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ATTORNEY GENERAL OPINION NO. 85- 47

Stan Martin
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325 Broadway
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Re: Cities and Municipalities -- Franchises -- Granting
Franchises; Elections on Ordinance

Synopsis: A popular election, held pursuant to K.S.A. 12-2001, at which the voters disapprove a city ordinance renewing a franchise with a natural gas company renders the ordinance in question void and without effect. The company in question, however, may continue to provide services and the city may continue to accept services according to the terms of the expired franchise under a theory of implied contract. Popular disapproval of an ordinance granting a franchise to a company does not prevent a city governing body from approving a new ordinance which grants a somewhat different franchise to the same company. Cited herein: K.S.A. 12-801, 12-2001, 12-2002.

* * *

Dear Mr. Martin:

As attorney for the City of Herington, you have requested our opinion regarding the effect of a recent election held in Herington. Specifically, you inquire if the result of the

election, which dealt with the granting of a franchise to a natural gas utility, prevents the utility from operating in the city.

You inform us that the city governing body recently approved an ordinance renewing the franchise held by Greeley Gas Company to operate in Herington. The franchise in question was granted and renewed pursuant to K.S.A. 12-2001(1), which authorizes the governing body of any city to permit any person, firm or corporation to:

"Manufacture, sell and furnish artificial or natural gas, light and heat; electric light, water, power or heat; or steam heat to the inhabitants."

The statute requires that all contracts granting such a right or renewing an existing right to engage in such activity be made by city ordinance. Such an ordinance must be read in full at three regular meetings of the governing body and twice published in the official city newspaper before taking effect. During this period, if a petition is presented which is signed by an appropriate number of voters seeking a popular election on the ordinance, the ordinance must be submitted for approval at a special election.

All of this occurred in Herington and at the election the voters disapproved the ordinance renewing the franchise of Greeley Gas Company. You inquire about the effect of this result and, in particular, ask whether Greeley Gas Company lawfully may continue to operate in the city.

K.S.A. 12-2001 clearly provides:

"If a majority of votes cast at the special election are against the ordinance and the making of the grant, the ordinance shall not confer any rights, powers or privileges of any kind whatsoever upon the applicants therefore and shall be void." (Emphasis added.)

Thus, it appears that the Herington city ordinance renewing Greeley Gas Company's franchise to operate in the city is void. The renewal ordinance does not confer any rights or privileges upon the gas company; thus the company has no authority to operate in the city under the renewed franchise.

We assume, however, that the City of Herington has not been without natural gas service since the date of the election. Presumably Greeley Gas has continued to supply the city and the city residents have continued to enjoy and pay for the service. Thus, both Greeley Gas and the city have continued to enjoy the benefits of the original franchise agreement. In the absence of specific plans to provide natural gas service or to replace Greeley Gas with another franchisee, we do not know how the situation could be any different. We doubt that the legislature intended the disapproval of a renewal ordinance at a popular election held pursuant to K.S.A. 12-2001 to require abrupt cessation of services by the current franchisee, particularly if such cessation would leave the city without the service provided by the franchisee. This is especially true in the case of franchises to companies which provide such basic and essential services such as heat, water and light.

It is a general rule that a company which continues to operate in a city after a franchise expires does so under an implied contract. The Kansas Supreme Court has noted that generally, upon the expiration of a municipal franchise granted to a utility, there is no longer any contractual relationship between the city and the utility. This would be the case in Herington, where the original franchise to Greeley Gas has expired and the renewal ordinance has been defeated at popular election. In Baker v. City of Topeka, 231 Kan. 328, 332 (1982), however, the court noted that an exception to the general rule occurs when:

". . . the parties to the franchise agreement continue to perform after the expiration of the franchise in the same manner as they did when the franchise was still formally in effect."

In such a case an implication arises that the parties have assented to a new contract containing the same provisions as the old contract. The court continued:

"A number of decisions have applied this principle to contractual relationships existing between municipalities and franchisees, when both continue to accept benefits and burdens of the franchise after the term of the franchise has expired. In Incorporated Town of Pittsburg v. Cochrane, 195 Okla. 593, 159 P.2d 534 (1945), the

plaintiff was a holder of a franchise granted by a city under which the franchise holder was to furnish water and lights to the inhabitants of the town for a period of twenty years. After the expiration of the twenty-year term, neither party did anything to continue or discontinue their relationship. The utility continued to furnish water and lights and the town inhabitants continued to pay for such services. The utility defaulted on its taxes, and Cochrane acquired the utility's property at a sheriff's sale. The city brought an action to enjoin Cochrane from removing the assets of the utility. The court held that Cochrane acquired no greater rights than the original franchise holder, and that the utility's assets could not be removed without first giving the town reasonable notice in which to obtain a new water system. The court stated in effect that the contractual relationship that existed prior to the expiration of the express franchise continued on the same terms and conditions after the date of expiration and said:

"If after termination of the franchise the company continues to furnish and the town accepts the service, an implied contract of indefinite duration arises and the company functions as a quasi-public utility subject to the terms of the former franchise and the rules and regulations of the Corporation Commission. Such arrangement may be terminated by either party by the giving of such reasonable notice as would be consistent with the duty owed by both to the inhabitants of the town. See Ann. 112 A.L.R. 635, 43 Am.Jur. Sec. 79, page 622' pp. 596-597. (Emphasis added.)" Id. at 332-333.

See also McQuillin, Municipal Corporations, §34.51; City of Richmond v. Chesapeake and Potomac Tel. Co., 205 Va. 919, 140 S.E.2d 683 (1965).

While the situation in Herington is not entirely the same as that presented in the Baker v. City of Topeka case, we believe the implied contract reasoning expressed therein is apropos in

justifying the continued operation of Greeley Gas in the city. In our opinion, the voters did not reject anything more than the ordinance renewing the franchise with Greeley. We understand the renewed franchise contained some terms which differ from the original franchise. The defeat of the renewal ordinance should not be assumed to affect the validity of the original franchise agreement. Thus, the implied contract theory serves to permit the parties to continue to function under the terms of the original franchise, even though its term has expired.

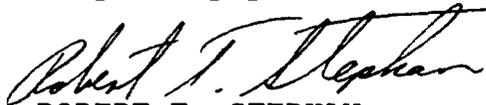
We assume, however, that both the city and the company would prefer to operate on a more substantial footing, which raises the question of what should happen next. You inform us that the city governing body has no plans to either offer the franchise to others or attempt to maintain a city-run utility pursuant to K.S.A. 12-801 et seq. Neither option appears to be especially practical as Greeley Gas owns the facilities and transmission lines necessary to serve Herington. Thus, exercise of either option would require the acquisition of Greeley's facilities or the construction of new facilities at some considerable expense. In addition, Kansas case law and K.S.A. 12-2002 make it clear that the presence of a franchise granted under K.S.A. 12-2001 does not affect the authority of the Kansas Corporation Commission to regulate public utilities, and thereby to deny a utility's application for a certificate of convenience and necessity. City of New Strawn v. Kansas Corporation Commission, 5 Kan. App.2d 630, 634-35 (1981). The facts present here raise the question of whether a new utility could obtain appropriate approval from the KCC.

In our opinion, however, the voters of Herington have rejected only the ordinance renewing Greeley's franchise, and the vote should not be construed as a rejection of the original franchise nor of Greeley Gas Company as an entity. Therefore, we cannot perceive any obstacle to the city's passing a different franchise ordinance which renews the city's natural gas franchise with Greeley Gas. While the city has some obligation to attempt to alter the terms of any new franchise, in light of the voters' earlier rejection, the city is under no obligation to refuse to offer the franchise to Greeley Gas.

We conclude that a popular election held pursuant to K.S.A. 12-2001 at which the voters disapprove a city ordinance renewing a franchise for a natural gas utility renders the ordinance in question void and without effect. However, the company in question is not thereby prohibited from operating in the city, and the company may continue to provide, and the city may

continue to accept, service according to the terms of the expired franchise under a theory of implied contract. Popular disapproval of an ordinance offering a franchise to a company will not prevent the city governing body from adopting a new ordinance granting a somewhat different franchise to the same company.

Very truly yours,



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