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February 15, 2001

Rex Carpenter  
General Manager  
Nebraska Rural Electric Association  
800 South 13<sup>th</sup> St.  
Box 82048  
Lincoln, NE 68501

RE: LB 243 (Split Rate Exception in the Event of Consolidation or Merger)

Dear Rex:

You have asked whether the electric rates charged by Electric Cooperative Corporations (ECCs) organized under *Neb. Rev. Stat.* §§ 70-701 to 70-738 and Electric Membership Associations (EMAs) organized under the Nebraska Non-Profit Corporation Act, *Neb. Rev. Stat.* §§ 21-1901 to 21-19,177, are subject to the fair, reasonable and non-discriminatory standard.

The answer is yes.

Unlike the statutory standard imposed on public power districts, statutes that govern ECCs do not specifically require rates that are fair, reasonable and non-discriminatory. See, *Neb. Rev. Stat.* § 70-725 (ECCs are required to charge "rates, fees, rents, or other charges, for electric energy that are sufficient to pay all operating and maintenance expenses for the prudent conduct of its business, and the principal of and interest on the obligations issued or assumed by the corporation in the performance of the purpose for which it was organized, and for the creation of reserves"); there are no statutes which govern rates for EMAs. Compare, *Neb. Rev. Stat.* § 70-655 (public power districts are required to set rates that are "fair, reasonable and non-discriminatory"); *McGinley v. Wheat Belt P. P. Dist.* 214 Neb. 178, 184, 332 N.W.2d 915 (1983) (affirms the fair, reasonable and non-discriminatory standard for public power districts.)

Nevertheless, common law and constitutional doctrines essentially impose the fair, reasonable and non-discriminatory standard on rates charged by public utilities. See, e.g., *Bard v. Cox Cable of Omaha, Inc.*, 226 Neb. 880, 885, 416 N.W.2d 4 (1987) (courts have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law); *Reimer v. City of O'Neill*, 189 Neb. 151, 153, 201 N.W.2d 706 (1972) (a public utility may classify its

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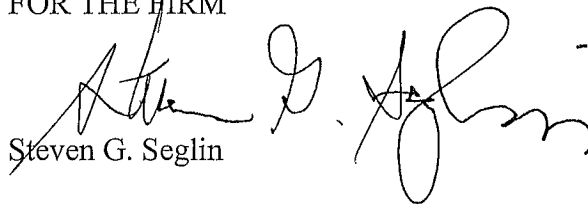
users for rate purposes if the classification is reasonable and not unjustly discriminatory; *Rutherford v. City of Omaha*, 183 Neb. 398, 404, 160 N.W.2d (1968)(statutes authorizing municipalities to establish equitable rates or charges for sewer declare the common law which prohibits unjust discrimination by a public utility. A difference in utility rates under substantially similar conditions of service may constitute unjust discrimination); *Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 107 N.W.2d 324 (1961) (where a water district furnishes water to the public at large it may classify users and charge different rates to different classes provided that the charges are reasonable and not discriminatory. Those engaged in serving water to the public generally may not make unreasonable and unjust discrimination either in service or rates among patrons).

Unless ECCs and EMAs are included in LB 243, they will not be subject to the so called split rate exception provided for in Section 3 of the bill in the event of a merger or consolidation.<sup>1</sup>

Sincerely,

FOR THE FIRM

Steven G. Seglin

A handwritten signature in black ink, appearing to read 'Steven G. Seglin', is written over the typed name. The signature is fluid and cursive.

SGS:rrk

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<sup>1</sup> See, *Neb. Rev. Stat.* § 70-628.01 which provides that any public power district that is interested by ownership, lease or otherwise in the operation of electric power plants, distribution systems, or transmission lines, either alone or in association with another district or districts, may sell, lease, combine, merge, or consolidate all or part of its property with the property of any other districts; *Neb. Rev. Stat.* § 70-728 which provides for the consolidation of two or more Electric Cooperative Corporations; and *Neb. Rev. Stat.* § 21-19,118-121 permits the merger of one or more non-profit corporations in a business or non-profit corporation.