1972

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Recommended Citation
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THE DEVELOPMENT OF REVENUE BOND FINANCING OF MUNICIPAL ELECTRIC UTILITY SYSTEMS IN KENTUCKY

INTRODUCTION

The power of the legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age.¹

The above statement was made by the Pennsylvania Court in 1894. Electricity has long since come into general use for more purposes than any court of that day could have imagined; however, the demand for electric power “to keep abreast with the progress and improvements of the age” has not changed. One of the biggest problems in meeting the demand has been finding means to finance the development of municipal public utility systems within the constitutional limitations of municipal indebtedness. In Kentucky, as in other jurisdictions, revenue bond financing as authorized by statute has become the most popular means of dealing with the existing constitutional limitations. The indebtedness created by the issuance of revenue bonds by a municipality does not constitute an indebtedness of the municipality within constitutional restrictions because revenue bonds are payable only from special funds rather than from the general funds of the city.

A municipality is an agent of the state and has been described as “a governmental unit, subservient to the state, performing certain definite functions delegated to it by the legislative body of the state, within prescribed constitutional restrictions.”² The Kentucky Constitution of 1891 provides for the creation of six classes of cities.³ The

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³ Ky. Const. § 156.
1893 General Assembly adopted charters for cities of the first, fourth, fifth and sixth classes; the 1894 General Assembly did the same for cities of the second class. Under these charters, cities, except those of the sixth class, were given authority to make contracts to provide lighting for streets and public buildings. Cities of the third class were authorized to provide lighting for streets and public buildings either by contract or by facilities acquired or constructed; they were also authorized to furnish light, heat and power to consumers located within their corporate limits. Nevertheless, this authority was limited by constitutional restrictions which affected the ability of the municipality to finance such projects. It is the purpose of this paper to examine the development of the statutory regulations for financing municipal electrical systems within the constitutional framework. This will be done by looking first at the constitutional provisions and then considering the statutes which were passed to meet these constitutional requirements.

**CONSTITUTIONAL PROVISIONS**

**Restrictions and Limitations**

While the Kentucky Constitution places several restrictions of a financial nature on municipalities, the most significant are those contained in Sections 157 and 158. Section 157 establishes the maximum tax rate for towns and cities. In addition, it provides that:

\[\text{no county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. . . .}\]

Section 158 sets out the authorized maximum indebtedness of municipalities in terms of percentages of the value of taxable property. These percentage limitations vary from ten to two percent depending

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9 Ky. Acts, ch. 100 (1894).
10 The maximum tax rate is $1.50/$100 of taxable property for towns and cities having a population of 15,000 or more; $1.00/$100 for towns and cities having a population of not less than 10,000 nor more than 15,000; $0.75/$100 for towns and cities having a population less than 10,000; and $0.50/$100 for counties and taxing districts. Ky. Const. § 157.
upon the type of taxing district and its population. However, Section 158 contains an exception which allows a municipality to exceed the stated maximum indebtedness where an emergency to the public health or safety exists. It was left to the courts to determine just what constituted such an “emergency.” Other constitutional restrictions are the requirements that a tax be levied which is sufficient to pay the indebtedness in not more than forty years, that the credit of the state not be loaned, and that the laws for borrowing money specify the purpose for which the loan is to be used.

Application of the Constitutional Provisions

The first cities which sought to provide electric power, under the authorization of their charters, attempted to do so by the use of general obligation bonds within the limitations of the Kentucky Constitution. In 1912, Murray, Kentucky, a city of the fifth class, attempted to construct an electric light plant and water works system which would be financed by an issuance of general obligation bonds. Since the indebtedness to be incurred under the proposed plan would be more than the income and revenue for the period, the question had to be presented to the voters in an election as required by the Kentucky Constitution. Two-thirds of the citizens voting in the election favored the issuance of these bonds to finance the electric light plant and water-works system. The new issue of bonds, together with the outstanding indebtedness of the city, did not exceed the three percent ceiling set by the Constitution for cities of the fifth class, and the obligation created by the indebtedness would not require a rate of taxation greater than that allowed by the Constitution. Thus, the Kentucky Court of Appeals upheld the authority of Murray to acquire and operate a city-owned electric light plant with funds obtained by an issuance of general obligation bonds.

In a later case, the court noted by way of dicta that it was

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11 The maximum indebtedness is 10% of the value of taxable property for cities of the first and second classes and cities of the third class which have a population over 15,000; 5% for cities of the third class with a population less than 15,000 and cities of the fourth class; 3% for cities of the fifth and sixth classes; 2% for counties and taxing districts and other municipalities. Ky. Const. § 158.
12 Ky. Const. § 159.
13 Ky. Const. § 177.
14 Ky. Const. § 178.
15 Swann v. City of Murray, 142 S.W. 244 (Ky. 1912).
17 Ky. Const. § 158.
19 Swann v. City of Murray, 142 S.W. 244 (Ky. 1912).
20 Juett v. Town of Williamstown, 58 S.W.2d 411 (Ky. 1933).
thoroughly settled that a city could own and operate an electric utility plant in order to light public streets and other public places and could sell any surplus electric power to its inhabitants. But, not every city that wanted to acquire an electric light plant and water system was able to do so within the limitations established by the Constitution. In 1919, Clinton, a city of the fifth class, attempted to acquire a joint municipal electric and water system. An ordinance was passed approving the issuance of $30,000 in additional general obligation bonds to finance the project although the city had an existing outstanding indebtedness of $10,500. Since the bond issue exceeded the income and revenue for the year, this ordinance was presented to the voters at a regular election and was approved by the necessary two-thirds majority. Clinton's bond issue, however, would have created a combined municipal indebtedness exceeding that authorized by Section 158 of the Constitution. When the question came before the Court of Appeals, the city argued that an emergency existed which would allow the bond issue under the emergency exception clause of Section 158. The Court stated that, if an "emergency" of the type contemplated by the Constitution did in fact exist, the city would have been authorized to incur the additional debt; however, by the terms of the Constitution, an "emergency" means "perils to the public health and safety, and eliminates any mere apparent necessities growing out of conveniences or out of conditions which are merely inconvenient to be borne." While noting that under the circumstances of this case, the need to maintain the city's water supply might constitute such an "emergency," the Court held that the city's plan to construct a joint water and electric system could not be upheld because the need for electricity did not present such an "emergency."

**Legislative Provisions**

The 1932 Act: Authorization for Third Class Cities

The legislature first authorized the use of revenue bonds to finance electric utility system with the passage of an act in 1932 entitled, An Act enabling cities of the third class to acquire, construct, operate and maintain electric light, heat and power plant and to issue revenue bonds of such cities to pay the cost thereof, payable solely from the

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21 Id. at 413.
22 Samuels v. City of Clinton, 211 S.W. 567 (Ky. 1919).
23 See note 11 supra.
24 Samuels v. City of Clinron, 211 S.W. 567, 569 (Ky. 1919).
25 Id. at 570.
revenues of such works without the incurrence of indebtedness of said cities.\textsuperscript{26} Section 1 provided that cities of the third class were:

authorized and empowered to purchase, establish, erect, maintain and operate electric light, heat and power plants, together with extensions and necessary appurtenances thereto, within or without the corporate limits under the provisions of this act for the purpose of supplying such city and the inhabitants thereof with electric light heat and power.\textsuperscript{27}

Section 2 of the same act provided that, in order to defray the cost of such plants, these cities could:

borrow money and issue negotiable bonds, provided no such bonds shall be issued unless and until authorized by an ordinance specifying the proposed undertaking, the amount of the bonds to be issued and the maximum rate of interest such bonds are to bear, which shall not be more than six (6) per cent per annum. Such ordinance shall further provide that the proposed electric light, heat and power plant and appurtenances which is to be acquired or constructed or the proposed extension thereto are to be made pursuant to the provisions of this act.\textsuperscript{28}

The bonds issued under the act were to be for a period not exceeding 40 years and were to be payable solely from the income and revenue earned by the light, heat and power plants authorized by this act. Therefore these bonds would not constitute an indebtedness of the city "within the meaning of the Constitutional provisions or limitations,"\textsuperscript{29} Section 5 of the act contained the provision that:

[It shall be plainly stated on the face of each bond that same has been issued under the provisions of this act and that it does not constitute an indebtedness of such city within the meaning of any constitutional provisions or limitations.]\textsuperscript{30}

The act instructed the city council or board of commissioners to create a "separate and special fund" for the income and revenue from the plants so that this money would be used only to pay for the cost and maintenance of the plants. The rates to be charged for the services of the plant were to be set and revised from time to time so that there would be sufficient funds for these purposes. It was also designated by the act that the city was to pay the reasonable cost and value for services rendered to the city.\textsuperscript{31} Section 20 of the act provided for the

\textsuperscript{26} Ky. Acts, ch. 119 (1932).
\textsuperscript{27} Id., \S 1.
\textsuperscript{28} Id., \S 2.
\textsuperscript{29} Id., \S 5.
\textsuperscript{30} Id.
\textsuperscript{31} Id., \S 9.
creation of a city utility commission. This commission was to be appointed by ordinance and was to have exclusive control over the operation of the electric plant.\textsuperscript{32}

The language of the 1932 act applied only to cities of the third class. However, in October 1932, Williamstown, Kentucky,\textsuperscript{33} a city of the sixth class, attempted to obtain funds for an electric system under a plan similar to that outlined in the 1932 act. Under the Williamstown plan, the city passed an ordinance calling for the issuance of bonds in the amount of $75,000. The proceeds from the bond issues were to be used to construct a municipal electric light and power plant which would be owned and operated by the city. The same ordinance provided for the creation of a “Bond and Interest Redemption Account” funded by incomes and revenues from the plant sufficient to pay the interest and to retire the bonds when they became due. It was noted on the bonds that they were payable solely from this special fund and did not constitute an indebtedness of the city within the constitutional provisions or limitations. A taxpayer brought suit to challenge the city’s action on the grounds that: (1) the city had obligated itself by the terms of the ordinance and, therefore, the debt would violate Sections 157 and 158 of the Constitution; and (2) the city had no authority to obtain funds with which to construct, operate and maintain an electric light and power plant in the proposed manner.\textsuperscript{34}

As to plaintiff’s first contention, that the bond issue created an obligation of the city, the Kentucky Court of Appeals held, as they had consistently held, that revenue bonds do not create an indebtedness of the municipality within the meaning of the Constitution because revenue bonds are payable from a special fund and not from the general fund of the municipality.\textsuperscript{35} In the instant case, the city could issue bonds which would not obligate the city within the meaning of the Constitution\textsuperscript{36} because the bonds were to be payable from a special fund established from the revenue received for the services furnished by the plant.\textsuperscript{37} The taxpayer’s second contention\textsuperscript{38} presented the Court with a novel question. In deciding whether a city of the sixth

\textsuperscript{32} Id., § 20.
\textsuperscript{33} Juett v. Town of Williamstown, 58 S.W.2d 411 (Ky. 1933).
\textsuperscript{34} Id. at 412.
\textsuperscript{35} Id.
\textsuperscript{36} For cases holding that revenue bonds do not constitute an indebtedness of the municipality see, Kentucky Util. Co. v. City of Paris, 58 S.W.2d 361 (Ky. 1933); Wheeler v. Board of Comm’rs, 53 S.W.2d 740 (Ky. 1932); Williams v. City of Raceland, 53 S.W.2d 370 (Ky. 1932); City of Bowling Green v. Kirby, 295 S.W. 1004 (Ky. 1927).
\textsuperscript{37} Juett v. Town of Williamstown, 58 S.W.2d 411, 412 (Ky. 1933).
\textsuperscript{38} Id.
class could obtain and operate an electric light plant under the Williamstown plan, the Court looked first to the statutes and found "no express statutory authority for a city of the sixth class to acquire and operate an electric light plant under the proposed plan." In upholding the circuit court's decision that no authority existed for a city of the sixth class to acquire and operate an electric light plant under the proposed plan, the Court of Appeals stated: "Municipal corporations possess only such powers as are expressly given, or necessarily implied, in statutes constitutionally enacted, and, if there be a fair and reasonable doubt of the existence of the power, it should be resolved against the municipality." Statutory authority for such a plan was provided for cities of the sixth class when the legislature amended its 1932 act.

The 1936 Act: Authority for Second, Fourth, Fifth and Sixth Class Cities

In 1936 the General Assembly amended the 1932 act to provide statutory authority for the revenue bond financing of electric utility systems for cities of the second, fourth, fifth and sixth classes as well as for cities of the third class. In addition, the 1936 act contained a provision requiring approval of an ordinance authorizing the bond issue by a majority of the voters voting at a regular election. In Booth v. City of Owensboro the constitutionality of the election provision was raised because it was not mentioned in the title to the 1936 amendment as required by the Kentucky Constitution. While refusing to decide the question as it applied to cities of the second, fourth, fifth and sixth classes, the Court held that the election provision was unconstitutional as it applied to cities of the third class. In so holding the Court reasoned:

We think this instance is a clear exemplification of [Section 51's] wisdom and a striking example of its violation. The title to the 1936 amendment only advised that the proposed act merely extended to other cities the existing statute enabling cities of the third class to acquire or improve their electric plants and thus bring the law on the subject in harmony with the law relating to

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39 Id. at 413.
40 Id.
42 Id.
43 Id.
44 122 S.W.2d 118 (Ky. 1938).
46 Ky. Const. § 51.
47 Booth v. City of Owensboro, 122 S.W.2d 118 (Ky. 1938).
their water works. The title indicates only extension. The body contains a substantial restriction. Its omission was concealment. Members of the legislature particularly interested in legislation affecting cities of the third class could not have known from reading the title that their existing power as to this subject was being materially curbed. No member was advised by the title that the extension of the authority to cities of the other classes was being likewise limited. The people who are usually apprised of proposed legislation through publication of only the title of pending bills or the substance thereof in the Legislative Digest and newspapers probably were never informed of this change in the existing law.

Three years later, the Court was faced with the question of the constitutionality of the election provision in the 1936 Act as it applied to other classes of cities and reached the same result it had reached in Booth, holding the election provision unconstitutional as it applied to cities of the second, fourth, fifth and sixth classes.

The 1936 enactment provided statutory authority for cities to use municipal revenue bonds to finance electric utilities systems. However, as municipalities sought to meet their individual needs, the Court would be called upon to answer additional questions concerning the revenue bond financing of such systems. One such question which would be presented to the Court was whether or not a city could use revenue bonds to finance a joint water and electric system for the city. In Eagle v. City of Corbin, Corbin proposed to issue bonds to finance the rehabilitation of its electric light and power facilities and water works. The bond issue was to be paid from the income and revenue of the systems. In looking to statutory authority, the Court of Appeals found not one but two statutes. One provided for the creation of a water system the other for the creation of an electric plant. The statutes were similar, however, and the Court held that there was no reason why bonds should not be issued for a unified plant if the provisions of both statutes had been observed. The statute which provided for the issuance of revenue bonds to finance electric plants also provided for the creation of a city utility commission, and at the time this action was brought, Corbin had no such commission. On this point the Court said that there was nothing in the statute to indicate that the creation of the commission was a condition precedent to the issuance of bonds. Rather, the court found the purpose of this part of the statute was “to obtain a non-political and business man-

48 Id. at 120.
49 Jones v. City of Benton, 148 S.W.2d 683 (Ky. 1941).
50 Eagle v. City of Corbin, 122 S.W.2d 798 (Ky. 1938).
51 Id.
52 Id. at 800-801.
agement of the plant in order to protect the bond holders and the inhabitants..."53 Thus, the Court took the view that the law would be complied with at the proper time and that Corbin would appoint a city utility commission.

The Court also discussed the circumstances surrounding the issuance of bonds. In Eagle, the city entered into a contract with the purchaser of the bonds before they were authorized.54 In addition, the purchaser was the only person to whom the city offered the bonds, and there had been no public advertisement of the bond issue. The city maintained that this was not required by the statute. In pointing out that public policy is declared first by the Constitution, second by the legislature, and third by the courts, the Court stated: "There are broad constitutional and statutory declarations as to public policy in respect to similar municipal transactions, namely, that public business is never a private matter."55 As to the statutes authorizing the issuance of revenue bonds to finance electric light plants, the Court said that while the city councils or commissions were granted broad discretionary powers in the creation and sale of bonds, these powers could not be used to the extent of avoiding public and reasonable bids.56

**Revenue Bond Plan v. General Obligation Bond Plan**

The above survey of cases and statutes indicates that there are two methods by which cities may acquire, construct or extend electric utility systems. To some extent, the method to be adopted by the city depends on whether the source of funds for the project is to be the sale of revenue bonds or the sale of general obligation bonds. In King v. Rowland,57 the Kentucky Court of Appeals discussed the difference in these two possibilities in terms of requirements for voter approval and for the appointment of a city utility commission. The sale of general obligation bonds requires that the question be submitted to voters of the city at an election held for that purpose, whereas the sale of revenue bonds to finance the project does not provide for an election unless a petition signed by 200 qualified voters is filed in support of an election on the issue. A city utility commission need not be appointed when the cost is financed by the issuance of general obligation bonds; however, when the cost is financed by the issuance of revenue bonds, the city is required by

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53 Id. at 801; see note 32 supra and accompanying text.
54 Eagle v. City of Corbin, 122 S.W.2d 798, 802 (Ky. 1938).
55 Id. at 803.
56 Id.
57 168 S.W.2d 755 (Ky. 1943).
statute to appoint such a commission.\textsuperscript{58} The reason for requiring the appointment of a city utility commission in cases where the electric system is to be financed by revenue bonds is to create an independent authority to manage the revenue derived from the operation of the plant because revenue bond holders must look exclusively to revenues derived from the operation of the plant for securing their bonds.\textsuperscript{59} The "city utility commission when appointed acts as trustee for the bondholders. . .".\textsuperscript{60} It is not necessary to have a city utility commission in the case of general obligation bonds because these bonds are backed by the full faith and credit of the state \textit{i.e.} all the taxable property of the state. Since revenue bonds are not backed by the full faith and credit of the state but are payable solely out of incomes and revenues from the projects for which they are issued, it has consistently been held that municipal revenue bonds are not subject to the same constitutional restrictions which are imposed on the issuance of general obligation bonds.\textsuperscript{61} Therefore it is not surprising that the use of revenue bonds to finance municipal capital improvements has had tremendous growth in recent years. Not only has their use prompted new projects, but they have also funded the construction of larger municipal electric utility systems than previously existed.

\textbf{Primary Purpose Question}

In 1961, the Kentucky Court of Appeals was called upon to decide if a municipality, when providing for a generating plant to meet present needs, had authority under KRS § 96.520 to construct and operate a plant adequate to meet future needs of the city and to sell the present excess kilowatts to a private company. In \textit{Miller v. City of Owensboro,}\textsuperscript{62} a taxpayer argued that the plan contemplated by the city for "construction, financing and operation of a new generating station" was not authorized by KRS § 96.520. His contention was founded on the theory that this statute only authorized a city to acquire and operate an electric light plant for the purpose of supplying the city and its inhabitants with electric power. The taxpayer maintained that the Owensboro plan was designed primarily for the benefit

\begin{itemize}
  \item \textsuperscript{58} Id. at 756.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Selle v. City of Henderson, 218 S.W.2d 645 (Ky. 1949); McKinney v. City of Owensboro, 203 S.W.2d 24 (Ky. 1947); Cawood v. Coleman, 172 S.W.2d 548 (Ky. 1943); Davis v. Board of Educ., 83 S.W.2d 34 (Ky. 1935); Reconstruction Fin. Corp. v. City of Richmond, 61 S.W.2d 631 (Ky. 1933); Wheeler v. Board of Comm'rs 53 S.W.2d 740 (Ky. 1932); Klein v. City of Louisville, 6 S.W.2d 1104 (Ky. 1928); City of Bowling Green v. Kirby, 295 S.W. 1004 (Ky. 1927).
  \item \textsuperscript{62} 343 S.W.2d 398 (Ky. 1961).
\end{itemize}
of Kentucky Utilities Company and only secondarily for the benefit of the city and its inhabitants. Owensboro already owned an electric plant, but this plant supplied only 22,500 kilowatts while the requirements of the city and its inhabitants were in excess of 40,000 kilowatts. The present plan had space for one additional generator but that would not be sufficient to meet the city's need after 1968. The new generating station planned by the city would have an initial capacity of 125,000 kilowatts with space for an eventual capacity of 800,000 kilowatts. This station would be in addition to the existing plant, and the city would contract to sell the excess power to Kentucky Utilities Company. In holding that the plant was primarily designed to meet the needs of the city of Owensboro and its inhabitants and thus authorized by KRS § 96.520, the Court reasoned that it was a matter of sound economic planning to construct a plant capable of generating enough electric energy to meet the future needs of the city and its inhabitants. With respect to the sale of the excess to Kentucky Utilities Company, the Court noted that this was "an advantageous means of realizing a return on the excess capacity rather than allowing it to constitute an economic loss."63

In 1970, the statute allowing cities of the second, third, fourth, fifth and sixth classes to construct and operate electric power plants was amended to authorize cities to:

... enter into and fulfill the terms of an interconnection agreement with any utility whose rates and services are regulated by the Public Service Commission of Kentucky (or, if not so regulated, operating and having customers only outside of Kentucky) and [to] establish, erect, maintain and operate such plants, individually or jointly with any such utility. In the case of any joint action such city and utility may provide by contract for their respective responsibilities, for operation and maintenance and for the allocation of expenses, revenues and power. If in the accomplishment of such purpose such city at any time has capacity or energy surplus to the immediate needs of the city and its inhabitants, such surplus, if not disposed of for consumption outside this state, may be disposed of only to a utility whose rates and services are regulated by the Public Service Commission of Kentucky.64

However, the statute, as amended, still required that the plant be "for the purpose of supplying the city and its inhabitants with electric light, heat and power."65

In the same year as this statute was amended, the Court of

63 Id. at 401.
64 KRS § 96.520(1) (Supp. 1971).
65 Id.
Appeals decided *Wilson v. City of Henderson*. In this case, the city of Henderson maintained that its plan should be upheld under the authority of *Miller v. City of Owensboro*. Yet, there appear to be some essential differences between the two cases. One significant divergence was the adequacy of the output of the existing electric plants of the two cities at the time the question arose in each case. The Henderson system had a generating capacity of 48,000 kilowatts and a maximum load requirement of only 34,800 kilowatts. So while the existing Henderson plant was capable of generating some 13,000 more kilowatts than were required by the city, the existing Owensboro plant was capable of generating only about one-half as many kilowatts as the city needed at that time. This differences in the existing systems of the two cities was completely overlooked by the Court. Another difference which the Court did discuss in the Henderson case was the firm capacity of the present Henderson system, which was somewhat less than the existing needs of the city and its inhabitants. The city had interconnection agreements with other systems, however, which gave it an over-all firm capacity of 44,000 kilowatts. This overall firm capacity exceeded its needs. But, the Court placed more emphasis on its expected growth, which was predicted to exceed the over-all firm capacity. Firm capacity was not discussed in the Owensboro case because the full generating capacity of the Owensboro plant was not enough to meet the city's needs.

Henderson's expansion plan called "for the construction of two new generating units, each having a capacity of 175,000 kilowatts." The construction of the plant was to be financed by the issuance of $76,000,000 in tax-exempt revenue bonds. This meant that the city would have a generating capacity of 398,000 kilowatts with an excess of 363,000 kilowatts. The city entered into an agreement with Big Rivers, a private corporation, which provided that:

[t]he units [would] be erected on land adjoining an existing generating plant of Big Rivers. Under 30-year contracts, Big Rivers and the city [would] utilize jointly certain auxiliary facilities such as those for coal handling, water circulation and disposal, barge unloading and rail traffic; Big Rivers [would] provide personnel for physical operation of the city's new generating units; and Big Rivers [would] purchase all of the power generated by the new units in excess of the city's needs.

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66 461 S.W.2d 90 (Ky. 1970).
67 343 S.W.2d 398 (Ky. 1961).
68 The firm capacity of a plant is its generating capacity with the largest individual generator out of commission.
69 461 S.W.2d 90, 92 (Ky. 1970).
70 Id.
While there was specific statutory authority for all the elements of the agreements between the city and Big Rivers, there was no authority for any of the plan unless the plant was for the purpose of supplying electrical energy to the city and its inhabitants. A majority of the Court held that under the authority of *Miller v. City of Owensboro* the Henderson plan was for the benefit of the city and its inhabitants. Thus, there was statutory authority for Henderson's plan and it was upheld. There was a strong dissent in the case which pointed out that "the law is clear and unambiguous that this facility cannot be constructed nor these bonds issued unless the primary purpose of the project is to furnish and supply the city and its inhabitants with electric power." And yet, the majority of the Court, seemingly ignoring the fact that Henderson had a first rate electrical system capable of generating more electric energy than the city presently needed, allowed bonds to be issued to finance a new generating plant. The combined effect of both the city's plants would give the city an excess of 363,000 kilowatts in 1970 which would be sold to Big Rivers. The dissenting opinion further pointed out that the excess capacity figures made it so obvious that the primary purpose of the construction of the facilities was to furnish power to Big Rivers that it was "amazing, appalling and confounding" that the Court held to the contrary.

The dissent further observed that the design of the system and the questions presented to the Court forced the Court "to play with a stacked deck."  

**CONCLUSION**

As noted above, recent cases indicate that the Kentucky Court of Appeals no longer maintains the position that when there is reasonable doubt as to the existence of a municipality's power to finance an electric utility system, the question should be resolved against the municipality. Although when *Miller v. City of Owensboro* was decided there was no statutory authority allowing a municipality to make a contract to sell excess electric energy to another utility com-

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71 343 S.W.2d 398 (Ky. 1961).
72 This was a four to three decision. Chief Judge Hill and Judges Milliken, Palmore and Steinfield made up the majority. Judge Osborne wrote a dissenting opinion in which Judges Neikirk and Reed joined.
73 Wilson v. City of Henderson, 461 S.W.2d 90, 97 (Ky. 1970) (emphasis in the original).
74 Id.
75 Id. at 98.
76 Wilson v. City of Henderson, 461 S.W.2d 90 (Ky. 1970); Miller v. City of Owensboro, 343 S.W.2d 398 (Ky. 1961).
77 343 S.W.2d 398 (Ky. 1961).
pany, the Court upheld Owensboro's authority to do so, declaring that the primary purpose of the plan was to supply the city of Owensboro and its inhabitants with electric energy. In *Wilson v. City of Henderson*, the Court reduced this principle to meaningless dogma by upholding a plan whereby the city was allowed to construct a plant capable of producing over ten times more kilowatts of electricity than the city and its inhabitants needed. As a result of this judicial legislation in *Wilson* there apparently exists authority for any municipality to issue tax-exempt revenue bonds to finance the construction and operation of an electric utility system capable of producing unlimited excess kilowatts.

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78 461 S.W.2d 90 (Ky. 1970).