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March 17, 2005

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
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Re: Telecommunications Services

Dear Jay:

You have asked that we update our January 22, 2003 opinion, which is set out below. On March 24, 2004, the United States Supreme Court decided *Nixon v. Missouri*, 541 U.S. 125, 158 L.Ed. 291 (2004). *Lexis* describes the procedural posture and an overview of the case as follows. "Respondents, including municipalities, municipal organizations and municipally owned utilities, petitioned Federal Communications Commission (FCC) for an order declaring Mo. Rev. Stat. § 392.410(7) preempted under 47 U.S.C. § 253 of the Telecommunications Act of 1996. The United States Court of Appeals for the Eighth Circuit reversed the FCC's decision to deny preemption. Certiorari was granted."

"Mo. Rev. Stat. § 392.410(7) barred state political subdivisions from providing or offering for sale a telecommunications service. Respondents contended that the state statute was preempted by 47 U.S.C. § 253, which authorized preemption of state and local laws and regulations expressly or effectively prohibiting the ability of any entity to provide telecommunications services. The FCC refused to declare the state statute preempted. The [Supreme] Court determined that, under § 253, the class of entities did not include the State's own subdivisions. Congress used "any entity" with a limited reference to any private entity when it cast the preemption net. Section 253 would not work like a normal preemptive statute if it applied to a governmental unit; it would often accomplish nothing, it would treat States differently depending on the formal structures of their law authorizing municipalities to function, and it would hold out no promise of national consistency."

The decision of the United States Supreme Court in *Nixon v. Missouri* provides in effect that a state may prohibit its political subdivisions including public power districts from offering telecommunications services for hire in that state. Therefore, the decision of the Nebraska Supreme Court's in *In re Application of Lincoln Electric System*, referred to below, no longer stands for the proposition that the State of Nebraska may not prohibit a political subdivision from offering telecommunications services for hire in Nebraska.

The Legislature of the State of Nebraska may therefore prohibit a political subdivision from offering telecommunications services in the state. In fact, the Nebraska Legislature has introduced a bill, L.B. 157, which amends *Neb. Rev. Stat.* § 86-128 (1)(b) in part by providing "[t]he commission shall not issue a certificate or permit to an agency or political subdivision of the state." The bill further amends *Neb. Rev. Stat.* § 86-128 (2) by providing "[n]o agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418 and 85-1501 to 85-1542 (not applicable here), or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications service for a fee."

The Conclusion reached below, as a result of *Nixon v. Missouri*, is even stronger since the State of Nebraska may prohibit a political subdivision from offering telecommunications for hire in the state. The conclusion reach below was based on the fact that there was no legislation authorizing a public power district to provide telecommunications for hire. If L.B. 157 passes, there will be two strikes against a public power district offering telecommunications service for hire in Nebraska. One, a legislative prohibition against offering the service and two, no legislative authority allowing a public power district to offer the service. In all other respects the opinion rendered January 22, 2003 is hereby reaffirmed.

REQUEST

You have asked that I review the recent Supreme Court decision involving Lincoln Electric System's ("LES") efforts to provide telecommunications services for-hire and discuss its application to public power districts.

LES CASE

On January 10, 2003, the Nebraska Supreme Court rendered its opinion in *In re Application of Lincoln Electric System*, 265 Neb. 70, ___ N.W.2d ___ (2003) hereinafter referred to as the "*LES case*."

FACTS

LES is an operating division of the City of Lincoln ("City"). LES filed an application with the Nebraska Public Service Commission (the "Commission") requesting that it be issued a contract carrier permit to provide competitive access transport services. LES sought authority

from the Commission to operate as a switchless facilities based provider of digital information transmission services over its fiber optic network facilities to and from customer user points. LES has constructed as part of its electric system a fiber optic network to meet its own telecommunication needs through the interconnection of its operations center, generation stations, and substations. LES sought contract carrier status from the Commission for the purpose of making excess capacity on its network available on a non-exclusive basis. LES proposed to provide digital transmission to and from user points within LES's geographic service area, including service to other licensed telecommunications carriers as a competitive access services provider. LES did not propose to use the public local and inter-exchange switched network and it expected to sell its proposed services to primarily business customers and governmental entities to meet their telecommunication needs.

The Nebraska Telecommunications Association ("NTA") formally intervened in the matter pending before the Commission and alleged that LES did not have the legal authority to engage in for-hire telecommunications services as a contract carrier. After a hearing the Commission entered an order finding that LES did not have the legal authority to provide the requested service. LES appealed the Commission's decision to the Nebraska Supreme Court ("Court").

COURT'S ANALYSIS

A. Issue.

The question on appeal was whether the Commission erred in finding that LES lacked legal authority to operate as a for-hire telecommunications carrier.

B. State Statutory Prohibitions.

Neb. Rev. Stat. § 86-128(1)(b) provides:

"The commission may only issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier after due notice and a hearing pursuant to commission rules and regulations. The Commission shall not issue a certificate or a permit to an agency or political subdivision of the state."

Neb. Rev. Stat. § 86-575(2) provides:

"No agency or political subdivision of the state shall provide telecommunications services for a fee ... or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee."

Hereinafter, the above two statutes are sometimes referred to collectively as the “unconstitutional statutes.”

C. Federal Doctrine of Preemption.

LES claims that the federal doctrine of preemption invalids the above two statutes. Federal preemption emanates from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal laws are invalid.¹ Under the Supremacy Clause, state courts have a concurrent duty to enforce federal law.² LES claims that preemption arises from the plain language of § 253(a) of the federal Telecommunications Act of 1996, which provides that “No State or local statute or regulations, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.” (Emphasis added.) LES argues that it is an “entity” which Congress has determined may not be prohibited by the state from providing telecommunications services.

On the other hand, NTA argues that under rules governing federal statutory construction, the phrase “any entity” does not include municipalities which are traditionally subject to overriding control of state legislatures, and thus the above two statutes are not preempted by federal law.

The Court noted that both arguments were supported by case law. However, it found the reasoning in *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002) the most persuasive. In the *Missouri* case, the court was guided by the United States Supreme Court decisions holding that the use of the modifier “any” denoted an unambiguous legislative intent to impart an expansive scope to a statutory term. Based on these decisions, the court found that a Missouri statute that prevented municipalities and municipally owned utilities from providing telecommunications services or facilities was preempted by 47 U.S.C. § 253(a). The Eighth Circuit Court, focusing on the phrase “any entity,” found that the plain meaning of the term “entity” included all business or governmental organizations, including municipalities. It further determined that the modifier “any” prohibits a narrow construction of a statute and that Congress’s use of “any” to modify “entity” signifies its intention to include within the statute all things that could be considered as entities. The Nebraska Supreme Court, adopting the reasoning of the Eighth Circuit Court, concluded that *Neb. Rev. Stat.* §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and therefore are unconstitutional.

¹ *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S.Const. art. VI, cl. 2.

² *Howlett v. Rose*, 496 U.S. 356 (1990).

D. Authority of City of Lincoln.

The Court next considered whether LES has the authority to seek a certificate of public convenience and necessity from the Commission to operate as a telecommunications carrier.

LES contends that the home rule charter of the City confers authority on LES to provide for-hire telecommunications services. The City adopted its home rule charter in 1917, pursuant to article XI, § 2 of the Nebraska Constitution. Article XI, § 2 permits a city having a population of more than 5,000 to “frame a charter for its own government, consistent with and subject to the constitution and laws of this state.” The Court in discussing the meaning of home rule charters stated:

The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. (Citations omitted). Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs. (Citations omitted.) While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. (Citations omitted.) While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. (Citations omitted.)

The Court then examined the provisions of the City’s charter to determine whether it was a grant or limitation of power. Article II of the Lincoln Charter was amended in 1922 and provides in relevant part:

The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers.

The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.

The Court found that the above language is a limitation of powers charter, not a grant of powers charter and that to determine whether the City has the power to operate as a for-hire telecommunications carrier, the Court need only consider whether the charter's broad authorization to engage in municipal powers and functions includes the authority to engage in for-hire telecommunications services. The Court stated as follows:

Consideration of our precedent and the dictates of logic lead us to conclude that the provision of for-hire telecommunications services by the city of Lincoln is incidental to or connected with its powers of municipal government granted under its limitation of powers charter. Although the charter does not grant the city authority to do all that the state could do, provision for-hire telecommunications, much like the provision of gasoline, serves a public purpose that is sufficiently related to the government of the municipality of the city of Lincoln. [Citation omitted]. The city seeks to provide telecommunications service by making efficient use of the facilities it already uses to provide public utilities, thus providing a further connection between the provision of for-hire telecommunications services and the necessary and incidental powers of a municipal government. (Citations omitted).

Id. at 83. The Court found on the basis of the above rationale, that the City's home rule charter authorizes it to provide for-hire telecommunications services.

E. Authority of LES.

The Court next decided whether the City had delegated its authority to LES to provide for-hire telecommunications services. LES is an operating division of the City and as such the Lincoln City Council grants LES all of its powers and authorities by ordinance. LES has been granted the authority to have general control of the electric system of the City including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances of the electric system.³ LES has also been granted the authority to do and perform all other acts necessary to efficiently maintain and operate the electric system including the management of the property, personnel, facilities and finances of the electric system.⁴

The Court determined that LES had not been delegated the authority to engage in for-hire telecommunications services since the facilities and property of LES would be used for an entirely different purpose. The ordinance granting LES its authority is limited to the efficient operation of the electric system. There is no evidence that the use of excess fiber optic capacity for the provision of for-hire telecommunications services is necessary to the efficient operation of the electric system.

³ Lincoln Municipal Code § 4.24 (2001).

⁴ Lincoln Municipal Code § 4.24.070 (2001).

SUMMARY OF LES DECISION.

The Court in essence determined:

(1) That § 253 (a) of the Telecommunications Act of 1996 preempted the unconstitutional statutes. 47 U.S.C. § 253 (a) prohibits a State, local statute, or regulation from precluding the ability of any entity to provide telecommunications services. The City is included within the term “any entity.”

(2) The City’s home rule charter authorizes it to provide for-hire telecommunications services.

(3) The City has not delegated its authority to provide telecommunications services for hire to LES.

The ruling of the unconstitutionality of the prohibitory statutes has broad application. However, the finding that the City has the authority to provide for-hire telecommunications services has limited application because an examination of each agency or political subdivision’s statutory authority must be performed before a decision can be reached. Thus, to determine whether an agency or political subdivision of the state has the requisite authority to provide such services, a case by case analysis must be performed regarding the statutory authority of each agency or political subdivision.

APPLICATION TO PUBLIC POWER DISTRICTS

A. PPDs were subject to prohibitions of Unconstitutional Statutes.

Prior to the declaration of unconstitutionality, *Neb. Rev. Stat.* § 86-128(1)(b) prohibited the Public Service Commission from issuing a certificate of convenience and necessity or a permit to an agency or political subdivision of the state. In addition, *Neb. Rev. Stat.* § 86-575(2) prohibited an agency or political subdivision of the state from providing telecommunication services for a fee and from being issued a certificate of public convenience and necessity as a telecommunications common carrier or a permit as a telecommunication contract carrier. Since public power districts are political subdivisions of the state,⁵ they were subject to the prohibitions of the two statutes before the *LES* decision. As a result of the declaration of unconstitutionality, however, public power districts are no longer prohibited from providing for-hire telecommunications services in the state.

⁵ *Neb. Rev. Stat.* § 70-602

B. Whether PPDs are authorized to provide for-hire telecommunications services as a result of the LES case.

As the Court determined in *LES*, the questions of whether a political subdivision is authorized to provide telecommunications services for-hire is a two-edged sword. The first edge of the sword is that the state cannot prohibit a political subdivision for providing the services because of the federal Telecommunications Act of 1996 (47 U.S.C. § 253(a)), which preempts any state statutes to the contrary. The second edge of the sword is that a political subdivision can only provide for-hire telecommunications services, if the Legislature grants it authority to provide such services. In *LES*, the Court found the authority in the City's home rule charter. Before a public power district can provide for-hire telecommunications services, similar authority must be found in the statutes that govern public power districts.

1. Does 47 U.S.C. § 253(a) in effect grant authority to provide Telecommunications Services.

Some may argue that a public power district or city has the requisite authority to provide telecommunications services for-hire since the state cannot prohibit the providing of such services by virtue of 47 U.S.C. § 253(a). Section 253(a) has no language which authorizes any agency or political subdivision of a state to provide telecommunications services. If it did, it would probably be unconstitutional under the Tenth Amendment to the United States Constitution.⁶ Furthermore, the doctrine of preemption is only applicable if there is a conflicting state law and does not grant authority to any entity.⁷

Assuming for the sake of argument that the Tenth Amendment was not applicable, the argument, I suppose, is that if the state cannot prohibit, then any entity can provide it. While this may have some modicum of validity with respect to a private corporation, it is not valid for an agency or political subdivision of the state which must derive its authority either from a state statute or the Nebraska constitution.⁸ Even a private corporation must have the authority in its articles or incorporation to engage in "any lawful business."⁹ Moreover, any entity claiming that it has the authority to provide the service must still obtain a certificate of public convenience and necessity from the Public Service Commission before it could provide telecommunications

⁶ See, e.g., *New York vU.S.*, 505 U.S. 144 (1992) ("Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'") (The take title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1995, 42 U.S.C. § 2021 b et seq., offers states, as an alternative to low level radioactive waste regulation pursuant to Congress' direction, the option of taking title to and possession of low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the state' failure to do so promptly. This provision crosses the line distinguishing encouragement for coercion, and thereby violates U.S. Const. amend. X.)

⁷ *LES case*, 265 Neb. at 75 ("Federal preemption arises from the Supremacy Clause of the U.S. constitution and is the concept that state laws that conflict with federal law are invalid.")

⁸ See *LES case*, 265 Neb. at 7 ("Having concluded that LES is not prohibited by state law from seeking a certificate of public convenience and necessity to operate as a telecommunications carrier, we must now consider whether it is authorized to do so")

⁹ See Nebraska Business Corporation Act, *Neb. Rev. Stat.* § 21-2024 (a private business can be incorporate "for any lawful purpose.")

services for-hire.¹⁰ Undoubtedly, the Public Service Commission will examine the authority of a public power district or city applying for a certificate or permit. If a public power district or city begin provisioning the service without a certificate or permit, it could be enjoined.¹¹

2. Compare authority of a City of the Primary class.

A city of the primary class has authority “to purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property facilities ...and preserve the interest of the city therein and to exercise such other and further powers that may be necessary or incident or appropriate to the powers of such city, including powers granted by the Constitution of Nebraska or exercised by or pursuant to a home rule charter adopted pursuant thereto. . . .¹² This general welfare provision is a comprehensive catch-all that arguably provides the municipality nearly unlimited power. It can be argued that this general welfare provision is broad enough to include the power to carry out proprietary functions such as providing telecommunications services. It is the functional equivalent of the power to incorporate a private business under state law “for any lawful purpose.”¹³ There is authority for the proposition that a governmental entity performing a proprietary function may do so in the same manner and to the same extent as a private corporation.¹⁴

C. Authority of Public Power Districts.

A public power district is “a public corporation and political subdivision” of the state.¹⁵ A public power district is limited in the types of businesses that it may engage in as follows:

“[a] district may be organized to engage only in the electric light and power business and the production and distribution of ethanol, only in the business of owning and operating irrigation works, in any business identified in 70-625, or in all of such businesses.”¹⁶

¹⁰ *Neb. Rev. Stat.* § 86-128(1)(a) (“...a person shall file an application and receive either a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier before such person may (1) offer any telecommunications service. . .”).

¹¹ *Neb. Rev. Stat.* § 86-801(16) defines “telecommunications company as “any person, firm, partnership, limited liability company, corporation, association, or governmental entity offering telecommunications service for a fee in Nebraska intrastate commerce.” (Emphasis added.) If a public power district offered telecommunications services for a fee, it is by definition a “telecommunications company.” A telecommunications company is required by § 86-805 to obtain a certificate from the Nebraska Public Service Commission authorizing it to offer and provide telecommunications services (not local service which is governed by another statute). If any telecommunications company violates, among others, § 86-805, any interested person may petition the district court in the county in which the violation occurred for an injunction, pursuant to § 86-811.

¹² *Neb. Rev. Stat.* § 15-201(6).

¹³ See Nebraska Business Corporation Act, *Neb. Rev. Stat.* § 21-2024.

¹⁴ See *Nelson-Johnston & Doudna v. Metropolitan Utilities Dist.*, 137 Neb. 871, 291 N.W. 558, 560 (1940) (“The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.”).

¹⁵ *Neb. Rev. Stat.* § 70-602.

¹⁶ *Neb. Rev. Stat.* § 70-604.

Section 70-625(2) also authorizes a public power district to “sell, lease, and service satellite television signal descrambling or decoding devices, satellite television programming, and equipment and services associated with such devices and programming . . . [provides for some exceptions not relevant to this analysis].”¹⁷

LB 660 passed in 1997¹⁸, removed the following prohibition contained in § 70-625 “except that nothing in this section shall authorize public power districts (1) to operate as common carriers engaged in furnishing communication services for hire in Nebraska intrastate commerce, . . .” The legislative history of LB 660 discloses the Legislature removed this explicit language prohibiting public power districts from providing telecommunications service for-hire, because it was preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253 (a).¹⁹ The Legislature seems to have forgotten the preemptive effect of § 253 (a) in 2001 when it passed LB 827, which enacted the statutes, determined to be unconstitutional in *LES*.

As previously noted, public power districts are “public corporations” and “political subdivisions” of the state.²⁰ As public corporations, public power districts “are subject to the plenary control of the Legislature”, and “in the exercise of such power the Legislature may authorize, limit, control, or even destroy such public corporations. . .”²¹ While public power districts are authorized “to operate in a successful and profitable manner,”²² the “public policy” underlying their creation was “the concept of electrical energy being furnished to the ultimate consumer at the lowest cost consistent with sound business judgment.”²³

Public power districts are “subject to the limitations, if any, of their petition which becomes their charter.”²⁴ Companies chartered for the purpose of supplying the public with electricity have the following authorities:

[such companies]. . . have such lawful rights and powers as are clearly and expressly granted, together with such implied . . . powers as are reasonably . . . necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld.²⁵

¹⁷ *Neb. Rev. Stat.* § 70-625(2).

¹⁸ 1997 Neb. Laws, LB 660, § 1.

¹⁹ Floor Debate on LB 660, 95th Leg., 1st Sess., 4250-51 (April 15, 1997) (Statement of Sen. Kristensen). It was noted by several members of the Legislature during debate on LB 660, that the deletion of the prohibitory language does not operate to authorize public power districts to provide intrastate telecommunications services for-hire. *Id.* at 42543-55 (Statement of Sen. Elmer); 4339 (Statement of Sen. Tyson); 4353 (Statements of Sens. Bromm and Kristensen).

²⁰ *Neb. Rev. Stat.* § 70-602.

²¹ *Wittler v. Baumgartner*, 180 Neb. 446, 451, 144 N.W.2d 62 (1966).

²² *Blankenship v. Omaha Pub. Power Dist.*, 195 Neb. 170, 173, 237 N.W.2d 86 (1976).

²³ *Custer Pub. Power Dist. v. Loup River Pub. Power Dist.*, 162 Neb. 300, 313, 75 N.W.2d 619 (1956).

²⁴ *Schroll v. City of Beatrice*, 169 Neb. 162, 166, 98 N.W.2d 790 (1959).

²⁵ *United Community Services v. Omaha Nat. Bank*, 162 Neb. 786, 794, 77 N.W.2d 576 (1956).

In *LES*, the Court examined Dillion's rule applicable to cities, and which is similar to the above limitation on Companies chartered to supply the public with electricity. The Court stated with respect to Dillion's rule:

Legislative grants of power are strictly construed pursuant to what has become known as Dillion's rule, which provides:

[A] municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.

270 Neb. at 83. The Court in *LES* however found that Dillion's rule was not applicable to the City's charter because the charter was a limitation of authority rather than a grant of authority. Therefore, Dillion's rule which requires a strict interpretation of legislative grants of powers was not applicable.²⁶

In 1997, the Attorney General of the State of Nebraska was requested by the Commission to examine whether Nebraska Public Power District had the authority to provide telecommunication services for-hire.²⁷ The Attorney General concluded:

[T]hat NPPD, even with the enactment of LB 660, § 1, removing the language in § 70-625 expressly prohibiting public power districts from engaging in providing communication services for hire, still lacks authority to engage in the business of providing telecommunications service for hire. NPPD is 'subject to the limitations' in the petition, and any amendments, which operate as its charter to do business. Under § 70-604(1), a public power district may be organized to engage only in specified business activities. These activities include: (1) the electric light and power business; (2) the production and distribution of ethanol; (3) the ownership and operation of irrigation works; or (4) all of such businesses. Based on these statutory limitations, neither NPPD (nor any other public power district) is authorized by its petition (which operates as its charter to do business) to provide telecommunications services for hire. While § 70-625 continues to provide that a public power district 'shall have all the usual powers of a corporation for public purposes', it provides that a district holds such powers "[s]ubject to the limitations of the petition for its creation and all amendments thereto, . . ." As public power districts are limited in the type of businesses in which they may engage, and are not specifically authorized to engage in the business of providing telecommunications services for hire, we conclude that

²⁶ *LES* case, 265 Neb. at 79.

²⁷ Neb.Op. Atty. Gen. No. 97045 (September 4, 1997).

public power districts are not authorized to provide telecommunications service for hire under existing Nebraska statutes.²⁸ *Id.* at 3.

I agree with the conclusion of the Attorney General. Moreover, the analysis of grants and limitations of authorities of subdivisions of the state in *LES*,²⁹ seems to reinforce the Attorney General's conclusion. The authority of public power districts is derived by a legislative grant of power, unlike that of the City's limitation of power derived from its home rule charter authorized by article XI, § 2 of the Nebraska Constitution, and therefore must be strictly construed. This limitation, precludes public power districts from providing telecommunications services for-hire.

IMPLICATIONS FOR DARK FIBER

Another issue to consider is the viability of the Dark Fiber statutes in light of the *LES* decision. *Neb. Rev. Stat.* §§ 86-574 to 86-578 authorizes an agency or political subdivision of the state to sell or lease dark fiber. Dark fiber is defined as "any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal."³⁰ The *LES* decision declared subsection (2) *Neb. Rev. Stat.* § 86-575 unconstitutional. Nevertheless, the balance of § 86-575, § 86-574 and §§ 86-576 to 86-578 remain unaffected by the *LES* decision.

Before the *LES* decision, *Neb. Rev. Stat.* § 86-575 provided as follows:

(1) Any agency or political subdivision of the state may:

- (a) Own dark fiber;
- (b) Sell dark fiber pursuant to 86-576; and
- (c) Lease dark fiber pursuant to section 86-577.

(2) No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized by sections [not applicable here] or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services for a fee. (Emphasis added).

As a result of the decision in *LES*, the underlined language above is no longer the law. Article 70, charter 6 authorizes public power districts to sell or lease dark fiber pursuant to sections 86-574 to 86-578.³¹ Can the declaration of unconstitutionality of the underlined portion of § 86-575(2) mean that a public power district that sells or leases dark fiber is authorized to provide telecommunications services for a fee? Probably not. Although the *LES* decision removed the prohibition of providing telecommunications services for a fee by an agency or

²⁸ Public power districts have one additional authority that the Attorney General failed to mention in his opinion, the authority to "sell, lease, and service satellite television signal descrambling or decoding devices, satellite television programming, and equipment and services associated with such devices and programming." *Neb. Rev. Stat.* § 70-625(2).

²⁹ *LES* case, 265 Neb. at 78 and 79.

³⁰ *Neb. Rev. Stat.* § 86-574.

³¹ *Neb. Rev. Stat.* § 70-625(4).

political subdivision of the state, the sale or lease of dark fiber is not providing telecommunications.³² The provision of dark fiber is merely a conduit that has the ability to provide telecommunications when the appropriate equipment is connected to light (provide a signal to) the dark fiber.³³ Therefore, such an argument would be an unwarranted stretch.

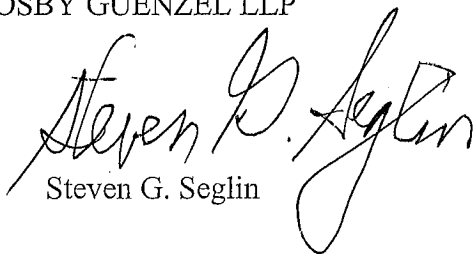
CONCLUSION

Based on the above analysis, it is my opinion that public power districts do not have the requisite authority to provide telecommunications for-hire.

Very truly yours,

CROSBY GUENZEL LLP

By


Steven G. Seglin

³² *Neb. Rev. Stat.* § 86-802(14) defines “communications” as the “means the transmission, between or among points specified by the subscriber, of information of the subscriber’s choosing, without a change in the form or content of the information as sent or received.”

³³ *Neb. Rev. Stat.* § 86-574 provides that: “. . . dark fiber means any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal.”