

Opinion No. 71-60

April 26, 1971

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Odis Echols, Jr. New Mexico State Senator Post Office Box 670
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QUESTIONS

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Are there constitutional objections to Senate Bill 427, the Rapid Transit Act, which was passed by the Legislature but vetoed by the Chief Executive?

CONCLUSION

Yes.

OPINION

{*85} ANALYSIS

Senate Bill 427, the Rapid Transit Act, was a farsighted and comprehensive plan for the administration of a rapid transit system under the jurisdiction of the State Highway Commission. The fact that this Commission was selected to be the administering agency for the rapid transit system does not have any bearing on the conclusions expressed herein. While the State Highway Commission is still a constitutional body, its powers and duties are no longer contained in that document. The Constitution now provides that the Commission "shall have such power and shall perform such duties as may be provided by law." Article II, Section 14, as repealed and reenacted in 1967.

The same question and problem here presented would have existed whether the Legislature had created a new agency to administer the Rapid Transit Act or had designated any other state board, agency, department or commission to administer it -- except the State Corporation Commission. That is the crux of the matter -- does the Rapid Transit Act unconstitutionally impinge on the powers and duties granted and imposed on the State Corporation Commission by Article XI, Section 7? This constitutional provision is unusual in the amount of detailed specificity that it contains regarding powers and duties. We must examine some of these powers and duties as compared with certain provisions in the Rapid Transit Act. Article XI, Section 7 provides:

"The Commission shall have power **and shall be charged with the duty** of fixing, determining, supervising, regulating and controlling all charges and rates of railway . . .

sleeping car and other transportation . . . companies and **common carriers** within the state . . ." (Emphasis added)

Section 7 of the Rapid Transit Act on the other hand provided:

"RATES, FARES AND SERVICES FIXED BY [STATE HIGHWAY] COMMISSION. -- Insofar as practicable and consistent with the provision of adequate service at reasonable fares, the rates and fares charged for and services provided by the transit facilities owned or controlled by the commission shall be fixed by the commission . . ."

Here we have a head-on clash between the constitutionally charged duties of the State Corporation Commission and the proposed statutorily imposed duties as to rates on the State Highway Commission. The constitutional mandate must control. Our State Supreme Court has found the constitutional language "shall be charged with the duty" to be highly significant. The opinion in **In Re Atchison, T. & S.F. Ry. Co.**, 37 N.M. 194, 20 P.2d 918, had this to say:

"Where the Constitution has said that the commission has the power and is charged with the duty to require a common carrier to do a certain thing, it is the last, the highest, and controlling fundamental law as to that matter. **No act of the Legislature**, for it must proceed in accordance with the terms of the Constitution, **can exercise the power, or place it elsewhere.**" (Emphasis added)

{*86} The State Corporation Commission is also granted the power and charged with the duty:

"To require railway companies to provide and maintain adequate depots . . . station buildings, agents and facilities for the accommodation of passengers and for receiving and delivering freight and express; to provide and maintain necessary crossings, culverts, and sidings upon and alongside their roadbeds, whenever in the judgment of the commission the public interests demand, and as may be reasonable and just. The commission shall also have power and be charged with the duty to make and enforce reasonable and just rules requiring the supplying of cars and equipment for the use of shippers and passengers, and to require all intrastate railways, transportation companies or common carriers, to provide such reasonable safety appliances in connection with all equipment, as may be necessary and proper for the safety of its employees and the public, and as are now or may be required by the federal laws, rules and regulations governing interstate commerce."

Section 2 of the Rapid Transit Act defines "transit facilities" which the State Highway Commission would regulate and control in the following language:

"D. 'transit facilities' means all real and personal property necessary or useful in rendering transit service between points within the state by means of **rail or bus**, including without limitation, tracks, rights-of-way, bridges, tunnels, subways, rolling stock for rail, motor vehicles or other modes of transportation, stations, terminals and

ports, areas for parking and all equipment, fixtures, buildings and structures and services incidental to or required in connection with the performance of transit services; and

E. 'transit service' means the transportation of persons and their packages and baggage in regular route, special or charter service by means of transit facilities between points within the state, and includes the transportation of newspapers, express and mail between such points but does not include taxicab or airport limousine service."

This provision too conflicts with Article XI, Section 7 and must give way to the extensive yet specific constitutional powers and duties placed in the State Corporation Commission.

The Rapid Transit Act, particularly Sections 5 and 6, would authorize the State Highway Commission to determine matters involving need, routes and schedules. Yet under the Constitution the State Corporation Commission is granted the power and charged with the duty "of determining any matters of public convenience and necessity relating to such facilities" (railway, common carriers, etc.).

The State Revenue Bond Act of 1963 (repealed in 1968 after much of it was declared unconstitutional in **State v. New Mexico State Authority**, 76 N.M. 1, 411 P.2d 984), gave a newly created body, the New Mexico State Authority, certain powers in respect to railroad tracks. The trial court's conclusion of law read: "That the State Revenue Bond Act, . . . is unconstitutional because under Section 9B the Act attempts to vest in state agencies powers respecting railroad tracks and other facilities which under Section 7 of Article XI of the Constitution have been vested in the State Corporation." The Supreme Court upheld this determination of unconstitutionality. So we see that even when the Legislature seeks to authorize another state agency to regulate matters under the jurisdiction of the State Corporation Commission pursuant to Article XI, Section 7, such legislation cannot withstand a constitutional attack.

Looking to future legislative action there are several options open to you. In no way do we mean to indicate that any of these alternatives is the desirable course of action. That of course is a matter for the Legislature. First, you could seek a constitutional amendment of Article XI, Section 7 to exclude a state transit system from State Corporation Commission jurisdiction. Second, you could enact legislation under which the State Corporation Commission {*87} was the administering agency of a rapid transit system. Third, the legislation could provide for the State Corporation Commission to handle the matters that are within its jurisdiction and expertise, e.g. rate making, geographical areas to be served, etc. with the State Highway Commission (Department) given the power and duty to make engineering determinations and acquire necessary right-of-way by negotiation or condemnation. It has considerable expertise in these matters.

Details could be placed in the legislation itself or the legislation might simply provide for jurisdictional limitations and set guidelines to be followed in implementing the system under the existing Joint Powers Agreement Act.

By: Oliver E. Payne

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