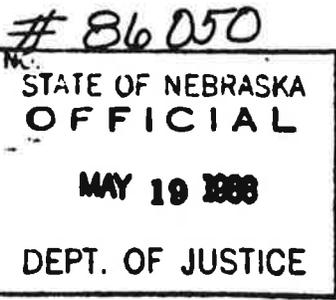


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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A. EUGENE CRUMP
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DATE: May 19, 1986

SUBJECT: Constitutionality of LB 835, 89th Legislature,
Second Session (1986) -- Due Process and Vagueness

REQUESTED BY: Donald D. Adams, Jr., Executive Secretary
Nebraska Public Service Commission

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

This is in response to your request for an opinion of May 5, 1986, concerning the constitutionality of LB 835, 89th Legislature, Second Session (1986). As you indicated, on April 4, 1986, we issued an Attorney General's Opinion, No. 86045, (copy enclosed), which stated that LB 835 as then before the Legislature was unconstitutional for the reasons that it did not provide adequate due process, contained vague and ambiguous terms, and resulted in an improper divesture of the constitutional delegation of authority to the Public Service Commission for the regulation of rates of telecommunications common carriers under Article IV, Section 20 of the Nebraska Constitution. Before the final passage of LB 835 by the Legislature it was amended in certain respects. Your question is whether our opinion on the constitutionality of LB 835 still applies to the final version of the bill as amended and passed by the Legislature.

The first amendment to LB 835 which relates directly to our previous opinion pertains to subsection 3(3) of LB 835 which establishes a procedure for the review of basic local exchange rates when a certain number of subscribers petition the Public Service Commission with a complaint as to a rate increase. This provision originally required the Public Service Commission to hold a hearing on the complaint within 60 days of the filing of the complaint. This provision was subsequently changed to establish a 90 day period for the conduct of the hearing. In our original opinion we indicated that a fundamental requirement of due process is the right to be heard "meaningfully". Because of the complex nature of a telephone rate case, the need to conduct discovery to obtain the necessary information from the phone company concerning the rationale and justifications for the increase, and the further need to analyze in detail this

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Donald D. Adams, Jr.

Page -2-

May 19, 1986

information in order to present a meaningful case before the Commission, we indicated that the arbitrary and extremely short 60 day time period would probably be inadequate for such a purpose, and hence would constitute a denial of due process.

For example, in a recent rate case filed by a major Nebraska telephone company, the company estimated that it spent 5,600 hours of time by over 40 people in preparing the initial filing and justification for its proposed rate increases with the Commission. The filing consists of over 200 pages, much of which contains detailed accounting and financial information. Moreover, this time spent does not include any preparation time for the hearing itself. To allow only 90 days for the subscribers challenging such a rate increase, or the Public Service Commission, to attempt to analyze this type of information in any meaningful fashion, and to conduct any necessary discovery, audit, or analysis of the company's operations in order to prepare an effective case is obviously grossly unfair. This is particularly true given the fact that the phone company will have been able to prepare its own justification for the rate increase well in advance of this 90 day period. The complainants would be denied an opportunity for a fair hearing and would thus not be provided adequate due process of law. The change in this time period from 60 to 90 days in the final version of the bill is thus hardly significant when one considers the complexity of the issues and the massive amount of information which must be analyzed and digested in order to properly challenge a telephone company's rate increase. In this regard, we believe that the change from 60 to 90 days is immaterial, and our original opinion is still valid in this respect.

It has been suggested that telephone rate payers are not entitled to the fundamental requirements of due process, because the rate setting function of the Public Service Commission has been described as a legislative rather than a judicial procedure. While it is true that the rate setting function has been characterized as legislative by the courts, it is highly questionable whether the procedure set forth in LB 835 could be characterized as "legislative rate setting". In any event, this traditional distinction has become somewhat blurred over the years particularly in view of the applicability the Nebraska Administrative Procedures Act. The Supreme Court, of course, has held that the Public Service Commission is an administrative body governed generally by the terms of the Nebraska Administrative Procedures Act. Yellow Cab Company v. Nebraska State Railway Commission, 175 Neb. 150, 120 N.W.2d 922 (1963). Likewise, the court recognizes that the Commission exercises a composite of legislative, administrative and judicial powers, Allen v. Omaha Transit Company, Inc., 187 Neb. 153, 187 N.W.2d 753 (1971), and

even during otherwise legislative proceedings, the Commission may exercise its judicial powers in weighing the evidence in the record, Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N.W.2d 633 (1972). This has more often been referred to as an exercise of "quasi-judicial power to make determination of fact and law," Allen v. Omaha Transit Company, Inc., supra at 159. Certainly, the complaint and hearing procedure initiated by telephone subscribers pursuant to LB 835 constitutes a contested case under the terms of the Nebraska Administrative Procedures Act, Neb.Rev.Stat. §84-913 (Reissue 1981). It is fundamental that under the Administrative Procedures Act a party is entitled to full due process rights and, of course, this would also seem to be obvious by virtue of the statutory right to a hearing established in LB 835 as well.

While the precise issue has never been addressed by the Nebraska courts, other courts have indicated that "the general statutory scheme for making and adjusting rates embraces the traditional requirements for due process, i.e. notice and hearing." Florida Power Corp. v. Hawkins, 367 S.2d 1011 at 1013, (Florida 1979). Likewise, in the case of Citizens of Florida v. Mayo, 333 S.2d 1 (Florida 1976), the court concluded that the public policy of the state favored traditional due process rights with regard to permanent and interim rate hearings. In the case of Citizens of the State v. Public Service Commission, 425 S.2d 534 (Florida 1982), the court noted that even in interim rate proceedings, intervenors, including public counsel, would be afforded all procedural due process rights to ensure their effective participation. Id. at 540. See also, Virginia Electric and Power Company v. State Corporation Commission, 312 S.E.2d 25, (Va. 1984), wherein the court held that the statutory scheme contemplated that all parties involved in rate making procedures be afforded fair notice and an opportunity to introduce evidence and be heard before the Commission renders its decision. Id. at 28. There would thus seem to be no substantial question that the subscribers, both under the provisions of LB 835, and the Nebraska Administrative Procedures Act, are entitled to the protections of due process and fair play in these proceedings.

In our previous opinion we also indicated that the language of sub-section 3(3) which provided that "at the hearing, 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" was unconstitutionally vague, because the term "substantially in excess of actual economic cost", was not adequately defined and provided no meaningful standard which could be applied by either the complainants, the telephone company, or the Public Service Commission in such proceedings. This sentence was eliminated

Donald D. Adams, Jr.
Page -4-
May 19, 1986

from the bill as finally passed, and replaced with language to the effect that the Commission was to hold a hearing after the filing "to determine if the rates as proposed are fair, just, and reasonable. The Commission may, . . . enter an order adjusting the rates and charges at issue, except that the Commission may not set any rate or charge below the actual cost of providing such service as established by the evidence received at the hearing."

While the term "fair, just and reasonable" as used in regard to rates is not defined, it is similar to the existing statutory requirement in Neb.Rev.Stat. §75-609 (Reissue 1981) which states that "in determining the valuation of telephone property for the purpose of fixing fair and reasonable rates, the Commission shall give consideration to the current value of such property and to such other factors as may be just and reasonable." While this language is also not specifically defined, the standard of what constitutes "fair and reasonable rates" has been developed through years of judicial and administrative proceedings. For example in Marquis v. Polk County Telephone Company, 100 Neb. 140 at 146, 158 N.W. 927 (1960), the court stated that "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

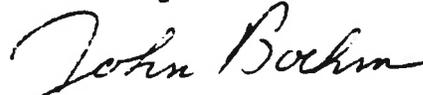
The term "actual cost of providing such service", as used in the final version of LB 835 is, however, more troublesome. As indicated, in our previous opinion, we determined that the term, "actual cost", had no common law significance and was without any well understood trade or technical meaning. State v. Northeast Poultry and Egg Company, 203 Minnesota 438, 281 N.W. 753 (1938), Boston Molasses Company v. Molasses Distributors Corporation, 274 Mass. 589, 175 N.E. 150 (1931). Likewise, an economist or an accountant would indicate that this provision referring to recovery of costs is nebulous at best because "cost" can be defined in many ways, including embedded economic cost, embedded accounting cost, incremental accounting cost, incremental economic cost, marginal economic cost, and so on. This lack of a definition of "cost" would thus result in a self serving situation on behalf of the telephone company, in which it could justify its rates by whatever method was expedient. Consequently, we must also conclude that the language "actual cost of providing such service" is inadequately defined, provides no ascertainable standards for application by the Public Service Commission in these proceedings, and is thus unconstitutionally vague.

Donald D. Adams, Jr.
Page -5-
May 19, 1986

These were the only significant changes which relate to our previous opinion and as indicated herein there still remain problems concerning due process and vagueness with LB 835 as finally passed by the Legislature. Other due process and vagueness problems noted in our original opinion were also apparently never corrected by the Legislature. In addition, none of the amendments dealt with that portion of our opinion which indicated that LB 835 violates Article IV, Section 20 of the Nebraska Constitution. Consequently, we must conclude that LB 835 as passed by the 1986 Legislature, is unconstitutional.

Sincerely,

ROBERT M. SPIRE
Attorney General

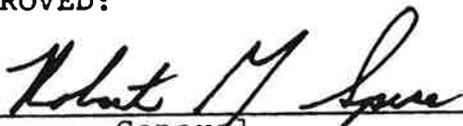


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APPROVED:



Attorney General