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Robert E. Corbin

November 2, 1987

Mr. Spencer A. Smith
DeConcini McDonald Brammer Yetwin
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240 North Stone Avenue
Tucson, Arizona 85701-1295

Re: I87-144 (R87-152)

Dear Mr. Spencer:

Pursuant to A.R.S. § 15-253(B) we have reviewed your opinion to the Sahuarita Unified School District No. 30 and concur that the Arizona Corporation Commission ("Commission") has no authority to regulate the construction, repair and maintenance of the district's natural gas pipeline distribution system.

We also concur that the district is not a master meter system as that term is used in rules promulgated under the Federal Act, because the district does not resell the natural gas either by submetering or by including it in a rental charge. See 49 C.F.R. § 191.3. The Commission's definition of "master meter system," is found in rule A.A.C. R14-5-201(E).

"Master Meter System" means physical facilities for distributing gas within a definable area where the operator purchases metered gas from a public service corporation to provide and make available gas service to others in two or more buildings.

(Emphasis added.) The district would not be a master meter system under the Commission's rules, because it is not furnishing natural gas "to others."

We disagree with your opinion that the district, if it were furnishing natural gas to the public, would be exempt from

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Commission regulation as a "municipal corporation." In this context, that term applies only to entities encompassed in Ariz. Const., art. XIII, and a school district is not a municipality.

Sincerely,



BOB CORBIN
Attorney General

BC:JGF:CSP:pcd

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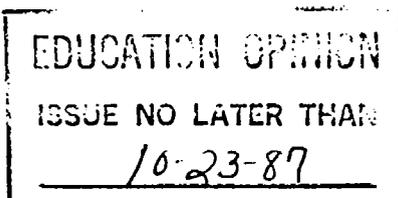
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PLEASE REPLY TO TUCSON

Mr. Stephen Lebrecht
Superintendent
Sahuarita Unified School District No. 30
P. O. Box 26
Sahuarita, Arizona 85629

Re: Jurisdiction of the Arizona Corporation Commission
Over School District Natural Gas Pipeline Facilities

Dear Steve:

You have requested that this office render an opinion as to the authority of the Arizona Corporation Commission ("ACC") to regulate the construction, repair and maintenance of certain of the underground natural gas pipeline facilities owned and operated by Sahuarita Unified School District No. 30 (the "District"). The ACC seeks to regulate the District facilities only in the situation where a school or other district facility is comprised of more than one building and there is one master gas meter supplying natural gas to these buildings. The ACC does not assert jurisdiction over underground facilities where a meter serves a single building regardless of the size of the building or extent of the underground facility. A review of the Arizona Constitution, the Arizona Revised Statutes, ACC Regulations, and the Federal Pipeline Safety Regulations leads us to conclude that the ACC lacks the authority to regulate the construction, repair and maintenance of any portion of the District's natural gas pipeline distribution system regardless of the number of District buildings supplied by one meter. The basis of our opinion follows.

The ACC has no inherent or implied powers. Kendall v. Malcolm, 98 Ariz. 329, 404 P.2d 414 (1965). Its authority is derived from a strict construction of the Arizona Constitution and the implementing statutes. Williams v. Pipe Trades Industry Program of Arizona, 100 Ariz. 14, 409 P.2d 720 (1966). In determining whether a particular activity is within the regulatory power of the ACC, the presumption is that the activity

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is not subject to regulation. Ariz. Corp. Comm. v. Cont. Sec. Guards, 5 Ariz. App. 318, 426 P.2d 18 (1967), vacated on other grounds, 103 Ariz. 410, 443 P.2d 406 (1968).

Article 15, Section 3 of the Arizona Constitution grants the ACC the power, among others, to make reasonable rules, regulations, and orders by which public service corporations shall be governed in the transaction of business within the state. Article 15, Section 2 of the Arizona Constitution defines a public service corporation as

all corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

Arizona Constitution Article 15, Section 6 allows the legislature to enlarge the powers and duties of the ACC. However, that section does not allow the legislature to give public service corporation designation to corporations not listed in Article 15, Section 2. Rural/Metro Corp. v. Arizona Corporation Commission, 129 Ariz. 116, 629 P.2d 83 (1981). Therefore, the legislature can expand the power of the ACC, but not its jurisdiction. The ACC's jurisdiction extends only to public service corporations.

To be classified as a public service corporation, a school district must meet the definition in Arizona Constitution Article 15, Section 2, which provides in pertinent part that

all corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power

are public service corporations subject to ACC jurisdiction. We conclude from our analysis that the District is not a "public service corporation" as defined in the Arizona Constitution and thus is not subject to the jurisdiction of the ACC.

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The Arizona Supreme Court stated in Williams v. Pipe Trades Industry Program of Arizona, *supra*, that the word "furnishing" in Article 15, Section 2 of the Arizona Constitution connotes a transfer of possession and that a corporation furnishing steam for heating and cooling was not a public service corporation "furnishing" water since no transfer of possession of the "water" occurred in carrying out the corporation's activities. Here, the natural gas is furnished by a public utility (a public service corporation) to the District which, when the District's facilities, or a portion thereof, are fortuitously comprised of more than one building served by one meter, is sought to be regulated by the ACC. There is no transfer of ownership or possession by the District when natural gas flows from one school structure to another or from one meter to various school buildings. The school is the end consumer--it does not furnish natural gas to anyone for resale or profit but consumes all of the natural gas furnished to it by the utility.

Even if the District were construed to "furnish" natural gas from a metered building to surrounding school buildings, that activity is incidental to the school's main business of education. The District uses natural gas primarily for space heating and heating of water. These uses certainly are incidental to the educational mission of the District. In Arizona Corporation Commission v. Nicholson, 108 Ariz. 317, 497 P.2d 815 (1972), the owners of a trailer park furnished water to tenants but imposed only one monthly charge for space rental and all services, including water. The court held that the owners were not in the business of supplying water and thus not under the jurisdiction of the ACC. Although furnishing water was a necessary part of the trailer park operators' business, it was a "clearly incidental part" of the business of renting trailer spaces and did not constitute activities of a public service corporation. ACC v. Nicholson, 108 Ariz. at 320, 497 P.2d at 818. The court noted that members of the public using the owners' facilities were afforded protection of other statutes not related to the ACC. In this regard it should be noted that the District's gas pipeline facilities must comply with the requirements of local building codes pursuant to A.R.S. § 34-461.

Finally, Arizona Constitution Article 15, Section 2 excepts from the ACC's jurisdiction all municipal corporations. For example, a public utility operated by a municipality cannot be regulated by the ACC. Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938). There are many parallels that can be drawn between the creation and existence of a school district and

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a municipal corporation. If the District were deemed to be operating a utility, which it is not, similar policy reasons should dictate an exemption from ACC regulation of the school district facilities.

Even if it is assumed for the sake of argument that the District is a public service corporation furnishing gas as an integral part of its business, it is our opinion that based upon the ACC's own regulations and definitions of "master meter systems" on which the ACC bases its assertion of jurisdiction, the ACC may not exercise jurisdiction over the District's natural gas facilities.

Sections 40-441 through 40-443 of the Arizona Revised Statutes address pipeline safety. These statutes seek to provide state control over safety standards to the full extent possible under the Federal National Gas Pipeline Safety Act of 1968, 49 U.S.C.A. § 1671 et seq. Pursuant to these laws, the ACC requested the District to complete an annual report as a "master meter system" operator, the definition of which is contained in the ACC's instructions that were furnished with the annual report and in 49 C.F.R. § 191.3, which is a regulation under the Federal Act. Neither the definition of a "master meter system" found in the Code of Federal Regulations, 49 C.F.R. 191.3 nor the ACC's annual report instruction sheet, in our opinion, includes the District's situation. The definition of a master meter system, found in 49 C.F.R. 191.3, is

a pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents.

While we believe that the operator of a master meter system must also fall within the definition of a public service corporation, we assume only for the purpose of this argument that jurisdiction over the District otherwise exists and thus focus on whether the District is within the definition of master meter system.

The federal regulation requires that the master meter system operator purchase gas for resale through a pipeline system to the

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ultimate customer. The District does not distribute any gas for resale; it is itself the end user -- a single consumer owning several buildings. Thus, the District is not a master meter operator under 49 C.F.R. § 191.3. Since it is not, the ACC may not acquire jurisdiction over the District by such construction.

The ACC's annual report instruction sheet uses a definition of "master meter system" that varies from the federal definition and is not found in any ACC rule or regulation. Rather than following the federal regulation definition set forth above, the ACC defines master meter system as "physical facilities for distributing gas within but not limited to, a definable area where the operator purchases metered gas from a public service corporation to provide and make available gas service to others in two or more buildings." Aside from the question of whether this definition has the force of a rule or order, we conclude that this definition does not include the District because it requires the operator to provide and make available gas service "to others in two or more buildings." (emphasis added). The only party for which the school is providing natural gas service in this case is the District itself. It neither operates a business nor provides any service related to gas distribution to any other person or entity.¹

¹A third definition of "master meter," not cited in any of the materials given to districts by the ACC, is found in AAC R14-2-301(24), which provides:

"Master Meter." An instrument for measuring or recording the flow of gas at a single location where said gas is transported through an underground piping system to tenants or occupants for their individual consumption.

While the ACC does not appear to assert jurisdiction over the District under this definition, the terms of the definition do not apply to the District facilities. The District does not transport gas "to tenants or occupants for their individual consumption" since the District itself, rather than "tenants or occupants," consumes the natural gas delivered by the utility. Also, implicit in this definition is a transfer of possession from the master meter operator to the tenants or occupants which does not occur where the District is the ultimate consumer.

Mr. Stephen Lebrecht

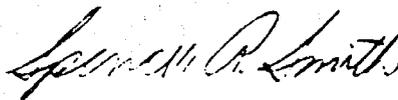
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In conclusion, the Arizona Constitution does not grant the ACC jurisdiction to regulate the District's natural gas pipeline system. The ACC has jurisdiction only over public service corporations performing the functions listed in the Constitution. The legislature may not expand this jurisdiction in the absence of a constitutional amendment. The District is not a public service corporation as it does not "furnish" natural gas, but rather functions solely as a consumer of the gas. Even if the ACC were to have jurisdiction over the District, the District's natural gas pipeline facilities do not fall under any of the applicable definitions of master meter systems found in federal or state regulations. Thus, by constitutional proscription and by its own regulatory definitions, the ACC cannot regulate the District's natural gas pipeline facilities. While the Arizona Constitution grants the ACC power to promulgate regulations for public service corporations for the benefit of consumers, that is not synonymous with a grant of jurisdiction to regulate those consumers and we therefore conclude that the ACC has no jurisdiction to regulate the District's natural gas pipeline facilities.

In accordance with your request, we are submitting a copy of this opinion to Robert K. Corbin, Attorney General of the State of Arizona, for his review pursuant to A.R.S. § 15-253B.

Very truly yours,



Spencer A. Smith

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c: Robert K. Corbin