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The Honorable Vearl Crystal
Idaho State Senator

The Honorable John T. Peavey
Idaho State Senator

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION
AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Dear Senators Crystal and Peavey:

On March 17, 1986, the Office of the Attorney General received your request for an opinion regarding S.B. 1430. The request raised issues of constitutionality for two sections of the proposed telecommunication deregulation bill.

1. Proposed § 62-606 sets forth a procedure by which a deregulated telephone corporation could be reregulated by the Idaho Public Utilities Commission. The question is raised whether the reimposition of regulation over a previously deregulated telephone corporation, or any part thereof, constitutes a taking of private property by the State of Idaho requiring the payment of just compensation pursuant to art. 1, § 14 of the Constitution of the State of Idaho.

It is our opinion that such action does not constitute a taking that would require just compensation. The United States Supreme Court has recently issued an opinion in John L. Connolly et al. v. Pension Benefit Guarantee Corporation, 54 U.S.L.W. 4208 (1986). In this case the Court outlines the test for identifying a "taking" forbidden by the Fifth Amendment, identifying three factors of particular significance: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

Regarding the nature of the governmental action, in this bill as in the Connolly case, the government does not physically invade or permanently appropriate any assets for its own use.

In Connolly, the Court found that the subject legislation safeguarded participants in multi-employer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. The Court found that this interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and thus, under the courts three-part test, does not constitute a taking requiring government compensation.

Likewise, the reregulation of a telephone corporation would occur under S.B. 1430 only if 10 percent or more of the customers of the corporation complained that the telephone corporation had allowed its noncompetitive services exempted from regulation to deteriorate or that rates for basic local exchange service or message telecommunication service had risen to a level that impaired the availability of universal telecommunication services. Thus, the proposed legislation safeguards the public interest by providing a mechanism for reregulation in the event anticipated results of the legislation are not realized. This falls in the category of a public program adjusting the benefits and burdens of economic life to promote the common good and would not constitute a taking requiring compensation. The reregulation of a utility service is no more a taking than the initial regulation of that service was.

2. Section 62-614 of S.B. 1430 grants a limitation of liability to a telephone corporation deregulated pursuant to the provisions of Title 62. Your letter points out that not all telecommunications corporations doing business in the State of Idaho at this time are certificated by the Public Utilities Commission. The Commission's jurisdiction does not extend to municipal or cooperative telephone corporations. Therefore, those entities would not be able to elect deregulation under the proposed Title 62. Consequently, they would not benefit from the provisions of 62-614 by being immune from liability for damages arising from any interruption of service or delay or failure to provide service or facilities in the absence of gross negligence or willful misconduct. A question is raised whether the existence of this limitation of liability constitutes an impermissible denial of equal protection because not all telephone corporations will benefit from it.

It is our opinion that there is no denial of equal protection to allow only the class of previously regulated telephone utilities to enjoy that benefit without allowing the never regulated telephone companies to enjoy such a benefit. The present distinction between investor-owned and cooperative and municipal telephone service providers has never been seen as an equal protection problem. One must assume that the

legislature had a valid reason for distinguishing between those types of companies and that a continued differentiation is likewise based on valid considerations.

The United States Supreme Court has recognized that states have a considerable amount of latitude in developing legislation in the areas of economic and social welfare. The Court has stated:

A state does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161 (1970).

The classification between the regulation and deregulation of the investor-owned utilities and the municipal and cooperative utilities does not appear to be one that has ever been considered arbitrary in the past. We conclude that it would not be considered arbitrary if this question were to arise in the future.

Additionally, there does not appear to be an equal protection problem for telephone corporations entering the state to do business after the effective date of the bill. Section 62-605 of the proposed legislation divides telephone corporations into two groups, those providing basic local exchange service and those that do not provide basic local exchange service. A telephone corporation not providing basic local exchange service may apply to the Commission to be subject to the provisions of this Chapter. Section 62-605(5). If its application were granted, it would then also benefit from the liability exclusion language of § 62-614.

It is possible that a new telephone corporation may come into the state to do business to provide basic local exchange service. The election provided for in the bill in § 62-604 states that any telephone corporation operating under the provisions of Title 61, Idaho Code, on June 30, 1986, may apply to relinquish its certificate or apply to amend its certificate to exclude from regulation any of its services. Because a telephone corporation that would enter the state after June 30, 1986 would not have a certificate of public convenience and

necessity before that date, it appears that it may elect to be subject to the provisions of the bill. See § 62-605.

While the legislation is not clear how the situation should be handled, it appears that no equal protection problem exists. The United States Supreme Court upheld an ordinance of the City of New Orleans that excepted from its prohibition against vendors selling food stuffs in certain areas those vendors who had continuously operated the same business in that area for eight or more years prior to January 1, 1972. See City of New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513 (1976). The court stated:

When local economic regulation is challenged solely on violating the equal protection clause, this court consistently defers to legislative determination as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. . . . In short, the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

Id. 427 U.S. at 303, 96 S.Ct. at 2516-7. Thus it appears that even if a new telephone corporation were to come into Idaho to provide local exchange service and were not allowed to elect for deregulation because it did not have a certificate of public convenience and necessity on June 30, 1986, there would still be no equal protection problem involved.

3. The final question in the request for a formal opinion asks whether a limitation of liability such as that in § 62-614 of S.B. 1430 constitutes special legislation in violation of art. 3, § 19 of the Idaho Constitution.

The Idaho Supreme Court has found that "a statute is general and not special if its terms apply to and its provisions operate upon all persons and subject matters in like

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situations." School District No. 25 v. State Tax Commission, 101 Idaho 283, 291 (1980). Section 62-614 of S.B. 1430 would apply to all investor-owned telephone corporations that are deregulated under the other provisions of the proposed Title 62. Therefore, it does not appear to be special legislation prohibited by the Idaho Constitution.

While art. 3, § 19 does prohibit legislation "releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or corporation in this state, or any municipal corporation therein" the language appears to speak in terms of already existing debt, liability or obligation. The provision limiting liability in S.B. 1430, does not extinguish any existing liability, but rather restricts the future liability of a telephone corporation covered under the proposed Title 62.

If you desire further clarification of this matter, please contact me.

Cordially,



JOHN J. McMAHON
Chief Deputy

JJM/lh