Opinion No. 57-124

June 10, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr., Assistant Attorney General

TO: Mr. Paul W. Robinson, District Attorney, Second Judicial District, County Court House, Albuquerque, New Mexico

QUESTIONS

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"May the County Commission, in granting a franchise to a public utility, impose a charge in the nature of rental for the occupation and use or easement over, upon and beneath the streets, highways, alleys, sidewalks, bridges and other public places and grounds in the County?"

CONCLUSION

See opinion.

OPINION

ANALYSIS

Generally, the powers exercisable by county governments are those specifically delegated or necessarily implied from the obligations of public trust imposed. 20 C.J.S. 850 reviews the subject as follows:

"It is well settled that a county board possesses and can exercise such powers, and such powers only, as are expressly conferred on it by the constitution or statutes of the state, or such powers as arise by necessary implication from those expressly granted or such as are requisite to the performance of the duties which are imposed on it by the law. It must necessarily possess an authority commensurate with its public trusts and duties."

Considering the aforesaid, what duties and powers are specifically conferred by the law and what must of necessity be implied to exist by reason thereof? Section 15-36-1, N.M.S.A., 1953 Compilation, provides:

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

First. To sue and be sued.

Second. To purchase and hold real and personal property for the use of the county.

Third. To sell and convey any real or personal estate owned by the county and make such order respecting the same as may be deemed conducive to the interests of the inhabitants.

Fourth. **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.**

Fifth. To exercise such other additional powers as may be specially conferred by law." (Emphasis supplied).

Hence, under paragraph "Fourth" the County Commissioners are given certain powers to contract with persons using property in their charge. More will be said concerning this provision supra.

With reference to the specific statutes dealing with public utilities and pipelines, the history of the enactments must be noted. Section 68-1-1 et seq., and including specifically § 68-1-3, was passed by the Legislature in 1909. This chapter of the statutes dealt specifically with "corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity, or steam for lighting, heating, power, manufacturing or other purposes." These series of statutes, which shall be referred to as the 68 series, and which were passed as noted above in 1909, apparently dealt with all corporations regardless whether they were utility companies or pipeline companies. Utility companies are defined as companies which distribute for use to the public any of the aforesaid items. Pipeline companies are defined as companies which transmit or transport for resale to a utility or other company, but not to a general consumer. These definitions are the definitions accepted by the Federal Power Commission and by our Public Service Commission. It is the feeling of this office that the 68 series of statutes covered pipeline companies as well as public utility companies from 1909 to 1921, at which time the statutes contained in § 65-4-11 et seq. were passed. These statutes dealt with pipeline companies who **transported** in and over the public highways gas, oil and other commodities. These statutes clearly superseded the 68 series of statutes so far as pipeline companies were concerned from 1921 to date. The argument could be made that the definition which is contained in § 65-4-11 et seq. included public utility companies except for the subsequent amendment of § 68-1-3 in 1949, wherein the Legislature reaffirmed that enactment, and wherein the County Commissioners were given the following power:

"The county commissioners of the several counties are hereby authorized to permit such corporation to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures; Provided, that such use shall not unnecessarily obstruct public travel and such county commissioners and municipal authorities of incorporated cities and towns are hereby authorized to grant franchises

not exceeding twenty-five years (25) duration to corporations for such purposes within their respective jurisdictions."

Hence, this office must hold that the 65 series, and specifically § 65-4-11, does not apply.

There is, however, certain powers vested in the County Commissioners under §§ 68-1-3 and 15-36-1 which we believe should be mentioned at this time. The County Commissioners, under the authority of these acts, may require contracts from public utility companies or from other users of the public properties to hold the county harmless from any damage whatsoever and require a guarantee in some reasonable amount to protect the county and the public from damage by the public utility company. Under the authority of the County Commissioners in the event the utility corporation will enter into such a contract, the County Commissioners may contract for reasonable reparation for possible damage in advance but such is a matter of contract and not of franchise. To permit a county to require a tax or other charge for the bringing of gas to an incorporated municipality would permit that county to effectively overrule a finding of convenience and necessity by the Public Service Commission of this State and could impair the distribution of gas, electricity, water, or other utility to an incorporated municipality.

So far as the use of the roads are made for transportation alone but not for distribution, of course the 65 series of statutes applies, and in the event the commodity is being transported on the public ways for resale to a public utility, and not directly by the owner of the pipe for distribution to the general public, a charge can be made under § 65-4-11.

Therefore, it is the opinion of this office that the county and the utility may contract for such purposes as the two see fit, Agua Pura Co. v. Mayor and Board of Ald., 10 N.M. 6; Mt. States Tel. & Tel. v. City of Belen, 56 N.M. 415, but that no charge may be levied against the company holding a certificate of convenience and necessity from the Public Service Commission of this State to distribute a commodity to a municipality without such contract entered into by the free will of the two parties, but that a charge may be levied against a pipeline company whose business is the resale at wholesale to a public utility of such commodity.