

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. C-2400
of Lincoln Electric System,)
Lincoln, seeking contract carrier) ORDER GRANTING NTA'S
permit authority.) MOTION FOR DECLARATORY
) RULING
)
) Entered: January 9, 2001

BY THE COMMISSION:

By its application filed October 4, 2000, Lincoln Electric System (LES or Applicant) of Lincoln, Nebraska, seeks contract carrier permit authority. Notice of the application appeared in The Daily Record, Omaha, Nebraska on October 5, 2000, pursuant to the rules of the Commission.

Formal interventions were filed by Aliant Communications Co., d/b/a Alltel; Arlington Telephone Company; AT&T; Blair Telephone Company; Clarks Telecommunications Co.; Citizens Telecommunications Company of Nebraska; Cox Nebraska Telcom, LLC; Curtis Telephone Company, Inc.; Dalton Telephone Company, Inc.; Diller Telephone Company; Eastern Nebraska Telephone Company; Elsie Communications, Inc.; Eustis Telephone Exchange, Inc.; Hamilton Telephone Company; Hartington Telecommunications Co., Inc.; Henderson Cooperative Telephone; Hershey Cooperative Telephone Company; Hooper Telephone Company; Home Telephone Company of Nebraska; K&M Telephone Company, Inc.; Keystone-Arthur Telephone Company; Nebraska Central Telephone Company; Nebraska Telecommunications Association; Northeast Nebraska Telephone Company; NT&T; Pierce Telephone Company, Inc.; Qwest Corporation; Rock County Telephone Company; Stanton Telecom, Inc.; Southeast Nebraska Telephone Company and UtiliCorp Communications Services, Inc. (collectively, Intervenor). Formal protests were filed by Time Warner Cable Nebraska Division and the Nebraska Cable Communications Association. Letters in support were filed by Pacific Media, LLC; Pacific Engineering, Inc. and RWK, Inc.

On November 9, 2000, Nebraska Telecommunications Association (NTA) submitted a Motion for Declaratory Ruling challenging LES' legal authority to provide for-hire telecommunications services in the state of Nebraska. NTA's motion asks the Commission to declare as a matter of law that the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services because it lacks the required legal authority.

A hearing on the NTA motion was held December 11, 2000, in the Commission Hearing Room. Attorneys Jack L. Shultz and Gregory D. Barton appeared on behalf of the NTA. Attorneys Mark J. Ayotte and Douglas L. Curry appeared on behalf of LES. Each party presented their respective arguments on NTA's Motion for Declaratory Ruling,

and the matter was submitted for decision by the Commission at the conclusion of the December 11, 2000, oral arguments.

F A C T U A L B A C K G R O U N D

NTA is a non-profit corporation organized under the laws of Nebraska, with offices located in Lincoln, Nebraska. A majority of NTA's members hold certificates of public convenience and necessity as telephone common carriers providing intrastate telecommunications service, including local exchange service and non-switched digital transmission services, at various locations throughout the state of Nebraska.

LES is an operating division of the City of Lincoln, a Nebraska municipal corporation and political subdivision of the state of Nebraska. LES filed an application, seeking authority from this Commission to provide non-switched digital transmission telecommunications services in and around Lincoln, Nebraska, as a contract carrier. In its application, LES asserted that it possesses authority to provide contract carrier telecommunications services pursuant to Neb. Rev. Stat. § 15-201(6) and the Lincoln City Charter.

NTA formally intervened in this case to oppose the LES application. NTA contends that LES is a municipal corporation and political subdivision of the state which lacks the legal capacity to provide for-hire contract carrier telecommunications services.

D I S C U S S I O N

In support of its Motion for Declaratory Ruling, NTA contends that LES does not have the legal authority to provide for-hire contract carrier telecommunications services because: (1) there is no express statutory grant of such authority; and (2) the "general welfare" powers conferred by the City of Lincoln's home rule charter grant only strictly municipal powers which can readily be overridden by state law.

LES countered by stating that the City of Lincoln has primary authority granted under its home rule charter to exercise any municipal power, function, right, privilege or immunity that is possible for it to have, independent of any other statutory authority.

In analyzing the powers exercisable by a municipality in Nebraska, there are a number of relevant rules which generally fall within the rubric of "Dillon's Rule." Under "Dillon's Rule,"

municipal corporations, like LES, "are purely entities of legislative creation" and, "[u]nlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power." *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961). See also, *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998) (affirming trial court's invalidation of county zoning action under "well-settled rule" that a municipal corporation "possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation -- not simply convenient, but indispensable") (emphasis added); *Briar West, Inc. v. City of Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980) (the "rule has long been established in this state that a municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of the municipality"); and *United Community Services v. Omaha Nat. Banks*, 162 Neb. 786, 77 N.W.2d 576 (1956) (public power district lacked power to make charitable pledges because companies "chartered for the purpose of supplying the public with electricity. 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 "[a]ll rights and powers not thus granted are withheld") (Emphasis added).

In order to determine whether LES has the legal capacity to provide for-hire contract carrier telecommunications services, it is necessary to review statutes governing cities of the "primary class," and local charter provisions and ordinances, to determine whether any such provision gives LES the express or necessarily implied authority to engage in for-hire contract carrier telecommunications services. In engaging in this review, it is important to keep in mind the long-standing rule of statutory construction that "[s]tatutes granting powers to municipalities are to be strictly construed, and where doubt exists, such doubt must be resolved against the grant." *Briar West, Inc.*, 206 Neb. at 176, 291 N.W.2d at 732.

The relevant statutory authority upon which LES relies is set forth in Neb. Rev. Stat. § 15-201 (Reissue 1997), which provides in pertinent part:

Cities of the primary class shall be bodies corporate and politic and shall have power:

...

(6) To purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities within and without the limits of the city . . . and to exercise such other and

further powers as 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. . . .

At first blush, one may be tempted to conclude that the power granted in § 15-201(6), to "operate public service and public utility property and facilities," authorizes LES to provide telecommunications services. However, there is an elementary distinction between acting as a "public utility" and acting as a "private enterprise." See, e.g., *In Re Application No. 30466*, 194 Neb. 55, 230 N.W.2d 190 (1975) (a "public utility is obligated to serve all its ratepayers fairly and without undue discrimination" because "[c]orporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions") (emphasis added). Accord, Black's Law Dictionary 1108-1109 (5th Ed. 1979) (defining term "public utility" as meaning an "[a]gency, instrumentality, business industry or service which is used or conducted in such manner as to affect the community at large, that is, which is not limited or restricted to any particular class of the community," and the "devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately") (emphasis added).

Since LES is seeking "contract" carrier authority, under which LES would not be authorized to serve the community at large, by definition, LES' application requests authority to act as a telecommunications "private enterprise" service, and not as a telecommunications "public utility" service.⁽¹⁾ Thus, the power granted in Neb. Rev. Stat. § 15-201(6) (Reissue 1997), to "operate public service and public utility property and facilities," only grants LES the power to act as a "public utility, and clearly does not authorize LES to operate a telecommunications "private enterprise" service.

At pages 10-11, 18, 21, 24 and 26 of its brief, LES makes the argument that the Nebraska Legislature specifically authorized LES to provide for-hire telecommunications services because the definition of the term "telecommunications company" is statutorily-defined to mean, among other things, a "governmental entity" which offers "telecommunications service for a fee in Nebraska intrastate commerce." Neb. Rev. Stat. § 86-802(16). However, it is clear to the Commission that there is nothing in this statutory definition which purports to grant legal authority to any public or private entity to engage in for-hire telecommunications services in Nebraska intrastate commerce. It is equally clear to this Commission that the provisions of Neb. Rev. Stat. § 86-802(16) merely define and recognize that a telecommunications company can take

many forms. Section 86-802(16) does not specifically authorize LES (or any other public or private entity) to provide for-hire telecommunications services.⁽²⁾ Unlike LES, some political subdivisions, such as counties, are expressly authorized to establish public telephone systems. See, Neb. Rev. Stat. §§ 86-401 to 86-412. The City of Lincoln/LES has no similar express statutory authorization.

The final potential source of authority for Lincoln/LES is the Lincoln Home Rule Charter. However, it is elementary that the provisions of a municipality's home rule charter are subject to, and must be consistent with, the Constitution and laws of Nebraska. See, e.g., *Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). Further, "when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains." *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

The general powers granted to the City of Lincoln are set forth in Article II, §1 of the Charter, which 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 city shall have the right and power to make such ordinances, by-laws, rules, and regulations, except as prohibited by the state constitution or restricted by this charter, as may be necessary or expedient for maintaining the peace, good government, and welfare of the city, its trade, commerce and manufacturing, and for preserving order, securing persons or property from violence, danger, and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city and to enforce all such ordinances by providing for the fine or imprisonment, or both the fine and imprisonment, of those convicted of violations thereof.

The ordinances establishing LES's Administrative Board and

delineating that Board's powers are located in Chapter 24 of the Lincoln Municipal Code. Under Lincoln Mun. Code § 4.24.010, the Board "is assigned the responsibility for the control and management of the property, personnel, facilities and equipment, and finances of the Lincoln Electric System." See also, Lincoln Mun. Code § 4.24.060 (power to appoint chief executive, manager and other employees "as may be necessary for the efficient and economical management of the said electric system"). The Board's specific "powers and duties" are set forth in Lincoln Mun. Code § 4.24.070, under which the Board has the power to:

(b) Purchase and contract for all materials, parts, services, supplies, and equipment required by Lincoln Electric System . . .

. . .

(e) Do and perform all other acts necessary to maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of this ordinance .

. .

As the foregoing demonstrates, there is no statute, charter provision⁽³⁾ or ordinance which expressly grants to LES the power to engage in the for-hire telecommunications business. The closest any of these legislative acts come to granting such authority is the power to "purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities within and without the limits of the city," set forth in Neb. Rev. Stat. § 15-201(6).

However, as discussed above, there is a fundamental difference between the power to establish a telecommunications public utility and the power to enter that field as a private enterprise. That is precisely the conclusion reached by the Nebraska Supreme Court in the factually comparable *Consumers' Coal Co.* case. There, a private retail fuel business brought an action to enjoin the City of Lincoln from operating a fuel yard "for the purpose of purchasing coal and wood at remote points of supply, having it shipped to the city of Lincoln and sold at retail to the inhabitants thereof." *Consumers' Coal Co.*, 109 Neb. at 53, 189 N.W. at 644. The trial court sustained the City's demurrer and the plaintiff retail fuel business appealed.

On appeal, the City claimed it had authority to operate a retail fuel yard pursuant to a state statute and a City charter provision. The statutory provision at issue granted the City the power to "establish and maintain a heating and lighting system for such city." The charter provision relied upon by the City, what was then Section 11, Article VIII, granted the City the "power to purchase, construct and otherwise acquire, own, and operate gas and electric plants and properties for the purpose of supplying the city and the inhabitants thereof with such service and utilities,

and to purchase, lease, construct and otherwise acquire, own, and operate ...telephone plants, lines and systems, and any and all other public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities." *Id.* Based upon these statutory and charter provisions, the City argued on appeal that, since the power to furnish heat was expressly granted to the City, the general grant of legislative power in Article 1, Section II of the Charter delegated to the council the discretion to determine the means or method of supplying the heat.

The *Consumers' Coal Co.* court rejected the City's appellate arguments, for reasons which are controlling in this case:

. . . So we have to inquire whether or not the provisions of the charter prescribed the mode in which the power to furnish heat to the inhabitants of the city shall be exercised; and it seems to us clear that the method is provided for by Section 11, art. 8, of the charter, in the words "construct and otherwise acquire, own and operate gas and electric plants and property for the manufacture and distribution of gas, heat and electricity for the purpose of supplying the city and the inhabitants thereof with such service and utilities;" and this provision is followed by authority to purchase "appliances, equipment and machinery necessary or incident to the proper operation and maintenance of such public service plants and properties," and a large number of similar provisions all referring to "such public service plants or properties." The central thought conveyed by this language is the establishment of a plant for the distribution of heat in the same manner or by the same method as had been in use for many years in the furnishing of water and light to the inhabitants of the city, namely, by the establishment of a central plant from which the public service was distributed. The language used contains no hint of any purpose of the people to grant to the city, to be exercised by its legislative body, the authority to enter into fields of private enterprise and into a business which had always theretofore been carried on by private individuals to the greater or less satisfaction of the public. To imply such a power from the language used would be to attribute to it a significance away beyond the general acceptance of the import of the terms. Implied powers, as the words themselves indicate, must find their justification and foundation in express power granted; that is, they are only implied ex necessitate that the express powers may be fully and completely exercised.

The argument being that such powers must have been within the contemplation of the granting authority, as otherwise those expressly granted could not be carried out. No doubt the power is implied to establish a municipal coal and wood-yard for the purpose of supplying the plant for the distribution of heat; but this power differs essentially from a power

to buy fuel and sell it to the inhabitants of the city in the ordinary course of trade.

...

While it is true that the constitutional provision granting all cities the right to form their charters for their own government should be liberally construed in order that the beneficent intention thereof may be fully carried out . . . , when it comes to a construction of the powers delegated by that charter to the city government, the rule of strict construction still obtains.

...

"The power conferred upon municipal corporations by their charters to enact ordinances on specified subjects is to be construed strictly, and exercise of the power must be confined within the general principles of the law applicable to such subjects."

...

We conclude that the establishment of a municipal fuel yard for the purchase and sale of fuel at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the ordinance in question is invalid. The case is reversed and remanded to the district court for Lancaster County, with instructions to enter a decree perpetually enjoining the defendants from conducting a fuel business under the said ordinance.

Consumers' Coal Co., 109 Neb. at 73-76, 189 N.W. at 652-653 (emphasis added).

At page 5 of its brief, LES attempts to distinguish the *Consumers' Coal Co.* case, claiming the "general welfare clause" of the City of Lincoln's Charter is "certainly broad enough to include the authority to provide for-hire telecommunications services" because, according to LES, this "general welfare clause" provides Lincoln/LES with "nearly unlimited power." LES does not explain why or how a "general welfare clause" of a city charter could be construed as either expressly or implicitly permitting a division of the City of Lincoln to engage in for-profit retail activities. The Nebraska Supreme Court's decision in the *Consumers' Coal Co.* case is instructive on this point:

We do not understand it to be claimed that the ordinance in question is referable to the general welfare section of the charter. To bring it within the police power to which this section refers, some public emergency would have to be shown, such as a coal famine, or monopoly, whereby the "government might be able to obtain fuel, when citizens generally could not..." No such emergency

is suggested.

Consumers' Coal Co., 109 Neb. at 75, 189 N.W. at 652 (emphasis added) (citation omitted).

In accordance with *Consumers' Coal Co.*, LES' reference to the "general welfare section of the charter," as a source of legal authority must be rejected. "To bring [LES Resolution 2000-10] within the police power to which this section refers, some public emergency would have to be shown," and "[n]o such emergency is suggested." See, *Consumers' Coal Co.*, 109 Neb. at 75, 189 N.W. at 652.

LES' attempt to distinguish the *Consumers' Coal Co.* case is based upon the premise that a home rule charter, which is a "limitation" as opposed to a "grant" of power, gives the city "nearly unlimited power." (LES's brief, at p. 5). This is not the law of Nebraska. On the contrary, the Nebraska Supreme Court has held on numerous occasions that a home rule charter confers upon a city a strictly municipal power which can readily be overridden by state law. See, e.g., *City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970) (fact that city has a home rule charter "does not mean that it may not be rendered nugatory by the exercise of state law dealing with other than strictly municipal concerns" and quoting the *Consumers' Coal Co.* case for the proposition that the court was and is "thoroughly persuaded that it never was within the contemplation of the framers of our system of government, or of our Constitution, that any city, whether organized under the general laws of this state, or under the provisions of the Constitution which allow cities to frame their own charter, to confer upon cities anything more than a police power, and a strictly municipal power"); *State ex rel. City of Grand Island v. Johnson*, 175 Neb. 498, 122 N.W.2d 240 (1963) ("[w]here the Legislature has enacted a law affecting municipal affairs, but which is of statewide concern, such law takes precedence over the provisions of a home rule charter"); *Michaelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951) ("[w]hen the Legislature has enacted a law affecting municipal affairs, but which [is] also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield"); and *In re Curtailment of Bus Service*, 125 Neb. 825, 252 N.W. 407 (1934) ("upon such subjects as pertain to state affairs as distinguished strictly from municipal affairs, the provisions of the State Constitution and the general laws of the state are as applicable in a home rule municipality as they are elsewhere in the state").

It is clear that LES' desire to engage in for-hire telecommunications services, both within and beyond the territorial limits of the City of Lincoln, gives rise to matters of statewide, rather than strictly municipal, concerns. This conclusion is fully supported by the Nebraska Supreme Court's decision in the *In re Curtailment of Bus Service* case. There, this Commission granted the application of a municipal street railway company to curtail bus service in Omaha. Omaha appealed, claiming that, as a home rule city, Omaha could force the re-institution of those bus services, regardless of what the

Commission said. The Nebraska Supreme Court rejected this argument, reasoning:

Mass transportation of passengers by common carriers within the state is, and ought to be considered, under our existing Constitution and laws, a matter of state concern. It would be anomalous to commit to a regulatory body, created by the Constitution, jurisdiction over intrastate steam railroads carrying passengers for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality.

In re Curtailment of Bus Services, 125 Neb. at ___, 252 NW. at 409.

This Commission has been empowered to regulate both intrastate telecommunications and transportation common and contract carriers, respectively. *See*, Neb. Rev. Stat. § 75-604 and Neb. Rev. Stat. § 75-309. Application of the *In re Curtailment of Bus Services* Court's reasoning demonstrates that the City of Lincoln's home rule status has no impact on the "legal authority" analysis because the provision of telecommunications services for-hire, either as a common carrier or as a contract carrier, is a matter of statewide concern. *See*, Neb. Rev. Stat. §§ 86-801 *et seq.* The provision of telecommunications services "by common [and contract] carriers within the state is, and ought to be considered, under our existing Constitution and laws, a matter of state concern." *See*, *In re Curtailment of Bus Services*, 125 Neb. at ___, 252 NW. at 409. "It would be anomalous to commit to [this] regulatory body, created by the Constitution, jurisdiction over intrastate [telecommunications carriers] for hire everywhere within the state boundaries and to deny that jurisdiction over a carrier operating within a home rule charter municipality." *See, Id.*

While we obviously are not addressing a "jurisdictional" issue in this case, the fact that the provision of telecommunications services for-hire in Nebraska is a "subject[] as pertain[s] to state affairs as distinguished from strictly municipal affairs," means that "the general laws of the state are as applicable in a home room municipality," like Lincoln/LES, "as they are elsewhere in the state." *See, Id.* Thus, because resort must be had to state law to resolve the "legal authority" issue, the strictures of "Dillon's Rule," as construed and applied by the Nebraska Supreme Court in the *Consumers' Coal Co.* case, are fully in play.

The reasoning of the *Consumers' Coal Co.* Court is, therefore, directly applicable to the "LES legal authority" issue in this case. Indeed, the statutory grant of the power to "purchase, construct, and otherwise acquire, own, maintain and operate public service and public utility property," in Neb. Rev. Stat. § 15-201(6), is virtually identical to the grant of "power to purchase, construct, and otherwise acquire, own and operate. any and all public service plants and properties, for the purpose of supplying the city and the inhabitants thereof with such service and public utilities," in former Section 11, Article VIII, of the Lincoln Charter, which was at issue in the *Consumers' Coal Co.*

case.

Like the charter section in *Consumers' Coal Co.*, in this case, the statutory "language used" in § 15-201(6) "contains no hint of any purpose of the [Legislature] to grant to the city, to be exercised by its legislative body," or by its LES Administrative Board, "the authority to enter into fields of private enterprise and into a business," like for-hire telecommunications, "which ha[s] always theretofore been carried on by private individuals to the greater or less satisfaction of the public." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652. Nor is there any basis to imply such a power from the language used in § 15-201(6). Such an implication would "attribute to [§ 15-201(6)'s language] a significance away beyond the general acceptance of the import of the terms." *See, Consumers' Coal Co.*, 109 Neb. at 74, 189 N.W. at 652.

"No doubt the power is implied to establish a municipal" communications system "for the purpose of supplying" telecommunications needed to operate the City's electric system.

However,

"this power differs essentially from a power to...sell [telecommunications services] to the inhabitants of the city in the ordinary course of trade."

See, Id. (emphasis added).

Accordingly, the Commission concludes that LES does not have the legal capacity to provide for-hire contract carrier telecommunications service because the "establishment of a municipal" communications system "for the purchase and sale of [telecommunications] at retail to the inhabitants of the city of Lincoln is not within the power granted to the city council, and that the" LES Resolution 2000-10 "is invalid" as it applies to this application. *See Id.* at 76, 189 N.W. at 653.

LES also claims that it has the ability to engage in "proprietary functions such as providing telecommunications services," based upon a comparison of the power to incorporate a private business under state law "for any lawful purpose." (LES' brief, at p.5). LES' attempt to rely on the general proposition that 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," *see, United Community Services*, 162 Neb. at 794, 77 N.W.2d at 584, fails on three counts.

First, LES does not explain how operating a private telecommunications business is a proper proprietary function of running a public utility electric system. Second, we disagree with LES' analysis of the *United Community Services* case at pages 20-21 of LES' brief. The important point from the *United Community Services* case is that the Nebraska Supreme Court specifically rejected a "proprietary function" argument exactly like that made by LES in this case, in the Court's holding which relied upon the principles of "Dillon's Rule." *See, United Community Services*, 162 Neb. at 794-795, 77 N.W.2d at 584 (rejecting OPPD's "proprietary function" contentions, in concluding that OPPD, as a public corporation, could not use revenues to make charitable donations because, "[i]n

the absence of express statutory authorization . . . the district was without authority to make these contributions"). Third, LES' "proprietary function" argument is contrary to longstanding Nebraska law which provides that "[g]eneral statutory limitations and restrictions upon the powers of a municipality ordinarily apply to proprietary as well as governmental functions." *Neisus v. Henry*, 142 Neb. 29, 41, 5 N.W.2d 291, 298 (1942) (fact that city, in making illegal payments to chairman of board of public works, as manager of light and water plant, in addition to his statutory salary, was engaged in "proprietary function" did not render inapplicable statutory limits on the power of the city to enter into such a contract).

Finally, we have determined that we need not reach the question of whether the City of Lincoln/LES possesses the requisite legal authority to perform for-hire contract carrier telecommunications services is a question of statewide commercial importance. We reach this conclusion because, as the NTA has correctly pointed out, the issue of the legal authority of political subdivisions, in general, to enter the intrastate competitive telecommunications field does present a question of statewide commercial importance, and that issue is already a primary subject of the separate investigatory proceeding, opened by this Commission on October 18, 2000, under Application No. C-2408/PI-42 (the purpose of investigation is to determine what interim policies and requirements should exist regarding telecommunications contract carriers and applications by political subdivisions with respect to fiber optics).

In conclusion, there is no statute, charter provision or ordinance which either expressly or implicitly grants to LES the power to engage in the for-hire contract carrier telecommunications business. The City of Lincoln's home rule charter grants only *strictly municipal powers* which are strictly construed, and the fact that the provision of telecommunications services for-hire in Nebraska is a subject that pertains to state affairs as distinguished from strictly municipal affairs, means that the provisions of Lincoln's charter must yield to the general laws of the state -- general laws which clearly do not grant LES the power to engage in the for-hire contract carrier telecommunications business. Therefore, because LES, as a political subdivision, can exercise no power except such as has been expressly delegated to it, or such as may be inferred from some express delegated power essential to give effect to that power, LES does not have the legal authority to provide for-hire contract carrier telecommunications services.

DECLARATORY RULING AND ORDER

IT IS THEREFORE DECLARED by the Nebraska Public Service Commission that the applicant, the City of Lincoln, d/b/a Lincoln Electric System, is not authorized to offer for-hire telecommunications services or to hold a contract carrier permit to perform such services, because it lacks the required specific legal

authority to do so.

FURTHER, IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that, in light of the applicant's lack of legal authority to provide for-hire contract carrier telecommunications services, this matter should be, and hereby is, dismissed.

MADE AND ENTERED at Lincoln, Nebraska this 9th day of January, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

Concurrence of Commissioner Frank Landis:

The Commission today finds that LES does not have the legal authority to provide for-hire contract carrier telecommunications services. The majority bases their finding on a review of the pertinent statutory provisions and the Lincoln home rule charter. While I concur with the majority's ultimate conclusion that LES lacks the requisite legal authority to provide the intended service, I reach this conclusion following a different path than the one traveled by the majority. For that reason, I write separately.

As a preliminary matter, NTA has asserted that the issue of whether LES possesses the legal authority to provide for-hire telecommunications services is one of "statewide commercial importance." (NTA Brief at 1). In terms of public policy, I agree that whether governmental entities should be in the business of providing telecommunications services is an issue that will have a large impact on all Nebraskans. This Commission has already taken steps to open dialogue on this question (see Application No. C-2408/PI-42). However, characterizing the case before us as one of "statewide commercial importance" loses sight of the specific, and purely legal, question presented by NTA's motion for declaratory ruling - whether the Lincoln Electric System possesses the *legal* authority to provide for-hire telecommunications services. The sources for any such authority are specific to LES: the statute

under which Lincoln may exercise power (Neb. Rev. Stat. § 15-201) is only applicable to cities of the primary class, of which Lincoln is the only one; the home rule charter under which Lincoln is organized is one of only two in the state, and is unique to Lincoln; and the ordinances creating LES obviously bind no other entity. Because of the narrow question before us, our findings today will have no precedential effect on any other similar application by a government entity to provide telecommunications service. Furthermore, any conclusions reached as to LES' or another government entity's legal authority to provide telecommunications services is merely the initial hurdle the applicant must clear. If such authority is ever found in any case, the applicant must still demonstrate to this Commission that they meet our standards of financial, managerial, and technical competency, and that their request is in the public interest.

Regardless as to whether Neb. Rev. Stat. § 15-201 grants LES the legal authority to operate as a contract carrier, I would find that the Lincoln home rule charter grants sufficiently broad powers to encompass the provision of for-hire telecommunications services. The "limitation of power" scheme which the voters of Lincoln amended their charter to in 1992 is one which grants all powers to the city government, limited only by any express reservation of power or by any inconsistency with the Constitution or laws of Nebraska. Article II, Section 1 of the Lincoln Charter expressly grants the city powers of "every name and nature whatsoever," without specifically precluding Lincoln from providing for-hire telecommunications services. No section of Nebraska law or the Constitution expressly prohibits municipalities from providing telecommunications services.

I disagree with the majority's contention that *Consumers' Coal Co. v. City of Lincoln*, 109 Neb. 51 (1922), is controlling in this case. It is a very relevant distinction that the charter interpreted in *Consumers' Coal Co.* was a "grant of power" charter, while the present day Lincoln charter takes a "limitation of power" form. And while the majority may be correct in stating that the powers granted by a home rule charter may be overridden by state law (see *supra* at 11-12), no state laws prohibit municipalities of the primary class from providing for-hire telecommunications services. In fact, LES recognizes that the state laws empowering this Commission to regulate intrastate telecommunications services take precedence over any exercise of their municipal power by coming to this Commission and subjecting themselves to our jurisdiction.

Despite my conclusion that the Lincoln home rule charter authorizes the City of Lincoln to provide for-hire telecommunications services, a proper analysis of the question presented must proceed to a review of the delegation of that power from the City to LES. LES's powers do not stem directly from the home rule charter. Instead, LES is a creature brought to life by the City through the City's exercise of its own charter powers. The City may bestow on LES those powers it wishes to bestow through properly enacted ordinances, and may likewise place restrictions on LES' powers. No analysis of LES's powers is thus complete without a review of the ordinances governing LES.

LES is governed by the LES Administrative Board under Chapter 4.24 of the Lincoln Municipal Code. Section 4.24.070(a)-(c) addresses the specific powers and duties of the Administrative Board, granting the board the power to fix salaries for employees, purchase materials for use by LES, and other specific powers. Section 4.24.070(d) expressly prohibits LES from exercising certain powers such as setting rates. Finally, Section 4.24.070(e) grants LES the power to "do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System..." It is this final subsection which LES contends endows them with the authority to provide for-hire telecommunications services.

Section 4.24.070(e) only allows LES to do those acts "necessary" to operate a municipal electric system. To interpret what powers this subsection authorizes LES to exercise, the language of a city ordinance must be given its plain and ordinary meaning. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 103 (1996).

The word "necessary" has been given several different meanings by various courts, from those who have given it a more rigid meaning, such as "indispensability" or "absolute requirement", see e.g. *State v. Crowdell*, 234 Neb. 469 (1990), *Atkins v. City of Durham*, 186 S.E. 330 (N.C. 1936), *National Docks & N.J.J.C. RY. CO. v. Pennsylvania R.R.*, 33 A. 860 (N.J. Ch. 1896), to those who have given it a more liberal meaning, such as "convenience" or "usefulness", see e.g. *In Re Application No. A-16642*, 236 Neb. 671 (1990), *Baltis v. Village of Westchester*, 121 N.E.2d 495 (Ill. 1954), *Howton v. Howton*, 124 P.2d 837 (Cal. Dist. Ct. App. 1942). Viewing Section 4.24.070 as a whole leads me to conclude that the word "necessary", as used in Section 4.24.070(e), is to be given a more rigid interpretation.

In the leading treatise on municipal corporation law, one commentator has remarked that "the general rule seems to be that where particular powers expressly conferred are followed by a general grant of power, such general grant by intendment may include all powers that are *fairly within* the term of the grant, and that are *essential* to the purposes of the municipal corporation, and *consistent with* the particular powers." — McQuillin, Municipal Corporations (3rd Ed. Rev.) § 10.24. (Emphasis added).

The more general grant of power found in Section 4.24.070(e), following the specific grants and limits of Sections 4.24.070(a)-(d), must therefore be read to include only those powers consistent with the more specific grants and those that are essential to LES' purposes -- in other words, Section 4.24.070(e) includes those powers related to providing electric power to the people of Lincoln. This reading implies that the word "necessary" must be given a more rigid interpretation. To give the word "necessary" in Section 4.24.070(e) a liberal interpretation would be to turn that section into a grant of virtually unlimited power. If such a construction was intended, the need for any specific grants of power, such as those in Sections 4.24.070(a)-(c), would be obviated.

Reading Section 4.24.070(e) to allow LES to perform those acts nearly "indispensable" or "required" to the operation of an electric system leads me to conclude that LES does not have the legal authority to provide for-hire telecommunications services in Nebraska. The relationship between operating an electric system and operating as a contract carrier of telecommunications services is dubious, and LES has made no assertion that continuance of the former is dependent on initiation of the latter.

Finally, it is my view that if the Lincoln City Council formally adopted an ordinance which specifically authorized the LES Administrative Board to apply for certification as a for-hire contract carrier of telecommunications services, the Administrative Board, under the city's "limitation of power" scheme of governance and barring a specific statutory prohibition, would clearly have the legal authority to do so, and this Commission could then proceed to a judgement of the application on the merits.

Commissioner Frank E. Landis

1. In fact, LES has expressly disclaimed any interest in serving the community at large, stating that, "[w]hile it is true LES provides electric service as a public utility, there is no requirement that it also provide telecommunications services as a common carrier." (LES' brief, at p. 18). LES has thus recognized the basic distinction between serving as a "public utility" and serving as a "retail entity," and LES does not seek to provide service as a public utility under its Application.

2. LES' invocation of the Commission's Rule requiring any "person, firm, partnership, ...corporation, cooperative, political subdivision, or association" to first make application for and receive authority from the commission before offering any telecommunications service, *see*, Neb. Admin. Code, Title 291, Ch. 5, §002.49A (emphasis added), is misplaced. In adopting §002.49A, this Commission was merely recognizing the obvious -- that a telecommunications company can take many legal forms.

3. LES claims that the power to operate a public utility electric system translates into an additional power to provide for-hire telecommunications services. There is no basis to imply a power to provide contract carrier telecommunications service from an expressly granted power to operate a public utility electric system.

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