

Opinion No. 47-5090

October 21, 1947

BY: C. C. McCULLOH, Attorney General

TO: Mr. Eugene Allison Chairman State Corporation Commission Santa Fe, New Mexico

{*98} We are in receipt of your letter of October 14, 1947 in which you ask whether a telephone company {*99} which has been operating under a franchise granted by the County Commissioners, prior to the incorporation of a village or town, must acquire a franchise from the village or town after it has been incorporated, in order to continue operating in such village or town.

The County Commissioners have the power to grant a franchise. This power is derived from Sections 15-3401 and 15-3501 of the 1941 Compilation which are, insofar as material, as follows:

"Each organized county in this state shall be a body corporate and politic and as such shall be empowered for the following purposes:

* * *

4. To make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers." (15-3401)

"The powers of a county as a body politic and corporate shall be exercised by a board of county Commissioners." (15-3501)

Based on these sections which have remained unchanged, the New Mexico Supreme Court in the case of Agua Pura Co. v. Mayor, 10 N.M. 6, 60 Pac. 208, held that the board of county commissioners had the power to grant a franchise to a water corporation to operate in the then unincorporated settlement of Las Vegas. Thus, the franchise, when granted by the county commissioners in the two cases referred to by you, was a valid franchise.

The grant of a franchise, when accepted and acted upon by the grantee, creates a contract which cannot be impaired. 26 C. J. 1022. Further, a franchise is property and, as such, cannot be taken away without due process of law. As the telephone company had the right to operate in the two communities mentioned by you, under a valid franchise, this right to operate in the community could not be taken from the telephone company without impairing the contract and depriving them of a valuable property right.

In the case of Owensboro v. Cumberland Telephone & Telegraph Company, 57 L. Ed. 1389, 230 U.S. 58, the Court held that the grant of a franchise is not a mere license, but

is the grant of a property right which is assignable, taxable, and alienable, and that when such grant had been accepted and acted upon by the grantee, it became a contract between the city and the telephone company, which could not be revoked or repealed unless the power to repeal was clearly and unmistakably reserved. In the lower Court in the Owensboro case, 174 Fed. 739, the Circuit Court of Appeals held that such a contractual right could not even be affected by the adoption of a Constitution by the State where the franchise had been granted prior to the adoption of the Constitution, even though the Constitution contained a provision forbidding the granting of such type of franchise.

In *City of Benton Harbor v. Michigan Fuel & Light Co.*, 250 Mich. 614, 231 N.W. 52, 71 A.L.R. 114, the Supreme Court of Michigan held that vested rights acquired under a franchise granted by a municipal corporation are not affected by the subsequent incorporation of the municipality under a statute limiting its power to grant franchises to terms not exceeding 30 years.

This is, in effect, the holding of the Supreme Court of New Mexico in the *Agua Pura* case, since the Court there held that after the franchise had been granted, the Legislature could not give the city of Las Vegas power to regulate rates in a manner different from that provided by the franchise.

In view of the foregoing, it is my opinion that as long as the telephone company's franchise from the county remains in full force and effect that the telephone company is not required to obtain a franchise from the newly incorporated {**100*} town or village. This is assuming, however, that the franchise from the county did not contain a reservation broad enough to cover the incorporation of a part of the county as a town or village.

By ROBERT W. WARD,

Asst. Atty. General