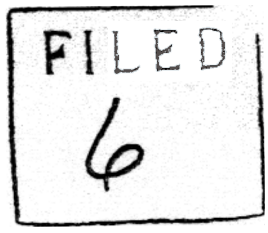
MUNICIPALITIES:
PUBLIC SERVICE COMMISSION:
WATER COMPANIES:
GAS COMPANIES:

Third class city may sell water to other cities and to individuals beyond its corporate limits. Such city may not own facilities beyond its corporate limits to deliver such water. Such sales are not subject to jurisdiction of Public Service Commission. Third class city may not sell gas beyond its corporate limits. This opinion does not apply to cities having combined waterworks and sewerage systems which fall within the provisions of Section 250.190, RSMo.

OPINION NO. 6
(AMENDED June 20, 1973)

This opinion should always be accompanied by Op. No. 32, 10/5/61, Garrett.

April 27, 1967



Honorable Ronald M. Belt
State Representative
Macon, Missouri

Dear Representative Belt:

Reference is made to your request for an official opinion from this office raising certain questions in regard to the sale of water or gas by a municipal water or gas utility owned and operated by a third class city. Inasmuch as the law applicable to municipally owned water utilities differs from the law applicable to municipally owned gas utilities, the questions raised by you have been restated for the purpose of logical treatment and disposition. The restatement of the questions, a discussion of the applicable law and conclusions by this office follow.

1. May a third class city sell water to a fourth class city or village for resale by the fourth class city or village to its inhabitants?

Authority for a third class city to own and operate a public utility for the purpose of supplying water to the inhabitants of such city is found in Sections 88.633, 91.010, 91.090 and 91.450, RSMo (All statutory references herein are to the Revised Statutes of Missouri as amended unless otherwise specified). Similar authority is conferred upon fourth class cities by Sections 88.773, 91.010, 91.090 and 91.450. Authority for villages to own and operate a public utility for the purpose of supplying water to its inhabitants is found in Sections 91.010 and 91.450. Therefore, the authority for cities of the third class, cities of the fourth class and villages to own and operate public utilities for the purpose of supplying water to the inhabitants of such municipal corporations is clearly provided for by the statutes.

ATTACHMENT 3

The sale of water by cities is provided for by Section 91.050 as follows:

> "Any city in this state which owns and operates a system of waterworks may, and is hereby authorized and empowered, to supply water from its waterworks to other municipal corporations for their use and the use of their inhabitants, and also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor, for such time, upon such terms and under such rules and regulations as may be agreed upon by the contracting parties."

The cited statute is applicable to the sales of water to cities of the fourth class and villages by a public utility owned and operated by a city of the third class. Such sales may be made for resale by cities of the fourth class and villages to the inhabitants of such municipal corporations.

The purchase of water by cities of the fourth class and villages is authorized by Section 91.060 as follows:

> "Any city, town or village in this state having authority to maintain and operate waterworks may procure water for that purpose from any other city having a system of waterworks, and to that end may enter into a contract therefor with such city having a system of waterworks; and any city of this state having a waterworks system is hereby authorized and empowered whenever it deems it expedient to supply any other city, town or village of this state in its vicinity with water from its waterworks for such time and upon such terms and under such rules and regulations as it may deem proper."

However, it appears that the facilities for delivering the water from the city limits of the city of the third class to the corporate limits of the city of the fourth class or village must be owned and operated by the city or village being supplied. Section 91.070 authorizes a city, town or village which is being supplied with water by another city to construct the necessary facilities to conduct the water from the supplying city to the supplied city, town or village.

In Taylor v. Dimmitt, 78 S.W.2d 841, the Supreme Court held that the statutes applicable to the supply and sale of electricity by a municipally owned utility to customers beyond the corporate limits of the city do not authorize the city to construct facilities for the delivery of such electricity from the corporate limits of such city to the customer. The Court noted that a city, town or village being supplied with electricity by another city is authroized by Section 91.040 to own and operate facilities for delivering the electricity from the supplying city, town or village. The Court applied the maxim expressio unius est exclusio alterius and held that the supplying city had no authority to own and operate transmission facilities from its corporate limits to the supplied city, town or village.

Section 91.040, applicable to agreements between cities for a supply of electricity, is substantially identical with the provisions of Section 91.070, applicable to agreements between cities for the supply of water. By the authority of Taylor v. Dimmitt, supra, it must be concluded that a city supplying water to another city, town or village does not have the authority to own and operate facilities to conduct the supply of water to the city, town or village being supplied.

2. May a third class city sell water directly to a public institution (public school) in a fourth class city?

Section 91.050 authorizes a city which owns and operates a system of waterworks to supply water to other municipal corporations for use beyond the corporate limits of such city. The Supreme Court has construed school districts to be municipal corporations; Russell v. Frank, 154 S.W.2d 63. Therefore, a third class city may sell water directly to a public school located beyond the corporate limits of such city. However, pursuant to Taylor v. Dimmitt, supra, as discussed under question 1, supra, the city may not own and operate facilities for the delivery of water from its corporate limits to a public school located beyond such corporate limits.

3. May a third class city sell water directly to an individual inhabitant of a fourth class city?

Section 91.050 provides that a city which owns and operates a system of waterworks is authorized to supply water to persons for use beyond the corporate limits of such city. Similar authority is conferred by Section 91.100. In Speas v. Kansas City, 44 S.W.2d 108, the Supreme Court held that a provision of the charter of Kansas City permitting the city to supply water to nonresidents was not in violation of the Constitution and was lawful. In upholding the lawfulness

of this charter provision the Court noted with approval the provisions of Section 91.050. Therefore, it must be concluded that a third class city may sell water directly to an individual inhabitant of a fourth class city. However, it should be noted that pursuant to the authority of Taylor v. Dimmitt, supra, and the discussion thereof under question 1 above, the city may not construct facilities beyond its corporate limits for the purpose of supplying an individual with water.

4. May a third class city sell gas to a fourth class city or village for resale by the fourth class city or village to its inhabitants?

Sections 91.010 and 91.450 authorize all cities, towns and villages to own and operate public utilities for the purpose of supplying gas to the inhabitants of such cities, towns and villages. The ownership and operation of gas works by cities of the third class is further provided for by Section 88.613. Section 91.210 provides that the statutory provisions applicable to the purchase of waterworks by cities, towns and villages shall apply to the purchase of gas plants. Therefore, the authority for cities of the third class, cities of the fourth class and villages to own and operate public utilities for the purpose of supplying gas to the inhabitants of such municipal corporations is clearly provided for by the statutes.

As noted in the discussion under question 1, supra, the sale of water by cities to other cities, towns and villages is authorized by Section 91.050 and such sales are pursuant to the provisions of Sections 91.060, 91.070 and 91.080. Substantially identical statutory provisions for the sale of electricity by a city to other cities, towns and villages are found in Sections 91.020, 91.030 and 91.040. A search of the statutes fails to disclose any statutory authorization for the sale of gas by a city to other cities, towns or villages.

Taylor v. Dimmitt, discussed the powers of a municipality as follows, 78 S.W.2d l.c. 843:

> "[2,3] The issue here does not involve the supply of electricity for the lighting of the streets of a city (an essential municipal, if not governmental, function) or the supply of electricity to inhabitants of the city (essentially a municipal function), but the right of a city to erect an electric transmission line to supply electric service to nonresident consumers. Even as to governmental functions, Missouri cities have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city. 'It is a general

> and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.' (citations)"

In finding that the city of Shelbina did not have statutory authority to construct, maintain and operate an elctric transmission line for the purpose of furnishing service to consumers outside its corporate boundaries, the Court applied the maxim expressio unius est exclusio alterius. This maxim, together with principles enumerated in regard to the powers of a municipal corporation, leads this office to the conclusion that cities, including cities of the third class, do not have the authority to sell gas to a fourth class city or village for resale by the fourth class city or village to its inhabitants. Sections 91.020 and 91.050 are specific authority for such sales of electricity and water. No such specific authority is found in the statutes in regard to the sale of gas. Such authority is not necessarily or fairly implied in, or incident to, any express powers and such authority is not essential to the declared objects and purposes of a third class city. By specifically granting authority for the sales of electricity and water the conclusion is indicated that the Legislature intended no such authorization for the sales of gas.

In reaching this conclusion this office has taken into consideration the provisions of Section 70.220, which authorizes municipalities to contract and cooperate together for the planning, development, construction, acquisition or operation of any public improvement or facility or for a common service. This section applies only if the subject and purposes of such contract or cooperative action are within the scope of the powers of such municipality. As noted above the exclusion of authorization for the sales of gas by a municipality indicates a legislative intent to withhold such authorization. Furthermore, research by this office has not disclosed cases which would support a conclusion that the sales of gas by one city to another city, town or village is within the meaning of "public improvement" or "common service".

5. May a third class city sell gas directly to a public institution (public school) or to an individual inhabitant of a fourth class city?

This subparagraph was amended in 1917 by the addition of the following proviso, Laws of 1917, page 433:

> "Provided, that nothing contained in this act shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state, except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality;"

This section as amended i 1917 remains unchanged as 386.250, 7), RSMo.

Jurisdiction of the Public Service Commission over a municipally owned water system which furnishes water to customers beyond the corporate limits of such municipality is indicated by Section 386.250 (7). Such jurisdiction is also indicated by the Supreme Court in Public Service Commission v. City of Kirkwood, 4 S.W.2d 773. In the cited case the Court held that the Commission could not require a municipality to obtain a certificate of convenience and necessity to supply water to persons and private corporations beyond its corporate limits. In reaching this conclusion the Court noted that a municipality supplying water beyond its corporate limits is subject to the supervision of the Commission as to service and rates pursuant to the statutory provision which is now 386.250 (7). However, it is noted that the specific provisions of the Public Service Commission Act in regard to service and rates, viz Sections 68, 69, 70 and 71, included the service and rates for gas, electrical and water services supplied by municipalities (the substance of the referred sections appeared as Sections 5645, 5646, 5647 and 5648, RSMo 1939, and appear as Sections 393.130, 393.140, 393.150 and 393.160, RSMo 1959). Such jurisdiction by the Public Service Commission is further indicated by the Supreme Court in Speas v. Kansas City, 44 S.W.2d 108. In the cited case certain taxpayers in the City of Kansas City complained, among other things, that the city was supplying water to nonresidents with the result of an inadequate supply of water for the use of residents. The Court held that complaints of this character must first be heard by the Public Service Commission and referred specifically to the provisions of what is now Section 386.250 (7).

However, in City of Columbia v. State Public Service Commission, 43 S.W.2d 813, the Court construed Section 69 of the Public Service Commission Act (Section 5646, RSMo, 1939, Section 393.140, RSMo 1959) In the cited case residents of the City of Columbia had filed a complaint with the Public Service Commission alleging that rates charged

by the City of Columbia for electric service were unfair. The Court held that the statutory authorizations for the Public Service Commission to regulate the rates and service of a municipally owned electric light plant were unconstitutional because the title of the Act was insufficient to include the subject of municipally owned electric plants. It is noted that the sections of the Act in regard to the regulation of municipally owned electric plants are the same sections of the Act concerning the regulation of municipally owned water systems. The Court has commented upon City of Columbia v. State Public Service Commission, supra, to the effect that municipally owned public utilities do not come within the regulation of the Public Service Commission Act; State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 62 S.W.2d 742, l.c. 745, and State ex rel. City of Sikeston v. Public Service Commission, 82 S.W.2d 105, l.c. 110.

As noted above, Speas v. Kansas City, supra, indicates that the Public Service Commission has jurisdiction over service rendered to nonresidents by a municipally owned water system. The Speas case was pending decision in Division 2 of the Supreme Court at the same time that the City of Columbia case was pending decision in Division 1 of the Supreme Court. The decision in the Speas case was rendered on October 1, 1931, and a Motion for Rehearing was overruled on December 1, 1931. The decision in the City of Columbia case was rendered on November 20, 1931, and no Motion for Rehearing was filed. Therefore, authority for supervision by the Public Service Commission over a municipality supplying water beyond its corporate limits as indicated by the Speas case is rendered doubtful by the City of Columbia case.

Although the City of Columbia case was decided in 1931, the specific regulatory provisions of Sections 68, 69, 70 and 71 of the Public Service Commission Act in regard to jurisdiction by the Commission over service and rates of municipally owned gas, electric and water systems remained in the Revised Statutes of 1939 as Sections 5645, 5646, 5647 and 5648. The 65th General Assembly revised the Missouri statutes in 1949. House Bill 2165 repealed Sections 5645, 5646, 5647 and 5648, RSMo 1939, and reenacted these sections eliminating therefrom regulatory jurisdiction over the service and rates of municipally owned gas, electric and water systems. (See Report on Revision of Statutes, 1949, Volume III, Errata to Appendix to Report No. 11, p. 5). Section 5646 (7), RSMo 1939, related to municipally owned gas, electric and water systems only, and this paragraph was eliminated from the reenacted section. Section 5661, RSMo 1939 (now Section 386.360), relating to action by the Commission to enforce the law or its orders, was amended by House Bill 2099 in 1949 by eliminating therefrom municipalities as one of the entities against which the Commission was authorized to take action to enforce the law or its orders. (See Report on Revision of Statutes, 1949, Volume III, Errata to Appendix to Report No. 11, p. 5).

Therefore, it appears that the Statutory Revision Session of the General Assembly in 1949 attempted to make necessary amendments to conform the Public Service Commission statutes to the opinion of the Court in City of Columbia v. State Public Service Commission, supra. It also seems clear that no specific statutory authorization over the service and rates of municipally owned gas, electric and water systems remained in the Public Service Commission subsequent to the decision in the City of Columbia case and subsequent to the Statutory Revision Session of the General Assembly in 1949.

The only remaining provision of the Public Service Commission statutes which relates in any way to municipally owned water systems is the general provision of Section 386.250 (7). As noted above, Public Service Commission v. City of Kirkwood, supra, and Speas v. Kansas City, supra, indicate that this section confers jurisdiction on the Commission over the service and rates of a municipally owned water system rendered to customers beyond the corporate limits of a municipality. However, these cases were decided prior to City of Columbia v. State Public Service Commission, supra, and prior to the elimination of municipally owned gas, electric and water systems from the specific regulatory provisions of Sections 393.130, 393.140, 393.150 and 393.160. Therefore, it does not appear that the general provisions of Section 386.250 (7), standing alone, subject the service and rates of a municipally owned water system rendered to customers beyond the corporate limits of such municipality to the jurisdiction of the Public Service Commission.

The conclusion above is supported by the decision of the Circuit Court of Cole County rendered on December 1, 1966, in Valley Sewage Company v. Public Service Commission, Case No. 23169. In 1965 the General Assembly amended Section 386.250, by adding paragraph 9 which purported to extend the jurisdiction, supervision, powers and duties of the Public Service Commission to the services and rates of privately owned sewer systems. None of the other regulatory sections of the Public Service Commission statutes were amended to include privately owned sewer systems. The Court held that any construction of the statute which granted power to the Public Service Commission to supervise, regulate, oversee or otherwise control in any manner or respect privately owned sewer systems would constitute an unconstitutional delegation of legislative power to the Commission in violation of Article III, Section 1 of the Constitution. This office understands that no appeal from this decision was taken and that the judgment therein is final. This office is in agreement with the decision and is of the opinion that the reasoning therein applies with equal force to Section 386.250 (7).

CONCLUSIONS

A city of the third class which owns and operates a water system may sell water to a city of the fourth class, to a village, to a

public school in a city of the fourth class and to an individual inhabitant of a city of the fourth class. A city may not own and operate facilities beyond its corporate limits to deliver water sold by it to public or private customers located beyond such corporate limits. Sales of water by a city to public or private customers located beyond its corporate limits are not subject to the jurisdiction of the Public Service Commission. A city of the third class which owns and operates a gas system may not sell gas to public or private customers located beyond its corporate limits. This opinion does not apply to cities having combined waterworks and sewerage systems which fall within the provisions of Section 250.190, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Very truly yours,

NORMAN H. ANDERSON
Attorney General

Opinion No. 298 Answered by
Letter by C. B. Burns, Jr.

32

October 5, 1961

Honorable J. Ben Garrett
Representative, Jefferson County
617 North Third Street
DeSoto, Missouri

Dear Mr. Garrett:

This is in answer to your letter of recent date regarding the question of the authority of the City of DeSoto to extend its water lines beyond the city limits.

We have ascertained from Mr. John Anderson, City Attorney of DeSoto, that DeSoto has a combined water works and sewerage system under the authority of Chapter 250, Revised Statutes of Missouri, 1959. Section 250.190, Revised Statutes of Missouri, 1959, provides as follows:

> "Any such city, town or village or sewer district operating a sewerage system or a combined waterworks and sewerage system under this chapter shall have power to supply water services or sewerage services or both such services to premises situated outside its corporate boundaries and for that purpose to extend and improve its sewerage system or its combined waterworks and sewerage system. Rates charged for sewerage services or water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits."

It will be seen from the provisions of Section 250.190, supra, a city operating a combined waterworks and sewerage system has authority to supply water services to premises

situated outside its boundaries and can extend for such purposes its sewerage system or its combined waterworks and sewerage system.

It is also provided in such section that the rates charged for water services to premises outside the corporate boundaries may exceed those charged for such services to premises within the corporate limits.

We believe that the provisions of such section answer the question contained in your letter.

With best personal regards, I am

Very truly yours

THOMAS F. EAGLETON
Attorney General

CB:BJ