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Susan B. Cunningham
General Counsel
(785) 271-3272 (telephone)
(785) 271-3167 (telecopy)
s.cunningham@kcc.state.ks.us

February 4, 2005

The Honorable Jay S. Emler
Chairman, Senate Utilities Committee
State Capitol, Room 449-N
300 SW Tenth Ave.
Topeka, KS 66612

Dear Chairman Emler:

The issue of the Kansas Corporation Commission's (KCC or Commission) jurisdiction was raised in the context of SB 63, proposed legislation which seeks to exempt landlords who sub-meter water from the definition of a public utility. Landlords supplying gas or water to their tenants may encompass various factual scenarios. The issue presented before the Legislature primarily concerns those situations where landlords use master meters or sub-meters and bill the tenants separately for gas or water. Master metering occurs when a landlord has one meter that serves the entire property, owns the pipes downstream and supplies gas or water to its tenants. The landlord is responsible to the gas or water utility supplier for the total bill and will generally allocate an amount due for a particular tenant's use of the gas or water.¹

The question is whether a landlord who supplies its tenants with gas or water and imposes a separate charge² for such services constitutes a "public utility" as defined in Kan. Stat. Ann. (K.S.A.) §§ 66-104, 66-1,202, and 1,230. K.S.A. 66-104 provides, in pertinent part:

Utilities subject to supervision; exceptions. (a) The term "public utility," as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter *may own, control, operate or manage*, except for private use, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through

¹ Master metering of electricity has declined since the Commission prohibited it, on a prospective basis, in October 1978, Docket No. 115, 379-U (finding master metering of electricity inherently wasteful because it provided tenants no economic incentive to practice conservation).

² This is in contrast to a situation in which the costs of any landlord supplied utility services are included in the rent.

any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, and *all companies for the production, transmission, delivery or furnishing of heat, light, water or power.* (Emphasis supplied.)

The plain language of K.S.A. 66-104 states the term “public utility” includes “all companies for the production, transmission, delivery or furnishing of heat, light, water or power.” In the situations in question, the landlord is clearly furnishing heat, light, water or power to the tenants and therefore falls within the definition of a public utility.

The majority of courts take the view that a landlord who supplies electricity, gas, water or similar service to its tenants only, is not devoting the property to public use and is not subject to regulation as a public utility. 75 A.L.R.3d 1204 (1977). However, a statutory exception for private use does not apply under Kansas law. The Kansas Supreme Court has interpreted the private use exception as being applicable to only the first part of K.S.A. 66-104 (telephone, telegraph and conveyance of oil and gas) but not the second part (furnishing heat, light, water or power). *Water District No.1 of Johnson County v. Mission Hills Country Club*, 265 Kan. 355, 960 P.2d 239 (1998).

Some courts have also concluded that the utility services are not subject to regulation because the landlord was providing a service “incidental” to some other dominant service; *i.e.*, renting the premises. 75 A.L.R.3d 1204 §4.

However, many landlords may not be subject to the Commission’s regulation because of the single city exception in the statutes.³

The Commission has no authority to control and regulate any public utility *situated and operated* wholly or principally within any city or principally operated for the benefit of such city or its people because that power and authority is vested exclusively in the city. K.S.A. 66-104(c) (emphasis supplied).

Thus, for landlords that are determined to be public utilities and that are located within a single city, the city would provide the actual regulation.

Whether a landlord’s providing utility services is a business of a public nature that should be regulated as a “public utility” is not a new issue. In 2001, for example, the Commission sought an Attorney General’s Opinion on whether the practice of sub-metering confers the status of a

³ Staff has not attempted to determine how this exception would apply to companies that own and operate apartments in more than one city.

The Honorable Jay S. Emler
February 3, 2005
Page 3

public utility on a landlord, pursuant to K.S.A 66-104 and K.S.A. 66-1,230. The AG's Opinion indicated that K.S.A. 66-104 is broadly worded and includes any company that furnishes heat, light, water or power. By including any company that controls operates or manages any equipment for the delivery or furnishing of water, K.S.A. 66-104 appears to include any company reselling water incumbent in the practice of sub-metering. AG letter dated February 6, 2001. However, relying on *Cities Service Gas Company v. State Corporation Commission*, 222 Kan. 598 (1977), it was suggested that interpretation of a regulatory statute must accomplish the statute's legislative purpose of regulating businesses of a public nature.

The 2001 AG Opinion concluded that the determination of whether landlords who supply gas or water should be regulated as public utilities should involve an examination of the public nature of the business and its attendant need for regulation. While the Commission to date has not made a definitive ruling, the issue is currently before it. Commission Staff is in the process of preparing recommendations to the Commission on how to address these issues.

If you have any questions or require additional information, please don't hesitate to contact me.

Sincerely,

/s/

Susan B. Cunningham

cc: Members, Senate Utilities Committee
Chair Moline
Commissioner Krehbiel
Commissioner Moffet
Tom Day

