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March 23, 1984

ATTORNEY GENERAL OPINION NO. 84- 28

Paul "Bud" Burke
Senator, Ninth District
143-N Capitol
Topeka, Kansas 66612

Re: Public Utilities -- Powers of State Corporation
Commission -- Valuation of Utility Property by
Commission

Synopsis: The legislature may, even in the absence of any finding of imprudence, mismanagement, or lack of efficiency, permit the State Corporation Commission to phase-in the reasonable value of public utility property, where said property is found to represent excess capacity. Further, carrying and finance costs associated with public utility property representing excess capacity may be excluded from the rate base, without regard to any determination of whether the decision to construct the property was prudent. Cited herein: K.S.A. 66-128, 1984 House Bill No. 2927.

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Dear Senator Burke:

You request our opinion as to the validity of Section 1 of 1984 House Bill No. 2927 (as amended by House Committee of the Whole). Said section, which would amend K.S.A. 66-128, provides for the determination (by the State Corporation Commission) of the reasonable value of public utility property used and required to be used in providing public services, and provides for a

"phase-in" of such value in certain circumstances, to wit:

"The commission may require a public utility to defer inclusion of all or any portion of the reasonable value as so determined and permit the phase-in of such value over any period of time and in such increments as it determines to be appropriate. If the commission requires a public utility to defer the inclusion of any portion of such reasonable value and orders a phase-in of such value, it may exclude [any or all of] the carrying or finance costs incurred after the date of its determination and throughout the period of any deferral or phase-in as so ordered."

You pose the following questions concerning the above-quoted portion of House Bill No. 2927:

- "(1) Can the Legislature permit the State Corporation Commission to deny rate recognition of all or part of the reasonable value of utility property without being required to find that such reasonable value or property has been the product of imprudence, mismanagement, or a lack of reasonable efficiency?
- (2) If the Legislature can permit the action described in question one, can the Legislature also permit the State Corporation Commission to permanently deny rate recognition of the carrying or finance costs associated with such property during the deferral period?"

In response to your first question, the Kansas Supreme Court has indicated that a segment of a facility which is "far in excess of present or near future needs" may be excluded from the rate base under K.S.A. 66-128. Kansas Gas & Electric Co. v. State Corporation Commission, 218 Kan. 670, 674 (1976). The court did not state that, as a condition-precedent to such exclusion from the rate base, it must be found that the subject facility was the product of imprudence, mismanagement, or a lack of reasonable efficiency.

Although not controlling in Kansas, a Pennsylvania appellate court has held that managerial imprudence need not be proved in

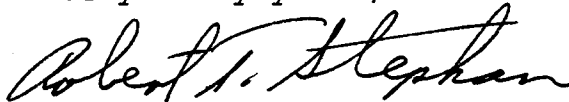
order to eliminate excess capacity from the rate base. In Philadelphia Elec. v. Pa. Pub. Util. Comm., 433 A.2d 620 (Pa. Cmwlth. 1981), the plaintiff utility sought review of an order which eliminated certain generating units, found to represent excess capacity, from its rate base. The utility contended that because its decisions to construct every generating unit, when made, were prudent (a contention not questioned by the public utilities commission), the commission was barred from removing properties representing excess capacity from the rate base. In rejecting the utility's argument, the court stated as follows:

"A unit may be properly excluded from a utility's rate base if the investment in that unit is found to be a result of managerial imprudence occurring at the time the decision to invest was made. . . . It does not follow that a unit prudently constructed must always be included in the rate base. The touchstone for determining whether or not a prudently constructed unit should be included in a utility's rate base is whether or not, during the test year involved the unit will be used and useful in rendering service to the public." [Citations omitted.] (Emphasis added.) 433 A.2d at 623.

In accordance with the above-cited authorities, it is our opinion that the legislature may, even in the absence of any finding of imprudence, mismanagement, or lack of reasonable efficiency, permit the State Corporation Commission to phase-in the reasonable value of public utility property, where said property is found to represent excess capacity.

In response to your second question, it is our opinion that carrying and finance costs associated with public utility property representing excess capacity may be excluded from the rate base, without regard to any determination of whether the decision to construct the property was prudent.

Very truly yours,



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