

## Opinion No. 52-5562

July 13, 1952

**BY:** JOE L. MARTINEZ, Attorney General

**TO:** L. D. Wilson Administration Engineer State Highway Department Santa Fe, New Mexico

{\*273} Recently you requested from this office an opinion as to whether the Highway Commission can pay the Hot Springs Telephone Company for actual costs incurred in relocating telephone lines which were situated upon property it was necessary to secure for the right of way of Project S-91 (3) in Sierra County.

I understand the facts of the case to be as follows: Project S-91 (3) is a Federal Aid Project. The right of way for Project S-91 (3) was obtained from the United States Government in the Elephant Butte Reservoir area. The poles and lines in question had been erected by the Butte Telephone Company (predecessor owner of the line) in late 1923 or early 1924, pursuant to an agreement dated September 25, 1923, between that company and the U. S. Reclamation Service. By this agreement, a permit was given the company to maintain such lines over this government land, but it was agreed that no permanent right was thereby given to the company and that the United States could revoke the permit at any time. However, the permit is still in effect and there is no indication that the United States will seek to revoke it. The actual cost of the recent relocation of the lines was \$ 491.82.

In view of the foregoing facts, it is my opinion that the Highway Commission can legally pay to the Hot Springs Telephone Company the actual cost of relocating the lines, a sum of \$ 491.82. In reaching this decision, this office is not unmindful of § 58-714 NMSA, which reads in part as follows:

{\*274} "In all cases where the widening, improvement, reconstruction, or maintenance of the highway shall necessitate the rearranging of the pole line, conduit, wires, or cables located upon such highway right of way, the owner thereof shall within thirty (30) days after receiving notice in writing from the State Highway Engineer of the necessity of such rearrangements, proceed at the expense of the owner thereof to make the rearrangements in conformity with the reasonable regulations of the state highway engineer."

The case at hand, however, does not fall within the above language, in my opinion. Sec. 58-714 contemplates, I believe, instances where the lines and poles are located on an unused portion of a right of way, already possessed by the state. The difference in the case we are considering is obvious. In the contemplation of the law, the company is, at least, a licensee on the government land, and although such license may be revocable, the company has a right to stay on the land until such revocation. Moreover, it is clear that the government does not regard the granting of the right of way to the state as a

revocation of the company's "permit," or license. Possibly the United States feels that whatever was the context of the original agreement (not available to this office), the company by expending money for improvements may have acquired an easement. This is of course conjectural.

In view of these facts, however, and the rather confused legal status of the company on this government land, it would be a harsh holding which would require the company to pay the cost of relocation. Whatever interest the company has on the land, whether that of a licensee or an easement holder, such interest preceded grant of the right of way to the state. Therefore, in my opinion, the payment of the cost of relocation of the company's lines in the case at hand is somewhat analogous to the payment of compensation to property owners for damages incurred incidental to condemnation. The facts differ, of course, but the fundamental legal principal of payment of compensation to property owners for damages suffered incidental to an acquisition of a right of way is common to both cases. The damages suffered here are easily determined -- the actual cost of relocating the company's lines.

It is therefore my opinion that the commission is authorized to make a payment of \$ 491.82 to the Hot Springs Telephone Company for the costs incurred in the relocation of its telephone lines in Sierra County.

I trust that this opinion answers all your questions on this subject.