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STATE OF NEBRASKA
OFFICIAL
AUG 26 1991
DEPT. OF JUSTICE

DATE: August 26, 1991

SUBJECT: Imposition of the Dual Party Relay Service Surcharge Provided for Under Neb.Rev.Stat. § 86-904 (Cum. Supp. 1990) on Access Lines Subscribed to by Governmental Entities.

REQUESTED BY: Frank Landis, Chairman
Nebraska Public Service Commission

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

You have requested our opinion on several questions relating to the imposition of the dual party relay service surcharge provided for under Neb.Rev.Stat. § 86-904 (Cum. Supp. 1990) on access lines subscribed to by governmental entities.

In 1990, legislation was enacted establishing a statewide dual party relay system for hearing-impaired or speech-impaired persons in Nebraska. 1990 Neb. Laws, LB 240 (codified at Neb.Rev.Stat. §§ 86-901 to 906 (Cum. Supp. 1990)). The purpose of the system is to provide hearing-impaired or speech-impaired persons in Nebraska with the ability "to communicate with others using conventional telephone systems. . . ." Neb.Rev.Stat. § 86-901 (Cum. Supp. 1990).

To fund the costs associated with establishment of the statewide dual party relay system, the Legislature created the Nebraska Telephone Relay System Fund ["Fund"]. Neb.Rev.Stat. § 86-903 (Cum. Supp. 1990). Funding for the system is generated by a surcharge on access lines provided for under Neb.Rev.Stat. § 86-904 (Cum. Supp. 1990), which provides, in pertinent part:

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> Beginning January 1, 1991, each telephone company in Nebraska shall collect a surcharge not to exceed ten cents per month on each telephone access line in Nebraska. The surcharge shall only be collected on the first one hundred access lines per customer. The telephone companies shall add the surcharge to each customer's local telephone bill.

The amount of the surcharge is determined annually by the Public Service Commission. Neb.Rev.Stat. § 86-904 (Cum. Supp. 1990).

The language employed in § 86-904, providing that the surcharge shall be collected on "each telephone access line in Nebraska," is broad and all-encompassing. The plain meaning of this language does not admit of any exceptions or exemptions from imposition of the surcharge. The only limitation set forth by the Legislature is the provision that the surcharge is to be collected on only "the first one hundred access lines per customer." Neb.Rev.Stat. § 86-904. Thus, the language of the statute evinces a clear legislative intent for the surcharge to be collected on all access lines subscribed to by all customers, including governmental entities, with the exception of the one hundred access line limit.

While the language of § 86-904 provides no exception for access lines of governmental entities or agencies, you have requested our opinion as to whether the surcharge may not be collected on access lines of federal, state or local government entities.

Initially, you ask us to consider whether the surcharge may be collected on access lines subscribed to by the federal government. In this regard, you note the rule that, absent congressional consent, the states and subordinate taxing units thereof are without power to tax the property of the federal government or the means, instrumentalities, and agencies of the federal government. E.g. Mayo v. United States, 319 U.S. 441 (1943). The immunity of the federal government and its agencies and instrumentalities from taxation arises from the necessity of preserving the independence of the dual system of federal and state governments under our constitutional system. McCulloch v. Maryland, 4 Wheat 316 (1819).

The word "surcharge" is defined as "an additional tax, impost, or cost." Black's Law Dictionary 1292 (6th ed. 1990). The term is sometimes used to refer to a "surtax," which is defined as "[a]n additional tax on what already has been taxed." Black's Law Dictionary, supra, at 1296. See Attorney General Opinion No. 91041, May 17, 1991.

While the term "surcharge" is employed in § 86-904, the imposition is not, in operation or effect, a pure "tax" or an additional "tax" upon a tax. Rather, the surcharge is more accurately viewed as a fee or charge assessed to telephone users as part of the cost of telephone service, which would include the opportunity for subscribers to use the dual party relay system, as well as to be called by persons using the system. Indeed, it is our understanding that other states which impose a charge or fee of this nature on subscribers to fund telecommunications services for communications impaired persons collect such fees from all customers, including the federal government. Minn. Stat. § 237.52.2 ("monthly charge" on "each customer access line"); Wyo. Stat. § 16-9-209(c) ("special fee" imposed on "[e]ach customer"). While the answer to your question is not entirely free from doubt, it is our conclusion that the surcharge in § 86-904 may be collected from access lines subscribed to by federal government entities (subject, of course, to the one hundred access line per customer limitation).

Your second question is whether the surcharge may be collected on access lines subscribed to by the state or subordinate governmental or political subdivisions in Nebraska.

Neb. Const. art. VIII, § 2, provides, in part, that "[t]he property of the state and its governmental subdivisions shall be exempt from taxation." This provision has been construed as a limitation on the Legislature's power to tax the property of the state and its governmental subdivisions and not to preclude the imposition of liability for excise taxes or other exactions not constituting property taxes. State v. Cheyenne County, 127 Neb. 619, 256 N.W. 67 (1934).

Furthermore, Neb. Const. art. VIII, § 7, provides, in part, that "[t]he Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes." This inhibition precludes only legislation relating to taxes levied upon municipal corporations "for corporate purposes." See Dwyer v. Omaha-Douglas Public Building Comm'n, 188 Neb. 30, 195 N.W.2d 236 (1972).

Even if the "surcharge" provided for under § 86-904 were construed to constitute a "tax" (which, for the reasons previously stated, we believe it is not), it is our opinion that the Legislature would not be prohibited from assessing this charge on access lines subscribed to by the state, governmental or political subdivisions of the state, or municipal corporations. The "surcharge" is not imposed on "property" of the state or its governmental subdivisions, as prohibited by Article VIII, § 2, nor is it imposed on municipal corporations for "corporate purposes,"

as barred by Article VIII, § 7. Thus, given the absence of any exception for such entities, we conclude that there is no impediment to the Legislature's imposition of the "surcharge" on access lines subscribed to by such entities.

Finally, you ask us to consider the potential implications of the provisions of the federal Americans with Disabilities Act ["ADA"] relating to telecommunication services for hearing-impaired and speech-impaired persons, 47 U.S.C. § 225, and whether such legislation constitutes congressional authorization to impose the surcharge on access lines subscribed to by entities of the federal government.

In light of our previous conclusion, it is not necessary for us to address your question in this regard. We would point out, however, that the Federal Communications Commission has, consistent with the ADA, recently adopted its final rule regarding implementation of the ADA's provisions relating to telecommunications services for hearing and speech disabled persons. 56 Fed. Reg. 36,729 (August 1, 1991). The FCC's final rule includes provisions pertaining to cost recovery and certification of state plans providing for the method of funding of telecommunications relay services of this nature. Id. at 36,732 and 36,733. The Commission may wish to contact the FCC to determine what impact, if any, the FCC's new rule may have with regard to this question.

Very truly yours,

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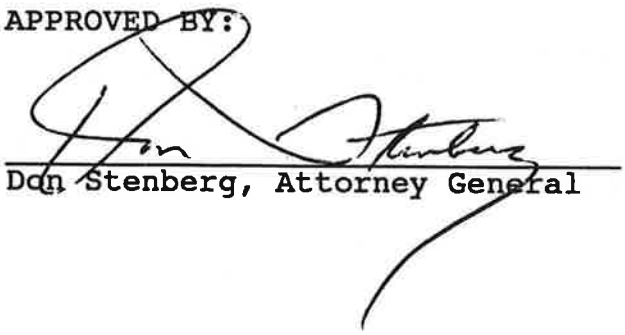

Don Stenberg, Attorney General