760716.1

FOURTH CLASS CITIES: Utility service.

REVENUE BOND ACT: Authority to acquire and operate an electrical utility.

PUBLIC UTILITIES: Cities of fourth class.

A municipally owned utility operated by a fourth class city or a home rule city with a charter adopting the fourth class city act is not prohibited from earning a profit from the delivery of the utility services, but the surplus revenues are to be applied by the municipality to the cost of services and plant.

Opinion No. 5045 July 16, 1976.

Mr. Robert W. Davis
State Senator
Capitol Building
Lansing, Michigan

Referring to utility rates charged by Charlevoix's municipally-owned electric utility, you have asked: Is it constitutionally permissible for a fourth class city to run its own utility service with the rate structure generating profits in excess of that necessary to provide service?

As expressed by the Constitution[1] and implemented by statute,[2] authority is given to municipalities of the fourth class to purchase or construct, operate and maintain public service facilities for supplying water, light, heat, power, sewage disposal and transportation to municipalities and their inhabitants.[3]

The Revenue Bond Act[4] authorizes a municipality to purchase, acquire, construct, improve, enlarge, extend and repair public improvements[5] (e.g. electric utility systems presently existing in public corporations having less than 160,000 population)[6] and own, operate and maintain the same[7] and pay for the same with proceeds from bonds to be liquidated by the *net revenues* derived from the operation of such public improvement.[8]

This legislation clearly envisioned a municipal utility as generating revenues above the cost of supplying the utility service.

Other earlier legislation dealing with money received by fourth class cities provides:

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[1] Const 1963, art 7, § 24.

[2] 1895 PA 215, Ch XXVII, § 1; MCLA 107.1; MSA 5.1895.

[3] 1939 PA 3, § 6; MCLA 460.6; MSA 22.13(6) municipally owned utilities are exempt from regulation by the Public Service Commission.

[4] 1933 PA 94; MCLA 141.101 *et seq*; MSA 5.2731 *et seq.*

[5] 1933 PA 94, § 4; MCLA 141.104; MSA 5.2734.

[6] 1933 PA 94, § 3; MCLA 141.103; MSA 5.2733.

[7] 1933 PA 94, § 4; MCLA 141.104; MSA 5.2734.

[8] 1933 PA 94, § 7(2); MCLA 141.107(2); MSA 5.2737(2) See: *Young* v *City of Ann Arbor,* 267 Mich 241; 255 NW 579 (1934); *Block* v *City of Charlevoix,* 267 Mich 255; 255 NW 579 (1934).

"All moneys and taxes raised, loaned or appropriated for the purposes of any particular fund, shall be paid in and credited to such fund and shall be applied to the purposes for which such moneys were raised and received and to none other; . . .

"Provided that *moneys* raised or *collected* in any fund for operating expense, extension or construction of any municipally owned public utility, *in excess of the expenditure requirements of that utility in any year,* shall not be transferred to any other fund at the close of the fiscal year, except for the payment of bonds or obligations incurred on account of that utility or to provide for replacement or extensions of that utility." MCLA 110.22; MSA 5.1951. (emphasis added)

In *Freeland* v *City of Sturgis,* 248 Mich 190; 226 NW 897 (1929), the court considered the above statute, MCLA 110.22; MSA 5.1951, *supra,* which was applicable to the city because its charter adopted by reference the fourth class city act and held that the city had violated the law by appropriating the *net surplus fund* derived from the operation of the municipally-owned electric plant for general city expenses.

Parenthetically, I note that the special charter for the city of Charlevoix[9] contains a similar reference to the laws relating to fourth class cities that was discussed in *Freeland, supra.*

In *Preston* v *Board of Commissioners of Detroit,* 117 Mich 589; 76 NW 92 (1898), the Court maintained that a city is not obligated by reason of its ownership of a water plant to make the cost of its construction and extension a general city expense, but may properly derive a profit from consumers, and apply the same in payment of the cost of the plant—as long as the rates charged are reasonable and equitable. See 90 ALR 701.

In *Wolgamood* v *Constantine,* 302 Mich 384; 4 NW2d 697 (1942), the Court made an interesting distinction between the revenue requirements of privately-owned and municipally-owned utilities. Yet, in that case, the Court affirmed the rates charged by a municipally-owned utility as being ". . . reasonably calculated to produce revenue sufficient to cover the operation and maintenance of the plant and system, interest payment and bond retirement and an annual reserve for depreciation, though not a sufficient reserve to cover the replacement cost of the plant and system at the end of its life. . . ."

My predecessor, in OAG 1935-1936, No 113, pp 295, 297 (October 10, 1935), upheld the right of the state to tax the sales of electricity and gas by a municipally-owned utility. The following proposition stated in that opinion has relevance and my concurrence as an answer to the question raised here:

"It is . . . true that municipally owned utilities are not subject to regulation as to rates and otherwise by the Michigan Public Utilities Commission. Were there some *statute requiring* that municipally owned plants furnish electricity to their inhabitants *at cost,* there might be some force to the argument that the sales tax would not apply to their

[9] Charlevoix City Charter, 1905 Michigan Local Act 586, § 12.

operations.[10] That, however, *is not true and the municipally owned utilities are permitted to charge whatever rates they deem best. . . .*" (emphasis added)

In view of the foregoing, it is my opinion that municipally-owned utilities operated by a fourth class city or a home rule city with a charter adopting the fourth class city act are not prohibited from earning a profit as long as such surplus revenues are applied by the municipality to the cost of services and plant.

FRANK J. KELLEY,
Attorney General.

760727.3

COLLECTION AGENCIES: Maintenance of an office in the state.

LICENSES AND PERMITS: Licensing of out-of-state collection agencies.

The Collection Practices Division of the Department of Licensing and Regulation must license qualified out-of-state collection agencies whose contact with residents in Michigan are solely through the use of the United States mail and/or interstate telephone lines and may not require the out-of-state collection agency to have an office in Michigan.

Opinion No. 5038 July 27, 1976.

Ms. Donna Duckworth
Deputy Administrator
Collection Practices Division
1116 South Washington Avenue
Lansing, Michigan 48926

You have asked a question regarding the constitutionality of the collection practices act, 1974 PA 361, as amended; MCLA 445. 211 *et seq;* MSA 19.655(21) *et seq,* that requires out-of-state collection agencies to be licensed and to have an office within the state of Michigan. 1974 PA 361, *supra,* § 7(4), states as follows:

> "(4) An agency licensee shall maintain an office in the state which, except as otherwise provided by section 20(c), may be shared with another business. . . ."

1974 PA 361, *supra,* § 15(1), also mentions the necessity of a collection agency office to be under the control of a Michigan resident with the exception of one situation which is not pertinent to this opinion.

It is my understanding that these out-of-state collection agencies use only the United States mail and interstate telephone lines to communicate with the debtor and have no employees in Michigan.

[10] cf: *Bay City* v *Board of Tax Administration,* 292 Mich 241; 290 NW 395 (1940) holding that municipal utilities as "business activities" (i.e. proprietary, not governmental functions) are taxable for their sales, *whether generating a profit or not.*