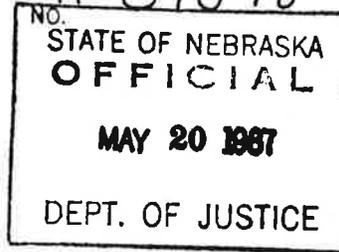


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: May 19, 1987

SUBJECT: Constitutionality of LB 663 as Amended - Due Process Requirements Regarding Natural Gas Rate-Making by Nebraska Municipalities

REQUESTED BY: Senator David Landis
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion regarding the constitutionality of LB 663, as amended. Previously, our office addressed at length the procedural due process requirements regarding natural gas rate regulation by Nebraska municipalities. Attorney General Opinion No. 87061, April 24, 1987. Your specific question now concerns whether the procedural safeguards contained in Section 15 of the amended version of LB 663 are consistent with the constitutional due process requirements outlined in our earlier opinion.

Generally, Section 15(4) of the bill provides for an area rate hearing before a hearing officer appointed by the affected municipalities, at which time both the municipalities and the utility are afforded the opportunity to call witnesses, present evidence, cross-examine witnesses, and argue the evidence. An official record of the proceedings before the hearing officer is to be prepared, including the gas company's rate filing, all reports, all evidence presented by the utility and municipalities at the hearing, the transcript of the proceedings, and the proposed findings of fact and conclusions of law presented to the hearing officer by the utility and the municipalities. A copy of the official record is forwarded by the hearing officer to each municipality. LB 663, Section 15(5). Each municipality is then required to take final action on the rate filing by adopting findings of fact and conclusions of law based on the record created before the hearing officer. LB 663, Section 15(6).

In the event a gas company is dissatisfied with the action taken by a municipality, a right of appeal to district court is provided under Section 15(7) of the bill. All such appeals are to be "de novo upon the record," with the provision that "the

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district court may, in its discretion, receive additional evidence. . . ." LB 663, Section 15(7). The district court is to determine "whether the action by the municipality was lawful as having set rates which are just and reasonable. . . ." LB 663, Section 15(7).

Initially, we note that you have requested us to expedite our response, in light of the short period of time remaining in the current legislative session. In spite of this time restriction, we will nevertheless endeavor to provide you with some general guidance regarding the specific issues you have raised concerning this procedure.

Your first question concerns the propriety of the appointment of a hearing officer to receive testimony and gather evidence presented by a utility and municipality regarding a rate filing. The general rule concerning the propriety of utilizing a hearing officer or examiner to gather evidence for use by an administrative body is stated in 2 Am.Jur.2d Administrative Law §437 (1962) as follows:

Neither due process of law nor the concept of a full or fair hearing requires that the actual taking of testimony be before the same officers as are to determine the matter involved, and it is common for hearings to be conducted by less than all members of an administrative agency or by examiners or hearing officers appointed for that purpose, the hearing officer not making the decision or making no more than a recommended decision. Beyond this, it is a general rule that in the absence of a statute to the contrary, due process or a fair hearing is not denied by the mere fact that an otherwise authorized person makes or participates in the making of a decision without having been present when evidence was taken. In this connection it is recognized that to "hear" relates, not to physical presence at the taking of evidence, but to certain procedural minimums to ensure an informed judgment by the one who has the responsibility of making the final decision and order. (Footnotes omitted).

The due process requirements with respect to the propriety of an administrative body relying upon evidence gathered by a hearing officer or examiner were established in Morgan v. United States, 298 U.S. 468, 481-82 (1936), in which the Court stated:

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute

inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them.

Accord, Alaska Transportation Commission v. Gandia, 602 P.2d 402 (Alaska 1979); Browning-Ferris Industries of New Hampshire v. State, 115 N.H. 190, 339 A.2d 1 (1975). See generally Annot., 18 A.L.R.2d 606 (1951, Supp. 1973).

On the basis of the foregoing, we believe that the use of a hearing officer to receive testimony and to gather evidence for municipalities to consider in making determinations regarding action on a natural gas rate filing is consistent with constitutional due process requirements. Accordingly, it is our conclusion that the procedure utilizing a hearing officer in this manner, provided for under Section 15(4) of LB 663, is permissible under established standards of due process.

Your second question concerns whether the provision of a right of appeal to the utility to district court "de novo upon the record," with a provision granting the district court discretion to hear additional evidence, is consistent with constitutional due process requirements.

The general rule regarding the question of whether trial de novo or review on the record is to be provided regarding appeals from public utility regulatory decisions is stated in 73B C.J.S. Public Utilities, §112 (1983) as follows: "Whether or not there is to be a trial de novo in the appellate court on review of an order of a public service commission is dependent on constitutional or statutory provisions, as is also the question whether the review is to be on the record alone." Thus, the scope of review provided in such appeals is dependent upon the nature of review specified in the constitutional or statutory provisions established in a particular jurisdiction.

The propriety of limiting the scope of court review of a determination made by a regulatory body to the record created before such body is illustrated by the U.S. Supreme Court's decision in Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341, 348 (1951), in which the court stated: "The fact that review in the Alabama courts is limited to the record taken before the Commission presents no constitutional infirmity." (Citation omitted). Furthermore, while some

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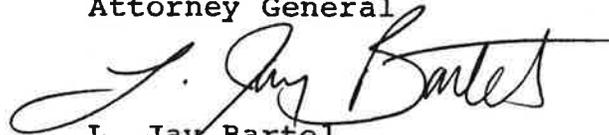
statutes provide only for review on the record, some provisions do establish a more expansive standard by providing for review "de novo" on the record. E.g., Application of Ditworth, 48 N.W.2d 22 (N.D. 1951).

In conclusion, we believe there does not appear to be any inherent constitutional deficiency by virtue of establishing a standard of review "de novo upon the record" in district court on appeal of a municipal rate decision. In the absence of any specific state constitutional requirement mandating a particular method of review, the determination of whether a trial de novo or review on the record is provided is a matter left to the discretion of the Legislature.

As we indicated in our earlier opinion, procedural due process in this context requires a public utility be provided with a complete hearing at some point in the process, either at the legislative or administrative level, or in court. Under LB 663, as amended, the opportunity for a gas company to present its case in a trial-type setting is provided at the legislative or administrative level, by virtue of the hearing held before a designated hearing officer. Under these circumstances, we believe that the limitation of review in the district court to the record made by both the utility and the municipalities is consistent with due process requirements, as both parties are given an adequate opportunity to present their case in a trial-type hearing, and to make and preserve a record in the event of an appeal.

Very truly yours,

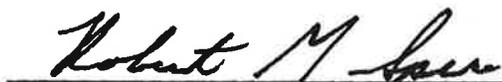
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cc: Patrick J. O'Donnell
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APPROVED BY:


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