TRADE REGULATIONS

THE NEBRASKA PUBLIC SERVICE COMMISSION: AVENUES FOR REFORM

KENNETH A. NICKOLAI*

INTRODUCTION

Seventy years ago President Roosevelt stumped the country urging congressional action on his proposal to create federal agency regulation over railroad rates. His recurrent theme was:

[W]e want an administrative body with the power to secure fair and just treatment as among all shippers who use the railroads.1

In a speech in Raleigh, North Carolina on October 19, 1905 he rejected the view that the Department of Justice should be charged with securing just treatment for the public from the railroads. He proclaimed:

The delays of the law are proverbial and what we need in this matter is reasonable quickness of action.2

He believed "fair treatment" and "reasonable quickness" would be secured by a strong federal regulatory agency.

On October 7, 1974 Lewis A. Engman, Chairman of the Federal Trade Commission, reflected that much of the present regulatory machinery does little else than protect producers from the usual competitive consequences of lassitude and inefficiency.3 He continued:

Most regulated industries have become federal protectorates, living in the cozy world of cost plus, protected from the ugly specters of competition, efficiency and innovation.4

The statements of Roosevelt and Engman are representative of the shift in public attitude toward the role of regulatory agencies.5

* J.D., Duke University School of Law; Member, Nebraska State Bar Assoc., formerly a staff attorney of the Nebraska Public Service Comm'n.
2. Id. at 305.
This shift has also occurred in Nebraska. In 1906, the voters of Nebraska overwhelmingly embraced a constitutional amendment creating the State Railway Commission, but by the fall of 1974 the Commission's usefulness was being seriously questioned by the press and the public.

This shifting public attitude is spurring action toward regulatory change on the national scene, and these tides can be expected to be felt within Nebraska. Therefore, an examination of the methods available to Nebraskans to modify their regulatory structure is highly appropriate.

The alternative methods by which reform of the Commission's regulatory power could be accomplished include:

1. legislative enactment;
2. Commission action;
3. constitutional amendment.

This article will discuss the constitutional and judicial limitations on legislative reform of the Nebraska Public Service Commission's

---

6. See State v. Winnett, 78 Neb. 379, 384, 110 N.W. 1113, 1114 (1907). The opinion states the amendment was adopted with 147,472 affirmative votes out of a total 194,692 votes cast.
7. Unreported statements of certain governmental officials and members of the working press corps of Lincoln, Nebraska.
9. See, e.g., text at notes 77-78 infra.
10. The power of the Commission to choose not to regulate a type of common carrier is unclear. A cursory examination of the question reveals that the court has said the Commission can adopt its own rules and procedures, Nebraska State Ry. Comm'n v. Service Oil Co., 157 Neb. 712, 722, 61 N.W.2d 381, 387 (1953), and that the determination of what is consistent with the public interest is particularly for the determination of the Commission, Andrews Van Lines v. Smith, 187 Neb. 533, 539, 192 N.W.2d 406, 410 (1971). The Commission can then establish procedures by which it may exercise its regulatory power. It would also appear that the Commission could find after investigation that the termination of price and service regulation of specified common carriers is in the public interest and have the court respect such language. However, dicta such as that found in Block v. Lincoln Tel. & Tel. Co., 170 Neb. 531, 538, 103 N.W.2d 312, 316 (1960) indicates that the court also feels that the Commission not only has the right to regulate common carriers, but that it has the duty to do so which would prevent any form of administrative de-regulation.
11. NEB. Const. art. XVI, § 1 sets forth the amendatory process. It provides that the legislature may propose amendments and when passed by a three-fifths vote of that body the proposal is to be placed on the ballot. The amendment will be adopted if a majority of those voting on the issue approve, so long as that majority constitutes at least thirty five percent of the total votes cast at the election.
regulatory powers, and will suggest specific proposals for its reform within those limits. The substantive policy issues justifying proposals for reform of common carrier regulation in Nebraska will not be discussed herein.\(^\text{12}\)

**THE COMMISSION**

In Nebraska, the Public Service Commission is the agency vested with intrastate jurisdiction over common carriers.\(^\text{13}\) It is the successor to the State Railway Commission.\(^\text{14}\)

The Nebraska Public Service Commission is currently composed of five elected commissioners chosen by district for six year terms.\(^\text{15}\) The operating divisions of the Commission include communications, warehousing, motor transportation, and rates and services.\(^\text{16}\) The Commission operates pursuant to statutory directives,\(^\text{17}\) the State Administrative Procedure Act,\(^\text{18}\) and its own published rules and regulations.\(^\text{19}\) Chapter 75 of the Nebraska statutes sets forth procedural, and often substantive directions for the Commission regarding aircraft carriers,\(^\text{20}\) motor carriers,\(^\text{21}\)

12. Regulatory reform can range from the simple modernization of regulatory procedure or can extend to total de-regulation of common carriers. The latter proposals depend heavily upon economic theory for their justification and a non-economist is obliged to accept the premises offered by the specialists. Several works that are helpful in setting forth the issues involved in the varying types of reform include:


13. Neb. Const. art. IV, § 20 vests the Commission with the following jurisdiction:

The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

rail carriers,\textsuperscript{22} pipe line carriers,\textsuperscript{23} telegraph and telephone utilities\textsuperscript{24} and transmission lines.\textsuperscript{25}

The importance of the Commission is apparent in a statement of the supreme court in \textit{State, ex rel. Quinn v. Marsh.}\textsuperscript{26} There the court said:

[I]t is safe to say that no other agency of the state subordinate to the sovereign government itself has more broad, far-reaching and important powers and functions than does the state railway commission.\textsuperscript{27}

\section*{LEGISLATIVE REFORM}

\subsection*{The Language of the Constitutional Grant}

The power of the Nebraska Legislature to modify the structure of Commission regulation of common carriers is limited. This limitation arises from the nature of the Commission as a constitutionally created body.\textsuperscript{28}

The regulatory authority of the Commission arises from article \textit{IV}, section 20 of the Nebraska Constitution which specifies in part:

The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.\textsuperscript{29}

The meaning of article \textit{IV}, section 20 is unclear. The first sentence quoted above appears to set forth general subject matter jurisdiction of the Commission as “regulation of rates, service and general control of common carriers.” But it qualifies this grant

\begin{footnotesize}
26. 141 Neb. 436, 3 N.W.2d 892 (1942).
27. \textit{Id.} at 447, 3 N.W.2d at 898.
29. The omitted portion of \textit{NEB. CONST. art. IV, § 20} reads as follows: There shall be a Public Service Commission, consisting of not less than three nor more than seven members, as the Legislature shall prescribe, whose term of office shall be six years, and whose compensation shall be fixed by the Legislature. Commissioners shall be elected by districts of substantially equal population as the Legislature shall provide.
\end{footnotesize}
of jurisdiction with the phrase "as the legislature may provide by law." The sentence itself does not specify the meaning of this last phrase. Taken alone, it may mean that the legislature could expand or contract the subject matter jurisdiction of the Commission at will. A more limited interpretation, however, would suggest that the Commission could exercise the enumerated jurisdiction only in a manner provided by law. This latter interpretation would reduce legislative authority to establishing the *procedural processes* of the Commission.

The second operative sentence of article IV, section 20 clarifies the first sentence somewhat when it states "in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision." This sentence, on its face, makes the Commission’s grant of power self-executing.\(^\text{30}\) It also appears to limit the meaning of "as the Legislature may provide by law," contained in the first sentence, by requiring that any legislative action be "specific legislation" before it will affect the Commission’s power. It does not, however, answer the question of whether the legislature’s power extends to control of Commission subject matter jurisdiction or is limited to specifying the procedures whereby that jurisdiction may be exercised.

When originally introduced,\(^\text{31}\) the senate bill clearly gave the legislature control over the subject matter jurisdiction of the Commission. It provided,

> The powers and duties of such commission shall include *such* regulation of rates, service and general control of common carriers as the legislature shall provide by law.\(^\text{32}\)

The conference committee of the house and senate resolved their differences, however, by omitting the word "such," and adding "but in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."\(^\text{33}\)

A house amendment rejected by the conference committee was the source of the phrase "specific legislation."\(^\text{34}\) That amendment would have given the Commission power to establish rates for railroads, prevent discrimination and determine disputes regarding

---


31. Introduced by A.E. Cady. It became senate file 196 and was first read on February 15, 1905.


33. The senate committee agreed to the house amendment changing "such" to "the." Neb. S. Jour., 29th Sess. (1905) at 1276, 1277.

34. *Id.*
transportation facilities in the absence of specific legislation. 35

The bill, then, as it emerged from the conference committee and as adopted, was characterized by ambiguous language concerning the respective power of the legislature and the Commission. 36

During the 1920 Constitutional Convention, Substitute Proposal 332 would have changed the language of the constitution to omit "as may be provided by law" in sentence one, substituting therefore the phrase, "these powers may be exercised without legislative authorization." 37

During the discussion, statements interpreting the meaning of the original 1906 language were made. A famous one was that of Mr. C. Petrus Peterson, who stated:

The present provision, as construed by the courts, gives the Railway Commission jurisdiction, constitutional jurisdiction over rates, service and general control in the absence of specific legislation, but that the Legislature retains power, under the present provision, to cut down or regulate the jurisdiction of the Railway Commission, so that under the present constitutional provision, the Legislature may say to the Railway Commission, 'you shall not regulate publicly owned common carriers, or publicly owned utilities, or you shall not regulate gas companies or electric light companies, or water companies. In other words, the present jurisdiction is subject to limitation by legislative act." 38

The significance of these comments is enhanced by the fact the convention ultimately chose not to amend the section and the 1906 provision remained intact. Thus, despite the ambiguity of the language, by the conclusion of the constitutional convention the concept that the legislature had control of Commission subject matter jurisdiction when it acted through specific legislation was firmly set.

This conclusion was based upon Mr. Peterson's interpretation and is widely accepted today. The supreme court, however, has never squarely examined the issue.

35. NEB. H. JOUR., 29th Sess. (1905) at 1036.
36. The wording of an amendment adopted by the house in committee of the whole prior to final reading illustrates the confusion. The amendment provided for broad Commission power in the absence of "specific legislation" regarding railroads. It also specified Commission power over all common carriers within the state but continued in further sentences by saying the Commission was to have other powers and duties as the legislature "shall" provide. Id.
38. Id.
TRADE REGULATION

LEGISLATION AND JUDICIAL INTERPRETATION

In the 1919 case of In re Lincoln Traction Co., the supreme court assumed, without citation or specific examination of the issue, that the term "specific legislation" meant legislative power to affect the jurisdiction as well as the procedure. The attorney for the respondents, in that case, was the same C. Petrus Peterson who offered his interpretation of the phrase "specific legislation" at the constitutional convention.

The case most often relied upon today for this proposition, however, is State ex rel. Missouri Pacific Railway Co. v. Clarke [Clarke], decided in 1915. There the supreme court denied a writ of mandamus which sought to order the Railway Commission to consider a rate increase in excess of two cents per mile, a limit set by statute.

The court said that legislative power to fix rates was still found in the constitution under article XI, section 4, and went on to say "it is in the absence of specific legislation that the state railway commission may exercise such authority." The Clarke case established the proposition that the legislature had retained the power to fix rates under the constitution; thus, the Commission could act only if the legislature had not acted. The test of that legislative action was whether or not there had been "specific legislation."

In a later case, however, the supreme court obfuscated the actual issue decided in Clarke, and said that in judging legislative

---

40. The court said:
The Legislature may make provision as to these powers and duties, but the Commission, "in the absence of specific legislation, shall exercise the powers and perform the duties enumerated." In this case an appeal was taken from an adverse rate ruling of the Commission.
Id. at 233, 171 N.W. at 194.
41. 98 Neb. 566, 153 N.W. 623 (1915) [hereinafter cited as Clarke].
42. Id. at 567, 153 N.W. at 623.
43. Ch. 67, § 141, [1907] Laws of Neb. 531.
44. Clarke at 568, 153 N.W. at 624.
45. The court in Clarke said:
After passing the act defining the powers and duties of the state railway commission, the legislature at the same session enacted laws decreasing existing express and freight rates. Laws 1907, chs. 91, 95. In each instance power to change the rates thus fixed was conferred in specific terms on the state railway commission.
Id. at 570, 153 N.W. at 624.
46. But whether or not there had been "specific legislation" was relevant only after a determination was made that the legislature had retained authority to act under the constitution.
action vis-a-vis the jurisdiction of the Commission, the question was whether the legislature had acted through "general" or "specific" legislation, not whether the constitution had preserved legislative power over the subject which was otherwise within the view of the Commission. Thus, the supreme court changed the thrust of its examination of the term "specific legislation" from that set forth in Clarke. The inquiry became whether the legislative action was definite and clear enough to constitute "specific" legislation; only then could the action divest the Commission of jurisdiction.

In this 1934 case, In re Yellow Cab & Baggage Co. [Yellow Cab], the supreme court considered the question of whether the legislature had enacted "specific legislation" when it authorized the Omaha city charter provisions concerning vehicular traffic. The court rejected the appellant's argument that the provisions relied upon were "specific" legislation, and said instead that the sections were general in nature and did not purport to reduce the power of the Railway Commission. The court continued by saying that, under the statutory sections relied upon, the city of Omaha was vested with a general police power to regulate the use of its streets, but that power was to be strictly construed. In contrast, the constitutional power of the Commission was to be broadly interpreted. The court in Yellow Cab thus gave an example of what "specific legislation" was not.

The doctrine that Railway Commission jurisdiction is subject to the limitation of "specific" legislation was reaffirmed in Rodgers v. Nebraska State Railway Commission [Rodgers]. That decision reversed a Commission order denying an applicant the benefit of a legislative exemption from regulation for agricultural products. The Rodgers court failed to discuss the scope of "specific" legislation, but assumed the act in question was such, and proceeded to dispose of other challenges to the exemption made by the Railway Commission. The court relied upon Yellow Cab for the proposition that Commission jurisdiction could be restricted by specific legislative action.

---

48. Id. at 141, 253 N.W. at 82.
49. Id. at 138, 253 N.W. at 80.
50. Id. at 144, 253 N.W. at 83.
51. Id. at 145-46, 253 N.W. at 84.
52. 134 Neb. 832, 279 N.W. 800 (1938) [hereinafter cited as Rodgers].
53. The two major issues of the case were whether the agricultural exemption violated the equal protection clause and whether the subject matter was one fit for legislative action. Both issues were resolved in favor of the legislative act.
54. Rodgers at 844, 279 N.W. at 807.
Not until 1949 was a legislative attempt to restrict the Commission's authority struck down by the court. The legislature in 1947 granted the State Department of Aeronautics general control over all aeronautics including the regulation of rates and services of "for hire" service. It further provided that the Railway Commission was to have "no control over aeronautics, and sections 75-101 to 75-512 shall be construed to have no application to the transportation of persons or property by aircraft."  

In *State ex rel. State Railway Commission v. Ramsey* [Ramsey] an injunction was granted against the Director of the Department of Aeronautics ordering him not to exercise any general jurisdiction over air carriers granted him under the statute. 

The court in Ramsey said:

The intention was that the commission should have authority to carry out this program in the absence of specific legislation.  

The court then confronted the meaning of specific legislation by referring to the two cent fare act which had been deemed controlling in *Clafe.*  

The Ramsey court said L.B. 247 was not specific legislation as was the two cent fare act, and went on to declare the legislative act an effort to confer the general regulation of common carriers upon another body in derogation of the constitution. Relying upon the precedent of *Rivett Lumber & Tool Co. v. Chicago & North Western Railway Co.*, the Ramsey court said that air carriers were indistinguishable from other common carriers, and that as such the legislature had no power to divest the constitutional jurisdiction of the Commission to regulate and control common carriers by transferring it to another body. Other more

---

55. See discussion in text at note 54 infra.  
56. Ch. 9, § 1, [1947] Laws of Neb. 71.  
57. Ch. 9, § 2, [1947] Laws of Neb. 72.  
58. 151 Neb. 333, 37 N.W.2d 502 (1949) [hereinafter cited as Ramsey].  
59. Ramsey at 343, 37 N.W.2d at 508.  
60. 98 Neb. 566, 153 N.W. 612 (1915).  
61. Ramsey at 344-46, 37 N.W.2d at 509. The court did not discuss the constitutionally retained legislative power over rates contained in the Clarke case.  
62. Id. at 347-48, 37 N.W.2d at 510.  
63. 102 Neb. 492, 167 N.W. 570 (1918). *Rivett* involved a statute giving the district court jurisdiction to hear cases involving the construction of side tracks and the power to grant appropriate relief. The court dismissed the case and held the question properly to be one within the jurisdiction of the Commission.  
64. Ramsey at 338, 37 N.W.2d at 506.  
65. Id. at 347, 37 N.W.2d at 510.
recent cases decided by the court have followed the language of both Yellow Cab and Ramsey.  

REGULATORY CHANGE

The power of the legislature to modify common carrier regulation by the Commission remains uncertain, despite the many cases. The intent of the framers of the 1906 amendment is unclear, as is the position of the Nebraska Supreme Court. As will be seen, application of the judicial doctrines surrounding "specific legislation" to de-regulation is difficult. Attempted legislative reform of the Commission could conceivably take many forms; total de-regulation, transfers of common carrier jurisdiction to other units of state government, or simple internal procedural reformation. Attempts to apply the "specific legislation" test to these reforms highlights the test's inconsistency.

"Specific" as a Procedural Door

If future court decisions were to follow the literal language of Yellow Cab and Rodgers, the legislature could readily divest the Commission of its jurisdiction. The only constitutional requirement would be that the legislature specifically enumerate each type of currently regulated activity intended for exemption. Following the precedent of Rodgers, the legislative laundry list could effectively exempt all common carrier activities from Commission jurisdiction.

Utilizing this type of approach, the legislature would have the choice of de-regulation of all common carriers, de-regulation of certain common carriers (for example, those of communications services), or de-regulation of only specific sub-types of carriers (for example, sand and gravel haulers).

This interpretation of "specific legislation" would actually permit the transfer of some jurisdiction from the Commission to another arm of government. It would only be possible, however, through use of narrowly drawn grants of power, with carefully delimited purposes. Otherwise, such action would be susceptible to interpretation as "general", not "specific" legislation.

---

67. This remains true despite the court's attempt to lay the issue to rest in Ramsey, and will remain true in the future because of the confusion apparent upon the adoption of the language.
68. This interpretation is supported by an examination of the argument rejected by the court in Ramsey. The defendant's brief argued:
    It is obvious that the language "specific legislation"... refers to legislation specifically dealing with the general subject matter of the amendment..." (emphasis added)
Briefs of the Nebraska Supreme Court, vol. 1755, at 237.
“Specific legislation” under this line of interpretation becomes a procedural door through which the legislature must walk to gain power over the Commission’s jurisdiction. If it walks through the correct doorway of this labyrinth, it may remove common carriers from Commission jurisdiction and may even transfer functions, under appropriate limitations, to other governmental entities such as a Department of Transportation.

A Substantive Test

A more likely interpretation of the legislative power would rely on the language in Ramsey. That is that the crucial issue is whether the legislature is seriously attempting to divest the Commission of a significant portion of its jurisdiction. If it is, the action is unconstitutional. The underlying theme of Ramsey was well spoken when the court said:

The conclusion is logical, if not inescapable, that the Legislature would not have proposed, and the people would not knowingly have approved, an addition to the Constitution creating a commission with power only to regulate and control common carriers to the extent . . . permitted by the Legislature . . . .69

The thrust of this is that the legislature must not be given the power to destroy what the people have created through their amendment to the constitution.

Any legislative attempt to reduce the powers of the Commission would be futile were the court to take this approach. This reasoning could be supported by a judicial re-examination of the line of cases defining “specific legislation” and a recognition that Clarke was the foundation relied upon. That case held that only when the legislature has constitutionally retained power over common carrier fares can it supersede Commission action by “specific legislation”.70 Thus interpreted, the “specific legislation” test closes the doorway to legislative de-regulation of common carriers, except where the Nebraska Constitution provides concurrent jurisdiction to both the Commission and the legislature.71

In that event, legislative reform of the Commission would have to take one of two possible forms: modification of the procedural processes of the Commission,72 or initiation of the process of con-
stitutional amendment. Of course these alternatives, along with legislative de-regulation, are available to the legislature under the broader interpretation of "specific legislation."

PROPOSALS FOR REFORM

Whether "specific legislation" is actually a procedural door, or, instead, a substantive test, is an issue only if the legislature attempts to divest the Commission of its jurisdiction over common carrier through legislative action.

There are, however, many less severe steps which might be taken by either the legislature or the Commission, or both, which would substantially change the method by which common carriers are regulated in Nebraska, but which would pose no difficult constitutional issues.

PROCEDURAL REFORM

The most important potential avenue of reform could be accomplished either by the Commission itself through its rulemaking powers, or by the legislature.73

Acting upon its own motion, the Commission made a significant procedural reform in 1975 when it modified the method by which telephone rate applications are handled. Faced with applications for rate increases which exceeded twenty million dollars, the Commission assigned staff attorneys to each of the cases, and directed them to prepare and present a staff case at the public hearing on certain matters, setting time limits on decision making, requiring the use of qualified hearing examiners, or the establishment of a public counsel within the Commission.

73. As to Commission action, the supreme court in Nebraska State Ry. Comm'n v. Service Oil Co., 157 Neb. 712, 722, 61 N.W.2d 381, 387 (1953) said:

The Commission is authorized to govern its proceedings and in the absence of statutory or constitutional inhibition to adopt and pursue its own rules and course of procedure.

Additionally, Neb. Rev. Stat. § 75-110 (Reissue 1971) states that:

The Commission shall adopt rules for the government of its proceedings, including rules of procedure for notice and hearing. The Commission shall also promulgate regulations which the Commission deems necessary to regulate persons within the Commission's jurisdiction. The Commission shall not take any action affecting persons subject to the Commission's jurisdiction unless such action be taken pursuant to a rule, regulation, or statute.

Legislative action directing the manner in which the Commission must proceed has been upheld as being within the scope of specific legislation permissible under the constitution. See Sherdon v. American Communications Co., 178 Neb. 454, 134 N.W.2d 42 (1965); Neuswanger v. Houk, 170 Neb. 870, 104 N.W.2d 235 (1960).
the rate application. The advantages of this new procedure are clear. Previously, staff recommendations were made privately to the Commission. Now, they are tested as to their validity by cross examination, and the Commission is presented with sworn testimony of credible witnesses testifying from a point of view broader than that of an applicant. The result is to guarantee a form of adversary proceeding, from which the Commission is able to assess the credibility of competing positions.

A serious deficiency with the system used by the Nebraska Commission is that it has not been institutionalized. No rule has been formally adopted outlining the staff role and the result is that staff participation is still decided upon a case by case basis. A rule such as that recently proposed by the Minnesota Commission should be utilized in Nebraska. That rule creates a “support staff” which assists the Commission in its decisional function and a “participating staff” which develops and presents the staff case at hearing.

74. An argument could be made that the adoption of this procedure without a formal rule is in violation of Neb. Rev. Stat. § 75-110 (Reissue 1971), which requires:

The Commission shall not take any action affecting persons subject to the Commission's jurisdiction unless such action be taken pursuant to a rule, regulation, or statute.

This is, however, mitigated by Rule 2 of the Commission which outlines the requirements of practice and which says:

Nothing in Chapter 1 shall prohibit staff members of the Commission who are admitted to practice law in Nebraska from interrogating witnesses or otherwise participating in proceedings before the Commission.

Rules and Regulations of the Nebraska Public Service Commission, ch. 1, rule 2 (Rev. 1972).

75. The proposed Minnesota rule is as follows:

PSC 504 Participation by Department of Public Service Staff and Counsel; Commission Support Staff and Counsel

(A) Participating Staff. Such members of the department staff as may be designated by the director with the concurrence of the Commission shall serve as participating staff in a proceeding. Participating staff shall participate as a special party and may

(1) through its witnesses present testimony as to results of its accounting, engineering and economic investigations, field studies, inspections, enforcement activities, and other technical investigations and studies, and

(2) make statements or recommendations on the record based on matters in paragraph (1) above, cross-examine witnesses, and file briefs.

(B) Participating Staff Counsel. Upon request of the director, the attorney general shall designate a member or members of his legal staff or special counsel to serve as participating staff counsel in a proceeding. Participating staff counsel shall provide legal assistance to participating staff and may participate with it in the proceeding.

(C) Commission Support Staff. The Commission support staff shall advise the Commission on issues relating to the proceeding and act in its be-
Two further steps need to be taken as well. The participating staff should be granted a fund with which to hire expert consultants, without Commission approval for each expenditure. Testimony of financial experts on the setting of a proper rate of return is mandatory, as is testimony of other experts on the questions of rate structure and regulatory accounting.

The second additional step is that the participating staff should be granted the right to participate in any appeal which might be taken from a rate order, and should himself have the right to prosecute an appeal.\(^7\)

Should the Commission fail to properly institutionalize this rate case procedure, the legislature could readily do so by either creating an independent public counsel,\(^7\) who would be directed to intervene in all rate cases before the Commission, or by directing the state attorney general to intervene.\(^7\) Either approach would be satisfactory, assuming that steps were taken to insure the competence of the personnel, the independence of the position, and the financial ability to obtain outside consultants as expert witnesses.

In addition, the use of the staff-presented case should be broadened. Currently staff cases are being presented only in telephone rate applications. They should be extended to all rate cases and to applications for authority as well.\(^7\)

---

\(^{76}\) The difficulty in this arises from the fact that as of this time all Commission attorneys are solely employees of the Commission. Thus, if an attorney wishes to appeal a decision the Commission majority wants left unappealed, the attorney may simply be terminated. For the Commission to grant a meaningful right of appeal, some form of employment tenure would also be necessary.

\(^{77}\) See, e.g., L.B. 521, § 1 et seq., [1969] Laws of Neb. 2879, which was passed by the legislature in 1969, but never implemented.


\(^{79}\) This is true if for no other reason than to insure the development of a complete record upon which the Commission can base its decision.
There is, of course, no guarantee that the broader application of the adversary process to rate and authority applications will result in an examination of broader regulatory issues than those presented in the facts placed before the Commission, but the additional voice of the "staff case" in the hearing process does increase the likelihood that alternative positions will at least be considered.

Ex Parte Contacts

A second procedural reform that was begun by the Commission this year, and which should be extended, is the prohibition against ex parte contacts. In the Code of Ethics adopted by the Commission in 1975, the following prohibition on ex parte contact was made:

No person who is a party to, counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit or make any ex parte communication concerning the merits of the proceeding to any member of the commission or hearing officer once the hearing has been opened.80

80. The complete ex parte provision of the Code of Ethics of the Nebraska Public Service Commission (1975) reads as follows:

3. Ex Parte Communications

No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit or make any ex parte communication concerning the merits of the proceeding to any member of the Commission or Hearing Officer once the hearing has been opened. No member of the Commission or Hearing Officer shall invite or knowingly entertain any prohibited ex parte communications, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

This section requires that persons who are parties of record to an on-the-record proceeding be treated somewhat differently than those who are members of the general public, not actively participating in a matter before the Commission. Any person who is a party to, or counsel for, or an agent of a party, or who intercedes in, any on-the-record proceeding must utilize the formal channels of a hearing or pre-hearing conference or formal motion to make any representation concerning the merits of the proceeding to any member of the Commission or a Hearing Officer. This section shall not be construed so as to prevent any elected member of the Commission from discussing matters with members of the general public who are not party to, or counsel for, or an agent of a party in any on-the-record proceeding.

It is advised, however, that any such Commission member who is contacted by a member of the general public regarding any on-the-record proceeding proceed in the following manner:

A. That he explain to the member of the general public that a decision in the matter will be made only upon the material brought out at hearing and appearing in the official record and that if he wishes to have certain matters considered, he should come a party to the proceeding.

B. That he should make no comment as to the ultimate decision to
The complete section prohibits these ex parte contacts after the hearing opens and, in effect, creates two classes of people; (1) participants in the proceeding, and (2) all others. The rationale for this is that the elected commissioners must be able to communicate at all times with their constituents who are not participants before the Commission.

This section should be tightened to eliminate all ex parte communications once the hearing is opened. It would be a simple matter for a commissioner to explain to a constituent that he cannot discuss a matter at this time because a hearing has been held, and that the decision must be made solely on the basis of that record.

If the Commission should fail to strengthen its code of ethics, the legislature could adopt a more stringent ex parte contact prohibition to apply when the Commission sits in hearing on an application. The legislature should not, however, require that the same standard apply when the Commission exercises its rulemaking powers. 81

**SHORT FORM HEARINGS**

Another area of procedural reform which could be accomplished by either the Commission or the Legislature is the elimination of the “short form” hearing.

Current statutes 82 and regulations 83 permit the processing of

---

81. As was pointed out in Pacific Coast European Conference v. United States, 350 F.2d 197, 205 (9th Cir. 1965):

It is apparent that in rulemaking hearings the purpose is to permit the agency to educate itself and not to allow interested parties to choose the issues or narrow the scope of the proceedings. The purpose of the notice is to allow interested parties to make useful comment and not to allow them to assert their ‘rights’ to insist that the rule take a particular form. The agency, in rulemaking, can look beyond the particular hearing record since it otherwise would be unable to draw upon its expertise.

82. NEB. REV. STAT. § 75-110.01 (Reissue 1971) provides:

After notice of an application or petition has been given as provided by the rules for notice, the Commission may process the application or petition without a hearing by use of affidavits if the application or petition is not opposed.

83. Rules and Regulations of the Nebraska State Railway Commission, Rule 15(c) (Rev. 1972).
applications which are not protested on the basis of affidavits. As a result of this procedure, a practice has developed in which applications for authority, such as sand and gravel hauling, are protested by competing carriers. But if the applicant is willing to amend his application to seek lesser authority, e.g. to carry wall rock, then the protestants withdraw, and the application is processed via the short form procedure.

The difficulty in these instances is that the Commission does not have a full hearing on the matter, and often fails to adequately consider the broader questions of the need or desirability of the authority being sought originally. A duty of the Commission is to provide for the public interest in motor carrier service, however, the power to shape the nature of authorities being granted rests in competing carriers, who threaten to protest unless the application is amended in a restrictive manner.

As pointed out previously, a reliance upon the hearing process cannot guarantee that this problem will be solved, but elimination of the short form procedure would provide a better opportunity for all applications to be more carefully considered.

These proposed changes are designed to insure the integrity both of the adversary process as a tool, and of the Commission in reaching its decision. A limitation inherent in that process is, however, that the focus naturally tends to be only on the issues set forth by the parties involved in the hearing.

**Rulemaking Powers**

The rulemaking function of the Commission is designed to permit the Commission to take a broader look at issues which cut across specific applications. Yet, the Commission usually chooses not to exercise that function. There are many issues which should be dealt with in this manner because of their importance. A good example is that of the telephone “interconnect” tariff. These tariffs outline the terms and conditions under which subscribers may “interconnect” equipment they have purchased with the telephone network. Several companies in Nebraska have such tariffs on file, approved after a hearing, but they are not uniform and those that the Commission finally ordered differ only slightly from the telephone company’s rather restrictive proposals. This

85. See, e.g., Pacific Coast European Conference v. United States, supra n.81.
86. For example, no substantive rulemaking actions have been taken by the Commission during the 12 month period from July 1974 to June 1975.
Nebraska practice stands in stark contrast to the rule recently promulgated by the California Public Utilities Commission. The California rule permits interconnection of any device that meets certain technical standards set up under a certification program.

Rulemaking should also be used to set forth procedural matters, such as minimum data to be filed with any rate authority application. Both areas are currently ignored by the Nebraska Commission. 87

The increased use of rulemaking would permit the Commission to more readily examine the overall impact of an issue, and to draw more extensively on its own expertise and offered comments. The broader impact is often only vaguely perceived when issues are examined on a case-by-case basis.

The desirability of the rulemaking procedure is reflected in several statements of Professor Kenneth Davis. He has said:

Recognition of the superiority of rulemaking procedure over adjudicative procedure for making law or policy affecting more than a few parties means that agencies should strive to use rulemaking procedure to the greatest extent they find feasible... 88

One fundamental need of American Administrative Law in its present stage is much more administrative rulemaking. 89

If the Commission chooses to continue to overlook this tool, which is at its command, the legislature could direct it to promulgate rules on specified issues, thus prodding the Commission to fulfill its broader responsibilities through use of the rulemaking process.

REGULATORY LAG

A continual problem of any agency’s procedure is the delay in processing applications. The frustration and difficulties arising from this type of delay are reflected in a decision of the Eighth Circuit Court of Appeals, which said of the Interstate Commerce Commission:

It is frustrating and thoroughly regrettable that the ICC could not in a matter of weeks determine whether or not this branch line should be abandoned, saving litigation expenses and more importantly giving a definitive answer to the future of the road. But no, our legal system is now

87. See, e.g., minimum filing requirements concerning statistical and financial data, issued by the Florida Public Service Commission.
89. Id. at 156.
so complex, so overburdened with contradictory requirements, that the system has almost ground to a halt.\textsuperscript{90}

Although it is doubtful that the lag present in the Public Service Commission is comparable to that found in the ICC,\textsuperscript{91} the legislature has taken one step designed to minimize regulatory lag. Section 75-128 of the Nebraska statutes provides in part:

\begin{quote}
[E]xcept for good cause shown, a decision of the Commission shall be made and filed within thirty days after completion of the hearing or after submission of affidavits in non-hearing proceedings.\textsuperscript{92}
\end{quote}

The statutory provision carries a noble intention, but provides no means by which the goal may be accomplished.

A more desirable and effective manner of avoiding the financial difficulties that can affect a regulated industry due to regulatory lag would be to permit the utility to place the increased rates it is seeking into effect immediately upon filing of an application, subject to a refund if any portion of the rates should be deemed unreasonable after completion of the hearing process. This is a procedure utilized by many other commissions,\textsuperscript{93} and its application in Nebraska would eliminate the most serious effects of regulatory lag.

\textbf{A RETURN TO “SPECIFIC LEGISLATION”}

The proposals presented to this point herein have been directed at making regulation function more effectively. This approach is sufficient for those common carriers which are by nature a natural monopoly,\textsuperscript{94} and thus, by definition, require regulation. But it does not confront the question of those common carriers which are not natural monopolies and which were placed under regulation for other reasons. The best example is that of motor carriers who

\begin{footnotes}
\footnote{90. I.C.C. v. Chicago, Rock Island and Pac. R.R. Co., 501 F.2d 908, 916 (8th Cir. 1974).

91. For example, the recent rate application of Northwestern Bell Telephone Co. was decided eight months after the initial application. The I.C.C. matter being examined by the Eighth Circuit in 1974 is still pending two and one half years after the application for abandonment was filed.


(A) Public Utility shall have the right any time after said rates have been suspended (by the Commission) for ninety days to place into effect any or all of such suspended rates by filing with the Commission a bond or other undertaking . . .

94. At least one economist agrees that some public utilities industries are at least in some respects natural monopolies. A. Kahn, The Economics of Regulation: Principles and Institutions, vol. II, ch. 1 (Wiley & Sons 1971) [hereinafter cited as Kahn].}

exhibit none of the characteristics of a natural monopoly but who were placed under regulation during the depression of the 1930's for a variety of other reasons.\textsuperscript{95}

If we are willing to accept the views of the economists,\textsuperscript{96} reform of this segment of common carrier regulation would include economic de-regulation of the industry, freeing it to permit competition. The policy of de-regulation is the point at which the constitutional language of specific legislation becomes crucial. Whether it is a procedural door or a substantive test determines the viability of a policy of de-regulation.

If it really is a substantive test, as \textit{Ramsey} indicates, then substantial de-regulation of motor carriers is impossible without a constitutional amendment.

In view of the disagreement over the desirability of de-regulation of motor carriers, perhaps a more modest approach would best serve Nebraska's needs. That could take the form of legislative action specifically removing one class or sub-class of carriers from Commission regulation. This limited action would seemingly be valid under \textit{Rodgers}, and would give the legislature an opportunity to study the effects of de-regulation before launching an effort to pass a constitutional amendment of broader impact.

Just as the constitutionality of broad legislative de-regulation is doubtful, any attempts of the Commission to administratively de-regulate certain carriers is constitutionally suspect. Although the supreme court has not confronted the question directly, it has provided dicta that the Commission not only has the right to regulate common carriers but has the duty as well.\textsuperscript{97} Such language would bar any effort by the Commission to divest itself of jurisdiction over common carriers.

\textbf{CONCLUSION}

It is unlikely that broad, substantive reform such as the de-regulation of all non-natural monopoly common carriers, could be accomplished by either the legislature or the Commission within the existing constitutional framework.

It is, however, within the power of both the Commission and the legislature to reform the procedures of the Commission so that

95. Id.
96. See generally, Kahn for the view that policy should be judged in terms of economic efficiency.
97. Block v. Lincoln Tel. & Tel. Co., 170 Neb. 531, 538, 103 N.W.2d 312, 316 (1960).
the "fair treatment" and "reasonable quickness" sought by Theodore Roosevelt through administrative agencies seventy years ago would be achievable. The procedural reforms discussed herein would not be vulnerable to constitutional attack because of the ambiguity of the "specific legislation" clause, and they would insure that the Commission does its assigned task in a manner better designed to secure and protect the public interest.