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Attorney General Opinion No. 87-_2__

To: The Honorable Elizabeth Allan-Hodge
Idaho State Representative
Statehouse Mail

Per Request for Attorney General Opinion

QUESTION PRESENTED:

Do the exclusive franchise provisions of proposed Idaho Code § 62-616 of the 1987 House Bill 149 violate art. 11, § 13 of the Idaho Constitution?

CONCLUSION:

No. The exclusive franchise language of House Bill 149 can be read in a manner that is not at odds with the Idaho Constitution and a court would be inclined to read the language in this manner to preserve its presumed constitutionality.

ANALYSIS:

Your inquiry of February 20, 1987 seeks our opinion on two separate issues regarding the telephone deregulation bill. Your first inquiry regarding the bill concerns art. 11, § 13, of the Idaho Constitution. Your second set of inquiries concerns policy issues that relate to the entire deregulation bill. Within the time available, we have endeavored to research and give you our best advice regarding the constitutional issue. However, the second set of inquiries goes beyond legal issues. As such, it is not possible for our Office to answer those questions.

1. The Language of the Constitutional Provision Itself.

Article 11, § 13, has two parts. The first provides: "Any... corporation...shall have the right to construct and maintain lines of telegraph or telephone within the state, and connect the same with other lines;... ." The second provides: "[T]he legislature shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

The first part of this section grants rights to telephone companies to construct, maintain and connect telephone lines. From this unqualified language, it could be argued that the framers of the Idaho Constitution intended to prohibit any direct grant of exclusive telephone franchises. However, the right conferred on telephone companies to construct, maintain and connect lines is subject to the retained police power of the legislature to pass general laws providing for "reasonable regulations" giving effect to the right. As we shall see below, both principles have been respected in Idaho since statehood.

2. Judicial Construction of this Section in Neighboring States.

The Idaho Supreme Court has not provided any authoritative judicial construction of this section addressing the question presented. The only Idaho cases construing the section--Mountain States Telephone and Telegraph Company v. Kelley, 93 Idaho 226, 459 P.2d 349 (1969), cert. denied, 297 U.S. 42, 90 S.Ct. 816, 25 L.Ed.2d 44 (1970), and State v. Idaho Power Company, 81 Idaho 47, 346 P.2d 596 (1957)--address other issues.

The fact that the Idaho courts have not construed art. 11, § 13, forces us to look for judicial guidance elsewhere. Both the Montana and Washington Constitutions of 1889 contained provisions nearly identical to art. 11, § 13, of the Idaho Constitution of 1890. Both were construed within a generation of their adoption. The courts, in each instance, affirmed that the constitutional provisions were not self-executing and would lay dormant till given vitality by legislative enactment. In each instance, the early challenges occurred when the legislature gave cities the power to regulate rights-of-way over which telephone companies proposed to erect lines.

In Montana, the state legislature enacted a uniform, general law allowing telephone companies to erect lines. The City of Red Lodge demanded that Rocky Mountain Bell Telephone Company install its lines underground in traversing the city. The Montana Supreme Court stated that the statute allowing erection of overhead telephone lines was "a general law, enacted in obedience to a command of the Constitution, and to provide means of enjoying a privilege originating with that instrument." State v. Mayor of City of Red Lodge, 76 P. 758, 760 (1904) (emphasis added). The court held that the city's insistence on underground transmission lines would interfere with the telephone company's constitutional right to construct telephone lines.

A year later, the Montana Legislature enacted a law strengthening the hand of cities to regulate telephone lines crossing their boundaries. The Montana Supreme Court struck down the new law on the ground that it failed to give effect to the constitutional privilege granted telephone companies to construct and maintain lines:

> The command in section 14, art. 15 of the Constitution, above, to the Legislature, is to pass a general law of uniform operation, with reasonable provisions, which will enable the telephone business to be conducted in this state as it was generally conducted through the country in 1889; that is, access to the business centers--the cities and towns--must be granted, and any law which falls short of this does not comply with the constitutional provision above.

State ex rel. Crumb v. Mayor of City of Helena, 85 P. 744, 745 (1906).

The Supreme Court of Washington considered its analogous constitutional provision in the case of State ex rel. Spokane & B.C. Telephone & Telegraph Co., v. City of Spokane, 63 P. 1116 (1901). In that case a long-distance telephone company providing service from the Canadian border to Spokane applied to the city of Spokane for permission to construct its own telephone lines within the city. Permission was denied. Suit was brought, and the Supreme Court of Washington considered art. 1, § 12, of its

constitution, containing language similar to art. 11, § 13 of the Idaho Constitution.

The Supreme Court of Washington upheld the city council's action on the ground that a local municipality is a "competent authority" to determine when the saturation point is reached and when additional utility lines would interfere with public access to streets and highways.

The result was that municipalities were free to regulate construction of telephone and telegraph lines in public rights-of-way. However, the Washington Supreme Court expressly noted that the municipality could not have awarded an exclusive franchise to a single utility:

> The argument against the power to grant an exclusive privilege is sound, and is fully sustained in the rule announced by this court in [citation omitted]. ...If the city had attempted to grant such privileges to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. (Emphasis added.)

63 P. at 1118.

The Montana and Washington decisions on their face reach opposite results. In Montana, the state supreme court held that municipalities could not refuse to allow the construction of telephone lines in city limits. In Washington, such conduct was allowed but only with the proviso that municipalities could not expressly grant exclusive privileges either by ordinance or by contract.

The cases can be reconciled by returning to first principles. The relevant constitutional provisions grant any corporation the right to construct, maintain or connect telephone lines. However, the same provisions authorize the legislature to pass general laws providing for "reasonable regulations" to give effect to this section. Thus, a fact-finding body of competent authority may grant or withhold the right to establish a telephone company or to connect to the network if it finds that construction

of the telephone system would "incommode the public". State ex rel. Rich v. Idaho Power Co., 81 Idaho 487, 530, 346 P.2d 596 (1959).

3. The Public Utilities Commission Era in Idaho.

The most comprehensive legislative enactment of uniform laws providing "reasonable regulation" of telephone utilities in Idaho is the Public Utilities Law of 1913. While the precise relation of that law to art. 11, § 13 has not been spelled out by the Idaho Supreme Court, the court has over the past seven decades laid down the fundamental principles guiding interpretation of all such laws.

The landmark case interpreting the Public Utilities Law was decided only one year after its passage. In Idaho Power & Light Company v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914), the Idaho Supreme Court addressed the same question at issue here, namely, whether the legislature could forbid competition and duplication of services by granting an exclusive franchise to a single regulated monopoly. The Idaho Supreme Court answered the question in the affirmative:

> There is nothing in the constitution that prohibits the legislature from enacting laws prohibiting competition between public utility corporations, and the legislature of this state no doubt concluded...that free competition between as many companies or as many persons as might desire to put up wires in the streets is impracticable and not for the best interests of the people.

26 Idaho at 241. While the Blomquist court expressly addressed only the electric utility industry, its principles apply to all natural monopolies. Indeed, in the same paragraph quoted above, the court referenced a classic text on telephone regulation.

Even as it announced this Magna Carta of regulation of utility monopolies, the Idaho Supreme Court was careful to leave open the door to competition when the public convenience and necessity might so require:

> The public utilities act merely declares the will of the people as expressed through the

> legislature, to the effect that competition between public utility corporations of the classes specified shall be allowed only where public convenience and necessity demand it, ... (Emphasis added.)

Id. at 248. And, again:

> The policy of said act is not to permit a duplication of plants where it is not for the welfare, convenience and necessity of the people, and under said act the body first to determine that question is the public utilities commission. (Emphasis added.)

Id. at 259.

Only one year later, in 1915, the Public Utilities Commission made clear its own understanding of the Blomquist principles. The Commission granted an exclusive franchise to Idaho Light & Power Company on the grounds that it had pioneered service in the field, was rendering adequate service, charged cheap rates and, in general, that the point of saturation had been reached in the service territory. Under such circumstances, the Commission held:

> The decision of the law is that the utility shall be protected within such field; but when any one of these conditions is lacking, the public convenience may often be served by allowing competition to come in. (Emphasis added.)

In re Idaho Light & Power Co., P.U.R. 1915A 2.

By 1931, the battleground had shifted to the gas industry. The Public Utilities Commission granted a certificate of convenience and necessity to a natural gas company to serve the city of Pocatello, despite the fact that a utility providing manufactured gas already had a certificate to serve that city and had been providing adequate service for 20 years. The Idaho Supreme Court upheld the decision of the P.U.C. to allow competition on the ground that the natural gas industry was a superior technology which appeared destined to replace the manufactured gas industry in providing service to the public:

> If the new service offered has no advantage over the old from the public viewpoint, other than mere competition under similar basic costs, then the convenience and necessity for it, under the public utility law, would be wanting and the utility in the field would be entitled to protection against duplication and unwarranted competition. However, if an applicant can and does in good faith offer a better or a broader service a different question is presented. In such case the applicant is offering the public more than sheer competition. In reality it is offering a different service.

McFayden v. Public Utilities Consolidated Corporation, 50 Idaho 651, 657, 299 P. 671 (1931).

The fact that the manufactured gas utility had a large investment in its facilities and, generally speaking, had a right to protection against competing utilities was of no avail:

> Protecting existing investments, however, from even wasteful competition must be treated as secondary to the first and most fundamental obligation of securing adequate service to the public.

Id. Thus, the certificate of public convenience and necessity does not provide an "exclusive franchise" in the sense of perpetual protection against competitors with superior technologies. As the court in McFayden stated:

> A service that is inferior is not adequate. The granting or withholding of the certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which is proposed to carry on for the service of the public.

Id.

In the 1970's, mobile radio paging systems appeared in the major metropolitan areas of Idaho. Such systems were found to be "telephone corporations" under Idaho Code § 61-121 and were required to obtain certificates of public convenience and necessity from the P.U.C. It was immediately obvious, however, that the mobile radio paging business was not a natural monopoly and that the public would best be served by allowing competition within the certificated service territories. Competing and overlapping certificates were the norm. By 1983, it had become clear that competition was the best regulator of mobile radio paging systems and the mobile telephone business was deregulated by the Idaho legislature.

Beginning in 1981, the Public Utilities Commission repeatedly heard complaints of poor service by the Silver Star Telephone Company during rate proceedings initiated by the company. After repeated failures by the company to remedy the problems, the P.U.C. initiated a proceeding to withdraw the certificate of public convenience and necessity enjoyed by Silver Star. After improvements were made, the Commission allowed Silver Star to retain its certificate. Nonetheless, the proceeding stands for the unquestioned rights of the P.U.C. to cancel a certificate if a utility fails to provide adequate service to its customers.

Finally, in 1984, the Public Utilities Commission was faced with two competing utilities each desiring to serve a handful of customers living at the base of Hells Canyon. The customers actually lived within the certificated area of Cambridge Telephone Company, but that utility had no lines in the canyon. A neighboring utility, Pine Telephone, had lines nearby. The P.U.C. removed the canyon area from the certificated area of Cambridge and awarded the area to Pine. The Idaho Supreme Court upheld the Commission decision against the claim that a certificate of public convenience and necessity is perpetual and exclusive in nature:

> "Despite the prior granting of a franchise to one company, therefore, it may not be assumed that the franchise is permanent and exclusive for the indefinite future when circumstances require reassessment."

Cambridge Telephone Co. v. Pine Telephone System, Inc., 109 Idaho 875, 879, 712 P.2d 576 (1985) (quoting approvingly from Empire

Elec. Ass'n v. Public Service Comm'n, 604 P.2d 930, 933 (Utah 1979)).

The Cambridge Telephone case brings us back full circle to Blomquist and its central holding that the P.U.C. can award an exclusive certificate of public convenience and necessity to a single utility in a natural monopoly situation where duplication of services would lead to economic waste. We must assume that the Idaho Supreme Court was familiar with art. 11, § 13 of the Idaho Constitution and its provision that "Any ... corporation ... shall have the right to construct and maintain lines of telegraph and telephone within the state, ..." Clearly, the court could not have allowed the P.U.C. to award the exclusive certificate to either Cambridge or Pine if the Idaho Constitution mandated unfettered competition at all times and in all circumstances.

The lessons to be learned after seven decades of enactments by the legislature, decisions by the P.U.C. and review by the Idaho Supreme Court are clear. If the telephone business at issue is not a natural monopoly (as in the case of mobile phones), then exclusive franchises will not be granted. In the more common situation, certificates of public convenience and necessity do grant exclusive franchises to regulated utilities. Such exclusive franchises are valuable property rights protected by due process rights of the holder. Nonetheless, exclusive franchises are not perpetual in nature. Nor are they unmodifiable. If the public is not provided with adequate service by the certificated utility, the certificate can be withdrawn. If a competitor can provide the same service at substantially lower costs, the incumbent utility can be forced to yield up its certificate. If a new and competing technology will better serve the public, then competition will be allowed within the certificated area. In short, the certificate of public convenience and necessity serves but one master, the public--not the entrenched monopolist, and not the intruding competitor.

4. Application of Principles to House Bill 149.

The principles enunciated above must guide us in answering the question whether H.B. 149 can survive constitutional scrutiny. The section in question states:

> 62-616. STATUS OF EXISTING OR EXPANDED CERTIFICATES OF PUBLIC CONVENIENCE AND

> NECESSITY, AND EXISTING AREAS OF SERVICE. (1) For telephone corporations, or their successors in interest, which remain subject to title 61, Idaho Code, and which provide basic local exchange service, their existing certificates of public convenience and necessity shall represent an exclusive service area franchise for telecommunication services within the certificated area of such telephone corporation, unless such telephone corporation consents to the provision of such services by another telephone corporation. (Emphasis added.)

The question is whether the grant of "an exclusive service area franchise" to existing certificated utilities is in violation of art. 11, § 13 of the Idaho Constitution. We are guided by the two cardinal principles of statutory interpretation that a validly enacted statute is presumed constitutional and that a court will adopt a reading of a statute that renders it constitutional if at all possible. State v. Hanson, 81 Idaho 403, 409, 342 P.2d 706 (1959).

If the intent of the proposed statutory language is to grant exclusive franchises that are perpetual in duration and unmodifiable in content, then the section would be unconstitutional. A corporation holding such a franchise would no longer be accountable for providing adequate service and would be insulated from competition from alternative and superior technologies. Such a construction of the section would be at odds with seven decades of legislative enactments, P.U.C. practice and Idaho Supreme Court opinions. Such a construction would most probably violate art. 11, § 13 of the Idaho Constitution in both its grant of a privilege to engage in the telephone business and its enactment of "reasonable regulations" to carry out that privilege. Most importantly, such a construction would clearly violate the provisions of art. 11, § 8 of the Idaho Constitution, which states that:

> The police powers of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of

> individuals, or the general well being of the state.

Similarly, if the section is construed to insulate the holder of a certificate from accountability to the public, it would violate art. 11, § 18 of the Idaho Constitution and its provisions against restraint of trade. The Idaho Supreme Court has construed that constitutional provision as standing for the proposition that a corporation vested with monopoly powers to serve the public becomes a utility subject to governmental regulation. Blomquist, 26 Idaho at 260.

Finally, if the "exclusive service area franchise" of proposed Idaho Code § 62-616 were construed to deny the public the right to insist upon high quality service at reasonable rates, then the section would also violate art. 1, § 18 of the Idaho Constitution and its guarantee that "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, ..."

We cannot lightly ascribe such an intent to the legislature. Rather, the intent of the proposed section appears to be simply that existing certificates of public convenience and necessity will continue to be recognized for the valuable property rights that they are. The legislature must be presumed to know and adopt the construction put upon such certificates by the Idaho Supreme Court only 15 months ago in the Cambridge Telephone case:

> Therefore, we conclude that the commission's order [partially rescinding the certificate of Cambridge Telephone and awarding the service area to a better located competitor] did not unconstitutionally deprive Cambridge of its certificate. The certificate was modifiable by a non-arbitrary application of a public convenience and necessity standard, a condition of the certificate, based upon substantial competent evidence. (Emphasis added.)

Cambridge Telephone, 109 Idaho at 880.

We conclude therefore that the phrase "exclusive service area franchise" in H.B. 149 is not a perpetual and unmodifiable license

to provide inadequate service or to be free from competition from companies that can provide similar service at more reasonable rates or from companies that meet the public need with alternative and superior technologies. Read in this manner, the phrase would not survive constitutional scrutiny by a reviewing court. Such a reading also would not be consistent with the legislature's announced intent in H.B. 149, namely:

> There is a need for establishing legislation to protect and maintain high-quality universal telecommunications at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition. (Emphasis added.)

By reading the phrase "exclusive service area franchise" to mean simply that existing certificated utilities retain the valuable property right of their existing certificates, subject to administrative and judicial review if they fail to provide adequate and technologically up-to-date service at reasonable rates, we are able to conclude that H.B. 149 will pass constitutional muster.

OTHER ISSUES.

Your second set of inquiries is as follows:

1. Is there any area of this bill that could potentially prevent or prohibit competition? If so, where?

2. Are there adequate provisions for consumers' protection relevant to subscriber complaints?

3. Does the provision for a sliding scale of access charges benefit both small and large companies dealing with long distance service?

4. Are there areas that require clarification to prevent possible abuse?

5. Regarding 62-615 page seven and eight of the bill: Would you please explain how that section translates into cost to the consumer?

6. What is the status of a multiple line customer?

As indicated above, these questions do not involve legal issues, but rather touch upon policy considerations. For example, in order to answer question 1 regarding the possibility of competition being prevented or prohibited, an intricate understanding of the method and manner in which the telephone companies currently operate would be required, together with an equally comprehensive technical understanding of the factual basis upon which companies will operate in the future should the bill pass. Our Office does not possess this technical expertise or knowledge. The same is true for the second question regarding consumer protection complaints. For the past several years, all complaints regarding telephone service have been processed by the Public Utilities Commission. It would not be appropriate for our Office to comment upon something of which we have no knowledge.

The Public Utilities Commission is a legislatively created body and operates as an arm of the legislature. As such, these questions should be answered by the Public Utilities Commissioners themselves. Those individuals have the skill and expertise, together with the detailed factual knowledge required, to give advice on these very factually oriented non-legal policy issues.

DATED this 2nd day of March, 1987.

Attorney General
State of Idaho

JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy Attorney General

AUTHORITIES CONSIDERED:

1. Constitutions:
Idaho Constitution, art. 1, § 18.
Idaho Constitution, art. 11, § 8.
Idaho Constitution, art. 11, § 13.
Idaho Constitution, art. 11, § 18.

Montana Constitution, art. 15, § 14.
Washington Constitution, art. 1, § 12.

2. Statutes:
Idaho Code § 61-121.

3. Idaho Cases:
Mountain States Telephone and Telegraph Company v. Kelley, 93 Idaho 226, 459 P.2d 349 (1969).
State v. Idaho Power Company, 81 Idaho 47, 346 P.2d 596 (1957).
State ex rel. Rich v. Idaho Power Company, 81 Idaho 487, 346 P.2d 596 (1959).
Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 141 P. 1083 (1914).
McFayden v. Public Utilities Consolidated Corporation, 50 Idaho 651, 299 P. 671 (1931).
Cambridge Telephone Co. v. Pine Telephone System, Inc., 109 Idaho 875, 712 P.2d 576 (1985).
State v. Hanson, 81 Idaho 403, 342 P.2d 706 (1959).

4. Cases from Other Jurisdictions:
State v. Mayor of City of Red Lodge, 76 P. 758 (Mont. 1904).
State ex rel. Crumb v. Mayor of City of Helena, 85 P. 744 (Mont. 1906).
State ex rel. Spokane and B.C. Telephone and Telegraph Co. v. City of Spokane, 63 P. 1116 (Wash. 1901).
Empire Elec. Ass'n v. Public Service Comm'n, 604 P.2d 930 (Utah 1979).