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OPINION NO. 85-211

Hon. Representative Bobby L. Glover
House of Representatives
State Capitol
Little Rock, AR 72201

Dear Representative Bobby L. Glover:

This letter is in response to your request for an official opinion on the following question:

Given the fact that the Arkansas State Constitution expressly prohibits monopolies and most of the large public utilities operate in a monopolistic situation, i.e., exclusive franchises, would it be possible for the General Assembly to pass a law which would prohibit utility monopolies and open up utility services to competition?

A general rule in regulatory law is that the state under its police power has the right to regulate any and all kinds of business in order to protect the public health, morals, and welfare. 16A Am.Jr.2d CONST. LAW, §424. The types of businesses that have been allowed to be regulated by the state are said to be clothed with a public interest. In Arkansas, for a business to be said to be clothed with a public interest, "the use of its commodities by the public must be such as to make it of public consequence or be of such nature that the service rendered has become indispensable for the convenience and happiness of the people and where it is fairly probable that excessive charges and arbitrary control of the business may arise." Cap F. Bourland Ice Co. v. Franklin Utilities Co., 180 Ark. 770, 22 S.W.2d 993, 1000 (1929).

The provision of the Arkansas State Constitution of 1874 that you refer to is found in Article 2 §19 which states in pertinent part:

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... [M]onopolies are contrary to the genius of a republic, and shall not be allowed; ...

The Arkansas Supreme Court, recognizing this anti-monopoly provision, followed the general rule by stating that this provision "is to be read and considered along with the [state's] police power and public welfare powers." North Little Rock Transp. Co. v. City of North Little Rock et al., 207 Ark. 976, 184 S.W.2d 52, 55 (1944). The Arkansas legislature has established agencies such as the Arkansas Public Service Commission (APSC) to regulate in the area of public utilities. A guiding principle in the creation of the APSC is the public convenience and necessity. In each of the cases before the APSC, "it is a question of fact as to how the public convenience and necessity may best be served, and competition is mandatory when the public convenience and necessity can best be served thereby." Id. 55; See Department of Public Utilities v. Arkansas Louisiana Gas Co., 200 Ark. 983, 142 S.W.2d 213 (1940).

Based upon the above cited cases, the General Assembly could deem it to be in the public interest to not have regulated monopolies in a particular area such as public utilities. To implement this objective the General Assembly would either repeal or amend the existing laws to require competition in the area of public utilities. At the present time, this decision is in the discretion of the Arkansas Public Service Commission. If the present laws are changed, an argument could be made that the State under the Arkansas Constitution Article 2, Section 22, would be required to compensate a utility company for the taking of any property right which the company may be found to have acquired under the grant of a franchise by the State.

The foregoing opinion, which I hereby approve, was prepared by Assistant Attorney General Paul L. Cherry.

Sincerely,


STEVE CLARK
Attorney General

SC:PLC:jr