonableness of the rate." 222 Kan. at 398.

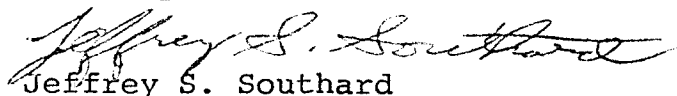
Our research indicates no statutory prohibition against the assessments of late charges by municipal utilities, thus leaving the field open for a city to act under its home rule powers. As to the reasonableness of imposing a 10% penalty after a failure to pay within 10 days, we note that provisions very similar to this have passed judicial muster in other jurisdictions. See, e.g., Ferguson v. Chattanooga Elec. Power Bd., 378 F.Supp. 787 (E.D. Tenn. 1974), Guste v. New Orleans City Council, 309 So.2d 290 (La. 1975), and Ford v. Vicksburg Waterworks Co., 102 Miss. 717, 59 So. 880 (1912).

In conclusion, a city may impose a late payment charge on overdue accounts involving the purchase of services from a municipally-owned utility. However, the charge must not be unreasonable or excessive, and must be reasonably related to the purpose to be achieved.

Very truly yours,



ROBERT T. STEPHAN
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RTS:BJS:JSS:gk