Opinion No. 52-5473

January 10, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Hon. Jason W. Kellahin State Corporation Commission Santa Fe, New Mexico

*{*186}* Recently you requested an opinion from this office as to what procedure you should follow in getting the record before you, as a member of the Commission, for participating in Commission decisions in those cases in which hearings had been held by the Commission prior to your appointment as a member but in which no order had been entered by the Commission.

You mentioned in your request that in two of such hearings, namely those involving the question of rate increases put into effect by Mountain States Telephone and Telegraph Company and Southwestern Associated Telephone Company, two of the Commissioners who attended the hearings are unable to agree upon an order to be entered and you mentioned that there may be other cases of like nature.

The question of the validity of orders or decisions entered by administrative agencies in which there has been a change of personnel due to illness, death, resignation, transfer or similar reasons has arisen a number of time in other jurisdictions but it is a case of first impression within our own state.

An excellent review of the powers of administrative agencies to enter orders or make decisions in which some member participates who did not attend the hearings appears in 18 A.L.R. 2d, the annotation appearing on page 606 et seq.

The following statement is made in connection with the introduction to the annotation:

"This annotation is concerned with the question of whether an administrative decision is vitiated because made or participated in by an officer who was not present when the evidence was taken. Obviously this question can arise only in proceedings in which under the pertinent statute or where the statute is silent, under due process requirement, the decision must be based upon evidence.

"In view of the vast number of Federal and state administrative agencies and decisions, this annotation aims at exploring all aspects of the subject, as reflected in illustrative cases, rather than at exhausting all cases which may be in point. The emphasis has been laid on more recent cases."

A further comment appears to the following effect:

"This annotation attempts to state rules of administrative law *{*187}* of general applicability. However, it should be taken into consideration that these rules are

announced by the courts in administrative proceedings of a specific kind, and that, consequently, the holding is always limited to the type of administrative proceedings in which it has been made. For that reason the type or kind of administrative proceedings involved in the case is stated, wherever pertinent.

"It should also be noted that these proceedings are conducted under a great variety of statutes, which fact, at least in some instances, may explain otherwise inconsistent results."

The leading case on the matter of due process is that of Morgan v. U.S. (1936) 298 U.S. 468, 80 L. Ed. 1288, 66 S. Ct. 906. In that case orders of the Secretary of Agriculture were attacked as invalid because those affected had not been given a full hearing before the Secretary of Agriculture. The Court held them to be defective in this case but in this, and in the subsequent appeal -- Morgan v. United States, 301 U.S. 1 -- established the proposition that it is not necessary to go beyond the terms of a statute in order to consider the constitutional requirements of due process.

The language of the Court indicated that notwithstanding the absence of an administrative officer when evidence was taken, due process and the concept of fair hearing require that he consider and appraise the evidence himself.

In the first Morgan appeal, 298 U.S. 468, at p. 481, the Court stated there was no basis for the contention that under the particular act reviewed, one official could examine the evidence and another who had not considered the evidence make the findings and order.

The Court stated:

"For the weight ascribed by the law to the findings -- their conclusiveness when made within the sphere of the authority conferred -- rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure . . . The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."

In the further Morgan appeal, 301 U.S. 1, in considering the requirements for a hearing to satisfy due process, the Court, at page 23, stated:

"But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determination must consider and appraise the evidence which justifies them."

In commenting upon the general proposition of the validity of administrative orders, the following statement appears in the annotation:

"As a general proposition, due process or the concept of a fair hearing does not require that the evidence be taken before the officer who decides or participates in the decision. The Courts agree as to this proposition in a situation in which authority to take evidence is delegated by an administrative tribunal to a hearing officer or officers. The Courts are not so *{*188}* unanimous, however, in a situation in which, after the taking of evidence, there is a change of personnel due to illness, death, resignation, reorganization, transfer, etc. And the Courts are divided in the situation in which a member of the tribunal is absent from a hearing which is had, or under the pertinent statute is required to be conducted, before the full tribunal."

The proposition that an administrative officer who decides the case must hear the evidence, or if he does not, must consider the evidence is supported by numerous decisions of the Federal courts involving various Federal statutes and by the States of California, Florida, Oklahoma, Pennsylvania, South Carolina and Utah.

These decisions are to the effect that due process has been accorded if the decision or finding of the administrative body is made by those who have considered the evidence, even though they may not have participated in the actual hearing as such.

A New Jersey Court, in 1949, held to the contrary that a Commissioner who had not heard the evidence adduced at a proceeding is not eligible to participate in the determination of the issue.

Different decisions likewise appear in cases involving the question of the absence of an individual member from the hearing before the full tribunal.

An administrative decision is not invalid merely because, due to a change in personnel because of illness, death, resignation, transfers or similar reasons, an officer who was not present when the evidence was taken, made or participated in the decision -- provided he has considered and acts upon the evidence received in his absence. This view has been supported by the Courts of the United States and by the Courts of Arkansas, California, Kansas, Michigan, New York, Pennsylvania and Washington.

The contrary rule was announced in the State of New York in the year 1915 however. Other offshoots of the problem arise out of the practice of having trial examiners provide reports to the Commissions. Thus in each and every case it almost becomes a matter of necessity to examine the particular statute and determine if it has been fully complied with. If it has, due process requirements are satisfied.

It thus appears that in considering whether a member of the Corporation Commission, who did not participate in a hearing may take part in the decision of the Commission, the conclusion depends upon the question of whether there is any prohibition in the Constitution against such procedure, or whether there is any requirement in the Constitution requiring any hearing before the Commission to be conducted before the full Commission.

Section 1 of Article XI provides for the creation of the Corporation Commission and provides that a permanent Commission is created consisting of three members.

Section 8 of Article XI provides that the Commission shall determine no question or issue any order in relation to the matters specified in Section 7 (the section delegating to the Commission the authority to prescribe rates for telephone and telegraph companies, railroads, etc.), until after a public hearing be held upon ten days notice to the parties concerned except in case of default after such notice.

Nowhere in the Constitution or in any of the cases dealing with the powers of the Corporation Commission does one find any language which indicates that any hearing before the Corporation Commission must be held before the three members thereof.

The import of the Court's decision in the case of In Re Atchison, Topeka and Santa Fe Rwy. Cos. Protest of Rates, 44 N.M. 608, is to the effect that before the Commission may act with respect to rates, a public hearing must be held at which all competent and *{*189}* material evidence sought to be presented by the interested parties has been produced.

In the recent case of State v. Mt. States Tel. & Tel. Co., 54 N.M. 315, the Court indicated that further requirements at the public hearing provided for by Section 8 of Article XI of the Constitution embraced the necessity of the introduction of evidence to prove the value of the Corporation's property, as well as its earnings and expenditures, as a basis for affixing or approving rates and of the determination of its value by the Commission "with due consideration to be given to the earnings, investment and expenditure as a whole within the State."

Nowhere do we find in the Constitution any requirement that in making any order or decision the three Corporation Commission members must be present and hear the evidence introduced at the hearing. Section 7 requires the Commission to give due consideration to the earnings, investment and expenditure as a whole within the State in setting rates for telephone and telegraph companies and prohibits the Commission from determining any question with reference to rates until after a public hearing has been held.

There is nothing in the Constitution which would prohibit the Commission from delegating such hearings to a duly authorized officer on behalf of the Commission to take evidence. If thereafter the Commission should review the evidence and make its decision, due process would have been served.

There is a further argument in favor of the proposition that in default of any Constitutional requirement that the three members of the Corporation Commission must hear the evidence in person, or in default of any requirement of the Constitution requiring that any given number of Commissioners must sit at any public hearing (such as is found in the Public Service Commission Act) there is nothing to prevent the Corporation Commission from acting upon the evidence which was presented by all parties concerned at the public hearing held pursuant to the Constitution.

Certain statutes in New Mexico -- Ch. 74 -- deal with the powers of the Commission. The Legislature, in supplementing the Constitutional creation of the Commission, attempted in Section 74-705 to give the Commission the power to delegate the taking of testimony to subordinates. Whether this legislation is constitutional or not need not be decided in this opinion nor need it be decided whether the provisions of that section requiring a forum of two for the entry of orders or making of decisions violate the Constitution, since it is axiomatic that no group of three can enter any order or make any decision without the concurrence of two members thereof.

It is further to be noted that the same Chapter 74, N.M.S.A., contemplated the absence of the chairman from hearings.

Strong argument in favor of the general proposition that the Corporation Commission may act, upon consideration of the evidence at any hearing, is found in the practice followed by the Commission. Under Section 4, Article XI of the Constitution, the Commission has power to prescribe its rules of order and procedure.

I am informed that while there may be no written rule to this effect, it has been the practice of the Commission for so long a time as to give the practice the effect of a rule of order or procedure, to dispose of many of the hearings which it must accord by having one Commissioner hear the evidence. The Commission then makes its order upon a review of the evidence heard at the hearing, accepting or rejecting the recommendation of the Commissioner who sat, as the case may be. There appears to be nothing in this practice which would violate the concept of due process. The Commission would be sorely hampered in the discharge of its duties if it could only act when three members sat to hear evidence. If one Commissioner were ill or unable to attend, all Commission *{*190}* business would be stopped indefinitely.

It is my opinion, therefore, that if you, as Commissioner, acquaint yourself with the evidence introduced by all of the parties concerned at the public hearing required under Section 8, Article XI of the Constitution, under the reasoning established in the Morgan cases, supra, you are empowered as a member of the Commission to make a decision upon the basis of the evidence introduced at the hearing.

It is to be noted in this opinion that under the reasoning set out in the recent case of State v. Mt. States Tel. & Tel. Co., supra, the Commission is presumed to represent the public in the matter of setting rates for utilities subject to its jurisdiction. Under the doctrine of that case, the question of satisfying the due process requirements of

constitutional law required to be fulfilled in every hearing has no application to the public as a whole and once the Commission has rendered a decision no appeal lies therefrom by the public. The only party which can seek regress in the Court is the utility involved.

The Commission can obtain compliance with its orders only by removal proceedings as provided by Section 7, Article XI. If the cause is removed by the Commission no further evidence is heard by the Court. If the cause is removed by the utility the Court in its discretion may hear further evidence. The Court in repeated decisions has stated that the orders of the Commission can be enforced only if they are reasonable and are based upon evidence. Thus, under the constitutional authority of the Commission as defined by our Supreme Court, the requirement that must be found for any order of the Commission to be enforced against any utility is that the order must be reasonable and based upon evidence brought forth at the public hearing required. Viewed in this light, this constitutional method of enforcement is aimed at assuring utilities that due process of law will be accorded them.

In the final analysis, therefore, the only party which could object to the entry of any order by the Commission based upon evidence received by less than all of the members of that body would be the utility. And if the order is reasonable and based upon evidence brought forth at the public hearing required to be held, it would seem that there could be little merit to the contention that the utility affected by the order has been deprived of due process of law because of the non-participation of any member of the Commission at the hearing proper.

It is to be observed further that while the Corporation Commission is a constitutionally created administrative agency and has been likened to a fourth branch of the government, nevertheless its function in the matter of setting rates is precisely what that of the Legislature would be were it not for its constitutional creation. The framers of the Constitution did not see fit to put any clause into the Constitution requiring that the three members of the Commission must hear the evidence in order to make decisions although they did see fit to insert into the document a requirement that there must be a full public hearing at which hearing of all the evidence that need be considered by the Commission must be brought forth.

I find there is no requirement in the Constitution as to the participation or non-participation by all of the members of the Commission in any hearing at which evidence is being presented. The weight of later authority would seem to indicate that in default of such requirement an administrative board is satisfying the due process requirement of constitutional law in entering a decision based upon evidence presented at a fair and full hearing which has been reviewed by the administrative board. It is, therefore, my opinion that the present members of the Corporation *{*191}* Commission by reviewing all the evidence under the Morgan case doctrine may make appropriate decision in these cases as well as in other cases which were pending before the Commission prior to the time of your appointment. And, in my opinion, the Commission may legally act upon the evidence presented at the hearings in these cases.

I trust that gives you the information you desire.

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