Approved:
Date2-15-01

MINUTES OF THE SENATE UTILITIES COMMITTEE.

The meeting was called to order by Chairperson Senator Stan Clark at 9:30 a.m. on February 13, 2001 in Room 231-N of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research
Bruce Kinzie, Revisor of Statutes
Lisa Montgomery, Revisor of Statutes
Ann McMorris, Secretary
Chris Crowder, Intern to Senator Clark

Conferees appearing before the committee:
Richard Cram, Department of Revenue

Others attending: See attached list

Chair Clark provided the committee with copy of a Retail Energy Bulletin. American Gas Assn. quotes 70% of new homes constructed were gas heated in 1999. Multifamily homes were 56% electirc heating and 42% gas. Overall, gas' share of the 1999 heating market for all new housing was 64% and the electric share was 33%, both unchanged from the year before. California Governor Gray Davis urges the Administration to expedite federal permits for power plans and waive some of the environmental requirements. Davis initiated an in-state permitting process that should cut the approval time to 21 days for new plants and eased emissions controls on older generation units. A White House spokesman said the administration is reviewing the request and will act soon. A story from the Christian Science Monitor covered the activities of an aluminum makers' business plan - shut factory doors, pay the employees a year's salary and becomes merchants of electricity. (Attachment 1)

Tax Implications of Electric Utilities
Richard Cram, Director of Office of Policy & Research for Department of Revenue, provided background, discussion on **Senate Bill 177,** difference of assessment procedures between commercial/industrial property and public utilities, and constitutional issues. (Attachment 2)

He called on Robert Badenoch, Property Valuation Department, to review the survey of other states' tax incentives for encouraging growth in electricity generating capacity. (Attachment 3)

A chart on tax rates by state was distributed and discussed. (Attachment 4)

Chair opened for questions from the committee. Questions asked on tax abatement for new plants, how this would affect local utilities, how the industry feels this would affect them, assessment of public utilities, how deregulation had worked in other states, possible tax policy changes and requests for additional information. Chair noted that **SB 177** hearings are scheduled for Thursday, February 15.

Next meeting of the committee will be on February 14, 2001.

Adjournment.

Respectfully submitted,

Ann McMorris, Secretary

Attachments - 4

SENATE UTILITIES COMMITTEE GUEST LIST

DATE: **February 13, 2001**

Name	Representing
BRUCE GRAHAM	KEPCo
Charles Reese	Midwest Energy
Ron Gaches	CBA
Robert M. Wyderwood	KDOR-PVA
Cynthia Smith	KCPL
Mary A. Campbell	Midwest Energy, Inc.
Carl Folsom	REP HOLMES
Nancy Sargent	League Women Voters
Richard Cram	KDOR
Bill Farrell	BOEING
J.C. Long	UtiliCorp United Inc.
Stacy Kramer	Western Resources, Inc.
Jim Jackson	SEN. Hensley

Platts
Retail Energy Bulletin
****
****
Monday, February 12, 2001.

****
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Please note that some e-mail clients
may receive truncated versions of long e-mails.
For this reason, there is also an enclosure of the issue attached.
If you do not see "END OF ISSUE" at the bottom of
this e-mail, you need to download the attached file.
Thank you.
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AGA says 70% of new single-family homes use gas heat

For a second straight year, 70% of the new homes constructed were gas heated, according to figures for 1999 complied by the American Gas Assn. In figures released Friday in conjunction with the start of the International Home Builders Show in Atlanta, AGA said natural gas' share of new single-family homes exceeded the electric share in all regions of the country. Nationwide, electricity had a 27% share of the new single-family home market and the remaining 3% used oil or other fuels. For multifamily homes, however, electric heating remained the top choice at 56%, and the share for gas dipped to 42% from 44% the year before.

Overall, gas' share of the 1999 heating market for all new housing was 64% and the electric share was 33%, both unchanged from the year before. "Consumers strongly prefer natural gas because it is a good energy value," said David Parker, AGA president and CEO. "Builders recognize natural gas is appropriate for a wide range of residential uses, from traditional heating and water heating to cooking, grilling, hearth products and lighting," he said.

Delay seen for West Virginia retail access plan
West Virginia appears likely to delay the start of retail electric competition until at least mid-2002, and perhaps later, state legislators, regulators and a utility spokesman said on Friday. The West Virginia Public Service Commission last spring approved a plan to implement customer choice in mid-2001, after the 2001 session of the state legislature enacted a short list of related tax-law changes. In the wake of the California situation, however, legislators have grown increasingly concerned about restructuring, so last week they decided to hire a consultant to study whether the PSC plan will adequately protect consumers. Terry Eads, American Electric Power's director of regulatory affairs for West Virginia, said that while the consultant is expected to submit its report to legislators before the conclusion of a 60-day ending in mid-April, he does not expect there will be sufficient time for them to review the report, as well as a separate analysis of tax issues, and still act on the tax changes before they adjourn. If legislators do not approve the needed tax changes this session, the start of customer choice most likely would be delayed to mid-2002, assuming they are "comfortable" with the PSC plan. Nevertheless, Eads added expressed confidence that the lawmakers ultimately will determine that West Virginia's situation -- with a generation surplus, thousands of MW of new capacity under construction or development, and a plan that caps rates for up to 13 years -- is far different than California's.

Davis urges administration to expedite federal permits for power plants
The White House said Friday it is reviewing a request from California Gov. Gray Davis to expedite federal permitting for power plants and waive some

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environmental requirements during the state's energy crisis. Davis made the request Thursday after initiating an in-state streamlined permitting process that should cut the approval time to 21 days for new plants and eased emissions controls on older generation units that are out of emissions credits. Davis predicted that his plan would allow 5,000 MW of new generation to come on-line for the summer. A White House spokeswoman said the administration is reviewing the request and will act soon, although she could not predict how soon. "We are aware of the situation in California and will take that into consideration," she said.

Three more suppliers sign on to PG&E securitization plan

As of mid-day Friday, nine companies had signed agreements to continue supplying gas to Pacific Gas and Electric under an arrangement in which the utility is pledging its gas accounts receivables as security for the purchases. Joining the list Thursday were Williams Energy Marketing & Trading, TXU Energy Trading of Houston and TXU Energy Trading of Canada, a PG&E spokeswoman said. The other six suppliers are El Paso Merchant Energy, BP Energy, Texaco Natural Gas, Dynegy Marketing and Trade, Texaco Canada Petroleum and Dynegy Canada Marketing and Trade. Three suppliers -- Western Gas Resources, J. Aron and Enron North America -- have declined to sign agreements. While Enron said it would continue delivering gas under its contracts with PG&E, WGR and J. Aron cut off service.

N.Y. takes comments on extension of farm and food processor retail pilot

The New York Public Service Commission on Thursday asked for comments on whether it should grant an eight-month extension in the Farm and F

'To injure no man, but to bless all mankind'

BOSTON · FRIDAY
FEBRUARY 9, 2001

THE CHRISTIAN SCIENCE MONITOR

Eco-arson rises in Phoenix *Luxury desert homes are among targets of the terrorists.* 7

Higher hurdles *Britain urges EU-wide changes in asylum rules in a bid to curb people-smugglers.* 7

Arts&Leisure *A new California park is Disney's answer to competitors' bigger, higher, faster rides.* 13

75¢

Aluminum makers' business plan: Shut factory doors

■ Smelters find they can make more money selling their subsidized energy to California than by working.

By Todd Wilkinson
Special to The Christian Science Monitor

BOZEMAN, MONT. – The California energy crisis is breeding some odd subplots.

Last week, when the Columbia Falls Aluminum Company closed its doors in Montana and became a merchant of electricity, many of the plant's 585 workers actually found some cause for celebration when they were laid off.

That's because their employer's decision to sell power – instead of making aluminum – had suddenly become so lucrative that furloughed employees were given a full year's wages, benefits, and the possibility of being rehired when the bull market for megawatts subsides.

For some public-policy experts, the turn of events in Columbia Falls, Mont., raises a pointed question: Should aluminum manufacturers, who for decades enjoyed publicly subsidized power on the justification that their product was contributing to America's national security, now be allowed to hawk their electricity?

"Americans built dams and a power grid so that these companies could produce aluminum at a profit, and now they are turning around and taking advantage of the public again by hitting consumers when they're most vulnerable," says Jim Jensen, executive director of the Montana Environmental Information Center.

Aluminum industry representatives say they are doing nothing wrong – it's just good business. Under an agreement brokered with the Bonneville Power Administration (BPA), a public agency which markets wholesale power generated by 29 dams on the Columbia and Snake river systems, aluminum companies in the region can sell the megawatts they control to the highest bidder.

'Once subsidies are created, they persist [because] people view them as entitlements.'

– John Baden, libertarian

FIVE years ago, the Columbia Falls smelter bought 165 megawatts of electricity in a fixed-price contract with Bonneville for roughly $26 per megawatt. Now, it is reselling that power to willing buyers for 20 times as much.

After Bonneville is paid $60 million – which will help ratepayers – company officials say they expect to earn $120 million without turning out an ingot of aluminum. Some profits will go to employees; others will be used to buy future power. Companies such as Kaiser Aluminum Corp. in Spokane, Wash., have also suspended operations in order to sell their power to desperate buyers in California.

Former Congressman Pat Williams (D) of Montana, a senior fellow at the Center for the Rocky Mountain West in Missoula, Mont., says that such profiteering is a violation of public trust.

The fact that Americans are spending tens of millions of dollars annually to save salmon runs from extinction – linked to hydroelectric dams – adds to the burden shouldered by taxpayers, he says. "When you count up all the expenditures, one cannot but question the current business practices of these companies."

Roughly half of the Pacific Northwest's power comes from dams and one-third of BPA's generating capacity has been allocated to aluminum companies.

However, the dams have been highly controversial, blamed in part for salmon-population crashes and viewed as a pork-barrel subsidy for certain industries. Their defenders have claimed they are essential to keep aluminum smelters, which employ thousands of people, in business.

Now, environmentalists are caught in a conundrum. Having aluminum plants idle means Bonneville may allow more water through dam floodgates, but the skyrocketing cost of power is also being used as an argument for keeping the dams in place.

"This power is not subsidized," insists BPA spokesman Ed Mosey in Portland, Ore., arguing that BPA is actually paying back its debt, unlike most federal agencies. He says that by October, aluminum producers will no longer enjoy lower rates.

But others rail against the low rates aluminum companies have enjoyed and say they should be held more accountable.

Critics include some free-market economists who have applauded the Bush administration's pro-business natural-resource agenda. "Insulating households and businesses from the real costs of power production has negative consequences," says John Baden, chairman of the Foundation for Research on Economics and the Environment, a libertarian think tank in Bozeman.

In addition to lost revenue for BPA, costs include the impacts on wild rivers, wasteful irrigation, and additional coal-fired power elsewhere. "Once subsidies are created, they persist [because] people view them as entitlements," Mr. Baden says.

STATE OF KANSAS
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Office of Policy & Research

To: **Senator Stan Clark, Chair**
Senate Utilities Committee

From: **Richard L. Cram**

Re: **Constitutional Issues Concerning Senate Bill 177**
Incentives Offered by Other States to Encourage Electricity Generating Capacity Growth

Date: **February 13, 2001**

Background

An article in the February 11, 2001 issue of the *New York Times* stated that most of the new power plants in the United States are being built not by regulated utilities but by independent and unregulated operators. Almost a fifth of the electricity generated in the first 10 months of 2000 came from generators other than traditional utilities, twice the proportion in 1997. More than 100 companies have announced new plants.

Discussion of Senate Bill 177

Section 1 of the bill proposes to amend the definition of "public utility" in the public utilities regulatory statute, K.S.A. 2000 Supp. 66-104, adding a subparagraph (e) to exclude from that definition, at the option of the entity, generation, marketing and sale of electricity generated by an electric generation facility, or addition to such facility, place in service after January 1, 2001, which is coal-fired or uses natural gas, and is not in the rate base of a regulated electric public utility, a cooperative, or municipal electric utility. These will be referred to as "merchant" electric generation facilities.

Section 2 defines "independent power producer property" as the property used by a merchant electric generation facility in the generation, marketing and sale of electricity generated by such a facility, and provides that such real and personal property will be assessed as commercial and industrial property at the rate of 25%.

Section 3 proposes to amend the definition of "public utilities" in the property tax statute, K.S.A. 2000 Supp. 79-5a01, to exclude from that definition, at the option of the taxpayer, the

business of marketing and selling of electricity generated by a merchant electric generation facility.

Difference in Assessment Procedures between Commercial/Industrial Property and Public Utilities

Commercial and industrial property is valued by the county appraiser on an asset by asset basis, with real property set at the fair market value and tangible personal property valued at the original cost, with 7-year straight-line depreciation, down to a minimum value of 20% of original cost for as long as the property remains in use, as provided in Article 11, Section 1 of the Kansas Constitution and K.S.A. 79-1439. Fair market value is defined as the price arrived at by a willing, informed buyer and a willing, informed seller in an open competitive market. Commercial and industrial property is assessed at the rate of 25% of the appraised value.

A public utility is valued centrally at the state level by the director of property valuation, pursuant to the Article 11, Section 1 of the Kansas Constitution and K.S.A. 79-5a04. The appraised value is based on the "going concern" fair market value of the business. This will reflect the synergies of all of the assets operating together. Therefore, it will include both the intangible value of the business and the value of the separate real and personal property assets, unlike the appraised value of commercial and industrial property. Public utilities are assessed at the rate of 33% of the appraised value. If the public utility does business in more than one state, then the director of property valuation must allocate to Kansas the appropriate portion of the value of the public utility.

Please see the attached flow chart for a comparison of the appraisal procedures for public utilities vs. commercial and industrial property.

Because Senate Bill 177 proposes to classify merchant electric generating facilities as commercial and industrial property (at the option of the entity owning/operating the facility), county appraisers would be called upon to appraise these facilities, instead of them being centrally appraised by director of property valuation. Because county appraisers are not likely to have the expertise needed to appraise such facilities (at least initially), they will probably need to retain the services of outside consultants. Local appraisal may also open the possibility for lack of uniformity among various county appraisers' valuations of merchant electric generating facilities in different locations, in comparison to the centralized appraisal process for public utilities.

Constitutional Issues

Article 11, Section 1 of the Kansas Constitution sets forth the different classes of property for purposes of property valuation and specifies the assessment rate that shall apply to each class of property. As previously discussed, public utilities are subject to a 33% assessment rate (based on going concern value), while commercial and industrial property (valued separately) is subject to the 25% rate. The Kansas Constitution does not contain a definition for the term "public utility." Therefore, it must conform to the commonly understood meaning of the term, as intended by the framers of the constitutional provision and the people adopting it. The legislature may not grant partial exemptions under the guise of improper definitions. Attorney General Opinion 93-142. Senate Bill 177 proposes that merchant electric generating facilities shall have the option of being valued as commercial and industrial property. How far can the Legislature go in defining electric generating facilities as other than public utilities?

Attorney General Opinion No. 99-21, dated April 6, 1999 (copy attached) addressed that question and determined that the Legislature has "some latitude" in this area, so long as the entities taken out of the definition of "public utility" do not "possess the basic characteristics of a public utility so that the definition [of public utility] remains consistent with the common understanding of what the term meant at the time the Classification Amendment was adopted [in 1985 and 1986]." The Attorney General determined that the common definition of the term "public utility" generally included "characteristics such as provision of an essential service or commodity to the public on a nondiscriminatory basis and, for such purposes, having a franchise, eminent domain powers, or other ability to acquire private property for a public purpose." The Attorney General assumed that the type of electrical generating facility the Legislature might attempt to exclude from the definition of "public utility" would not be monopolistic, but competitive, and would generate power for itself or sell power to perhaps one customer and not to the public. Also, there would be no franchise or eminent domain powers given to the entity.

The merchant electric generating facilities contemplated in Senate Bill 177 seem to be consistent with the AG Opinion. However, depending on how these facilities may evolve, questions could be raised as to whether they are in fact "public utilities" within the common meaning of the term in 1986. These merchant electric generating facilities are expected to market electricity on a wholesale basis, not to individual consumers on a non-discriminatory basis. However, nothing in Senate Bill 177 itself would appear to prevent such a facility from marketing electricity to individual consumers. In addition, the AG Opinion seems to assume that the non-public utility would market power to perhaps one customer. Even if the merchant electric generating facility sells power at wholesale, would a customer base consisting of several wholesalers veer outside the bounds of the AG Opinion? Generation and marketing of electricity are clearly characteristics of public utilities, as that term was understood in 1986.

If the entities building these merchant electric generation facilities turn out to be primarily affiliates of existing public utilities, then the question may arise as to whether these merchant electric generating facilities remain part of a monopoly, which could point toward the common meaning of the term "public utility." To the extent these merchant electric generation facilities are owned and operated by independent entities, they are more likely to be competitive.

Removal of merchant electric generation facilities from the rate base of public utilities was clearly an important factor in the AG Opinion. The fact that merchant electric generation facilities will not be regulated as public utilities and are not guaranteed a rate of return is a distinguishing characteristic.

It does not appear that Senate Bill 177 would clothe merchant electric generation facilities with any eminent domain powers. However, to the extent that the acquisition and construction of any such facilities involve public financing, this could be used as an argument that these facilities are public utilities.

Survey of Other States' Tax Incentives for Encouraging Growth in Electricity Generating Capacity

Robert Badenoch, Property Valuation Department, has conducted a survey of other states to inquire about the tax incentives for encouraging growth in electricity generating capacity. He has prepared a handout showing the results of his survey, which should be distributed to everyone. These incentives include, among others, removal of property taxes—except those

negotiated with local municipalities (Arkansas); revenue bonds (Arkansas); use of an excise tax on kwh generated and resold instead of property tax (Iowa); personal property tax exemptions for individual generators (Minnesota); wind generation incentives (North Dakota, South Dakota); and 30-year life depreciation schedule and eligibility for enterprise zone tax incentives (Ohio).

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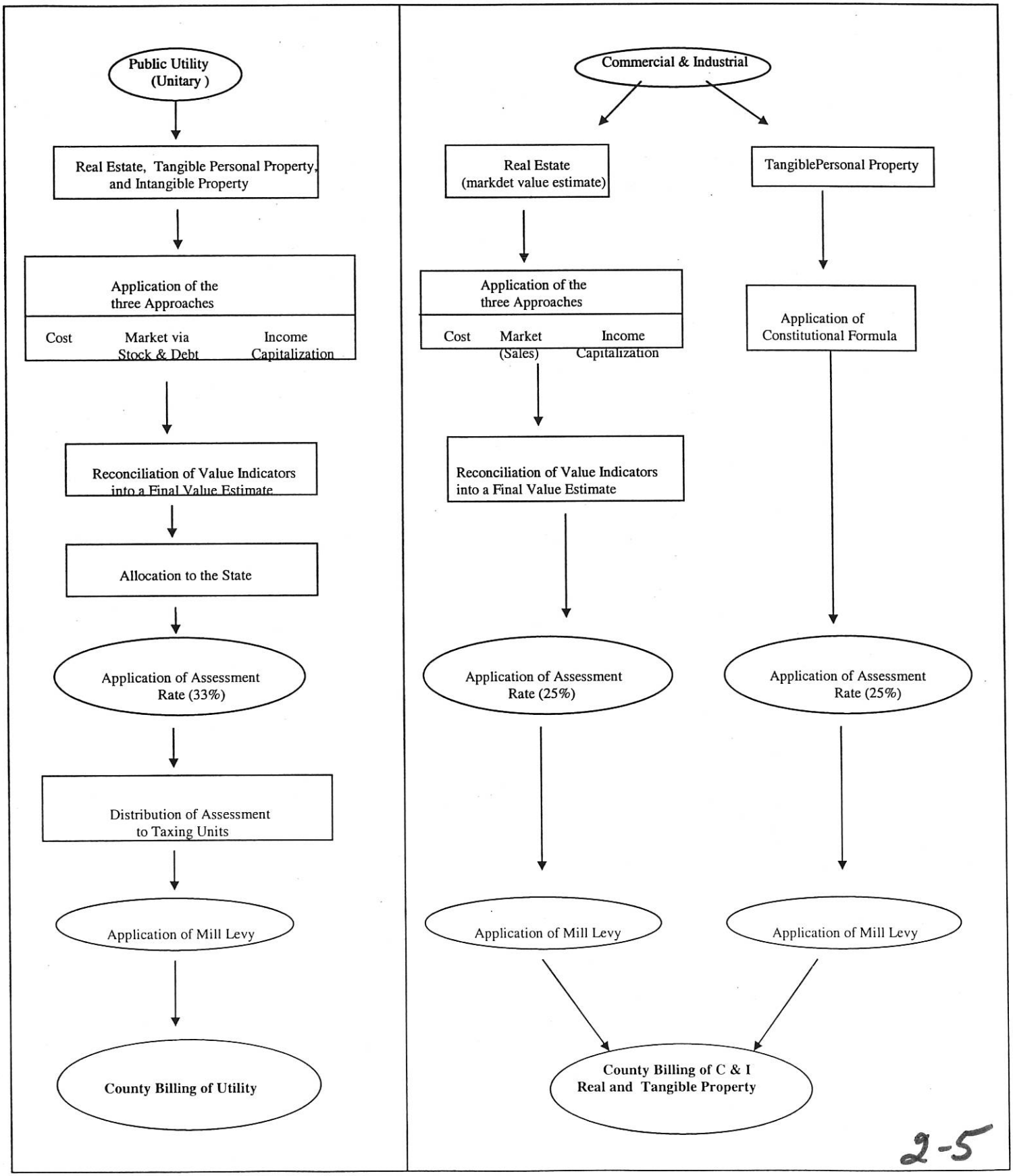
The Valuation Process



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Kansas Attorney General Opinions

April 6, 1999

ATTORNEY GENERAL OPINION NO. 99- 21

The Honorable Carl Dean Holmes
Chairman, House Utilities Committee
State Capitol, Room 115-S
Topeka, Kansas 66612-1504

Re: Constitution of the State of Kansas Finance and Taxation System of Taxation; Classification; Definition of Public Utility; Exclusion of Property Used in the Generation, Marketing and Sale of Electricity

Taxation Public Utilities Definition; Constitutionality of Excluding Property of Certain Independent Power Producers

Synopsis:

The Legislature may, under Article 11, Section 1 of the Kansas Constitution, define the term "public utility" for purposes of property tax classification, as long as the legislative definition remains consistent with the commonly understood meaning of the term. Common definitions of the term "public utility" in 1985 and 1986, the years the Classification Amendment was framed and adopted, generally included characteristics such as provision of an essential service or commodity to the public on a nondiscriminatory basis and having a franchise, eminent domain powers or other ability to acquire and use private property for a public purpose. Cited herein: K.S.A. 1998 Supp. 66-104; K.S.A. 79-5a01; Kan. Const., Art. 11, 1; 1999 H.B. 2400, 13; L. 1986, Ch. 371, 1; L. 1983, Ch. 314, 1; L. 1969, Ch. 434, 1.

Dear Representative Holmes:

You request our opinion regarding the authority of the Legislature to statutorily define certain property as commercial and industrial, as opposed to public utility property, for purposes of property tax classification. Due to time constraints, we initially responded by letter dated March 16, 1999. As per your request, we now address the question with a formal opinion.

The property in question is that which is defined in 1999 House Bill No. 2400 (H.B. 2400) as:

> "[P]roperty used solely in the generation, marketing and sale of electricity generated by an electric generation facility no portion of which is included in the rate base of: (1) An

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> electric public utility that is subject to rate regulation by the state corporation commission; (2) a cooperative, as defined by K.S.A. 17-4603 and amendments thereto, or a nonstock member-owned cooperative corporation incorporated in this state; or (3) a municipally owned or operated electric utility."

The bill would amend the definition of "public utility" found in K.S.A. 1998 Supp. 66-104 to include the following language:

> "The term 'public utility' shall not include any activity of an otherwise jurisdictional entity as to the generation, marketing and sale of electricity generated by a nonnuclear electric generation facility construction no portion of which is included in the rate base of: (1) An electric public utility that is subject to rate regulation by the state corporation commission; (2) any cooperative, as defined by K.S.A. 17-4603 and amendments thereto, or any nonstock member-owned cooperative corporation incorporated in this state; or (3) a municipally owned or operated electric utility."

The definition of "public utility" found in K.S.A. 79-5a01 would also be amended to exclude:

> "the business of generating, marketing and selling electricity generated by a nonnuclear electric generation facility no portion of which is included in the rate base of: (A) An electric public utility that is subject to rate regulation by the state corporation commission; (B) a cooperative, as defined by K.S.A. 17-4603 and amendments thereto, or a nonstock member-owned cooperative corporation incorporated in this state; or (C) a municipally owned or operated electric public utility."

Article 11, Section 1 of the Kansas Constitution provides for the classification of both real and personal property, and fixes the assessment rate for each subclass. Thus, nonexempt property that falls within the subclass of "public utility real property . . ." or "public utility tangible personal property . . ." must be assessed at the rate of 33% of its value, whereas property falling within the subclass of "real property used for commercial and industrial purposes . . ." or "commercial and industrial machinery and equipment . . ." must be assessed at 25%. Your question is whether the Legislature may define the term "public utility" so as to exclude certain property from application of the 33% assessment rate.

This question was addressed by then Attorney General Robert T. Stephan in Attorney General Opinion No. 93-142. The Opinion concluded that because the term "public utility" is not defined in Article 11, Section 1 of the Constitution, and because that Section specifically authorizes the Legislature to define by law what property is in each subclass, there is some room for legislative interpretation of what is meant by the term "public utility" as used in Article 11, Section 1. "However, any legislative definition of a term used in the constitution must be within reason and must conform to the commonly understood meaning of the term, as intended by the framers of the constitutional provision and the people adopting it. . . . The legislature may not grant partial exemptions under the guise of improper definitions." The Opinion then examined definitions for the term "public utility" that existed at the time the Classification Amendment was framed and adopted in 1985- 1986. The American Heritage Dictionary defined the term at that time as "[a] private business organization, subject to government regulation, that provides an essential service or commodity, such as water, electricity, transportation, or communication, to the public." Black's Law Dictionary defined the term as "[a] privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent

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domain, in consideration of which the owners must serve all persons who apply, without discrimination. It is always a virtual monopoly." In addition to these definitions discussed in Attorney General Opinion No. 93-142, we have found case law definitions that would have been considered common knowledge at the time the Classification Amendment was adopted. In determining that a common carrier was a "public utility" for purposes of the statute relating to collection of delinquent taxes owed by public utilities operating in not more than four counties, the Court found:

> "In the absence of expressed intention otherwise it must be assumed that the legislature here used the term 'public utility corporation' in its broad and general meaning. . . . The essential characteristic is that the utility be one which is dedicated to public use, without unreasonable discrimination. From 51 C.J. 4 we quote:
>
> "'A "public utility" has been described as a business organization which regularly supplies the public with some commodity or service, as electricity, gas, water, transportation, or telephone or telegraph service. . . . the distinguishing characteristic of a public utility is the devotion of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has a right to demand that the use or service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges.'"

Two cases of limited interest (because they interpret the definition in K.S.A. 66-104, which the Court has found to be of limited relevance in determining what a public utility is for tax purposes) are State ex rel. Grant v. City of Coffeyville and City of Cimarron v. Midland Water, Light & Ice Co. In the former the Court held that a producer of natural gas having one customer only, the City of Coffeyville, was not a public utility as then defined by K.S.A. 66-104 because it was "not engaged in general commercial distribution of natural gas, and it does not have a pipe line long enough to bring it within the statutory definition of a public utility." Conversely, in Midland Water the Court concluded that a company "in arranging to supply the [City of Cimarron] with electricity, whether for its own use or to be distributed among its residents, was acting in its character as a public utility" for purposes of regulation by the then public utilities commission. One important factor in this latter case was that the company provided electricity to several other cities as well.

While definitions may vary depending on the context in which the term is used, certain characteristics are common to a majority of the definitions expressed above: The service or commodity provided is an essential one that is required to be made available without discrimination to all who apply; the entity has been granted eminent domain or special franchises for use of public property; the entity is subject to regulation and guaranteed a rate of return on investments; the entity is often monopolistic.

We note that K.S.A. 79-5a01 does not, and did not in 1985-1986, include these characteristics in its definition of "public utility" for purposes of State valuation. However, in our opinion, with regard to electricity in particular, the statutory definition's failure to include the characteristics generally thought of as constituting a public utility does not necessarily mean that those factors were consciously excluded from the definition, for in 1969 (when this provision was enacted) companies capable of generating, conducting or distributing electric power generally possessed those characteristics; it may have been considered unnecessary to spell them out. As electrical generation and distribution systems continue to evolve, it may at some point become necessary to include such characteristics in the definition in order to maintain consistency with the common understanding of the term "public utility" and avoid capturing within the net of the definition entities not possessing any of those characteristics.

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Attorney General Opinion No. 93-142 concluded that "the legislature may, under article 11, section 1 of the Kansas constitution, define and redefine the term 'public utility' as necessary and reasonable to effectuate the makers' and adopters' intent in treating such property differently for purposes of taxation, as long as the legislative definition remains consistent with the commonly understood meaning of the term." We concur with this conclusion and further opine that entities generally having the characteristics listed above can be included by the Legislature in the definition of public utility for property tax purposes and conversely, entities generally having these characteristics cannot by statute be excluded from the definition of public utility for property tax purposes.

With regard to your specific question, the bill would exclude from the K.S.A. 79-5a01 definition of public utility "the business of generating, marketing and selling electricity generated by a nonnuclear electric generation facility no portion of which is included in the rate base of: (A) An electric public utility that is subject to rate regulation by the state corporation commission; (B) a cooperative, member-owned cooperative corporation incorporated in this state; or (C) a municipally owned or operated electric public utility." The element of government regulation appears to be absent from the type of entity sought to be excluded from the definition of public utility. We assume that any entities meeting this definition would not be monopolistic, but rather competitive. If it is a competitive industry, or an entity that generates electricity for its own use or that of just one customer, presumably there would be no need to require that the service or commodity be offered on a nondiscriminatory basis to everyone who applies to purchase the service or commodity. As far as we can tell, no franchise or eminent domain powers will be granted the type of entity in question; if the entity needs to use transmission lines, it will have to contract to use those already in existence or otherwise acquire the land on which any lines are installed. If these are indeed the facts, it appears that an argument can be made that these entities do not possess many of the "trappings" of a public utility and therefore can be excluded from the definition legislatively for property tax purposes. [This argument is particularly compelling for companies that only market or sell electricity as opposed to generating it.] On the other hand, 1985 entities that generated electricity for sale to the public generally were public utilities and it would not seem unreasonable for the Legislature to continue to define them as public utilities today even if some of the "trappings" are no longer present.

In our opinion, the Legislature has some latitude in the instant situation due to the change of circumstances attending generation and distribution of electric power over the past few years. Legislative acts are presumed constitutional, and must be clearly contrary to the Constitution before the Courts will strike them down. At this point in time, the Legislature may go either way with its definition and may choose to treat these "new" types of entities either as public utilities or not, as long as there is a rational basis for the decision and an argument can be made that they do, or do not, possess the basic characteristics of a public utility so that the definition remains consistent with the common understanding of what that term meant at the time the Classification Amendment was adopted.

In conclusion, the Legislature may, under Article 11, Section 1 of the Kansas Constitution, define the term "public utility" for purposes of property tax classification, as long as the legislative definition remains consistent with the commonly understood meaning of the term. Common definitions of the term "public utility" in 1985-1986, the years the Classification Amendment was framed and adopted, generally included characteristics such as provision of an essential service or commodity to the public on a nondiscriminatory basis and, for such purposes, having a franchise, eminent domain powers, or other ability to acquire private property for a public purpose.

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Very truly yours,

CARLA J. STOVALL
Attorney General of Kansas

Julene L. Miller
Deputy Attorney General

CJS:JLM:jm

Kansas Attorney General Opinions

Sunday February 11, 2001 03:36:17 PM CST

INFORMATION NETWORK OF KANSAS
STATE OF KANSAS

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ELECTRIC GENERATION
INCENTIVE SURVEY

STATE	CONTACT	INCENTIVE
Arkansas	Steve Switzer 501-682-1231	Revenue bonds - no property taxes except those negotiated with the local municipalities.
Colorado	Allen Hahne 303-866-2682	No state incentives –no proposed legislation. Local government under economic development laws can provide incentives for new generation facilities. There has been modest use of local option.
Illinois	Steve Santarelli 217-785-0411	Currently undergoing de-regulation and removing generation from general unit. Counties have authority to set assessment rate by class. Market value for generation - rate base cost for regulated plant.
Indiana	Keith Lewis 317-232-3756	No response
Iowa	Alan Harding 515-281-4782	In January of 1999 a new tax code was put into effect Chapter 437a.(6). Revisions include an excise tax vs. property tax - 6/100's of a cent on kwh generated and resold.
Michigan	Dianne Wright 517-373-2408t	No response
Minnesota	Alan Whipple 651-296-0338	Since talk of de-regulation was begun, their legislature has enacted numerous personal property exemptions - either partial or full exemptions on an individual basis to generators (see Statute 272.02). Today (2/12/01). The House of Representatives is beginning to look at a bill that would exempt all generating machinery (first hearing today).
Missouri	Lincoln's Birthday Office Closed No response	Local government under economic development - laws can and do provide incentives for new generation facilities (see attached article).
Nebraska	Jody Warfield 402-471-5982	There are no property tax incentives for electric generation.
North Dakota	Marcy Dickerson 701-328-3141	There are proposed bills for incentives for wind generation only. The property tax assessment rate would decrease from 10% to 3%. No sale tax on the construction of the wind generation plant and they are also discussing a possible income tax credit.
Ohio	Louis Spisak 614-466-8489	The State of Ohio has de-regulated the electric utilities. The electric utilities are valued at original cost and depreciated based on a 30-year life schedule. The generation plant is assessed at 25% while distribution and transmission is at 100%. Another law was passed in 2000 that allowed the utilities to be eligible to make enterprise zone agreements with local governments and receive tax incentives like other business moving into a town.
Oklahoma	William Mack 405-521-3178	There is no change or proposed changes in taxes for Oklahoma electric utilities. They have been discussing de-regulation of the electric utilities but the legislature may push the timetable back due to the problems California has had with it.
South Dakota	Audrey Nelson 605-773-5851	There is a proposed bill for incentives for wind generation and only for Electric Coops. They would be exempt from their gross receipt tax. The exemption is only for generation capacity of 10 megawatts or less anything larger would not be exempt. And only one Coop could be the owner of the plant.
Wisconsin	Jerry Smith 608-264-6889	They are studying the possibility of lowering the rate on gross receipt tax. The rate is at 3.19% and could be cut in half to 1.595%. This proposal is not necessarily for stimulating new generation. The electric power producers believe taxes should be lower.

Telephone survey conducted by Kansas Department of Revenue, Division of Property Valuation on February 12, 2001.
RMB/RMB

Senate Utilities Committee
February 13, 2001
Attachment 3-1

The web site is:
http://archive.showmenews.com/2000/jun/20000601comm008.htm
Tribune Online News Story [Back | Archive]

Missouri

Here is an article I found about the **new 640mw $230 million gas-fired plant** in Audrain County (near Mexico) Missouri.

Story ran on June 1, 2000. New power plants. Audrain provides tax incentives

Over in Audrain County, they have a history of providing tax incentives to attract industry. In that sparsely developed rural neighborhood, officials think the deal they recently made with Duke Energy North America is a good one. The county will own the plant for an interim period of 20 years. In lieu of property tax, **Duke will pay** a lesser amount: **$350,000 per year.** After 20 years ownership will revert to Duke, and the company will pay regular property taxes.

As Audrain presiding commissioner Dick Webber says, without Duke the undeveloped parcel would continue to provide about $500 a year in property taxes. Duke saves money, and the county makes money.

That sort of reasoning also has driven city officials in Mexico, the county seat, to give tax incentives to new companies. Several have taken advantage, no doubt increasing the local job market somewhat.

Associated Electric Cooperative also is considering Audrain County along with several other sites, including a couple in northern Boone County, for a new plant to supply its own Rural Electric Cooperatives.

Boone County presiding commissioner Don Stamper wonders out loud whether Boone can or should try to compete with Audrain in the tax giveaway business. He faces a different tradition and public mentality here, where tax incentives for private business development are not favored. In our blessed area, new business development has come without this troublesome practice, and we should keep it that way.

The problem with economic development tax incentives is a loss of tax-system equity. If one principle should be sacrosanct for government, it is tax equity. I know; we wonder if some politicians ever heard of the concept, but here locally where so far we are able to keep a rather good handle, we should continue our grip. Look at it this way: Do you want your city council or county commission picking and choosing among private business owners which ones shall get tax abatement and which shall be left to carry a disproportionate load? In Audrain County, for every newcomer officially favored in this way, scores of faithful existing taxpayers are left out. This is blatant tax discrimination, and it is bad business on its face.

To be sure, Audrain apparently will come out money ahead for having bribed Duke to settle there. Maybe most citizens there accept the trade-off. In Boone, however, I hope Stamper & Co. decide the value of having a new electric plant is not a good enough reason to convolute a sound tax policy. Once that door is open, how will we get it shut again?

Tax Rates by State