

## **Opinion No. 57-31**

February 20, 1957

**BY:** OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

**TO:** Hon. Earl E. Hartley, State Senator, New Mexico State Senate, Santa Fe, New Mexico

### **QUESTIONS**

#### QUESTIONS

Is a rural electric cooperative a utility within the meaning of § 68-7-1, New Mexico Statutes Annotated, 1953 Compilation?

#### CONCLUSION

No.

### **OPINION**

#### ANALYSIS

You have verbally supplemented your written request by stating that you desire the opinion of this office on the question of whether or not rural electric cooperatives are utilities within the meaning of § 68-7-1, N.M.S.A., 1953 Comp., rather than within the meaning of § 68-8-1, N.M.S.A., 1953 Comp.

Particularly are we concerned with whether a rural electric cooperative is within the meaning of "any other public utility" claiming to be injuriously affected by construction proposed by a potential competitor.

The jurisdiction of the Public Service Commission is limited by by § 68-3-3, N.M.S.A., 1953 Comp. While this is not a definition statute, some assistance is given in determining the question by the last proviso of this section. It denies the commission power or jurisdiction over "public utilities" covered by Art. XI, Sec. 7, Constitution of New Mexico; and further denies jurisdiction or power over "corporations" organized under the Rural Electric Cooperative Act. Thus we see that the Legislature denied jurisdiction over two different categories of concerns in the said last proviso, to-wit: over certain "utilities" and over certain "corporations", thus giving at least some indication that rural electric cooperatives were not viewed by the Legislature as being utilities. This, however, is not determinative, but only a portion of the statutory interpretation necessary.

§ 68-3-2 (f) (1), N.M.S.A., 1953 Comp., contains the definition of electric utilities, which definition controls throughout the Public Utility Act, "unless otherwise specified." We find in § 68-7-3, N.M.S.A., 1953 Comp., nothing to take the term "utility" out of the definition in § 68-3-2 (f) (1), N.M.S.A., 1953 Comp., which is as follows:

"Any plant, property, or facility for the generation, transmission, or distribution, sale or furnishing **to or for the public** of electricity for light, heat, or power, or other uses."  
(Emphasis supplied.)

We make special reference to the language "-- to or for the public --", and will dwell at some length thereon later in this opinion.

Nor are we at liberty to entirely disregard the language of § 68-3-1, N.M.S.A., 1953 Comp., which contains the declaration of policy and is as follows:

"Declaration of policy. -- (A) Public utilities as hereinafter defined, are affected with the public interest in that, among other things,

(1) A substantial portion of their business and activities involves the rendition of essential public services to large numbers of the general public.

(2) Their financing involves the investment of large sums of money, including capital obtained from many members of the general public.

(3) The development and extension of their business directly affects the development, growth, and expansion of the general welfare, business and industry of this state.

(B) It is the declared policy of this state that the public interest, the interest of consumers, and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just, and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension of proper plants and facilities for the rendition of service to the general public and to industry."

In arriving at a solution to the question at hand, some aid is derived from a study of this section in order to ascertain if the factors motivating regulation of public utilities obtain in the case of rural electric cooperatives. As shall be seen, *infra*, such is clearly not the case.

While a different statute was involved in Opinion of the Attorney General No. 5279, dated January 31, 1950, the question arose whether or not a telephone cooperative was a public utility within the meaning of a statute restricting its requirements to those companies which furnish "public utility service." It was held that telephone cooperatives were not public utilities, the Honorable Joe L. Martinez reasoning that there was a lack

of the essential element of service to the general public which is required for designation as a utility.

Our research discloses no case by our Supreme Court deciding the question at hand. It further discloses that all courts are not in harmony on the matter. The better and more persuasively reasoned cases, and also the majority, are in accord with our above conclusion.

Perhaps the case which most clearly sets out the distinctions between public utilities and rural electric cooperatives, and which takes pains in applying cogent reasoning to clear facts, is Garkane Power Co., Inc. vs. Public Service Commission of Utah, 98 Utah 466, 100 P. 2d 571. Garkane was a non-profit membership corporation organized under Utah law to generate electricity, and transmit the same **to its members**. Under the public utility statutes of Utah, electric utilities were defined as a corporation which owns, controls, operates, or manages an electric plant or in anywise furnishes electric power "for public service --." § 76-2-1 (20), RSU 1933. Reference is made at this point to the almost identical language emphasized by us in § 68-3-2 (f) (1), N.M.S.A., 1953 Comp. The Utah court pointed out how Garkane did not even propose to serve all who might apply for service or live near its transmission lines. Rather, its charter limited it to service to its members, **and it did not serve the general public**. In the Garkane case it was pointed out that membership in the cooperative was easily obtained, and that Garkane solicited membership. The court answered this by stating that the distinction between a utility and a cooperative was qualitative, not quantitative; that in a cooperative, mutuality of ownership is substituted for the conflicting interests of owner vendor and nonowner vendee; that in a cooperative, all sell to each and that seller and buyer are one and the same. We make reference at this point to the conflicting interests of consumer and utility so clearly recognized by our Legislature in § 68-3-1, N.M.S.A., 1953 Comp. As to the number of members in a cooperative, the Utah court held that such is no criterion.

It now behooves us to consider § 45-4-3 (d), N.M.S.A., 1953 Comp., which empowers rural electric cooperatives to furnish electricity to members, governmental agencies, "-- and to other persons not in excess of ten percentum (10%) of the number of its members; --."

The quoted language raises the question of whether or not it authorizes service "to or for the public" (§ 68-3-2 (f) (1), N.M.S.A., 1953 Comp., supra), or thus empowers the cooperative to embark upon service to the general public which was the controlling, and lacking, element in the Garkane case and Opinion of the Attorney General No. 5279, supra. We feel that if anything the authorization to serve non-members not in excess of 10% of the number of members presents an even clearer case of non utility status than was before the Utah court in Garkane, for we have here an express denial of power to serve the general public, i.e., rural electric cooperatives are enjoined from furnishing electric service "to or for the public" (§ 68-3-2 (f) (1), N.M.S.A., 1953 Comp.)

And see generally the annotation in 132 ALR pp 1496-1514, wherein service to the entire public in the area within which the facilities of the cooperative are located, is held to be the controlling factor, citing cases from numerous jurisdictions.

Reading the above statutes together, as we must, in the light of the other authorities cited, we are lead to the conclusion that rural electric cooperatives are not "any other public utility" within the meaning of § 68-7-1, N.M.S.A., 1953 Comp.

We trust that this fully answers your inquiry.