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STATE OF NEBRASKA
OFFICIAL
APR 18 1994
DEPT. OF JUSTICE

DATE: April 12, 1994

SUBJECT: Constitutionality of Distribution of Gross Revenue Payments Made by Public Power District Under Neb. Rev. Stat. § 70-651.04 (Supp. 1993) Based on "Property Tax Requirements" of Political Subdivisions.

REQUESTED BY: Michael Justus, Deputy State Auditor

WRITTEN BY: Don Stenberg, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of an amendment to Neb. Rev. Stat. § 70-651.04 (Supp. 1993) regarding the distribution to local government subdivisions of the five percent gross revenue payments made by certain public power and irrigation districts pursuant to Neb. Rev. Stat. § 70-651.03 (1990). In 1993, the Legislature amended § 70-651.04 by altering the distribution language to provide that such payments be distributed to local governments "in the proportion that their respective property tax requirements in the preceding year bore to the total of such requirements." 1993 Neb. Laws, LB 346, § 6. Previously, the statute required the distribution to be made "in the proportion that the[ ] respective property tax levies [of the subdivisions] in the preceding year bore to the total of such levies." Your question is whether the change from basing distribution of the gross revenue payments on the proportion each subdivision's property tax levy bore to the total property tax levy to the proportion each subdivision's property tax requirement bears to total property tax requirements is inconsistent with Neb. Const. art. VIII, § 11.

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In Op. Att'y Gen. No. 91017 (March 18, 1991), this office addressed the meaning of the prior language contained in § 70-651.04 requiring the distribution of gross revenue payments based on "property tax levies". We concluded that the statute "mandate[d] distribution to the respective subdivisions based on the proportion which their particular property tax rate for the year preceding distribution [bore] to the total property tax rate for all such entities in that year." *Id.* at 2. In reaching this conclusion, we noted that the authority for the Legislature to require certain public power districts to make payments based on a portion of their gross revenues, and the distribution of funds received from public power districts in this manner, emanates from Neb. Const. art. VIII, § 11. Article VIII, § 11, provides, in part:

> Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.
>
> The legislature may require each such public corporation to pay to the treasurer of any county in which may be located any incorporated city or village, within the limits of which such public corporation sells electricity at retail, a sum equivalent to five (5) per cent of the annual gross revenue of such public corporation derived from retail sales of electricity within such city or village, less an amount equivalent to the 1957 payments in lieu of taxes made by such public corporation with respect to property or operations in any city or village. The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

This constitutional provision also contains language concerning the manner in which payments by public power districts of five per cent of gross revenues (less the in lieu payment amount) are to be distributed:

> So much of such five (5) per cent as is in excess of an amount equivalent to the amount paid by such public corporation in lieu of taxes in 1957 shall be distributed in each year to the city or village, the school districts located in such city or village, the county in which such

> city or village is located, and the State of Nebraska, in the proportion that their respective property tax mill levies in each such year bear to the total of such mill levies. (emphasis added).

In our opinion construing § 70-651.04 prior to its amendment in 1993, we stated that "the term `mill levy' can only refer to the rate of taxation; it cannot be construed to mean the amount of taxes levied." Opinion No. 91017 at 3. Thus, in order to construe § 70-651.04 in a manner consistent with the language employed in art. VIII, § 11, we concluded that, "while it is true that property tax rates in Nebraska are no longer stated as `mill levies',". . ."the reference in § 70-651.04 to distribution of proceeds of payments made by public power districts based on gross revenues pursuant to § 70-651.03 must be based on the proportion that each subdivision's property tax rate bears to the total property tax rate for all subdivisions." **Id.**

The Legislature amended § 70-651.04 in 1993 by the enactment of LB 346. Section 6 of LB 346 altered the language of § 70-651.04 by eliminating the reference to "property tax levies" and replacing it with the language "property tax requirements". While the Legislature did not define the term "property tax requirements", it seems obvious that this phrase refers to the amount of taxes to be raised by property taxation. This is apparent from an examination of Neb. Rev. Stat. § 77-1601 (Supp. 1993), regarding the annual property tax levy made by the county board of equalization, which provides that "[t]he levy shall include all county taxes necessary to cover the amounts required to be raised by taxation, as provided in the annual budget of the county for the current year, and shall include all township, city, school district, precinct, village, road district, and other taxes required by law to be certified to the county clerk and levied by the county board of equalization." (emphasis added). ***See also*** Neb. Rev. Stat. §§ 13-505 to -508 (Supp. 1993) (provisions of Nebraska Budget Act relating to budget statements of political subdivisions). The legislative history of the 1993 amendment is not extensive. The only reference to the change to § 70-651.04 indicates it was intended "to provide for a more equitable distribution of in lieu of tax which will occur if prior tax requirements are utilized rather than levies." Committee Records on LB 134, 93rd Neb. Leg., 1st Sess. (Introducer's Statement of Intent) (Jan. 27, 1993).[1] This history supports the conclusion that the Legislature intended to change the distribution formula by basing it on the amount of property taxes required to be levied for political subdivisions in relation to all property

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[1] The provisions amending § 70-651.04 were originally contained in LB 134. LB 134 was amended into LB 346 by AM0640 on March 30, 1993.

taxes, as opposed to the prior manner of calculating the distribution based on the proportion each subdivision's property tax levy rate bore to the total property tax levy rate.

In our view, the Legislature's action in amending § 70-651.04 to base the distribution of gross revenue payments on "property tax requirements", and not on "property tax levies", as defined in our earlier opinion, cannot be squared with the language of Neb. Const. art. VIII, § 11. The Constitution mandates that the distribution of such revenues be made based on "property tax mill levies". The term "mill levy" refers to the rate of taxation, not the amount of taxes levied. While property tax rates are no longer stated as "mill levies", the Constitution plainly contemplates that the distribution be based on consideration of the proportion the property tax levy rate of each subdivision bears in relation to the total property tax levy rate. Section 70-651.04, as amended, conflicts with this provision by basing the distribution on the amount of property taxes required to be levied for each subdivision in relation to the total amount of property taxes required to be levied. While the change made by the Legislature may well lead to a "more equitable distribution", as referenced in the legislative history, such a change cannot be accomplished absent amending art. VIII, § 11, to allow for a distribution based on property tax requirements, as opposed to property tax levy rates. Thus, § 70-651.04, as amended, is inconsistent with art. VIII, § 11.

Very truly yours,

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APPROVED BY:

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