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## Granting Contested Telephone Rate Increases Without Evidentiary Hearing Violates Due Process

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## Insurer's Duty

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types of insurance, namely uninsured motorist and "no-fault" coverage. The statutes governing these coverages provided that they would be included automatically in a policy unless the insured specifically rejected them. Ark. Code Ann. § 23-89-403 (Supp. 1984) and Ark. Code Ann. § 23-89-202 (Supp. 1989). This language was much stronger than that found in the underinsured motorist statute, which simply required that the coverage be "made available." This difference suggested to the court that the state legislature considered uninsured motorist and "no-fault" coverage more important than underinsured coverage, and that Shelter Mutual's duty to provide underinsured coverage was simply to make it available to its policyholders.

There were few decisions, from any jurisdiction, which interpreted the "make available" language. Edens relied heavily on *Jacobson v. Illinois Farmers Insurance Company*, 264 N.W.2d 804 (Minn. 1978) which approved of an insurer's actions as "commercially reasonable" when that insurer "made available" coverage by offering an application accompanied by information about the coverage to its renewing policyholders.

Shelter Mutual did not offer information to the Johnsons. Using the *Jacobson* analysis, Edens argued that Shelter Mutual did not "make available" the coverage. Edens contended that consumers in general, and the Johnsons in particular, were too ignorant to decide on the value of such coverage without more information. Rejecting this argument as one better addressed to and by the Arkansas legislature, the court stated its hesitancy to read a "commercial reasonableness test" into the statute and refused to do so.

### Summary Judgment Was Proper

The Court of Appeals affirmed the summary judgment for Shelter Mutual on the basis that the insurer complied with the Arkansas underinsured motorist statute. The court did not reach the question of

whether coverage would have been imputed if Shelter Mutual had violated the statute, nor did the court consider whether Edens's status as a passenger, rather than a policyholder, would have affected his ability to recover under imputed coverage. Finally, the court noted that this was a close case and that the waiver of oral argument by both sides was unfortunate.

Frank J. Troppe

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## Granting Contested Telephone Rate Increases Without Evidentiary Hearing Violates Due Process

Recently, the Supreme Court of Iowa ruled on the constitutionality of allowing a utility rate increase when opponents of the increase were not given the opportunity for an evidentiary hearing. In *Office of Consumer Advocate v. Iowa State Commerce Commission*, 465 N.W.2d 280 (Iowa 1991), the court held that the Iowa Utilities Board ("Utilities Board") violated the Office of Consumer Advocate's ("OCA") constitutional rights to due process when the Utilities Board determined that a proposed telephone rate increase was reasonable without having allowed the OCA opportunity to present evidence contesting the credibility of material facts submitted in support of the increase.

### Background

In December 1985, United Telephone Company of Iowa ("United") filed a rate increase application with the Iowa State Commerce Commission (now known as the Iowa Utilities Board). United sought to increase its directory assistance charges from \$0.25 to \$0.75 and to create new operator service charges ranging from \$0.75 to \$2.75 effective as of January 5, 1986. Pursuant to Iowa Code § 476.6(7), the United official responsible for rates and tariffs attached to his application a sworn affidavit stating that the proposed increases were necessary to offset increased expenses in-

curred by the company as a result of a contractual change with Northwestern Bell. In addition, United provided a statement of projected revenues and expenses under the current and revised agreements.

United notified its customers of the proposed increases by letter and invited them to file written objections with the Utilities Board. The Utilities Board received several objections. One of these was from the OCA, asserting that the increases were unreasonable and unjust and asking the Utilities Board to deny United's application or, alternatively, to docket it for further investigation. OCA stated that United had failed to supply sufficient evidence supporting the reasonableness of the increases and questioned United's claim that the proposed changes were revenue neutral. It charged that United had understated its revenue projections and overstated its expenses.

United answered OCA by arguing that Iowa Code § 476.6(7) and corresponding administrative regulations allowed rate making without evidentiary hearings when rate changes affected only specific services and not basic or general rates. Although United admitted that its expense and revenue figures were based on estimates, the company argued that the increases were reasonable because it would suffer revenue losses even with the proposed increases.

Despite OCA's concerns, and without granting an evidentiary hearing, the Utilities Board authorized the tariff, or rate increases. When, however, the Utilities Board received a subsequent proposal by United to increase rates unrelated to those in its previous request, the Utilities Board questioned whether the proposed tariffs were piecemeal, general ratemaking requiring the submission of additional factual evidence. The Utilities Board then suspended United's rate increases and asked OCA and United to submit briefs solely on the legal issues of whether the increases were specific or general and whether the agency had the authority to approve the increases without evidentiary hearing.

### The Utilities Board's Conclusion

Basing its conclusions solely on the data submitted by United, the Utilities Board concluded that it had the authority to approve United's increases because the rate changes: (1) affected only specific services and not basic rates, (2) had a minimal impact on United's rate of return, and (3) were motivated by an increase in costs beyond United's control. The Utilities Board further concluded that the increased rates were reasonable and just.

OCA disputed the Utilities Board's findings regarding the nature of the proposed increases and moved for rehearing. OCA also renewed its contention that customers would be harmed by the Utilities Board's refusal to grant a hearing allowing OCA to present opposing evidence and cross-examine United's experts before deciding whether the increases were reasonable. However, the Utilities Board denied the motion for rehearing, citing its authority to make rate-increase decisions without evidentiary hearings. The Board also stated that because its staff had previously examined United's projections, it saw no benefit in an evidentiary hearing. Given these facts, the agency held that OCA would have to do more than merely protest the proposed increases to raise a material issue of disputed fact that would require a hearing; it would have to identify affirmatively the correct information.

### The District Court's Decision

OCA petitioned the Iowa district court for judicial review of the Utilities Board's findings. In cases brought under the Iowa Administrative Procedure Act, such as the present case, the district court acted as an appellate court and decided whether the agency committed legal error. Iowa Code § 17A.19(8) (1989). On review, the district court found that under certain circumstances the Utilities Board had a statutory right to allow rate making without evidentiary hearings. The court also found, however, that OCA had raised material issues of disputed facts regarding the

reasonableness of the increases on the basis of United's revenue and expense projections. Therefore, the court held, because OCA represented the rights of United's customers, due process considerations required the Board to conduct a meaningful hearing on the proposed increases. The district court thus remanded the case back to the agency for resolution. United, as intervenor, appealed that decision to the Iowa Supreme Court.

### The Iowa Supreme Court's Decision

United raised two issues on appeal to the Iowa Supreme Court. It argued first that the district court based its ruling on an issue of constitutional due process that had not been preserved in the record before the Utilities Board. Secondly, United claimed that the district court erred in holding that OCA had raised issues of material fact that would constitutionally require a hearing before the Utilities Board.

### Preservation of Constitutional Claim

United argued that OCA had not raised a due process challenge in its initial objections to the Utilities Board's action. Because this constitutional issue had not been raised before the agency, United contended, OCA was barred from raising the issue on appeal. However, the supreme court did not find dispositive the fact that OCA had not raised the constitutional issue in its initial pleadings to the agency. Although the court noted that the general rule barred the introduction of new issues raised on appeal, the court held that an exception existed when the issue was raised for the agency's consideration in a motion for rehearing. The court noted that OCA's motion for rehearing included the due process claim. In its application for rehearing, OCA had specifically cited section one of the fourteenth amendment to the United States Constitution and article one, section nine, of the Iowa Constitution. OCA claimed that these due process considerations required that it be allowed the opportunity

to present evidence and arguments contesting the proposed tariffs before the Utilities Board issued its final ruling. The court further noted that OCA had claimed from the outset that the utility's consumers were entitled to be heard on the proposed rate increases. Therefore, the court held that the due process challenge had been raised with sufficient timeliness to give both United and the Utilities Board an opportunity to respond.

In addition to contesting the timeliness of OCA's constitutional challenge, United also alleged that OCA had not raised the issue with sufficient specificity to enable the Utilities Board to know what error OCA alleged. United claimed that to preserve the issue on appeal, OCA should have specifically cited to the due process clause of the fourteenth amendment. The supreme court dismissed this argument, stating that the other safeguards secured by the fourteenth amendment clearly had no bearing on the case. The court found that OCA's repeated requests for an evidentiary hearing sufficiently alerted the agency to the fact that OCA's constitutional challenge related to the due process clause of the fourteenth amendment and not to some other clause.

### Right to an Evidentiary Hearing

Both parties agreed that no statute existed that mandated an evidentiary hearing in this case. The parties disagreed, however, on whether the due process clause of the U. S. Constitution mandated a hearing. The court held that due process would require a hearing if the parties disputed underlying material facts. OCA contended, and United denied, that OCA had raised sufficient factual disputes before the Utilities Board.

The supreme court examined the district court's conclusion that OCA had, in fact, raised at least three disputed issues of material fact related to the reasonableness of the proposed rate increases. The district court had noted first, that United had failed to document the terms of its contract with Northwestern Bell. Second, United did not provide the source of its pro-

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jected directory assistance usage data or its corresponding revenue and expense projections. Because these omissions precluded independent verification of the reliability of United's figures, the district court found that OCA's concerns regarding inflated numbers and duplicate recovery were validated. Finally, because the Utilities Board had failed to furnish OCA with the calculations that led it to conclude that the increases were just and reasonable, its conclusion was open to dispute.

On appeal to the supreme court, United argued that the district court's findings were merely a reiteration of OCA's contentions. United claimed that unless OCA presented its own contrary data refuting United's calculations, OCA had not disputed material facts making an evidentiary hearing worthwhile. Although the supreme court agreed that purely legal disputes did not warrant an evidentiary hearing, the court dismissed United's argument.

The supreme court agreed with the lower court's findings that OCA has raised sufficient factual issues warranting an evidentiary hearing. The court found that the Utilities Board had mistakenly decided that no genuine dispute regarding material facts existed when it relied solely on United's version of the facts and prevented OCA's challenge. Because OCA represented United's consumers in this case, the court held that constitutional considerations necessitated that OCA be given the opportunity to examine and to test the credibility of the data upon which the Utilities Board based its decision. The supreme court therefore affirmed the district court's remand to the agency for further proceedings.

Aida M. Alaka

## Insurance Agent May Have Bound Company To Temporary Insurance Policy Despite Misrepresentation By Insured

In *Ellingwood v. N.N. Investors Life Insurance Co., Inc.*, 805 P.2d 70 (N.M. 1991), the Supreme Court of New Mexico held that genuine issues of material fact existed with respect to the authority of an insurance agent to bind the company to an oral contract for temporary insurance coverage and with respect to alleged misrepresentations made on an application for insurance coverage.

### Background

On October 30, 1985, James Streeter ("Streeter") applied for health and life insurance from N.N. Investors Life Insurance Co. ("N.N. Investors"). Streeter suffered from scoliosis, a spinal deformity, which was plainly visible. The agent for N.N. Investors asked Streeter questions and completed the application forms based on Streeter's verbal responses. The agent asked whether Streeter ever had any indication, diagnosis or treatment of various respiratory diseases or muscle and bone disorders, to which Streeter replied, "No." The agent indicated on the form that Streeter's lower spine had been surgically fused and recorded the name, address, and phone number of Streeter's treating physician. Streeter did not have a physical examination or interview with a physician prior to completing the insurance application of N.N. Investors.

The language of the application provided that coverage would not be effective until the insurance company approved the application and the applicant paid the first premium. Streeter signed the application and asked the agent when coverage would be effective. According to the affidavit of Streeter's grandmother, the agent responded, in her presence, that coverage would begin upon receipt of payment of the first premium;

when Streeter paid the agent, the agent replied that coverage was in effect at that time. Relying solely on the application, the company subsequently approved major medical and term life insurance coverage for Streeter. The insurance certificate stated that coverage would begin at 12:00 noon on November 12, 1985.

On November 10, 1985, Streeter entered a hospital emergency room for treatment of severe bronchial pneumonia. Streeter died 3:40 a.m. on November 12, just over eight hours prior to the time of effectiveness of coverage, as stated on the insurance certificate.

### Claims and Defenses

Upon receipt of claims under the insurance policies, N.N. Investors investigated Streeter's medical history and discovered that he suffered from scoliosis and had suffered pulmonary problems in the past. N.N. Investors claimed that Streeter's failure to disclose these medical conditions amounted to material misrepresentations. As a result, N.N. Investors refused to pay benefits under the policies and refunded the premiums paid by Streeter to date. In addition to the claim of misrepresentation, N.N. Investors argued that under the terms of the application, insurance coverage was not effective until approved by the company. N.N. Investors argued that the terms of the agreement excluded coverage for pre-existing conditions; since the pneumonia occurred prior to the effective date of coverage, it constituted such a pre-existing condition.

In response, Patricia Ellingwood ("Ellingwood"), as representative of Streeter's estate, sued N.N. Investors for breach of contract and negligence. Ellingwood claimed that N.N. Investors's agent had apparent authority to bind the insurance company by oral agreement to temporary insurance coverage effective upon receipt of payment. Ellingwood further claimed that N.N. Investors violated a statute regulating temporary insurance coverage which she claimed constituted negligence per se on the part of N.N. Investors