

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MIDAMERICAN LONG DISTANCE
COMPANY,

Plaintiff,

vs.

DONALD S. LEUENBERGER, Tax
Commissioner of the State of
Nebraska, THE DEPARTMENT OF
REVENUE, State of Nebraska,
COUNTY OF DOUGLAS, SAM J.
HOWELL, Treasurer of the
County of Douglas,

Defendants.

Docket 423 Page 280

ORDER OF SUMMARY JUDGMENT

This case came before the Court on February 4, 1988, for joint hearing on the plaintiff's motion for summary judgment, plaintiff's motion for temporary injunction and the joint motion of the defendants for summary judgment. Exhibits 1 through 19 were received into evidence and these matters were then submitted to the Court on briefs. The last briefs were received by the Court on February 25, 1988, and the Court now being fully advised, finds and order as follows:

1. This action requests declaratory and injunctive relief from the assessment and threatened collection of taxes under §77-803, Revised Statutes of Nebraska. This action challenges the constitutionality of §§77-801 et seq., Nebraska Revised Statutes and the validity of the assessment under §77-803, Revised Statutes of Nebraska.

2. The plaintiff, MidAmerican Long Distance Company (hereinafter MidAmerican), provides long-distance telephone service. MidAmerican does not own any switches - the equipment necessary to transfer calls from the local telephone company to a MidAmerican long-distance line. Instead, MidAmerican leases the physical facilities necessary to its business from the local telephone company.

3. On August 15, 1986, MidAmerican received a personal property tax statement from Douglas County. In that statement MidAmerican was notified that the tax was due on November 1, 1986, and delinquent after December 1, 1986. In June of 1987 MidAmerican was notified that a distress warrant would be issued against the personal property of the company if the taxes were not paid by July 1, 1987. On July 16, 1987, MidAmerican filed suit in Douglas County District Court requesting declaratory relief. Defendants named in the suit include Donald S. Leuenberger, Tax Commissioner of the State of Nebraska; the Nebraska Department of Revenue; Douglas County; and Sam J. Howell, Treasurer of Douglas County. After MidAmerican filed its petition in Douglas County District Court it received the notice of the issuance of a distress warrant. At that time MidAmerican moved for injunctive relief. Before the Douglas County District Court had reached the merits of the case, venue was transferred to the Lancaster County District Court. MidAmerican filed its motion for summary judgment on December 17, 1987 and the defendants filed their joint motion for summary judgment on January 22, 1988.

4. The main issue presented by both motions for summary judgment is MidAmerican's status as a public service entity under §77-801.01, Revised Statutes of Nebraska.

77.801.01. PUBLIC SERVICE ENTITY, DEFINED. As used in sections 77-801 to 77-803, public service entity shall mean any person or company, as defined in section 49-801, organized for profit under the laws of this state or any other state of government and engaged in the business of waterworks, electrical power, gasworks, natural gas, telegraphs, telephones, pipelines used for the transmission of oil, heat, steam, or any substance to be used for lighting, heating, or power, and pipelines used for the transmission of articles by pneumatic or other power and all other similar or like entities.

The tax was imposed on MidAmerican as a corporation "in the business of . . . telephones." Section 77-801.01 appears to be clear on its face and there is no need to resort to legislative history in order to interpret said statute.

5. MidAmerican asserts that it should not be characterized as being in the business of telephones. This argument is founded on the conceptualization of a telephone company as a business that operates and owns telephones and the physical properties necessary to telephone use. MidAmerican rents the physical facilities through which its business is accomplished. Requiring ownership of the business property would remove MidAmerican from the reach of §§77-801 through 77-803, Revised Statutes of Nebraska.

6. The defendants contend that the correct identification of a public service entity and the proper application of the term "in the business of telephones" need not be based on proof

of ownership of tangible property. Defendants argue that the services provided by MidAmerican are those that a telephone company would provide and therefore MidAmerican must be a telephone company. The defendants rely on United States Transmission Systems, Inc. v. Board of Assessment Appeals, 715 P.2d 1249 (Colo. 1986). In that case the Colorado Supreme Court examined a statute similar to the statute here challenged by the plaintiff. United States Transmission Systems, Inc. v. Board of Assessment Appeals, supra and the instant case are analogous on the issue of ownership and in both cases the long-distance service provider leased switches from the local telephone company. This Court finds the reasoning of the Colorado Supreme Court persuasive.

7. MidAmerican falls within the definition of "public service entity" under §77-801.01, Revised Statutes of Nebraska (Reissue 1986). The plain language of §77-801.01, Revised Statutes of Nebraska (1986), relates to the nature of the service provided by an entity in order to assess whether it falls within the definition of a "public service entity". MidAmerican is in the business of providing a form of telephone service and thus, is engaged in the "business of . . . telephones" under §77-801.01, Revised Statutes of Nebraska (Reissue 1986).

8. The tax imposed under §§77-801 to 77-803, Revised Statutes of Nebraska (Reissue 1986), is not a property tax levied for

state purposes in violation of the Constitution of the State of Nebraska. Said tax was levied by the defendant County of Douglas and the proceeds of said tax are to be distributed to local taxing entities in Douglas County. Under these circumstances said tax is not in violation of Article VIII, Section 1A, of the Nebraska Constitution. See State ex rel. Meyer v. County of Banner, 196 Neb. 565, 244 N.W.2d 179 (1976).

9. The application of §§77-801 to 77-803, Revised Statutes of Nebraska (Reissue 1986), to MidAmerican does not violate MidAmerican's constitutional rights to due process or equal protection of the law. See Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121, (1967).

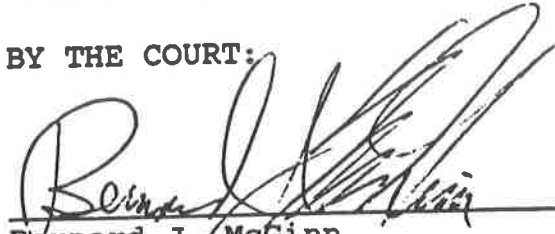
10. There are no genuine issues of material fact and the defendants are entitled to judgment as a matter of law. Defendants' motion for summary judgment is sustained. Plaintiff's motion for summary judgment is overruled.

11. The plaintiff is not entitled to injunctive relief and plaintiff's motion for temporary injunction should be and it is hereby overruled.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law for all of the reasons set forth in the preceding paragraphs. Plaintiff's petition is dismissed and the costs of this action taxed to the plaintiff.

DATED AND SIGNED this 31st day of May, 1988.

BY THE COURT:



A handwritten signature in black ink, appearing to read "Bernard J. McGinn", is written over a solid horizontal line. The signature is stylized and cursive.

Bernard J. McGinn
District Judge