OPINION
73-515

June 7, 1973 (OPINION)

Mr. Q. R. Schulte
State's Attorney
Mountrail County
Stanley, ND 58784

Dear Mr. Schulte:

This is in reply to your letter of April 16, 1973, relative to Senate Bill 2300 enacted by the recent Legislative Assembly. We are sorry for the delay in answering the question. However, the import of the question caused considerable research and conference in order to prepare our answer. You state the following facts and questions:

> "During the past Legislature, the Legislature passed Senate Bill 2300 and Governor Link signed the same enacting it into law. This bill amended Section 57-34-01 by merely changing the 500 to 2500. This enables the Midstate Telephone Company of Stanley, North Dakota, to be taxed on the same basis as all mutual telephone companies such as RTA are taxed. I would assume this law becomes effective July 1, 1973, and this creates a problem as to whether the Midstate Telephone Company must make two tax reports, one for the first half of the year under Chapter 57-06 as the company has previously done and the last half under Chapter 57-34. It would be very nice if the company could just make one tax as required under Chapter 57-34. Would you kindly advise your thinkings on this matter."

I believe that the holding in the 1957 North Dakota Supreme Court decision in United Telephone Mutual Aid Corporation v. State, 87 N.W.2d. 54, and what seems to me to be the applicable rules of statutory construction require a holding that Senate Bill 2300 does not apply to the 1973 assessment and tax on any company affected by it but, instead, applies for the first time to the 1974 assessment and tax.

The United Telephone Mutual Aid Corporation case held that not only the value, ownership and use but also the taxability of property assessed under Chapter 57-06 for any year is determined as of January 1 of that year (even though the assessment to determine the value of the property is not made until in August of that year). As to telephone companies taxed under Chapter 57-34, the Court said, 87 N.W.2d. at 56, that:

> "It is also clear that mutual and cooperative telephone companies are to be assessed upon the basis of the number of telephones they had in service on December thirty-first of the year preceding the year in which the assessment is made."

Although the United Telephone case did not involve any change in the law as is the case with Senate Bill 2300, its holding as applied to companies affected by Senate Bill 2300 I believe means that on January 1, 1973, any such company's property becomes liable for

assessment in 1973 under Chapter 57-06 for 1973 property tax purposes unless Senate Bill 2300 has the effect of vacating that 1973 taxability status under Chapter 57-06 and placing it under Chapter 57-34.

Senate Bill 2300 says nothing about an effective date or whether it should have either prospective or retroactive effect. I believe that in order to regard Senate Bill 2300 as applying to the 1973 assessment of a company affected by it, it would be necessary to hold that it has the retroactive effect of changing the 1973 taxability status that the company's property had acquired on January 1, 1973 under Chapter 57-06. Our Supreme Court has, of course, many times applied the rule that unless the legislature has expressly stated its intention that a statute should apply retroactively, the statute should be regarded as operating prospectively only. See, in particular, Scranton Grain Company v. Lubbock Machine and Supply Co. (N.D. 1971), 186 N.W.2d. 449, in which it was held that Section 1-02-10, North Dakota Century Code, which provides that "No part of this code is retroactive unless it is expressly declared to be so", prohibited the Court from giving retroactive effect to a statute unless the statute had a savings clause that did so. In that case the 1969 statute in question, the "long arm statute", did not have such a savings clause and the Court held that Section 1-02-10 prohibited the giving of retroactive effect to it even though the Court apparently regarded the statute as a purely procedural type of statute. Also see the cases cited in Murray v. Mutschelknaus, 70 N.D. 1 at 8, 291 N.W. 118, and Great Northern Railway Company v. Severson, 78 N.D. 610 at 618, 50 N.W.2d. 889.

Since Senate Bill 2300 amending the definition of a telephone company in Section 57-34-01(1) does not become effective until July 1, 1973, the annual report which is required under Chapter 57-34 to be filed by May 1, 1973, as provided in Section 57-34-02, could not be required of a company that is affected by Senate Bill 2300 unless Chapter 57-34 as amended by Senate Bill 2300 is applied retroactively to that company.

Similarly, since Senate Bill 2300 does not become effective until July 1, 1973, any telephone company affected by it that has been subject to assessment under Chapter 57-06 presumably is still subject to the requirement in Section 57-06-06 that it file an annual report by May 1, 1973, in which is detailed the information that is applicable as of January 1, 1973, unless Senate Bill 2300 is applied retroactively to repeal Section 57-06-06 insofar as such a company is concerned.

What is said in the two preceding paragraphs with respect to the filing of annual reports by May 1 applies with equal force to the effect that Senate Bill 2300 has on all of the other provisions of Chapters 57-06 and 57-34.

The only way that Senate Bill 2300 and the other provisions of Chapter 57-34 on which it depends can be applied without retroactive operation is by regarding the year 1974 as the first year to which Senate Bill 2300 can apply. This would give Senate Bill 2300 prospective operation as to the provisions of both Chapter 57-34 and Chapter 57-06. If Senate Bill 2300 were regarded as controlling the

1973 assessment of any company affected by it, it would necessarily have to be applied retroactively to the provisions of both Chapter 57-34 and Chapter 57-06 without any expression of intention by the legislature that it should operate retroactively.

In view of the foregoing, the filing of an annual report by May 1 that is required by both Chapter 57-06 and Chapter 57-34 should be regarded as only one of the steps in the assessment process and is in reality a listing by the company of its property for taxation. The assessment made in August by the state board of equalization under either chapter is another step in the assessment process. The date for completing either of these steps is not the date prescribed for determining whether telephone property is subject to tax for the year or how it is required to be taxed for the year; that date is the preceding January 1, for property assessed under Chapter 57-06 and the preceding December 31 for property assessed under Chapter 57-34. All of the steps in the annual assessment process that occur after either of those dates merely relate back to establishing the facts as they exist on that date such as valuation, ownership and taxability.

Sincerely yours,

ALLEN I. OLSON

Attorney General