Approved Ivan Sand 2/7/85
Date

MINUTES OF THE HOUSE COMMITTEE ON Local Government.

The meeting was called to order by REPRESENTATIVE IVAN SAND at
Chairperson

2:00 ~~xxx~~a.m./p.m. on JANUARY 30, 1985 in room 521-S of the Capitol.

All members were present except: Representative Samuel (Burr) Sifers

Committee staff present: Mike Heim, Legislative Research Department
Mary Hack, Revisor of Statutes Office
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee: (Re New Legislation)

Representative Nancy Brown
Mr. John Peterson, Kansas Cemetery Association
Mr. Jim Kaup, League of Kansas Municipalities
Mr. Scott Lambers, Assistant to City Manager, Overland Park, Kansas
Mr. Kim Dewey, Sedgwick County
Representative Arthur Douville

Chairman, Ivan Sand, called for introduction of new legislation.

Rep. Nancy Brown, requested legislation concerning county extension councils; relating to the budget thereof. (See Attachment I.)

Rep. Kenneth D. Francisco made a motion to introduce the proposal as a Committee bill. Rep. George R. Dean seconded the motion. Motion carried.

Mr. John Peterson, representing the Kansas Cemetery Association, requested legislation which would amend K.S.A. 17-1311. (See Attachment II.) The legislation would provide collection of a fee of at least 10¢ per square inch of a permanent memorial's foundation area, and the fee would be used for permanent maintenance of the cemetery.

Rep. Robert D. Miller made a motion to introduce the proposal as a Committee bill. Rep. Clyde Graeber seconded the motion. Motion carried.

Mr. Jim Kaup, representing the League of Kansas Municipalities, presented two requests:

1. Legislation to resolve problems with current language in K.S.A. 15-204, regarding the appointment of officers in mayor/council cities of the third class; concerning terms of office of appointive officers and providing for their removal or suspension. (See Attachment III-A.)

2. Legislation to modify the statutes to recognize the ruling of the Kansas Supreme Court in Cook v City of Enterprise, 233, Kan. 1039, which is accomplished by repealing K.S.A. 12-1651a and amending K.S.A 12-1651 by adding a new subsection (b), relating to official newspapers in the second and third class cities; concerning the qualifications and designation thereof. (See Attachment III-B.)

Rep. Dorothy Nichols made a motion to introduce the proposed legislation regarding appointive officers as a Committee bill. Rep. Arthur Douville seconded the motion. Motion carried.

Rep. LeRoy Fry made a motion to introduce the League's proposed legislation regarding official city newspaper designation as a Committee bill. Rep. Robert D. Miller seconded the motion. Motion carried.

Mr. Scott Lambers, Assistant to the City Manager, Overland Park, Kansas, requested legislation authorizing certain cities of the first class having one or more fire districts, to establish city fire departments or contract for fire protection services and the dissolution of the fire districts. (See Attachment IV.)

Rep. Robert D. Miller made a motion to introduce the proposed legislation as a Committee bill. Rep. Phil Kline seconded the motion. The motion carried.

Mr. Kim Dewey, representing Sedgwick County, requested that K.S.A 68-1101 be amended to include culverts.

Rep. Phil Kline made a motion to introduce the proposed legislation as a Committee bill. Rep. Burt DeBaun seconded the motion. Motion carried.

Rep. Arthur Douville requested legislation which would amend K.S.A. 1984 Supp. 19-3516 and repeal the existing section; regarding water supply and distribution districts; relating to the letting of contracts. (See Attachment V.)

Rep. Kenneth D. Francisco made a motion to introduce the legislation as a Committee bill. Rep. Robert D. Miller seconded the motion. The motion carried.

Chairman Sand informed the Committee that he had met with several persons concerned with HB 2016; that Staff is preparing an amended version of the bill; that hopefully the amended version will be acceptable to the Senate; that there will be further discussion and possible action on the bill on Thursday, January 31.

A written statement on behalf of The Electric Companies Association of Kansas was received by Committee members. (See Attachment VI.) In Re HB 2016.

The minutes of the meetings of January 23, 1985, and January 24, 1985, were approved as presented.

The meeting was adjourned.

HOUSE COMMITTEE ON LOCAL GOVERNMENT

DATE Jan 30, 1985

NAME	ADDRESS	REPRESENTING
Jim Kaup	Topeka	League of Municipalities
John Peterson		Ks Cemetery Assn
Gerry Ray	Olathe	Jo County
Scott Chambers	OP	O.P.
Nancy Brown	Topeka	Jo County
D. WAYNE ZIMMERMAN	TOPEKA	THE ELECTRIC COs ASSOC. OF KS.
Kim C. Devoy	Wichita	Sedgwick Co.

(Attachment I)
1/30/85

AN ACT concerning county extension councils; relating to the budget thereof; amended K.S.A. 2-610.

Be it enacted by the Legislature of the State of Kansas:

COUNTY APPROPRIATIONS; BUDGETS, APPROVAL; TAX LEVIES, USE OF PROCEEDS. On or before the ~~thirteenth day of June~~ fifteenth day of July each year, the executive board of the county extension council shall file with the county commissioners in the office of the county clerk:

(a) A list of current members of the county extension council and its executive board; (b) a certification of election of officers as provided in subsection (c) of K.S.A. 2-611; (c) a certificate by the director of extension of Kansas State University of Agriculture and Applied Science that the county extension council is properly functioning and entitled to receive the appropriations provided by las; and (d) a budget prepared in cooperation with the board of county commissioners and the director of extension of Kansas State University of Agriculture and Applied Science for the ensuing calendar year. The budget shall clearly show all receipts from all sources. After the approval of such budget by (1) the board of county commissioners, (2) the director of extention of Kansas State University of Agriculture and Applied Science or the director's duly authorized representative, and (3) the chairperson of the executive board of the county extension council, acting as a body, the board of county commissioners shall then make an appropriation and certify to the county clerk the amount of tax necessary to be levied on all tangible taxable property of the county sufficient to provide a program of county extension work and to pay a protion of the principal and interest on bonds issued under the authority of K.S.A. 12-1774, and amendments thereto, by cities located in the county, which levy shall not exceed the limitation prescribed by K.S.A. 1982 Supp. 79-1947, and amendments thereto.

Attachment 1

(Attachment II)

1/30/85

17-1311. Permanent maintenance fund; requirements; use. Such corporation shall maintain, in a trust company, a bank within the state of Kansas or a savings and loan association incorporated under the laws of this state, a percentage of the purchase price of each burial lot hereafter sold by it, or any payment thereon, not less than fifteen percent (15%) thereof, for the permanent maintenance of the cemetery within which said burial lot lies, but the total amount so set aside shall not be less than twenty-five dollars ($25) for each burial lot at the time of conveyance of such lot. Deposits to the permanent maintenance fund shall be made within forty-five (45) days of receipt of moneys for which deposits are required to be made. Moneys placed in such fund under the provisions of K.S.A. 17-1308 shall be credited for the purposes of fulfilling such requirement. Moneys in such fund may be held and invested to the same extent as is provided in K.S.A. 17-5004 and any amendments thereto, but the total amount of money invested in any mortgage upon real property shall not exceed an amount equal to seventy-five percent (75%) of the market value of such property at the time of such investment. The income of the said permanent maintenance fund shall be used exclusively for the maintenance of said cemetery. No part of the principal of said fund shall ever be used for any purpose except for such investment. In no event shall any loan of said funds be made to any stockholder in such corporation. The treasurer of such corporation may deposit, to the credit of such fund, donations or bequests for said fund and may retain property so acquired without limitation as to time and without regard to its suitability for original purchase. As used in this section, the term "burial lot" shall mean a plotted space for one grave. Such maintenance shall include, but not be limited to, mowing, road maintenance and landscaping, but shall not include administrative costs, expense of audits or the portion of any capital expense for equipment used to maintain portions of a cemetery not sold for burial purposes or in use for grave sites.

History: L. 1901, ch. 102, § 5; R.S. 1923, 17-1311; L. 1931, ch. 147, § 1; L. 1963, ch. 138, § 1; L. 1968, ch. 330, § 3; L. 1971, ch. 71, § 1; L. 1978, ch. 76, § 1; July 1.

For each permanent monument, tombstone, burial lot marker or other memorial installed on a burial lot after July 1, 1985, such corporation prior to such installation shall collect on a non-discriminatory basis from the burial lot owner or other person authorized to install such memorial an amount determined by such corporation but at least 10¢ per square inch of the memorial's foundation area; and such corporation shall deposit the amounts so collected into the permanent maintenance fund for the permanent maintenance of the cemetery in which such burial lot lies.

Attachment 2

League of Kansas Municipalities

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Members of House Local Government Committee
FROM: Jim Kaup, Staff Attorney, League of Kansas Municipalities
RE: Proposed Legislation for Terms of Office of Appointive Officers in Mayor/Council Cities of the Third Class

This bill is intended to resolve two different problems with the current language of K.S.A. 15-204. (1) In mayor/council cities of the third class a problem commonly arises when the mayor makes his or her annual appointment or reappointment of a city officer and the city council refuses to consent to the appointment or reappointment. The question which arises is who serves as officer for the period of time between the end of that officer's term of office and the time when a successor is confirmed? The common law rule has been that the incumbent officer continues on in office until a successor is lawfully appointed. Kansas has followed this common law rule. In addition, statutory provisions applicable to cities of the first and second class and for third class cities with the commission form of government already expressly provide that an officer continues in office until his or her successor has been appointed and qualified (K.S.A. 13-2101; 14-1501; and 15-1601). Therefore, the proposed amendment to K.S.A. 15-204 merely codifies the common law rule already in place in Kansas and further makes the law concerning this situation consistent among all classes of cities in the state.

(2) The bill also deals with the issue of the power of the mayor to remove a city officer. K.S.A. 15-204 presently says that the mayor "may remove any such officer, with the consent of the council." This language is deficient in that it can be read to mean that the mayor can fire an officer on the spot. It is the League's position that the present language means that the mayor may suspend a city officer on the spot, but the actual termination of that officer can be ordered only by the city council. Some of the problems which have arisen from this current language are: what is the status of an officer between time of "removal" by the mayor and the time of city council action consenting to the mayor's "removal" of that officer; and what happens if the mayor views his or her power to "remove" an officer as power to fire, and so acts, but the city council does not consent to that firing?

Because of these, and possibly other, questions this second amendment to K.S.A. 15-204 is offered to do the following: (1) We repeat the provision that the city council may remove any officer; and (2) we provide that the mayor may "suspend" an officer, with the power to "remove" an officer remaining only with the city council.

This second amendment to 15-204 will protect city officers in that it clarifies the issue as to exactly who has power to remove appointive officers from office. The amendment would also protect the mayor in that it will prevent a mayor from misreading the statute so as to believe he or she has power to summarily fire a city officer, but still recognizes the power of the mayor to take immediate action to remove a city officer from the job. Finally, the amendment will protect the city in that it will lessen the liklihood of unlawful discharge lawsuits being brought by the officer.

The bill is drafted to become effective upon publication in the statute book (July 1).

Attachment 3-A

HOUSE BILL No. _____

By Committee on Local Government

AN ACT relating to appointment of officers in mayor/council cities of the third class; concerning terms of office of appointive officers and providing for their removal or suspension; amending K.S.A. 15-204 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 15-204 is hereby amended to read as follows: The mayor, with the consent of the council, may appoint, at the first regular meeting of the governing body in May of each year, the following city officers~~, to wit~~: A municipal judge of the municipal court, a clerk, a treasurer, a marshal-chief of police,~~/policemen, street commissioner~~, and such other officers as deemed necessary; and may retain a licensed professional engineer to act in the capacity of city engineer for specifically defined duties. The duties and pay of the various officers ~~provided for in this section~~ shall be regulated by ordinance. ~~A majority of all the members of the council may remove any such officer; or, for good cause, the mayor may remove any such officer, with the consent of the council.~~

[law enforcement officers

[Such persons shall hold their respective offices until their successors shall have been appointed and qualified.

[Any officer may be removed by majority vote of the members-elect of the council, and may be suspended, at any time, by the mayor.

Sec. 2. K.S.A. 15-204 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

League of Kansas Municipalities

(Attachment III-B)
1/30/85

PUBLISHERS OF KANSAS GOVERNMENT JOURNAL/112 WEST SEVENTH ST., TOPEKA, KANSAS 66603/AREA 913-354-9565

TO: Members of House Local Government Committee
FROM: Jim Kaup, Staff Attorney, League of Kansas Municipalities
RE: Proposed Legislation for Designation of Official City Newspaper

K.S.A. 12-1651a, enacted in 1959, requires that governing bodies of cities of the second and third class must annually designate an official city newspaper. In the 1983 case of Cook v. City of Enterprise, 233 Kan. 1039, the Kansas Supreme Court concluded that K.S.A. 12-1651a directs but does not mandate cities to designate the official newspaper annually. The courts stated that "where the city officially designated the newspaper as its official city newspaper and then continued to utilize it for local publication of its ordinances over a period of many years, the purpose of the statutes requiring publication of ordinances, and of K.S.A. 12-1651a requiring designation of an official city newspaper, are fully accomplished."

Removal of the annual designation requirement is accomplished by the repeal of K.S.A. 12-1651a and by amending K.S.A. 12-1651 to add a new subsection (b) which states that once designated as such, a newspaper remains the official city newspaper until such time as the governing body designates a different newspaper as its official newspaper.

The removal of the annual designation requirement is not in any way designed to affect the requirement that an official city newspaper be designated or that municipal ordinances be published therein. Rather, the purpose is simply to modify the statutes to recognize the ruling of the Kansas Supreme Court in the Cook v. City of Enterprise case.

Note: The statute which covered designation of official newspapers for cities of the first class was repealed in 1981 (K.S.A. 13-1420; L. 1981, Ch. 173, Sec. 85).

Attachment 3-B

HOUSE BILL No. _____

By Committee on Local Government

AN ACT relating to official newspapers in second- and third-class cities; concerning the qualifications and designation thereof; amending K.S.A. 12-1651 and repealing the existing section and K.S.A. 12-1651a.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 12-1651 is hereby amended to read as follows: 12-1651. (a) The newspaper selected for the official publications of cities of the second and third class shall be one which has the following qualifications:

(1) ~~(a)~~ It must be published at least weekly ~~fifty (50)~~ times a year and have been so published for at least one ~~(1)~~ year prior to the publication of any official city publication.

(2) ~~(b)~~ It must be entered at the post office of publication as second class mail matter.

(3) ~~(c)~~ More than ~~fifty~~ percent ~~(50%)~~ of the circulation must be sold to the subscribers either on a daily, weekly, monthly or yearly basis. [50

(4) ~~(d)~~ It shall have general paid circulation on a daily, weekly, monthly or yearly basis in the county and shall not be a trade, religious or fraternal publication.

(b) Designation of an official newspaper shall be by resolution of the governing body. Once designated the newspaper shall be the official city newspaper until such time as the governing body designates a different newspaper meeting the qualifications of subsection (a).

Sec. 2. K.S.A. 12-1651 and 12-1651a are hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

(Attachment IV)

DRAFT 1/30/85

(10/29/84)

AN ACT RELATING TO CERTAIN CITIES OF THE FIRST CLASS HAVING ONE OR MORE FIRE DISTRICTS ORGANIZED UNDER THE PROVISIONS OF K.S.A. 19-3613 TO 19-3623 LOCATED WITHIN CITY CORPORATE LIMITS, AUTHORIZING SUCH CITIES TO ESTABLISH CITY FIRE DEPARTMENTS OR CONTRACT WITH ANY PRIVATE OR PUBLIC ENTITY FOR FIRE PROTECTION SERVICES; AND PROVIDING FOR THE DISSOLUTION OR DETACHMENT OF ALL OR ANY PART OF SUCH FIRE DISTRICTS LOCATED WITHIN THE CORPORATE LIMITS OF SUCH CITIES.

SECTION 1. Any city of the first class having one or more fire districts organized under the provisions of K.S.A. 19-3613 to 19-3623 located and operating within its corporate limits, is hereby authorized to establish a city Fire Department or to contract with any private or public entity for provision of fire protection services within the corporate limits of the city by adopting a resolution to that effect directed to the Board of County Commissioners of the County within which such city is located. Such resolution shall state a date certain for the establishment of such city Fire Department or contractual relationship with any private or public entity which date shall be not less than 90 days following adoption of such city resolution.

SECTION 2. Upon receipt of a city resolution to establish a city Fire Department, the Board of County Commissioners shall forthwith issue an order dissolving any such fire district located wholly within the corporate limits of such city and an order detaching that portion of the area located within such corporate limits served by any fire district. Upon receipt of a city resolution to contract with any private or public entity for fire protection services, the Board of County Commissioners shall order dissolution and detachment, as aforesaid. Any such orders of dissolution and detachment shall be effective as of the date of establishment of the city fire department or effective date of contractual arrangements with any private or public entity.

SECTION 3. As to any fire district dissolved hereunder, the books, papers, moneys, equipment, apparatus, machinery, fire stations, sites, buildings and other real and personal property belonging to the dissolved fire district shall be transferred to and shall become the property of the city. As to any fire district from which a portion of its area within the limits of such city is detached hereunder, any books, papers, equipment, apparatus, machinery, fire stations, sites, buildings and other real and personal property located within the limits of such city shall be transferred to and shall become property of the City. In addition, the city is authorized to negotiate and enter into contracts with any private or public entity to acquire by lease or purchase and to operate or maintain fire fighting equipment, and to acquire, construct or lease buildings to house the same and do all things necessary to effectuate the purposes of this act.

SECTION 4. As to any fire district from which a portion of its area within the corporate limits of such city is detached hereunder, such portion of the unexpended moneys in the treasury or in the reserve funds of such fire district at the time of detachment, and such portion of all moneys to be disbursed to such fire district during the remainder of the fiscal year in which detachment occurs, shall be transferred to the city for the provision of fire protection services in the proportion that the assessed taxable tangible valuation of the detached area of said fire district bears to the total assessed taxable tangible valuation of the fire district.

SECTION 5. If any fire district dissolved hereunder shall have outstanding at the time of its dissolution any general obligation bonds, the tax levies to retire said bonds and to pay the interest thereon shall only be levied on the taxable property

located in the territory of such district prior to its dissolution. In addition, if any fire district from which area is detached hereunder shall have outstanding at the time of detachment any general obligation bonds, the tax levies to retire said bonds and to pay interest thereon shall continue to be levied only on the taxable property located in the detached area.

SECTION 6. For purposes of this act, any such city is hereby authorized to make an annual levy of taxes in an amount not to exceed 8.5 mills upon the assessed valuation of all tangible taxable property in the city, which tax levy shall be in addition to all other tax levies authorized or limited by law, except that no other tax levies for fire protection purposes shall be made on such property.

SECTION 7. This act shall take effect and be in force from and after its publication in the statute book.

(Attachment V)
1/30/85
MEMBERS COPY
5 RS 0461

HOUSE BILL NO. _____

By ~~Representative~~ Douville

AN ACT concerning water supply and distribution districts; relating to the letting of contracts; amending K.S.A. 1984 Supp. 19-3516 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1984 Supp. 19-3516 is hereby amended to read as follows: 19-3516. (a) Any water district board may issue and sell revenue bonds to finance the cost of acquisition, construction, reconstruction, alteration, repair, improvement, extension or enlargement of any such water supply and distribution system. The board shall fix by resolution such rates, fees and charges for the services furnished by such water supply and distribution system as may be reasonable and necessary and provide for the manner of collecting and disbursing such revenues subject to the limitations hereinafter contained.

Revenues derived from the operation of any such water supply and distribution system shall be deposited in a responsible bank within the county in which the greatest portion of such water district is located and the deposits shall be governed by article 14 of chapter 9 of the Kansas Statutes Annotated and shall not be used except for the purpose of: (1) Paying wages and salaries of all officers and employees, (2) paying the cost of operation, (3) paying the cost of maintenance, extension and improvement of such water supply and distribution system, (4) providing an adequate depreciation fund, and (5) creating reasonable reserves for such purposes. All revenues over and above those necessary for the above enumerated purposes shall be placed in a reserve fund which, together with any moneys not currently needed which have been set aside for the purposes described in (4) and (5) above, may be invested in accordance with the provisions of K.S.A.

10-122, and amendments thereto, or K.S.A. 10-131, and amendments thereto. Such reserve fund shall be used solely for improving, extending or enlarging the district's water system or for the retirement of revenue bonds issued hereunder and the payment of interest thereon. Such revenue bonds are hereby made a lien on the water supply and distribution system and on the revenues produced from such water supply and distribution system but shall not be general obligations of the issuing water district. Such revenue bonds shall not be taken into account or in any way be a limitation upon the power of the water district to issue bonds for any other purpose. All revenue bonds issued under this act shall be signed by the chairperson of the issuing water district board and attested by the secretary and shall contain recitals stating the authority under which such bonds are issued; that they are issued in conformity with the provisions, restrictions and limitations of that authority; that such bonds are to be paid by the issuing water district from the revenues derived from the rates, fees or charges herein mentioned and not from any other fund or source; that the same have been registered in the office of the county clerk of the various counties in which the issuing water district is located and in the office of the treasurer of the state of Kansas, respectively; and that such bonds are negotiable. All such bonds, when registered and issued, as herein provided, shall import absolute verity, and shall be conclusive in favor of all persons purchasing such bonds, that all proceedings and conditions precedent have been had and performed to authorize the issuance thereof. The provisions of K.S.A. 10-112, and amendments thereto, shall not apply to any bonds issued under this act.

(b) Revenue bonds issued under this act shall mature not later than 40 years after the date of the bonds; may be subject to redemption prior to maturity, with or without premium, at such times and upon such conditions as may be provided by the water district board; and shall bear interest at a rate not to exceed the maximum rate of interest prescribed by K.S.A. 10-1009, and

amendments thereto. The board may sell such bonds in such manner and for such price as it determines will best effect the purposes of this act. In no case where revenue bonds are issued under this act shall the total amount received therefrom be in excess of the actual cost of the plan or program which includes, in addition to all expenses incurred in the acquiring of a water supply and distribution system, all expenses incurred prior to and including the bond election, the no-fund warrants outstanding under the provisions of K.S.A. 19-3505a, and amendments thereto, and unpaid at the time such revenue bonds are issued and all costs of operation and maintenance of such water supply and distribution system estimated to be necessary for a period of two years immediately following the acquisition of such system and the amount necessary to pay the salaries of the water district board due from the date the first member of the first board is elected. Whenever any such water district board has sufficient revenues to pay the operational and maintenance cost and the board members' salaries, then such expenses shall be paid out of such revenues and any surplus funds remaining from the sale of revenue bonds shall be transferred to the revenue bond sinking fund of the water district. No water district or county in which a portion of such water district lies shall have any right or authority to levy taxes to pay any of the principal of or interest on any such bonds or any judgment against the issuing water district on account thereof, and the provision of K.S.A. 10-113, and amendments thereto, shall not apply to any bonds issued hereunder. All water district boards created by this act shall by appropriate resolution make provisions for the payment of such bonds by fixing rates, fees and charges, for the use of all services rendered by such water district, which rates, fees and charges shall be sufficient to pay the wages and salaries of all officers and employees and the costs of operation, improvement and maintenance of the water supply and distribution system; to provide an adequate depreciation fund and an adequate sinking fund to retire such bonds and pay the interest thereon when due;

and to create reasonable reserves for such purposes. Such fees, rates or charges shall be sufficient to allow for miscellaneous and emergency or unforeseen expenses. The resolution of the water district board authorizing the issuance of revenue bonds may establish limitations upon the issuance of additional revenue bonds payable from the revenues of the district's water supply and distribution system or upon the rights of the holders of such additional bonds and may provide that additional revenue bonds shall stand on a parity as to the revenues of the water district and in all other respects with revenue bonds previously issued on such conditions as specified by the board in such resolution. Such resolution may include other agreements, covenants or restrictions deemed necessary or advisable by the district board to effect the efficient operation of the district's system and to safeguard the interests of the holders of the revenue bonds and to secure the payment of the bonds and the interest thereon.

(c) The water district board shall cause an audit to be made annually by a licensed municipal public accountant or by a certified public accountant of the operations of any water supply and distribution system created hereunder for which revenue bonds have been issued by any water district, and, if the audit discloses that proper provision has not been made for all of the requirements of this section, the water district board shall promptly proceed to cause rates to be charged for the water supply and distribution services rendered which will adequately provide for the requirements set out herein. Within 30 days after the completion of such audit, a copy of the audit shall be filed with the county clerks of the various counties in which such water district is located, and such audit shall be open to public inspection.

(d) The water district board, by a majority vote of the members thereof, may contract for repairs, alterations, extensions or improvements of the water supply and distribution system and issue revenue bonds to pay the cost thereof without submitting to a vote of the electors of such water district the

proposal to contract for the making of such repairs, alterations, extension and improvements and to issue revenue bonds to pay the costs thereof. All contracts for any construction of all or part of the water system, or for repairs, extensions, enlargements or improvements to any such water supply and distribution system created under this act, the cost of which exceeds ~~$10,000~~ $25,000 shall be awarded on a public letting by the water district board to the lowest responsible bidder, and in the manner provided by K.S.A. 19-214, 19-215 and 19-216, and amendments thereto, except that the required notice of letting contracts shall be seven days if the cost does not exceed ~~$25,000~~ $100,000 and 30 days if the cost exceeds ~~$25,000~~ $100,000.

Sec. 2. K.S.A. 1984 Supp. 19-3516 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

(Attachment VI)
1/30/85

STATEMENT

ON BEHALF OF

THE ELECTRIC COMPANIES ASSOCIATION OF KANSAS

TO THE

HOUSE LOCAL GOVERNMENT COMMITTEE

HB 2016

JANUARY 30, 1985

The attached statement is submitted for your information and for inclusion in the Committee record.

The Electric Companies Association is a trade association with membership consisting of the six investor-owned electric utilities serving Kansas. They are: The Kansas Power & Light Company, Kansas City Power & Light Company, Kansas Gas and Electric Company, The Empire District Electric Company, Western Power Division of Centel and Southwestern Public Service Company.

Attachment 6

STATEMENT

OF

THE ELECTRIC COMPANIES ASSOCIATION OF KANSAS

TO

HOUSE LOCAL GOVERNMENT COMMITTEE

HB 2016

JANUARY 30, 1985

Mr. Chairman, and Members of the Committee:

We appreciate the opportunity to submit a written statement to the House Local Government Committee presenting our recommendations as to House Bill No. 2016.

In summary, the Association believes it is sound social policy for the state to declare that its antitrust immunity does extend to municipalities engaged in official governmental action directed and properly supervised by the state, but such immunity should not be extended to municipalities while engaged in the operation or franchising of proprietary enterprises such as water utilities, gas utilities, and electric utilities. Such proprietary enterprises, freed from the surveillance of the antitrust laws, possess the inherent capacity for economically disruptive anti-competitive effects. These enterprises, though conducted by municipalities, are not essentially different from other entrepreneurial endeavors in the economic community. Such a municipal enterprise, as does every business enterprise, operates in the furtherance of its own goals to assure benefits for its community constituency--not for the broader interests of a state, an economic region, or of the nation. The same may be said of

investor-owned water, gas, or electric utilities, but such are at least subject to extensive state regulation for the protection of state, regional and national concerns. In short, there is no realistic justification for broadly immunizing the city enterprise to engage in tying agreements and other anti-competitive conduct violative of federal and state antitrust policy while not so immunizing their investor-owned counterparts, especially since a limited immunity, restricted to governmental activities, as opposed to proprietary conduct, would provide an adequate measure of protection for local government officials and instrumentalities Finally, the bill as drafted probably would be held invalid as in conflict with the Supremacy Clause of the United States Constitution. For a state, or instumentality thereof, to be immune from federal antitrust laws according to the Supreme Court, the following must exist:

> First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy;" second, the policy must be "actively supervised" by the State itself.

Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., 100 S.Ct. 937 (1980), emphasis supplied. No such supervision or regulation is provided in the proposed bill.

The Chief Justice of the United States in The City of Lafayette, et al., v. Louisiana Power & Light Co., 435 U.S. 389 (1978), delineated the fundamentally identical nature for antitrust purposes of the municipal utility enterprise and the in vestor-owned utility enterprise. Both are engaged in a business

activity in which a profit or return on investment is sought. Both have the inherent capacity for anti-competitive action and effects. Both can be competitors in the same market (e.g., outside and inside city limits). Both can inflict and suffer a litany of economic woes. Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983), cert. granted 52 U.S.L.W. 3885 (U.S. June 12, 1984). Both may have a parochial regard for their own customers or constituents in conflict with or disruptive of the economy locally, regionally, and nationally. In City of Lafayette, for example, it was alleged that the municipal enterprise was outside its city limits engaging in unlawful tying conduct--agreeing to serve customers with city gas and water service only on condition that such customers also purchased electricity from the city and not from the competing investor-owned electric utility. The same type of abuse could occur within the city limits of a municipality harmful to an investor-owned utility franchised for all or a portion of the area within a municipality. The Chief Justice in City of Lafayette used, and we here use, the term "proprietary" only to illustrate or focus attention on the fact that municipal utilities and investor-owned utilities are or can be in a competitive relationship such that each should be constrained by federal and state antitrust laws. 435 U.S. at 422. In short, Kansas should not create a situation in which these municipal enterprises could complain of antitrust injury while boldly asserting that any similar harms they might unleash upon competitors or on the economy are absolutely beyond the

purview of federal and state antitrust law. Such a situation would, as our Chief Justice notes, ". . . inject a wholly arbitrary variable into a 'fundamental national economic policy'". 435 U.S. at 419. Thus, where a municipality acts in essentially a commercial capacity, immunizing its conduct from all antitrust liability serves no rational policy objective. See Note, the Antitrust Liability of Municipalities under the Parker Doctrine, 57 B.U.L. Rev. 368, 386 (1977).

Congress, concerned about proliferation of antitrust suits against municipalities and the awarding of ruinous treble damages, recently reexamined the extent to which it believed it appropriate, under modern conditions, for the antitrust laws to be applied to municipalities. The result was the Local Government Antitrust Act of 1984, P.L. 98-544. That law, adopted October 24, 1984, granted a limited immunity from antitrust liability for municipalities. In balancing the interests of states and municipalities in their governmental activities against the fundamental federal policy favoring free competition, the Congress provided that municipalities were exempt from the damage provisions of the antitrust laws (including trebling); however, municipalities remain subject to the awarding of injunctive relief. Thus, the potential for the exaction of ruinous damages was eliminated while still retaining for society the protection of the antitrust laws in the form of the availability of injunctive remedies. This Association has no quarrel with such a limited exemption, but a blanket grant of immunity to all municipalities regardless of how egregious they may act or how much

damage they may inflict both distorts the balance Congress sought to achieve and significantly hobbles healthful competition.

The majority of the Court in City of Lafayette, supra, in harmony with the Chief Justice, touched upon the following points of pertinence to this Special Committee's deliberations:

1. A municipality utility's contention that its goal is not private profit is not significant or determinative as every business enterprise, public or private, operates its business in the furtherance of its own goals. A municipally owned utility will make economic choices to assure benefits for its community constituency. These choices are not inherently more likely to comport with the broader interests of regional and national economic well being than are the decisions of an investor-owned utility seeking to further the interests of its customers, organization, and share holders (435 U.S. at 403.)

2. If a municipal utility engages in tying practices, the typical antitrust ills of the increase in cost of the frustrated service seeking competition with the tied service is an economic ill to a region, to customers of the injured competing utility, and to the injured utility which may be forced to abandon or lose existing equipment from the unfair competition. (435 U.S. at 404.)

3. A tying practice, while providing some benefits for the constituents of the municipality, would still have and inflict the typical tying antitrust injury--i.e., upon the tied customer whose economic freedom is restricted as well as upon the seller of the product in competition with the tied product. Further, decisions to displace existing service in favor of the tied service, rather than being made on the basis of efficiency of the distribution of services, may be made or forced by the municipality in the interest of realizing benefits to itself and without regard to extraterritorial impact in regional efficiency. (435 U.S. at 404.)

4. Other harmful antitrust activity may be sham and frivolous litigation by a city against an investor-owned utility for the purpose and with the effect of delaying approval and construction of electric generating plant facilities. While such activity may seemingly benefit citizens of the municipality by "eliminating a competitive threat to expansion of the municipal utilities . . .", such activity may impose enormous and unnecessary costs on the existing or potential customer of the proposed generating facility both within and beyond a city's proposed area of expansion. It may further cause significant injury to the investor-owned utility by interfering with its ability to provide expanded service. (435 U.S. at 405.)

5. It is really no answer that persons affected by abusive acts of municipal utilities may seek redress through the "political process." For example, injured parties residing outside the municipality would have no political recourse. A claim that such parties outside the municipality could complain to the legislature, is not deemed by the Supreme Court or by this Association to be sound. The same argument may be made regarding anti-competitive activity of an investor-owned corporation--yet the Sherman Act would still be applicable. (435 U.S. at 406.) A swift injunction may be needed to keep a lawful business from perishing. Action by the legislature may well be far too slow.

6. The Supreme Court noted that municipal monopolies could engage in a variety of harmful anti-competitive conduct such as predatory pricing (pricing below cost) in an effort to drive a competing investor-owned utility out of business. (435 U.S. at 405.) The court wrote:

> "When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the

efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." (435 U.S. at 408.)

Egregious forms of anti-competitive conduct in which municipalities may potentially engage are too numerous to list exhaustively. Yet, based on existing case law and perceptions of muncipalities' self-interest, certain forms of anti-competitive behavior, if immunized, are quite likely. For example, even within its own bounds, a garbage pick-up business could be completely destroyed if a municipal water company, for instance, refused to sell water to those who did not also buy garbage pick-up services from the city or even if coupons for free city garbage pick-up service were distributed with water purchases. Indeed, some of the victims of unbridled municipality predation could well be other municipalities. See, Town of Hallie, supra. A city with the only sewage treatment plant in the vicinity might condition use of that plant on neighboring cities' agreement to abandon their own proprietary services and buy them from the city with the sewage treatment monopoly--for a handsome price. Moreover, without the restraining influence of the antitrust laws, there would be nothing to prevent municipalities from ganging up, for instance, on investor-owned utilities operating adjacent regions.

As this Committee will recall the Supreme Court of the United States held in City of Lafayette that the cities there involved were not, simply because they were cities, exempt or

immune from the application of antitrust laws. As the Supreme Court noted, the "pole star" of the Sherman Act, sometimes called the Twenty-Fifth Amendment to the United States Constitution, is competition, and immunity from this fundamental national policy should not be lightly inferred. And we add, nor should it be lightly granted -- as is the case with House Bill No. 2016 as it now reads.

Finally, quite apart from the policy concerns outlined above, House Bill 2016, as presently written, has a serious legal deficiency. To the extent the bill attempts to nullify the federal antitrust laws (going beyond the limits of the Local Government Antitrust Act of 1984) without specifically articulating kinds of conduct and local conditions for which the legislature believes a regime of economic regulation other than competition is more appropriate and without establishing a framework of state supervision, the bill's provisions will be preempted (made a nullity) by federal law. Without such an articulation of state policy and without a supervisory framework, the bill amounts to little more than a state pronouncement that whatever a municipality decides to do is lawful under both state and federal antitrust laws. As Justice Stone noted in Parker v. Brown, supra,:

> A state does not give immunity for those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful or by becoming a participant in a private agreement or combination by others for restraint of trade.

Id., at 317 U.S. 351.

The foregoing considerations suggest that, if immunity for local governmental officials or instrumentalities is to be conferred, then:

(i) There must be a clearly articulated and affirmatively expressed statement of the legislature's policy choice favoring specific state supervision over a regime of competition in limited spheres of activity;

(ii) The provision of appropriate state supervision or regulation of specific categories of activity or conduct must be established;

(iii) A provision should be added to Section 1 of the bill to the effect that "any immunity granted or extended hereunder shall not extend to or include immunity from any injunctive or equitable relief"; and

(iv) Subsection (c) of Section 1 of the bill should be amended to read (words dashed out would be omitted and words in brackets, added):

(1) ~~Franchising and~~ Supervising the operations and activities of public utilities;

(2) ~~operating municipal water, gas and electric utilities;~~

(3) ~~franchising and~~ Supervising operations and activities of cable television businesses;

(4) ~~providing and~~ Supervising ambulance and emergency medical services;

(5) formulating comprehensive plans for the development of municipalities and regulating land use through the adoption and administration of zoning and subdivision regulations;

(6) ~~operating~~ [Supervising] sanitary sewerage and storm drainage systems; or

(7) ~~operating municipal airports and~~ Enforcing airport zoning regulations.

With the foregoing suggested changes, the social policy deemed best in the long range interest of the state could probably be preserved.

Thank you very much.

Prepared by The Electric Companies Association of Kansas Legal Committee for filing by D. Wayne Zimmerman, Director.