OFFICIAL OPINION NO. 88-31, Proposed Referendum

July 13, 1988

Honorable Joyce Hazeltine
Secretary of State
State Capitol
Pierre, South Dakota 57501

Official Opinion No. 88-31

Proposed Referendum

Dear Secretary Hazeltine:

You have requested my opinion concerning the following facts:

FACTS:

On June 13, 1988, the Office of Secretary of State received for filing a petition seeking referral of 1988 Senate Bill 42. Based upon review of the petition as filed in the office, it appears that there are sufficient signatures to require certification of the question to a vote of the people in the 1988 general election. Since 1988 Senate Bill 42 does not contain a legislatively enacted emergency clause, you, as Secretary of State, intend to certify the bill to the ballot unless instructed by the Attorney General not to do so for legal reasons relating to the content of the bill.

Based upon those facts, you have asked the following questions:

QUESTIONS:

1. When presented with a petition apparently containing sufficient signatures to refer an Act of the Legislature, is there discretionary authority within the office of the Secretary of State to refuse to certify the question to the ballot? Assuming the existence of such authority, under what circumstances should it be exercised?

2. Is 1988 Senate Bill 42 referable?

BACKGROUND:

Article III, § 1 of the South Dakota Constitution provides in pertinent part:

The Legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the Legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions: provided, that not more than five per cent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This constitutional provision has been implemented through enactment of SDCL 2-1-3. The statute provides:

Any law which the Legislature may have enacted, except one which may be necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, shall, upon the filing of a petition as hereinafter provided, be submitted to a vote of the electors of the state at the next general election. Such petition shall be signed by not less than five percent of the qualified electors of the state. The form of the petition shall be prescribed by the state board of elections.

The South Dakota Supreme Court in State v. Larson, 138 N.W.2d 1 (1965) noted that the constitutional provision set out above establishes two classes of laws that are not subject to the referendum.

First, such laws as are declared by the act itself to be necessary for the immediate preservation of the public peace, health, or safety of the state; and, second, such laws as are necessary for the support of the government and its existing public institutions. A law may be necessary for the preservation of the public peace, health, or safety, and still be subject to the referendum unless the Legislature declares it necessary for the immediate preservation of the public peace, health, or safety. ... But a law that is necessary for the support of state government or its existing institutions is not subject to the referendum in any event. [Emphasis in the original.]

138 N.W.2d 3-4 quoting Hodges v. Snyder, 43 S.D. 166, 178 N.W. 575 (1920).

Accordingly, all acts of the Legislature are referable unless an act falls within one of the two identified exceptions.

IN RE QUESTION NO. 1:

In State ex rel. Wegner v. Pyle, 55 S.D. 269, 226 N.W. 280 (1929), a Writ of Mandamus was sought to compel the Secretary of State to accept a petition for filing and certify to the ballot a referendum upon Chapter 246 of the laws of 1929. The Court noted, "On advice of the Attorney General, respondent [Secretary of State] rejected the petition on the ground that the law was not subject to referendum." 226 N.W. at 280. In this case the Supreme Court ultimately determined that the Writ of Mandamus should issue and the ballot question be certified. At no point, however, did the Court criticize the Secretary of State's exercise of discretion, as informed by the Attorney General. The Writ issued upon a determination by the Court that the Act was not "necessary" for the support of state government and its existing public institutions.

In State ex rel. Shade v. Coyne, 58 S.D. 493, 237 N.W. 733 (1931), the Secretary of State again refused to certify a referendum question to the ballot once again acting upon the advice of the Attorney General. The Court upheld the Secretary of State's refusal to certify the question because "in this case it does not affirmatively appear from the face of the law, nor from the facts of which the court will take judicial notice, that the law in question will not produce additional revenue." 237 N.W.2d at 734. The Writ of Mandamus was denied.

Based upon the foregoing cases it is my opinion that the Secretary of State does have discretion to refuse to certify a ballot question in two circumstances. First, where the act sought to be referred has been declared to be an emergency act by the Legislature and said declaration affirmatively appears in the act. Second, the Secretary of State may refuse to certify a ballot question when informed by the Attorney General that in his opinion the act sought to be referred is necessary for the support of state government and its existing public institutions.

IN RE QUESTION NO. 2:

In State v. Pyle, our Supreme Court set out a "test" for deciding whether a law is necessary for the support of state government and its existing institutions.

The true test in determining whether or not a law is necessary for the support of the state government is, What will be the effect upon state government if the law is suspended until a vote can be taken, or what will be the effect if it is finally defeated?

State v. Pyle, 226 N.W. at 284. In State ex rel. Kornmann v. Larson, 81 S.D. 540, 138 N.W.2d 1 (1965) the Supreme Court said that "If the efficient operation of the state government would be unaffected by the delay or possible defeat, the law in such instance cannot be said to be necessary so as to prevent a referral." 138 N.W.2d at 4. This test was recently applied in Gravning v. Zelmer, 291 N.W.2d 751 (1980). In Gravning the Court concluded that a one-cent sales tax, ninety-eight percent for the purchase of a railroad and two percent for administration of the state railroad program, was necessary for the support of state government. The test is well settled and appears to have two subparts. The first part of the test is whether an existing public institution is involved, and the second, whether the act is necessary for the support of government.

As to the first part of the test, it is beyond doubt that the Public Utilities Commission is an existing public institution. The problem arises with applying part two of the test to this Act.

Section 30 of the Act amends SDCL 49-31-44 to provide that when the Commission undertakes to conduct investigations and hold public hearings pursuant to the Act any telecommunications company involved must make a deposit not exceeding $75,000 into the "utility investigation fund." The section goes on to provide that the Commission uses this deposit to defray expenses incurred in conducting the hearing and investigating the telecommunications company making the deposit, and for no other purpose. Section 31 of the Act provides that the funds thus generated are only for the purposes of this Act and not for the support of state government or even the Commission, since any funds remaining at the conclusion of a hearing are returned to the telecommunications company making the deposit.

This Act is a completely self-contained vehicle. The Act bestows heretofore nonexistent deregulation powers upon the PUC. In exercising these powers the Commission will incur certain expenses. The Act then provides the source of revenue for these expenses and only these expenses. Any excess revenue exceeding the cost of conducting the proceeding is returned to the telecommunications company at the conclusion of the hearing. Under the stringent test crafted by our Court the only effect of delay awaiting the vote is a later startup date for the exercise of deregulatory authority by the PUC. The only effect of defeat

of the measure by the people is to return the PUC and all other parties to the status quo ante as it existed prior to the enactment of 1988 Senate Bill 42. I cannot say that "the efficient operation of state government would be [affected] by the delay or possible defeat" of the law. Kornmann, supra, 138 N.W.2d at 4. Accordingly, 1988 Senate Bill 42 is not "necessary for the support of the state government or its existing public institution" in the constitutional sense as interpreted by our Court.

The answer to your second question is "Yes."

Respectfully submitted,

Roger A. Tellinghuisen
Attorney General