LAW OFFICES

CROSBY GUENZEL LLP

FEDERAL TRUST BUILDING
134 SOUTH 13TH STREET, SUITE 400
LINCOLN, NEBRASKA 68508
TELEPHONE: (402) 434-7300
FACSIMILE: (402) 434-7303

WRITER'S E-MAIL: SGS@CROSBYLAWFIRM.COM
WRITER'S DIRECT DIAL NO. (402) 434-7324

THEODORE L. KESSNER
WILLIAM D. KUESTER
STEVEN G. SEGLIN
ROCKY C. WEBER
DAVID A. JARECKE
WILLIAM R. KUTILEK
RICHARD L. RICE
THOMAS E. JEFFERS

ROBERT C. GUENZEL (RETIRED)

ROBERT B. CROSBY (1911-2000)
THOMAS R. PANSING (1917-1973)
DONN E. DAVIS (1929-1998)

October 17, 2003

Jay Holmquist, General Manager
Nebraska Rural Electric Association
800 South 13th Street
P.O. Box 82048
Lincoln, NE 68501

Re: Contributions to Community Colleges offering line-workers programs

Dear Jay:

QUESTION

You have asked whether a public power district may lawfully make contributions of cash and surplus property including used vehicles ("Expenditures") to the Northeast Community College which presently offers educational instruction, training, and safety programs for line-workers or to some other educational institution which may in the future offer some or all of these programs ("Community College").

SHORT ANSWER

Arguably, yes.

ANALYSIS

The seminal case which considered whether expenditures by a public power district to a community chest were ordinary business expenses or charitable contributions is *United Community Services v. The Omaha Nat. Bank,* 162 Neb. 786, 77 N.W.2d 576 (1956) (the "Community Chest case"). In the Community Chest case, the Nebraska Supreme Court found that such expenditures were charitable contributions and that a public power district had no statutory authority to make such expenditures. Therefore, a pledge by the Omaha Public Power District (the "District") to United Community Services (the "Community Chest") for charitable

purposes was held to be invalid. The Court also found that statutes authorizing the pledge were unconstitutional as special legislation and for the further reason that they supported in part charities that had religious affiliations. A careful analysis of this case is important in understanding the Court's reasons for finding that the District's expenditures were charitable contributions rather than ordinary business expenses.

A. Nature of the Case

The Community Chest sought a declaratory judgment to determine whether the District had the authority to make contributions to the Community Chest. Community Chest operated within the boundaries of the territory served by such District. The declaratory judgment sought a declaration first, under the District's general statutory powers, and second, under statutes passed by the 1951 Legislature giving such District the specific power to do so under the conditions stated in the statutes. The trial court found that the pledges made by the District were in the nature of business expenditures authorized under its general powers. The Supreme Court reversed the trial court's decision.

B. Facts of the Case

The Community Chest annually conducted a campaign in the city of Omaha to collect funds in support of numerous accredited and affiliated agencies engaged in charitable and eleemosynary purposes. These funds were used by these agencies to carry on their work exclusively within the limits of the City of Omaha, a city of the metropolitan class, for the welfare of the people of Omaha.

For each of the years 1950 and 1951 the District, by separate resolutions of its board of directors, contributed and paid to the Community Chest the sums of $28,000 and $32,000 respectively.

The District, in each of the years 1952, 1953, and 1954, by separate resolutions of its board of directors which contain findings and imposed requirements to meet all the provisions of the law relating thereto as passed by the 1951 Legislature, authorized contributions to be made to the Community Chest in the respective amounts of $36,800, $39,000, and $39,000.

In 1951 the Legislature passed L.B. 447, codified in sections 14-1107 and 14-1107. The statutes authorized any public corporation or political subdivision engaged in a business in a proprietary capacity in a city of the metropolitan class, to use its funds for charitable or eleemosynary purposes. The statutes identified examples of businesses operating in a propriety capacity, such as the production or furnishing of light, power, gas, water, or any other utility to the public, and whose proprietary activities is not support directly by taxation. The statutes also provided that before a charitable contribution was made, the governing body of such political subdivision was required to determine by a two-thirds vote of all of its members that such contribution will protect and increase the safety of its property and promote the health and welfare of its employees and enable them to render more efficient service. The contributions

were limited by the statutes to one-half of one percent of the annual gross receipts derived from providing service with the corporate limits of a city of the metropolitan class.

C. Court's Rationale

The Court first examined the nature of expenditures, i.e., whether they were charitable contributions or ordinary business expenses.

(1) Charitable Contribution.

The Court first looked at the dictionary meaning of Eleemosynary which means "relating or devoted to charity; given in charity; having the nature of alms." See Webster's New International Dictionary (2d ed.), p. 829.

Id. at 791. Next, the Court examined the legal meaning of charity:

> **** a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. 10 Am. Jur. Charities, § 3, p. 585. See, also, 142 A. L. R. 1076; 14 C. J. S., Charities, § 1(a), p. 410; 17 McQuillin, Municipal Corporations (3d ed.), § 47.01, p. 1.
>
> It is the general rule that a gift of its property by a corporation not created for charitable purposes is in violation of the rights of its stockholders and is ultra vires, however worthy of encouragement or aid the object of the gift may be." 6A Fletcher, Cyclopedia Corporations (Perm. ed.), § 2939, p. 667.
>
> And, as stated in 10 McQuillin, Municipal Corporations (3d ed.), § 28.43, p. 106: * * * a municipality cannot give away its property or expend money for purposes other than corporate ones, and it follows that a municipality has no power in any manner to dispose of property of the corporation without consideration, where not for a corporate purpose.

Id.

(2) Ordinary business expense.

The District contended it had the lawful right to make these expenditures under its general powers, since they resulted in benefits to the District, i.e., they were ordinary business expenses and not charitable contributions. In support of its claim, the District offered the following evidence cited by the Court:

> . . . that the district's 980 active and 83 retired employees, and their families, take advantage of some of the facilities which these agencies supply; that it helps the morale of these employees because the district supports the community chest and therefore they

are more loyal and efficient employees; that it helps protect the district's property by reason of the fact that the programs of these agencies curb juvenile delinquency; that by doing so the district discharges a duty to the public of the community which it serves and thus creates good public relations; that a good community welfare program helps draw new business to Omaha which the district will have the opportunity of serving; and that all this will result in increased revenue and lower rates. It is also the thought of the district officers that as one of the leading businesses in Omaha it is important for it to accept civic responsibility in the community which it serves and properly discharge its duties to the public thereof.

Id. at 791 and 792.

(3) Powers and authorities of a public power district.

The Court next examined the general powers of a public power district as follows:

Section 70-602, R. R. S. 1943, provides in part that: 'A district may be created as hereinafter provided, and when so created, shall be a public corporation and political subdivision of this state, and may sue or be sued in its corporate name.'

In regard thereto we have said that: '* * * a public corporation, authorized by the legislature and organized pursuant thereto to carry out functions that have been determined to be for a public purpose and the general welfare of the people, is an arm or branch of the government for this purpose and under the plenary control of the legislature and therefore a governmental subdivision of the state within the terms of section 2, art. VIII of the Constitution, as amended in 1920.' Platte Valley Public Power & Irr. Dist. v. County of Lincoln, 144 **Neb.** 584, 14 N.W.2d 202, 155 A. L. R. 412. See, also, Regents v. McConnell, 5 **Neb.** 423.

The Legislature gave to public power districts all the usual powers of a corporation organized for public purposes. § 70-625, R. R. S. 1943. These are more fully set forth in section 70-626, R. R. S. 1943, and section 70-655, R. R. S. 1943. They are intended to permit the business of the district to be operated in a successful and profitable manner.

We have said that the following applies to a municipal corporation in exercising the power it possesses when functioning in a proprietary capacity: * * * a municipal corporation 'possesses, and can exercise, the following powers, and no others; First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable.' Christensen v. City of Fremont, 45 **Neb.** 160, 63 N. W. 364. Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., 137 **Neb.** 871, 291 N. W. 558. See, also, Slepicka v. City of Wilber, 150 **Neb.** 376, 34 N.W.2d 646. The same is true of public corporations engaged in proprietary functions. As held in State ex rel. Johnson v. Consumers Public Power Dist., 143 **Neb.**

753, 10 N.W.2d 784, 152 A.L.R. 480, by quoting from 29 C. J. S., Electricity, § 15, p. 521: 'Companies chartered for the purpose of supplying the public with electricity * * * have such lawful rights and powers as are clearly and expressly granted, together with such implied * * * powers as are reasonably * * * necessary to enable them to exercise those expressly conferred, and to enable them to accomplish the objects of their creation. All rights and powers not thus granted are withheld.'

In Nelson-Johnston & Doudna v. Metropolitan Utilities Dist., supra, in dealing with this subject, we said: 'The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances.' See, also, Greenwood v. City of Lincoln, 156 **Neb.** 142, 55 N.W.2d 343, 34 A. L. R. 2d 1203; State ex rel. Johnson v. County of Gage, 154 **Neb.** 822, 49 N.W.2d 672. We think the same would be true of all public corporations authorized to engage in proprietary functions.

(4) Were the expenditures by the District ordinary business expenses? or charitable contributions?

The Court found that the expenditures by the District were charitable contributions and not ordinary business expenses. The Court acknowledged that there was some evidence that the expenditures were of some benefit to the District and therefore could be considered operating expenses. Nevertheless, it declared that the approval of the expenditures as business expenses would subject all public corporations to solicitations by all kinds of charities and therefore it is best to leave the approval process to the Legislature. The Court found the expenditures invalid and its reasoning is as follows:

Since we have held that a district, in the operation of its business, should be treated in the same manner as a private corporation, appellant cites cases as controlling which hold that private corporations may expend funds for purposes, as was here done, on the basis that they are proper operating expenses. It is true there are some courts, both state and federal, that have come to such a conclusion independent of statutory authority, however, generally the authority to do so exists by statute or provisions of the Internal Revenue Code and Treasury Department directives issued pursuant thereto. The same is true in this state since the 1953 Legislature passed what is now section 21-1,165, R. R. S. 1943, authorizing private corporations to contribute to charitable undertakings or enterprises.

In this jurisdiction, under the general powers granted public corporations, the revenues derived are required to be devoted to the purposes for which the corporation is being operated, that is, the payment of operating expenses, indebtedness, and repairs, extensions, and improvements of the facilities. The diversion of the revenues to purposes other than these cannot be approved as incident thereto. While we are not unmindful of the fact there is some reasonable basis for the argument made, particularly in view of the evidence adduced to the effect that these contributions bring some benefits to the district

> and therefore should be considered as operating expenses, nevertheless, we think the matter of subjecting all such public corporations to solicitations by all classes of nonprofit agencies serving a public purpose is a matter of such grave public concern that it should be left with the Legislature which has plenary power over them. There the pros and cons of the matter can be fully presented and that body determine the public policy in regard thereto. We think the purposes served by these agencies are very worthy of everyone's charity but whether or not the revenue of public corporations should be permitted to be contributed for those purposes through these agencies, and to what extent, is, we think, a matter for the Legislature and not the courts. In the absence of express statutory authorization we find the district was without authority to make these contributions.

Id. at 794 & 795.

D. Are the proposed Expenditures to a Community College by a public power district ordinary business expenses or charitable contributions?

It is difficult to predict with any degree of certainty whether a court would rule that the proposed Expenditures to a Community College are ordinary business expenses. Nevertheless, I believe that the proposed Expenditures to a Community College have a better chance of being found by a court to be ordinary business expenses, than the expenditures made by the District to the Community Chest. The reasons are twofold. First, a community college is not the same type of charitable organization as the Community Chest. A community college is an educational institution which educates and trains students, while on the other hand, the Community Chest served as an umbrella organization exclusively within the City of Omaha that collected funds in support of numerous agencies engaged in charitable purposes, some which had religious affiliations. In other words, the Community Chest, in the broadest sense, is more of a charity than a Community College whose primary purpose is education. The Court in the Community Chest case appears to have placed substantial weight on the fact that the Community Chest's sole purpose was supporting other charitable organizations in the City of Omaha, some of which had religious affiliations.

Secondly, the courses and instruction which line-workers receive at a Community College train them for positions with electric utilities throughout the state and provide public power districts with a resource for obtaining well educated and skilled line-workers. A good percentage of the new line-workers hired by public power districts throughout the state are graduates of a Community College. In addition, Northeast Community College provides safety training and continuing education for line-workers of most of the public power districts throughout the state. Public power districts therefore have a continuing interest in the viability of a Community College and its continued existence, especially with the cut back of State funding for state colleges. Public power districts are benefited from the education and training received by line-workers.

A public power district making Expenditures to a Community College has a reasonable argument that such Expenditures are ordinary business expenses and not charitable contributions since the power district receives a benefit from such Expenditures. The nature of the benefit is the availability of educated and trained line-workers, which, if hired, may lead to a more efficient workforce with fewer accidents. This ultimately may result in to more revenues to the power district and lower rates for customers.

In comparison, the benefit that the District argued in the Community Chest case was less tangible and more remote. The District argued that some its employees took advantage of some the facilities that the charitable agencies supplied; it helped the morale of the employees which leads to more loyal and efficient employees; it helped protect district property since the programs offered by the charitable agencies curb juvenile delinquency; it helped create good public relations; a good community welfare program helps attract new business, and all of this will result in increased revenues and lower rates.

E. Electric Cooperatives

The statutory and constitutional limitations and restraints imposed on a public power district as a political subdivision of the state are not applicable to electric cooperatives organized under either *Neb. Rev. Stat.* §§ 70-701 to 70-738 (Electric Cooperative Corporation) or 21-1901 to 21-19,177 (Electric Membership Association). There appear to be no statutes pertaining to an Electric Cooperative Corporation that specifically governs the Expenditure that is the subject of this opinion. *Neb. Rev. Stat.* § 21-1928 authorizes an Electric Membership Association, unless its articles of incorporation provide otherwise, "To make donations not inconsistent with law for the public welfare or for charitable, religious, scientific, or educational purposes and for other purposes that further the corporate interest." Thus, an Electric Membership Association would be authorize to make the Expenditures even if they were found to be charitable contributions, so long as its articles of incorporation did not provide otherwise.

Most of the analysis regarding charitable contributions and ordinary business expenses is applicable to Electric Cooperatives. Any expenditure made should be supported by a detailed resolution stating the purpose of the expenditure and the expected benefits to be derived.

F. Constitutionality of Statutes in the Community Chest case

The 1951 Legislature dealt with the subject of making gifts to the Community Chest by passing L.B. 447, which are codified as sections 14-1106 and 14-1107. They provide as follows:

> For the purpose of promoting and aiding in the health and welfare of any city of the metropolitan class in which it may be operating, any public corporation or political subdivision in the State of Nebraska, which is engaged in a business in a proprietary capacity in a city of the metropolitan class, such as the production or furnishing of light, power, gas, water, or any other utility to the public, and which proprietary activities of such public corporation or political subdivision are not supported directly by taxation, may use its funds for charitable or eleemosynary purposes. § 14-1106, R. R. S. 1943.
>
> Any such public corporation or political subdivision in the State of Nebraska which is engaged in a business in a proprietary capacity in a city of the metropolitan class may contribute from its funds derived or to be derived from its proprietary activities to any association or corporation in a city of the metropolitan class which is organized or existing without profit to its officers, directors, or members and which operates exclusively for charitable or eleemosynary purposes for the welfare of the public; Provided, the governing body of such public corporation or political subdivision shall before making such contribution find and determine by the vote of two-thirds of all its members that to make such contribution will protect and increase the safety of its property and promote the health and welfare of its employees and enable them to render more efficient service to such public corporation or political subdivision and enable it to better discharge its duties to the public; and provided further, that the association or corporation to which such contributions are made shall so operate that the funds contributed shall be used within the limits of the city of the metropolitan class for the purposes set forth in this act. Such contributions shall not in any one year be in excess of one half of one per cent of the annual gross receipts of such public corporation or political subdivision in that year, which shall be computed on the basis of the receipts derived within the corporate limits of such metropolitan city. §14-1107, R. R. S. 1943.

The questioned examined by the Court was whether the Legislature acted within its authority in dealing with the matters involved in the statutes. The Court found that the Legislature, if it sets up reasonable standards, was not prohibited from authorizing Omaha Public Power District to use the funds for charitable or eleemosynary purposes. The Court found that the Legislature had set up reasonable standards, but violated Article III, section 18, of the Constitution of Nebraska which provides that "[t]he Legislature shall not pass local or special laws in any of the following cases, that is to say * * * Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

The Court stated in this regard that:

> The public good which the Legislature intended, and which it thought the money so authorized to be expended would serve, is applicable to the employees of all public power districts so operating. We think if such contributions are to be authorized no reasonable basis exists for the classification here made, which is, 'For the purpose of promoting and aiding in the health and welfare of any city of the metropolitan class in which it may be operating, * * *

United Community Services, 162 Neb. at 804. In other words, the statutes should have been broader to include all public power districts, not only the one located within a city of the metropolitan class.

The Court also found that the statutes violated Article VII, section 11 which provides:

> Neither the state Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof.

The statutes did not properly restrict the Community Chest to use the funds so that agencies that engage in both charitable and religious activities like the Y.M.C.A. and the Salvation Army, would not be benefited.

CONCLUSION

In my judgment, a reasonable argument can be made that the Expenditures made by a public power district to a Community College are ordinary business expenses and not charitable contributions. The rationale for this conclusion is explained above. Any expenditure made should be supported by a detailed resolution stating the purpose of the expenditure and the expected benefits to be derived.

Very truly yours,

CROSBY GUENZEL LLP

By Steven G. Seglin

SGS:rrk