Opinion No. 58-236

December 17, 1958

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

TO: Hon. Patrick F. Hanagan, District Attorney, Fifth Judicial District, County Court House, Roswell, New Mexico

QUESTION

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May a municipality which has extended a franchise to a privately operated public utility engaged in the sale and distribution of electricity, now undertake the construction and operation of its own power plant for the distribution of power throughout the municipality, the franchise being still outstanding?

CONCLUSION

Yes.

OPINION

ANALYSIS

Your question requires analysis of the scope and effect of a franchise granted by a municipal corporation to a privately operated public utility, under the laws of the State of New Mexico.

You are familiar with Article IV, Section 26 of the Constitution of the State of New Mexico, which provides:

"The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; **no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.** (Emphasis added)"

The significance of this provision is that the municipality, as a matter of law, retains the right to grant to any privately operated public utility corporation a franchise to engage in direct competition with any other such corporation operating pursuant to franchise previously granted. The question then becomes this: Has the municipality any lesser rights than such subsequent grantee would have?

We have no hesitancy in concluding that the municipality may compete with the privately operated public utility holding the franchise. The legislature has expressly granted to municipalities of the State of New Mexico the right to construct, operate and maintain public utilities for the generation and distribution of electricity - see § 14-39-32, N.M.S.A. 1953.

The constitutional provision here considered is, of course, self-executing, since it is a prohibitive and restrictive provision, and such provisions are always so construed. See 16 C.J.S., Constitutional Law, § 49, p. 147. And since the operation of a public utility for the generation and distribution of electricity is the exercise by the municipality of a proprietary function, rather than a governmental function, the provision here applies without question. Compare **Gomez v. City of Las Vegas,** 61 N.M. 27 (1956), upholding the grant of an exclusive franchise for the collection of garbage, a governmental function and a reasonable exercise of the police power. Accordingly, the power of a municipal corporation to grant a franchise to a public utility for the generation and distribution of electricity (ss § 14-39-1, N.M.S.A. 1953) must be read as subject to the qualifications imposed by the constitutional provision first above quoted.

Furthermore, we know of no statutes which impose upon the municipality in this situation any restrictions or qualifications upon its right to enter into competition with the privately operated utility in contravention of the franchise previously granted. Thus, our law imposes no obligation to qualify for a certificate of public convenience and necessity under the Public Utility Act. See Section 17A, codified as § 68-5-5, N.M.S.A. 1953, authorizing municipalities to come under the regulatory provisions of the statute if they so desire.

Under these circumstances, the law is well settled that the action of a municipal corporation in undertaking to compete with a privately operated public utility holding a franchise previously granted by the municipality itself, in no way violates any constitutional right of the utility - whether the right asserted be that based upon the constitutional provision invalidating laws which impair the obligation of a contract, or those relating to the taking of property without due process of law, the injuring or destroying of property without just compensation, or the denial of the equal protection of the laws. **Alabama Power Company v. City of Guntersville et al,** 177 So. 332, 114 A.L.R. 181 (Ala., 1937), and following annotation, at 114 A.L.R. 192.

However ill-advised such a venture might be, then, from the standpoint of good faith, or from the standpoint of economic feasibility, these are questions of policy, to be determined by the municipality and those who undertake to finance the project; they are not legal questions, and so they are beyond our competence.