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ATTORNEY GENERAL OPINION NO. 90- 3

Mr. Philip C. Lacey
Chief Legal Counsel
Kansas Rural Water Finance Authority
One Main Place, Suite 800
Wichita, Kansas 67202-1398

Re: Cities and Municipalities -- Interlocal
Cooperation -- Interlocal Agreement by Public
Agencies; Filing

Corporations -- Formation of Corporations --
Execution, Acknowledgement, Filing, Recordation and
Effective Date of Articles of Incorporation and
Other Corporate Instruments; Exceptions

Synopsis: As recognized by K.S.A. 17-6003(e), filings made by
the Kansas Rural Water Finance Authority pursuant
to K.S.A. 12-2905 do not require payment of the
late penalties provided for by K.S.A. 17-6003(d).
Cited herein: K.S.A. 12-2901; K.S.A. 1988 Supp.
12-2904; K.S.A. 12-2904a; 12-2905; 17-6001;
17-6002; 17-6003.

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Dear Mr. Lacey:

As chief legal counsel to the Kansas Rural Water Finance
Authority you request our opinion concerning filing fees. You
state that the Authority was organized and exists pursuant to
K.S.A. 12-2901 et seq. and that the Authority is
constantly in the process of admitting new member agencies.

When new members are admitted to the Authority a copy of the interlocal cooperation agreement is then filed in additional counties. You note that this additional filing often occurs weeks or even months after the original filing. You state that some local registers of deeds have assessed late filing penalties against the Authority because of the belief that K.S.A. 17-6003(d) requires such recordation within 20 days after certification by the secretary of state. You interpret K.S.A. 17-6003 as applicable only to corporations and their documents and as inapplicable to cooperative entities organized pursuant to K.S.A. 12-2901 et seq. We agree with that position.

K.S.A. 12-2901 et seq. permit Kansas public entities to cooperatively exercise their public powers and authorities. It is not utilized by private individuals wishing to contract with each other. See Attorney General Opinions No. 87-85, 83-52, 82-245, and 81-41. If public entities possess the authority to create a separate legal entity, K.S.A. 1988 Supp. 12-2904(c)(2) allows such a separate legal entity to be cooperatively created pursuant to an interlocal cooperation agreement. K.S.A. 1988 Supp. 12-2904(a) sets forth the various powers and duration of any separate legal entity created pursuant to K.S.A. 12-2901 et seq. Such a separate legal entity retains certain public authority and is not a private entity.

A separate legal entity created pursuant to K.S.A. 12-2901 et seq. may be created pursuant to city or county home rule authority or as a result of specific statutory procedures applicable to certain public entities. A separate legal entity created pursuant to K.S.A. 12-2901 et seq. by public agencies may in form resemble a private corporation, but the general nature and requisites remain distinct. A private corporation may be created by private individuals while K.S.A. 12-2901 et seq. requires that at least one party be a public entity. While both public and private corporations are corporations which derive their existence from the state, private corporations are corporations in which the public is interested only in their objects, and in which the whole interest is not in the government or in the corporation that is not created for the administration of political power. McQuillin, Mun. Corp. § 2.02 (3rd ed. 1987). Public corporations are created for public purposes only and are connected with the interests and franchises which are the domain of the government. 18 Am.Jur.2d Corporations, § 30 (1985).

K.S.A. 12-2905 states:

"Prior to its entry into force, an agreement made pursuant to this act shall be filed with the register of deeds of the county where such political subdivision or agency of the state government is located and with the secretary of state." (Emphasis added).
See also Attorney General Opinion No. 88-37.

If the terms of the interlocal agreement permit subsequent amendment to include additional parties, the amended contract should be filed as required by K.S.A. 12-2905 and may thus require new filings in additional counties.

K.S.A. 17-6003(d) provides:

"(d) Any instrument filed in accordance with subsection (c) shall be effective upon its filing date except that if the instrument is not recorded in accordance with paragraph (5) of subsection (c) within 20 days after its filing date, the recording fee to be collected by the register of deeds shall be increased by 25%."

K.S.A. 17-6003(c) (5) provides that

"(5) the duplicate copy of the instrument so certified by the secretary of state shall be recorded in the office of the register of deeds of the county in which the corporation's registered office in this state is, or is to be, located."

K.S.A. 17-6003(c) sets forth the procedures for obtaining approval by the secretary of state "whenever any provision of this act requires any instrument to be filed with the secretary of state." (Emphasis added). See also State v. Construction Enterprises, Inc., 6 Kan.App.2d 627 (1981). K.S.A. 17-6003(a) requires instruments to be executed in a certain manner when "any provision of this act requires any instrument to be filed with the secretary of state or in accordance with this section or act. . . ." (Emphasis

added). K.S.A. 17-6003(e) specifically recognizes that other laws may govern filings:

"(e) If another section of this act or any other law of this state specifically prescribes a manner of executing, acknowledging, filing or recording a specified instrument or a time when such instrument shall become effective, which differs from the corresponding provisions of this section, then the provisions of such other section shall govern."

The provisions of K.S.A. 17-6001 et seq. do not require the filing of an interlocal cooperation agreement and K.S.A. 17-6003(e) exempts instruments subject to different filing requirements.

The Kansas Rural Water Finance Authority was organized pursuant to K.S.A. 12-2901 et seq. and not pursuant to K.S.A. 17-6001 et seq. The Authority has not filed incorporation articles as set forth under K.S.A. 17-6002, but rather, has entered into an interlocal cooperation agreement with the approval of each governing body party to the agreement. Filings required by K.S.A. 12-2905 are not the same as the filings set forth at K.S.A. 17-6003.

Thus, as recognized by K.S.A. 17-6003(e), it is our opinion that filings made by the Kansas Rural Water Finance Authority pursuant to K.S.A. 12-2905 do not require payment of late penalties as provided for by K.S.A. 17-6003(d).

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
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