

LETTER OPINION
93-L-70

March 9, 1993

Honorable John Hokana
State Representative
House Chamber
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

RE: Senate Bill No. 2385 -- IntraLATA Equal Access

Dear Representative Hokana:

Thank you for your February 24, 1993, letter requesting an opinion regarding the constitutionality of Senate Bill No. 2385, a bill which, if enacted, would prevent the Public Service Commission from requiring local exchange telephone companies to provide what is known as 1+ intraLATA equal access.

It is my understanding that the continental United States is divided up into a number of LATAs or local access and transport areas. The boundaries of these areas were established in the antitrust consent decree between the United States Department of Justice and American Telephone and Telegraph in the early 1980s. A LATA marks the boundary beyond which a Bell operating company such as U.S. West may not carry telephone traffic. InterLATA telephone traffic is under the jurisdiction of the federal government and has been effectively deregulated. IntraLATA telephone traffic, because it is usually confined within the boundaries of a single state, remains under the jurisdiction of the state Public Service Commission, or other state telephone regulatory agencies.

1+ equal access is a service provided by a local exchange company to interexchange carriers. To the customer, however, 1+ equal access refers to the ability of that customer to determine for himself or herself which telephone company will carry that customer's calls when the customer direct dials "1" plus a non-local telephone number from the customer's phone. Under federal deregulation of long distance

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telephone service, there currently exists in many local exchange areas, 1+ equal access for the interLATA telephone market. That is, for interLATA calls from many areas the telephone company that will carry a particular customer's long distance traffic when that customer places a 1+ direct dial phone call is determined by the prior selection of the customer.

However, 1+ equal access does not presently exist in the intraLATA telephone market within North Dakota. That is, the local exchange company, and not the customer, determines which company will carry a particular customer's telephone traffic within that customer's LATA when that customer dials 1+. The customer has the option of using a long distance carrier other than the one selected for the customer by the local exchange company; however, to do so requires the use of additional numbers in direct dialing the intraLATA telephone call.

It is my understanding that there are 23 local exchange companies within North Dakota. However, U.S. West is the dominant local exchange company, serving a substantial majority of all telephone customers within North Dakota. Moreover, U.S. West is presently the only carrier offering 1+ intraLATA telephone service to North Dakota telephone customers.

On April 7, 1992, the North Dakota Public Service Commission issued an order in Case No. PU-2320-90-183 (hereinafter "Order 183"), which provided, in part, that intraLATA 1+ equal access must be made available to all North Dakota telephone subscribers no later than December 31, 1994. That order is currently on appeal to the Burleigh County District Court. In the meantime, Senate Bill No. 2385 would, in effect, overturn Order 183 by providing that 1+ intraLATA equal access "may not be required to be provided by any company providing local exchange service." Senate Bill No. 2385, however, does not prohibit any local exchange company from offering 1+ intraLATA equal access service.

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In your letter you ask four questions:

1. Does Senate Bill No. 2385 constitute a special or local law prohibited by Article IV, Section 13 of the North Dakota Constitution, by either:

(a) uniquely positioning local exchange companies as the public policy decision-maker with respect to where, when and under what conditions 1+ intraLATA equal access may occur; or

(b) uniquely preserving U S WEST as the monopoly provider of 1+ intraLATA equal access service, to the exclusion of other ready, willing and able long distance companies.

2. By attempting to legislatively overrule an administrative decision implementing a legislative enactment and, potentially, a judicial decision interpreting that legislative enactment, does Senate Bill No. 2385 result in the legislature infringing upon the powers of either the executive or judiciary branches of government, establishes equal branches of government by Article XI, Section 26 of the North Dakota Constitution?

3. By legislatively establishing a monopoly over 1+ intraLATA telephone service, and not providing for any regulation of the rates which may be charged for that service, does Senate Bill No. 2385 constitute a legislative delegation of rate regulating authority, vested in the legislature by Article XII, Section 16 of the North Dakota Constitution, to a deregulated monopoly?

4. Does Senate Bill No. 2385 violate any other provisions of the North Dakota Constitution?

With respect to question number 1, it is my opinion that Senate Bill No. 2385 does not violate Article IV, Section 13 of the North Dakota Constitution.

North Dakota Constitution Article IV, Section 13 provides that "no local or special laws may be enacted." "[A] 'special law' is one which relates only to a particular person or things of a class, as distinguished from a 'general law' which applies to all things or persons of a class [citations omitted], and a 'local law' is one which applies to a special locality or spot, as distinguished from a law which operates generally throughout the entire state [citations omitted]." State v. First State Bank of Jud, 202 N.W. 391, 399 (N.D. 1925). Because Senate

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Bill No. 2385 would have effect in every part of North Dakota, it is not a local law.

Whether it is a special law depends on whether it operates uniformly upon all persons and property similarly situated. Thus, the fact that its application is limited to only telephone companies and telephone customers does not make it a special law so long as its application to telephone companies and telephone customers is uniform. That appears to be the case here.

In this regard, it should be noted that Senate Bill No. 2385 does not prohibit any company providing local exchange service from offering 1+ intraLATA equal access; it merely provides that the companies may not be required to provide that service.

On its face, Senate Bill No. 2385 applies equally to all telephone exchange companies and to all telephone customers. The fact that this provision may, as you suggest, "uniquely position local exchange companies as the public policy decision-maker with respect to . . . 1+ intraLATA equal access" does not make Senate Bill No. 2385 a special law. Whatever unique policy decision-making power the local exchange companies enjoy is a result of their historical status as local monopolies and not Senate Bill No. 2385.

Similarly, the fact that U.S. West may be, as you suggest, "the monopoly provider of 1+ intraLATA equal access service" is also a result of the historical development of the telephone service market in North Dakota and not Senate Bill No. 2385. Under the bill, local exchange companies are free to offer to their customers 1+ equal access service on an intraLATA basis or not to offer this service, as they choose.

In response to your second question, it is my opinion that Senate Bill No. 2385 does not violate North Dakota Constitution Article XI, Section 26. Article XI, Section 26 provides for three co-equal branches of government and each branch is supreme within its own area. State ex rel. Spaeth v. Meiers, 403 N.W.2d 392 (N.D. 1987). It is the province of the Legislature to enact laws which are then implemented and enforced by the executive and interpreted by the judiciary. The authority of the Legislature to overturn by statute decisions and actions of the other two branches of

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government is well established. See In Re Estate of Jensen, 162 N.W.2d 861 (1968).

Your third question presupposes that Senate Bill No. 2385 "legislatively" establishes "a monopoly over 1+ intraLATA telephone service." Senate Bill No. 2385 does not establish an unregulated monopoly. If U.S. West or anyone else has a monopoly over 1+ intraLATA telephone service, it is the result of the historical development of the telephone service marketplace in North Dakota and not the result of Senate Bill No. 2385.

North Dakota Constitution Article XII, Section 16 prohibits combinations whose object or effect is the control of prices "of any product of the soil or any article of manufacture of commerce, or the cost of exchange or transportation." This section does not vest the Legislature with rate regulation nor does it address such regulation.

Senate Bill No. 2385 does not establish any combination which would violate Article XII, Section 16. Consequently, in my opinion, Senate Bill No. 2385 does not violate Article XII, Section 16 of the North Dakota Constitution.

Finally, I am aware of no other provisions of the North Dakota Constitution which would be violated by Senate Bill No. 2385.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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