

## **Opinion No. 57-277**

October 29, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Alfred P. Whittaker,  
Assistant Attorney General

**TO:** Honorable Gordon E. Melody, State Senator, San Miguel County, 614 E. Lincoln  
Avenue, Las Vegas, New Mexico

### **QUESTION**

#### QUESTION

If the City of Las Vegas should construct a gas line to a point adjacent to an existing gas line of a public utility now serving another community, would the utility be required to sell gas to the City of Las Vegas for distribution through its municipally-owned system, assuming an ample supply of gas to be available?

#### CONCLUSION

Not under state law.

### **OPINION**

#### ANALYSIS

The question presented is a question of the extent of, and limitations upon, the duty of a public utility to serve.

In considering this inquiry this office has assumed that by the use of the term "public utility" you have reference to a public utility as defined by the Public Utility Act of New Mexico, Chapter 84, Laws 1941 (§ 68-3-1, et seq., N.M.S.A., 1953). Accordingly, no consideration has been given to the inquiry as it might relate to the duty of an interstate gas pipeline company to provide the service described, pursuant to Section 7 (a) of the Natural Gas Act, 15 U.S.C.A. § 717 f(a). As you are probably aware, the Federal Power Commission has exclusive jurisdiction and authority under the provisions cited to direct a natural gas company to establish physical connection of its transportation facilities with the facilities of any municipality legally authorized to engage in local distribution of gas to the public, if the Commission finds that no undue burden will be placed upon the natural gas company thereby, although the Commission has no such authority when the effect would be to impair the ability of the natural gas company to render adequate service to its existing customers.

The term "public utility", as it relates to natural gas, is defined by the New Mexico statute to mean every person or corporation, not engaged solely in interstate business,

which owns, operates, leases or controls any plant, property, or facility for the manufacture, storage, distribution, sale or furnished to or for the public of natural gas for light, heat or power or other uses. The distinguishing characteristic of a public utility is the devotion of private property by its owner to a public use, giving rise to the obligation to serve the public with reasonable efficiency and under proper charges. (See 73 C.J.S., Public Utilities, § 1) This characteristic, that the rendition of such service is impressed with the public interest, gives rise to the regulation of public utilities generally. It is well-settled, however, that the duty of a public utility to serve is not all-inclusive. Generally, even if a public utility may be required to serve every applicant within the territory which it professes to serve, it cannot be required to extend service outside of that territory. (See 73 C.J.S., Public Utilities, § 7, p. 998; I.C.C. v. Oregon-Washington R. Co., 288 U.S. 14, 1933). Even the obligation of a public utility to make extensions within the area which it professes to service is subject to the limitations that the state cannot, under the guise of regulation, require a utility to make an excessive investment in order to extend service to an unserved area, thereby compelling the utility to devote its property to public use without just compensation. Nor can such an extension be required when the effect of the increased costs is to impose a discriminatory rate upon other consumers of the utility. See Cedar Island Improvement Assn. v. Clinton Electric L. & P. Co., 114 Atl. 2d 535 (Conn.- 1955).

Authorities which have considered this question are in agreement that the answer to the legal question hinges entirely upon a question of fact: What is the extent of the utility's profession to serve? Nor is it material that your inquiry is stated to assume that the extension of the system required to serve the City of Las Vegas is to be constructed by the City rather than by the utility. The exact situation contemplated by your question was before the court in the case of Oklahoma Natural Gas Co. v. Corporation Commission, 211 P. 401, 31 A.L.R. 330, (Okla. - 1922). In that case, a privately operated public utility which distributed natural gas in the City of Chickasha sought to compel a gas utility furnishing the commodity to 35 to 40 municipalities in the state to furnish gas to it at a point on its pipeline, a few miles from the city limits, to which the distributing utility had constructed a line. On appeal from the Order of the Corporation Commission requiring the gas company to supply such service, the court reversed the Commission holding that the Commission was without jurisdiction to enter the order complained of, because the gas company had never served the community in question, and had never assumed, undertaken nor professed to serve that community and, in fact, was unwilling to serve that community.

This case rests upon the proposition that one who undertakes to serve the public undertakes an obligation which is limited by the extent of his profession, and he cannot be compelled to serve beyond the limits of that profession.

There are cases which reach the opposite result, upholding a direction to the utility to render service. Such cases, however, also apply the standard set forth above, as to the extent of the profession to serve made by the public utility. In such cases it was determined as a matter of fact that the service sought to be compelled was service which the utility had held itself out as offering. Cases of this nature include, for example,

Utah Power and Light Co. v. Public Service Commission, 249 P. 2d 951 (Utah - 1952) and Georgia Public Service Commission v. Georgia Power Company, 186 S.E. 839 (Ga. - 1936).

In your inquiry, you state the assumption that the public utility concerned now serves another community. We understand this to mean that the utility in question has not as a matter of fact held itself out as ready to serve the City of Las Vegas. The assumption made in the inquiry is dispositive of the question under the authorities cited. This office must emphasize, however, that the question of the duty to serve, and related questions as to the terms and conditions upon which service should be provided, if such questions are reached, are all questions of fact to be determined by the regulatory agency having jurisdiction in the premises, upon the basis of all of the facts and circumstances presented to it in the proceeding giving rise to the questions.

In connection with your request for an opinion, this office also reviewed a memorandum prepared by counsel for the New Mexico Public Service Commission at our request, which memorandum was of considerable assistance in our consideration of authorities.