

Opinion No. 66-58

May 11, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

TO: Mrs. Maxine Gerhart, Public School Finance Division, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

FACT SITUATION

The Jemez Mountain School District proposes to install natural gas service in the Gallina and Lindrith Schools. In order to obtain such service from the public utility involved, the utility maintains that either a customer advance for construction or a contribution in aid of construction will be necessary.

In arriving at this determination, the utility has estimated the cost of construction of gas lines to the school facility and the amount of revenue to be derived from the sale of natural gas at the involved facilities. Applying a "line extension policy" which is on file with the Public Service Commission, the utility is able to determine the amount of money it may expend towards the completion of the needed facilities. The remainder must be raised from the prospective user in either the form of an advance for construction, or a contribution in aid of construction. The user must pay a one time charge in addition to paying for the commodity received at a rate on file with the Public Service Commission.

If the amount needed to complete the project is paid as an "advance in aid of construction" it takes the following form: This amount is paid into the rate base upon which the company may earn money. If other persons subsequently tie onto the new line and commence using the utility service, they are charged a proportionate cost which is returned to the person making the initial advance. If over a period of time, usually five years, a sufficient number of parties takes service on the new line, the original advance may all be returned. If not enough persons tie in during that period, the balance of the contribution, remaining at the end of the five-year period, is transferred to another company account. At this time the person paying the money has lost its right to further refund and the company has lost the right to earn on that balance as it may not be placed in the rate base.

If the amount needed to complete the project is paid as "contribution in aid of construction" the following consequences attach: The money is paid in to a company account separate and apart from moneys which the company invests. There it never can become a part of the company's rate base upon which it can earn. This money is not refundable to the payor thereof at any time.

Under either of the above methods of payment, the facilities installed are the property of the utility and the utility assumes all obligations as to maintenance and operation thereof.

QUESTION

Are payments made as either advances for construction or contributions in aid of construction illegal under the provisions of Article IX, Section 14 of the Constitution of New Mexico?

CONCLUSION

No.

OPINION

{*71} ANALYSIS

Article IX, Section 14 of the New Mexico Constitution provides as follows:

" **Aid to private enterprise.** Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

It appears obvious from an examination of that section that the prohibition contained therein is directed against the payment by the state or school district of an obligation belonging to a public or private corporation. It is our opinion that the payment of a contribution or advance is not the payment of the utility's obligation and therefore is not a contribution within the scope of the constitutional prohibition. Furthermore, it is our opinion that money so expended by the school district or any other such agency is money expended for value received and therefore not prohibited.

First, let us examine the nature of the obligation involved. Generally, a public utility has an obligation to extend its service facilities so as to meet the reasonable needs of the community or territory it is obligated to serve. 43 Am. Jur., Public Utilities and Services, Section 47, pp. 601-602. However, this obligation is not absolute. In the determination as to whether an extension should be made and the conditions of such extension, consideration is given the need for service, cost of the extension and the return in revenue which may be expected from the extension. If the return is insufficient, the utility may require the proposed consumer to assist in paying for the cost of the extension. 43 Am. Jur., Public Utilities and Services, Section 48, pp. 602-603. The assistance may come in the form of an advance for construction or contribution in aid of

construction. In determining whether either of these shall be necessary, the utility applies the line extension policy it has on file with the New Mexico Public Service Commission pursuant to that Commission's General Orders. Assuming that the extension policies are properly applied, it can be seen that the district would not be relieving the utility from any obligations it has, but merely as a consumer is or would be making payments for which it would be liable under the line extension policy.

Furthermore, it is our opinion that the school district is receiving value for the moneys paid. It has a new service, which it paid for, but which the utility owns and maintains. The utility may not earn a return on the moneys invested by the district which are not returned to the district after other users tie onto the line. It is part and parcel of a contract for service and therefore a payment in the form of either an advance for construction or a contribution in aid of construction would not be contrary to Article IX, Section 14.