

Opinion No. 55-6271

September 6, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. L. D. Wilson, Chief Highway Engineer, State Highway Department, Santa Fe, New Mexico

The matter of payment by the State, with possible subsequent reimbursement from Federal Aid funds, for removal and relocation of electric transmission and distribution lines on an urban road project in Artesia has been submitted by you to this office for opinion.

The question submitted is whether Southwestern Public Service Company is entitled under its franchise and under applicable statutes to be reimbursed for the cost of moving its lines.

It is agreed by all concerned that the lines must be moved and relocated to permit the proper construction of the project. Southwestern Public Service Company operates in Artesia by virtue of a franchise dated July 16, 1943, which gives it the right to use and occupy the streets of Artesia in any lawful way for any use, effect and lawful purpose. The franchise was granted by the City under the provisions of § 68-1-3, N.M.S.A., 1953 Compilation. We note that this section permits the use of the streets and provides "that such use shall not unnecessarily obstruct public travel."

The construction of franchise agreements and statutes pertaining to this problem has been the subject of many decisions throughout the country, although not by our Supreme Court. One of the latest cases on the subject and one which is quite closely in point from a factual standpoint is that of Southern Bell Tel. & Tel. Co. v. Commonwealth, (Ky. App. 1954), 266 S.W. 2d 308. There, the utility franchise provided that the use of the streets was to be "so as not to obstruct the same". The Kentucky Court held:

"We think, fairly and reasonably construed, the removal and relocation of the poles and lines at appellant's expense may be justified under the specific provisions of the grant. The term 'so as not to obstruct the same' unquestionably relates to the obstruction of improvements, construction, and reconstruction of the state's highways as well as obstruction of travel upon completed highways."

It was further held that a contrary construction of this provision would violate the provision of the Kentucky Constitution prohibiting pledging the credit of the State in aid of any person, association or corporation. The provision of the Kentucky Constitution therein construed is quite similar to Article 9, Section 14 of the Constitution of New Mexico, and the reasoning expressed by the Kentucky Court would likewise be applicable in New Mexico.

It was further held in the above mentioned case that irrespective of the construction of the term in the franchise, the relocation of utility lines without reimbursement could be required under the police power of the state. Inasmuch as the question may be completely answered without deciding this point, we do not express an opinion as to it, but merely present it for your information.

From the foregoing, we conclude that Southwestern Public Service Company is not entitled to reimbursement for the relocation of the facilities involved.

By Walter R. Kegel

Assistant Attorney General