DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

#860 45
NO.
STATE OF NEBRASKA
OFFICIAL
APR 4 1986
DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: April 4, 1986

SUBJECT: Constitutionality of LB 835 -- Due Process and Article IV Section 20 of the Nebraska Constitution

REQUESTED BY: Senator Loran Schmit
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
John Boehm, Assistant Attorney General

This is in response to your letter of March 31, 1986, in which you inquire about the constitutionality of LB 835 as amended by the adoption of AM 2536.

Your first concern deals with subsection 3 of section 3 of LB 835 as amended. This provision provides that the Public Service Commission shall hold a hearing for the review of local exchange rates if a complaint has been filed with the commission by the requisite number of subscribers within 60 days from the date of notice of the rate change. This provision requires that the commission shall "hold and complete a hearing" within 60 days after the filing of the petition, and further provides that "If the commission fails to enter any order within sixty days after the close of the hearing, the complaint shall be deemed denied and the rates and charges shall be deemed approved for all purposes including for purposes of appeal." Your specific question is whether "this severance of the customers' right to contest the rate increase because of the inaction of the Public Service Commission" is a violation of their rights to due process of law. We believe that it is.

The fundamental principle underlying the constitutional guarantee of due process of law is that "a party shall have his day in court." Brisbin v. E.L. Oliver Lodge No. 335, 134 Neb. 517 at 526, 279 N.W. 277 (1938). The indispensable elements of due process are a tribunal with jurisdiction, notice of a hearing to the proper parties, and an opportunity for a fair hearing according to applicable procedures. In Re Godden, 158 Neb. 246, 63 N.W.2d 151 (1954). A procedure which grants a party the right to be heard by a tribunal, and subsequently removes the authority of that tribunal to decide the issue because of the failure of that body to act within an arbitrary time limit, and furthermore

L. Jay Bartel, John M. Boehm, Dale D. Brodkey, Martel J. Bundy, Janie C. Castaneda, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Ruth Anne E. Galter, Yvonne E. Gates, Jill Gradwohl, Calvin D. Hansen, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Sharon M. Lindgren, Charles E. Lowe, Harold I. Mosher, Bernard L. Packett, Terry R. Schaaf, LeRoy W. Sievers, Mark D. Starr, John R. Thompson, Linda L. Willard

automatically decides the issue in favor of the opposing party to the proceeding is most certainly a violation of due process of law and a failure to provide an opportunity for a fair hearing and the proper adjudication of the matter at issue.

"It is not enough that a person may have actually had notice and hearing; the statute must provide for it as a matter of right if a failure of due process is to be avoided." School District No. 8 of Sherman County v. State Board of Education, 176 Neb. 722 at 730, 127 N.W.2d 458 (1964). Here the statute would instead terminate that right through no fault of the party requesting the hearing.

> Due process of law requires notice and an opportunity to be heard, as a matter of right and not by the let or leave of administrative officers or agencies, when the rights, duties, or privileges of interested parties are involved by an exercise of quasi-judicial power pursuant to the terms of a statute.

First Federal Savings and Loan Association v. Department of Banking, 187 Neb. 562 at 568, 192 N.W.2d 736 (1971), School District No. 8 of Sherman County v. State Board of Education, supra. This provision which terminates the right of one party to a decision on the issue by the designated tribunal, and in turn automatically decides the issue in favor of the other party, does not provide a fair hearing and does not meet fundamental due process requirements.

Arguably, the failure of the Public Service Commission to hold and complete a hearing within 60 days after the filing of the complaint, as required in the bill, would also have the same result of terminating the petitioners' right of due process. This being the case, the court would declare this provision unconstitutional as well, or in the alternative simply hold that this time requirement is only directory and not jurisdictional.

We should also point out that the rather limited period of time granted to the complainants to present their petition, 60 days from the date of the notice, and the limited period in which to prepare and present a case, within 60 days after filing, might also be construed as denials of due process. In the first case, because of the potential number of signatures required for a proper complaint under the bill, it may be extremely difficult if not impossible for the ratepayers to meet this narrow time constraint thus denying them the opportunity for a hearing on the matter. In addition, the short period of time in which to prepare for a hearing, particularly in view of the complex nature of a case involving telephone rates, the need to discover and analyze the information which is solely in the possession of the

telephone company, and perhaps the need to employ experts to decipher this information, would also likely be construed as a denial of due process.

A fundamental requirement of due process is the right to be heard "meaningfully." Application of Cochrane, 434 F.Supp. 1207 (D.C. Nebr. 1977). If the complainants cannot present a proper case before the commission because of the extremely short time period in which a hearing is required to be held, or because of an inability to obtain and analyze in detail the necessary information in the possession of the telephone company in this time period, the complainants would not have the opportunity to be meaningfully heard in such a matter and thus would be denied their opportunity for a fair hearing and due process of law. This is true even though the initial burden of proof may be on the telephone company, since this initial showing by the company could possibly be overcome by a substantial showing on behalf of the complainants despite the tremendous advantages enjoyed by the phone companies in such a proceeding.

You also ask whether the state might be subject to a possible liability suit for the failure of the Public Service Commission to act in the required time period, thus cutting off the complainants' rights to due process, and what the possible measure of damages might be in such an action. Arguably, the state could be subject to such liability claims, but we deem the more likely scenario to be a declaration that these particular provisions are simply unconstitutional and of no force and effect. In any event it would be impossible for us to contemplate what might be the magnitude of any potential liability, including attorneys' fees, in such a situation.

Your second concern also deals with subsection 3 of section 3 of the bill, as amended, and in particular the provision that provides that "the telecommunications company shall have the burden of proof that such rates and charges are not substantially in excess of the actual economic cost of providing such services." Specifically, your question is whether the failure to define the terms, "substantially," and "actual economic cost," could result in a successful challenge to this law for vagueness.

The Nebraska Supreme Court has stated that:

> [T]he due process clause of the fourteenth amendment of the Constitution of the United States requires that a statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must provide adequate notice of what conduct it requires or proscribes, as

> well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined.

State v. Mayhew Products Corp., 211 Neb. 300 at 304, 318 N.W.2d 280 (1982). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values." Id. at 305. Likewise, in Linn v. Linn, 205 Neb. 218 at 224, 286 N.W.2d 765 (1980), the court noted that "The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or prescribes. . . ."

The word "substantially" is obviously not susceptible to any precise definition. We have likewise inquired as to the meaning of the term "actual economic cost" among members of the accounting, financial and regulatory professions, and find that not only does it not have any generally accepted definition, but most certainly is not a term of art or a phrase that is commonly understood or even used within the industry. Certainly, the word "cost" is susceptible to many different interpretations and applications from an accounting standpoint alone. In addition, the term "actual cost" has been held not to be a technical term having at all times the same meaning, but a general or descriptive term which may have varying meanings according to circumstances in which it is used. Boston Molasses Company v. Molasses Distributors Corporation, 274 Mass. 589, 175 N.E. 150 at 152 (1931). Likewise, "actual cost" has no common law significance, and is without any well understood trade or technical meaning. State v. Northeast Poultry and Egg Company, 203 Minn. 438, 281 N.W. 753 at 755 (1938). The simple addition of the modifier "economic" to this term would not appear to establish any understandable meaning or definition to this phrase. Consequently, we are unable to ascertain any meaningful standard which could be applied by either the complainants, the telephone company, or the Public Service Commission under the language "substantially in excess of the actual economic cost." As it now reads, it would simply allow one to employ whatever accounting rationale or financial theory one could concoct to justify the increased rates.

Although you have not addressed the particular question, we would also point out that other terms in this subsection, may also be subject to challenges for vagueness and lack of definition, including the terms "affected subscribers," "proper complaint," and "proper notice." In addition, we would further note that although you have also not addressed this specific issue, the failure to provide refunds to successful complainants where excessive charges by the telephone company have been found

by the commission under subsection 4 of section 3 of the bill, may well constitute a taking of property without due process of law. In this regard it is fundamental and long understood that the private property of a citizen cannot, by the exercise of legislative power in any form, be taken from him and given to another, or to a corporation. Such an act would be judicial, thus depriving the citizen of his property without the due process of law. Turner v. Althaus, 6 Neb. 54 (1877). Yet that is precisely the effect of this provision by allowing the phone company to retain the excessive charges billed to the customer. A similar argument could also be fashioned by the failure of the bill to grant interest on refunds of excessive charges under these provisions.

While the bill purports to divest the Public Service Commission of its rate regulation powers, it is not clear whether it also is intended to divest it of the duty imposed by the court "to see that the utility is not unjustly enriched by actions inimicable to public interest", Myers v. Blair Telephone Co., 194 Neb. 55 at 61, 230 N.W.2d (1975), assuming for the moment that is even constitutionally possible. See also Marquis v. Polk County Telephone Co., 100 Neb 140, 158 N.W. 927 (1916), and United Gas Improvement Co. v. Callery Properties, 382 U.S. 223 (1965). The failure to authorize the Public Service Commission to issue refunds and interest would certainly not be consistent with this constitutionally implied responsibility.

Your third concern is whether the action of the Legislature as set forth in LB 835 as amended, constitutes a violation of Article IV, Section 20 of the Nebraska Constitution. This is perhaps the most difficult issue to address. Article IV, Section 20 first establishes the existence of the Public Service Commission, and then provides that "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." It is, of course, axiomatic that telephone companies are common carriers of communication services for hire and are subject to regulation by the commission. Block v. Lincoln Tel. and Tel., 170 Neb. 531, 103 N.W.2d 312 (1960).

In effect then, the Constitution grants certain powers to the commission, specifically as in this case the regulation of rates for common carriers, but also provides that the Legislature may limit those powers. The question that must be addressed here is the extent of the ability of the Legislature to limit the commission's constitutional powers. This was the issue that was thoroughly analyzed by the Nebraska Supreme Court in the case of State ex rel. State Railway Commission v. Ramsey, 151 Neb. 333,

37 N.W.2d 502 (1949), and it is clearly the pivotal decision in this regard. In that case the court examined the history of this constitutional provision and provided some rather specific guidelines and insights as to its meaning. The issue in that case was legislation which removed the commission's jurisdiction over common carriers by air and transferred it to another state agency.

At the outset we must apologize for the rather lengthy quotations from this case but they are essential to an understanding of the court's analysis and interpretation of the meaning of Article IV Section 20. The court first noted that:

> The commission is a regulatory body of constitutional origin not amenable to legislative interruption or limitation of its status or powers except by specific legislation, and, since the amendment to the Constitution creating it is an independent one, it is not construed as other sections of the article to which it has been assigned by the compiler.

Id. at 337. In its analysis the court relied on the meaning of the amendment at the time of its adoption and considered the historical facts and background surrounding its adoption. Id. at 340-41. In so doing, the court noted as follows:

> The desire and necessity for a strong, regulatory, constitutional body is indicated by the practically unanimous vote of the Legislature in submitting the proposal, the endorsement thereof by the platforms of the three principal political parties, the thorough and favorable discussion of its merits throughout the state, and its adoption by a very large majority of the voters participating in the election. (Omission of citation) The pertinent legislative history confirms these views. The bill (Senate File 196) originally provided: "There shall be a State Railway Commission" and its "powers and duties * * * shall include such regulation of rates, service and general control of common carriers as the legislature shall provide * * *." (Emphasis supplied) . . . . The language was changed before final approval by substituting "the" for "such" before the word "regulation"; "may" for "shall" preceding the word "provide"; and by adding the sentence "but in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this section." . . . The substitutions and additions made clearly eliminate any conclusion that it was intended that the powers of the commission should include only such regulations and

> control as the Legislature shall provide or permit by law. The language finally adopted positively provides that the powers of the commission shall include the regulation of all the enumerated matters with the right of the Legislature to control the manner in which the commission shall perform its independent constitutional duties, or to enter the field itself to the extent of "specific legislation." The conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent and for the time provided or permitted by the Legislature, in view of the history attesting that the attempts at regulation by it had been disappointing and ineffective, and that the people had rejected three proposals of the Legislature to amend the fundamental law to provide for executive officers to regulate and control common carriers only as prescribed by it. The legislative record of the bill shows the type of activity which was comprehended by the word "specific."

Id. at 343. (Emphasis added.)

> The amendment provides that the commission shall have constitutional authority to regulate common carriers "as the Legislature may provide by law," and "in the absence of specific legislation" the commission may exercise all such duties and powers. The right to regulate "as" the Legislature may provide means the right to regulate in the manner in which the Legislature provides. . . . The word "specific" in the phrase "in the absence of specific legislation" is synonymous with the word "particular." The term implies a definite restriction on the kind and extent of legislation over common carriers which is permissible by the Legislature. . . . Although the term is a relative one, it is limited to a particular, definite or precise thing, and hence is the very opposite of "general." It was not intended by the use of these words to authorize unlimited, broad, general legislation in reference to the control and regulation of common carriers.

Id. at 344. (Emphasis added).

The court then noted that "There have been many instances of specific legislation on subjects within the jurisdiction of the commission directing the manner in which it may exercise its

power." Id. at 346. In any event the court determined here that the particular legislation at issue "undertakes to legislate completely and generally with reference to that entire class of carriers." Id. at 344.

The court went on to quote from the case of Rivett Lumber & Coal Company v. Chicago & Northwestern Railway Company, 102 Neb. 492, 167 N.W. 570 (1918), as follows:

> While the Constitution authorizes the legislature to provide by law how these powers and duties of the commission shall be exercised, it was clearly not intended that the legislature should confer the general power to regulate rates, service or control generally of common carriers upon some other body or jurisdiction. If the legislature under the Constitution could confer jurisdiction upon the courts either to regulate rates or service or to control generally common carriers, it follows that it could confer jurisdiction to do all of the things enumerated in the railway commission statute, and the constitutional provision establishing a railway commission would then become nugatory. . . .

Id. at 346. Consequently, even though recognizing the presumption of constitutionality generally given to legislative acts, the court concluded in the Ramsey case that "The Legislature has no power to divest the State Railway Commission of its constitutional jurisdiction to regulate and control common carriers by air by transferring it to another body or jurisdiction." Id. at 347.

From this decision we can fairly conclude that while the Legislature may direct the manner in which the commission may conduct its regulation of common carriers, it cannot divest that jurisdiction which is specifically granted by the Constitution. This would be true whether the Legislature attempted to transfer that jurisdiction to another body as in the Ramsey case, or simply attempted to eliminate that jurisdiction altogether. Either result essentially renders the constitutional provision meaningless. In addition, the court noted that the Legislature may only direct the manner in which the commission conducts its regulation as provided by the Constitution through specific legislation, and not through "unlimited, broad, general legislation." Certainly the Legislature may provide parameters, guidelines, and specific limitations as to the exercise of the commission's regulation but may not impose limitations of a wholesale, sweeping, and general nature.

These then are the questions that must be addressed in regard to LB 835, as amended. Does this legislation, in effect, divest the commission of its constitutionally granted jurisdiction to regulate the rates, in this case of telephone common carriers, and does it likewise do so by way of legislation which completely and generally governs this area of regulation, as opposed to specific legislation which simply directs the manner in which that regulatory control is to be exercised? On its face, the bill does in fact divest jurisdiction of rate regulation from the commission as noted in section 3 subsection 1 wherein it provides that "Telecommunications companies shall not, however, be subject to <u>any rate regulation</u> by the commission and shall not be subject to provisions as to rates and charges prescribed in Chapter 75, articles 1 and 6." (Emphasis supplied).

A further reading of the bill, however, discloses three instances or situations in which the commission appears to retain a modicum of authority or responsibility in regard to telephone rates. These specific situations, however, are triggered only upon the occurrence of an event initiated by another party, and may not be commenced by the commission on its own authority. The first of these is found in subsection 3(3) wherein the commission may hear a complaint generated by ratepayers as to increases only in local exchange rates, where the complainants have obtained the necessary signatures by a petition process and filed a proper complaint with the commission. The second provision is found in subsection 3(4) where a telecommunications company may at its own volition file an application with the commission requesting it to prescribe fair and reasonable rates. The third such provision is found in subsection 3(7), wherein the commission may hold a hearing on its own motion, but only in the event that a telephone company has initiated a rate increase of more than 10 percent within any consecutive 12 month period. As indicated, the occurrence of these events are all beyond the control of the commission, and should they never occur, the commission simply has no authority under this bill in regard to the rates of telephone common carriers.

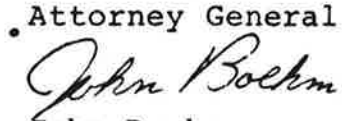
It should also be noted that subsections 3(3) and 3(7) apply only to local exchange rates, or the flat monthly charge for a telephone access line, as defined in the bill. All of the other many services and charges by the phone company, including intrastate interexchange and inter-LATA services, or toll calls, are completely removed from commission jurisdiction. Even subsection 3(4) which might arguably encompass more than just local exchange rates does not include any rates for toll calls. In addition, because of the specific language in the bill indicating that the commission shall have no authority to regulate any rates, one must question the extent of the

commission's powers in this regard under these three provisions. It would certainly appear under subsections 3(3) and 3(7) that the commission's function is solely to act as a hearing and fact finding body, and to implement those rates and charges which the company demonstrates are "not substantially in excess of the actual economic cost of providing such services," assuming such a standard can in the first place be determined. In short, even under these three provisions it would appear that the commission's authority to actually regulate rates has been effectively eliminated.

A strong argument can thus be made that, in effect, and as set forth in the bill itself, this legislation does in fact divest the Public Service Commission of its constitutionally granted authority to regulate the rates of telecommunications common carriers. This is particularly true when viewed from an historical perspective and the broad authority traditionally exercised by the commission in this area since its inception. Based on the court's analysis in the Ramsey case it appears that this type of regulation was the intention of the people when enacting this provision. Likewise, the broad sweeping provisions of this legislation concerning the regulation, or in actuality the absence of any regulation, of telephone rates does not appear to be the type of "specific" legislation which merely directs the manner in which the commission is to conduct its regulatory powers, as contemplated in the Ramsey case. To paraphrase that case, LB 835, as amended, "undertakes to legislate completely and generally with reference" to the entire area of rate regulation of telecommunications common carriers and goes beyond the mere provision of direction to the commission as to how it should exercise that authority. Taken in its entirety and under the principles set forth in the Ramsey case, we must therefore conclude, that LB 835, as amended, is an impermissible attempt by the Legislature to interfere with the constitutional authority granted to the commission by virtue of Article IV, Section 20 of the Nebraska Constitution.

Sincerely,

ROBERT M. SPIRE
Attorney General



John Boehm
Assistant Attorney General

JB/bae
cc: Patrick J. O'Donnell
Clerk of the Legislature
APPROVED:

Attorney General