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April 18, 2001

Rex Carpenter
General Manager
Nebraska Rural Electric Association
800 South 13th Street
PO Box 82048
Lincoln, NE 68501

Re: Election Subdivisions

Dear Rex:

I. QUESTION

Now that the 2000 federal census numbers are available, you have asked me to review the applicable statutes and principles governing election subdivisions of Public Power Districts (PPDs).

II. TIME FRAME

I am told that the official publication of the 2000 federal census occurred on or about March 15, 2001. A PPD has six (6) months to amend its charter, otherwise a complaint may be filed with the Nebraska Power Review Board (NPRB). *Neb. Rev. Stat.* §§ 70-604.05.

III. ANALYSIS

A. Statutory Requirement. PPDs that have previously divided their operating areas into subdivisions for the purposes of electing directors, should, within 6 months of the official publication of the most recent federal decennial census, reexamine the population distribution among its subdivisions for purposes of determining whether the population distribution among subdivisions is "substantially equal." If upon such examination a PPD finds that the distribution of the population among its subdivisions is not "substantially equal," then it should amend its charter to effect a substantially equal population among its election subdivisions. *Neb. Rev. Stat.* §§ 70-604(6) and 70-604.05.

B. Meaning of “Substantially Equal Population.” The language “substantially equal population” found in *Neb. Rev. Stat.* §§ 70-604(6) and 70-604.05, has not been interpreted by the Nebraska Supreme Court, and therefore is not completely clear under PPD law. Although language that is almost identical (“substantially equal *in* population”) found in *Neb. Rev. Stat.* § 5-108 (now *Neb. Rev. Stat.* § 32-553), has been interpreted by the Nebraska Supreme Court, the fact that PPDs are specifically excluded from § 32-553 which applies to all other political subdivisions, leads one to believe that the meaning of the language may not necessarily be the same.

Neb. Rev. Stat. § 5-108 was interpreted in *State ex Rel. Hansen v. Seiler*, 193 Neb. 9, 225 N.W.2d 662 (1975); *Pelzer v. Bellevue*, 198 Neb. 19, 251 N.W.2d 662 (1997) (*Pelzer I*); *Pelzer v. City of Bellevue*, 200 Neb. 541, 264 N.W.2d 653 (1978) (*Pelzer II*).

A review of *Pelzer II* is helpful in understanding the requirements and principles involved with one person-one vote under both federal and state law.

1. State Law. *Pelzer II* involved a challenge to redistricting ordinances passed by the City of Bellevue (City). The challenge was based on the grounds that the ordinances failed to comply with § 5-108 requiring that the most recent federal census be used to determine whether election districts are substantially equal in population in accordance with the one person-one vote principle.

The 1974 special federal census showed that the population of the area in question was 22,338. Absolute equality in population of the four election wards of the City would produce a population of 5,584 each. The evidence established that the population of the largest ward was 5,905, and the population of the smallest ward was 5,359. The total disparity between the largest and smallest wards was 9.73% of the mathematical ideal. Plaintiff’s position was that a difference of approximately 500 persons between the largest and smallest election districts constitutes a violation of the principle of one person-one vote.

The Nebraska Supreme Court in upholding the City of Bellevue’s plan stated:

“ . . . The City of Bellevue made a good faith effort to reapportion the voting districts of the City of Bellevue to make them substantially equal in population. The evidence is also uncontradicted that the city, in preparing the apportionment plan here, sought to keep neighborhoods together, group major streets, move as few people as possible from one district to another, and change existing district lines as little as possible. All of these are legitimate considerations in carrying out a rational governmental policy of apportionment. . . . Mathematical precision and exactness are impossible as a practical matter, and can be approached only within flexible limits. . . .”

Pelzer II, Neb at 545.

2. Federal Law. The Nebraska Supreme Court in *Pelzer II*, analyzing the meaning of “substantially equal” under state law, reviewed applicable opinions of the United States Supreme Court.

(a) Since *Backer v. Carr*, 369 U.S. 186 (1962), the one person-one vote principle has been an issue under the Equal Protection Clause of the 14th Amendment.

(b) *Gray v. Sanders*, 372 U.S. 368 (1963), extended the concept of political equality to all phases of state elections.

(c) In *Reynold v. Sims*, 377 U.S. 533 (1964), the Supreme Court recognized that mathematical exactness or precision is hardly a workable constitutional requirement, and that the element of practicality must be considered. While the court rejected the idea that there is some fixed minimum deviation from equality that is permissible in every case, the court concluded that **the facts of each case must be examined to determine whether the existing deviation is the product of proper state considerations.** (Emphasis added.)

(d) In *Burns v. Richardson*, 384 U.S. 73 (1966), the Supreme Court indicated that variations from a pure population standard might be justified, and that such state policy considerations as the integrity of political subdivisions, the maintenance of compactness, and contiguity in legislative districts, or the recognition of natural or historical boundary lines might be appropriately considered.

(e) The court, in *Swann v. Adams*, 385 U.S. 440(1967), quoted from *Roman v. Sincock*, 377 U.S. 695 (1964), noting that the Constitution permits “such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.”

(f) In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the court recognized that while fixed numerical standards which excuse population variances could not be set without regard to circumstances of each particular case, the extent to which equality may practicably be achieved may differ from state to state and from district to district. The court determined that the ‘as nearly as possible’ standard requires that the state make a good faith effort to achieve mathematical equality.

(g) The principle of one person-one vote is applicable to local governmental bodies as well as to state legislatures. See *Avery v. Midland County*, 390 U.S. 474 (1968). However, one should also consider the special purpose unit of government exception on page 4.

(h) In *Mahan v. Howell*, 410 U.S. 315 (1973), the Supreme Court upheld a state legislative apportionment plan which involved a total deviation range from the mathematical ideal of 16 per cent and said: “Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general

language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviation is permissible, and what is not.”

(i) In 1973, in two cases involving state legislative districts in which the deviation percentages were 7.83 percent and 9.9 percent, the Supreme Court determined that plaintiffs had failed to make a prima facie case of constitutional violation, and that no rational state interest need be shown. See, *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973). In the *Gaffney* case the Supreme Court noted particularly that census figures reflected population at only a single instant in time and were constantly changing and that “it makes little sense to conclude from relatively minor ‘census population’ variations among legislative districts that any person’s vote is being substantially diluted.” The court noted that the work of state or local government in carrying out the task of reapportionment should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved.”

3. Special-Purpose Unit of Government Exemption. Casting some doubt on whether the one person-one vote principle required by the due process clause of the 14th Amendment applies to PPD, is the special- purpose unit of government exemption established in *Saylor Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). The United State Supreme Court found in *Saylor*, that the principle of one person-one vote did not apply, and upheld a state law that limited voting for electing the directors of the Tulare Water District to eligible landowners and apportioned voting power according to the number of acres owned. The Court upheld this state law on the grounds that the Water District’s purpose was sufficiently specialized and narrow and its activities bear on landowners so disproportionately as to release it from the strict demands of the principle of one person-one vote. In *Ball v. James*, 451 U.S. 355 (1981), the Court held that a large public entity, the Salt River Project Agricultural Improvement and Power District, was not within the strict demands of the one person-one vote principle of the Equal Protection Clause of the 14th Amendment. Although the District was a major generator and supplier of hydroelectric power in the state and 40% of its power went to urban areas for non-agricultural uses, a property based election structure not consistent with one person-one vote was nonetheless upheld. The Court emphasized that the purpose of the District was specialized and narrow and that the District is not authorized to impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government such as maintenance of the streets, the operation of schools, or sanitation, health, or welfare services.

Even if the principle of one person-one vote applies to PPDs, there exists flexibility with respect to subdividing the election subdivisions and mathematical precision is not required.

C. PPDs Statutes.

1. General Rule. The General Rule as to what is to be included in a PPD's charter is stated in *Neb. Rev. Stat.* §§ 70-604.01 and 70-604.02. The Charter is to include the "operating area" where retail customers are served from PPD lines, together with areas served at wholesale under a firm power contract with an original term of 5 or more years.

2. Broad based representation. The Legislature, in *Neb. Rev. Stat.* § 70-609.01, stated as a matter of public policy, that a broad base representation of citizens should be on the boards of public power districts.

3. Counties without regard to population. *Neb. Rev. Stat.* § 70-612 allows a PPD operating in all or part of two or more counties with more than 50% rural customers, to form subdivisions by following county lines without regard to population if the NPRB finds that the interests of rural users of electricity will not be prejudiced.

4. Unserved municipalities. A PPD operating in 50 counties or less may, if the board finds it would be consistent with the best interests of the district or customers, either include or exclude all unserved municipalities with less than 1500 population in counties where the PPD operates. *Neb. Rev. Stat.* § 70-604.01(2).

5. Boundary lines coincide with precincts or dividing precincts. A PPD may add or delete from its operating area to make boundary lines coincide with precinct lines, or may divide precincts if desired. A PPD that wishes to divide a precinct, must do so by section, township and range, and obtain the approval of the Secretary of State and must pay added election costs caused by subdividing. *Neb. Rev. Stat.* § 70-604.03(1), (2), and (4).

6. Customers outside chartered area. Customers residing outside the chartered area of a PPD but served at the customer's principal residence may be certified eligible to vote and run for the board. *Neb. Rev. Stat.* § 70-604.03(3).

7. Amendment to charter. An amendment by a PPD to its charter shall not nullify, conflict with, or materially affect any other PPD. *Neb. Rev. Stat.* § 70-662(1).

8. Failure to amend charter. If a PPD fails to voluntarily amend its charter within 6 months after the publication of the federal census pursuant to *Neb. Rev. Stat.* § 70-604.05 anyone living in the area or any one or more districts may file a complaint with the NPRB. If that occurs:

(a) NPRB sets a hearing and orders the PPD to show cause why amended charter, eliminating such noncompliance, should not be filed for approval;

(b) at the hearing (after 33 days notice) PPD may answer or propose amended charter;

(c) burden of proof of noncompliance is on the complainant, and of the proposed amendments on the PPD;

(d) if NPRB finds charter should be amended and that any charter proposed is not acceptable, the NPRB after hearing from those concerned shall frame the amended charter.

(e) board members of noncomplying PPD are liable for civil penalty of \$50 for each day of noncompliance (in suit by Attorney General) after 30 days following final adjudication of noncompliance; board members cannot be paid compensation or expenses during the time they are liable to the penalty.

IV. SUMMARY

In summary, the strict constitutional requirement of one person-one vote in election subdivisions need not be applied to PPD charters. Even under the one person-one vote principle, considerable flexibility is allowed to meet legitimate objectives of the entity involved, particularly where congressional districting is not involved.

In *Abate v. Mundt*, 403 U.S. 182 (1971), the United States Supreme Court upheld a 11.9% deviation in a county legislative body, recognizing the following points:

(a) that viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal ends;

(b) that local legislative bodies, having fewer representatives and districts of smaller populations are entitled to greater percentage deviations than required for Congressional districting.

(c) that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.

Also, in *Mahan v. Howell*, 410 U.S. 315 (1973) the Court emphasized the importance of maintaining the integrity of local boundaries, in upholding the Virginia House of Delegates Districts which had a percentage deviation of 16.4% from the ideal district. A lower court had drawn boundaries at a deviation of about 10%, but in many instances did not follow political subdivision boundary lines. The Supreme Court reversed and upheld the 16.4% deviation for the reason that the legislature's maximum population percentage deviation was not excessive and resulted from the State's rational objective of preserving the integrity of political subdivisions lines.

Although *Neb. Rev. Stat. §§ 70-604(6) and 70-604.05* provide that when subdivisions are utilized they are to be of "substantially equal population," that language should be read in the light of other provisions of the PPD law. The legislature specifically recognized that situations could exist where it may not be in the best interest of PPD and its customers to divide voting precincts. Such division may produce greater equality in population, but it also may add additional costs and confusion. This is the reason the PPD law allows a district to adjust

boundary lines coincide with precinct lines, unless the PPD desires to divide precincts. If a PPD decides to divide precincts, it must do so by section, township and range, must obtain the approval of the Secretary of State (presumably to minimize election confusion) and must pay any added election costs which result from dividing precincts. *Neb. Rev. Stat.* §§ 70-604.03.

In addition, a PPD has the discretion to either include or exclude all unserved municipalities within its overall service area which are under 1500 population. *Neb. Rev. Stat.* §§ 70-604.01(2).

It should also be noted that *Neb. Rev. Stat.* §§ 70-612 allows a PPD consisting of 2 or more counties with more than 50% rural customers to form subdivisions by following county lines without regard to population if the PPD board finds that the interests of rural users of electricity will not be prejudiced. This indicates that the Legislature was not convinced that mathematical equality in population was necessary for PPD voting.

Accordingly, some flexibility should be utilized in setting subdivision boundaries and the population requirements of the subdivisions, especially when any disparity results from the desire to avoid dividing election precincts.

Very truly yours,

CROSBY GUENZEL LLP

By

Steven G. Seglin

SGS