

Opinion No. 72-35

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BY: OPINION OF DAVID L. NORVELL, Attorney General Thomas Patrick Whelan, Jr.,
Assistant Attorney General

TO: Mr. C.P. Correll, Director, New Mexico Liquefied Petroleum Gas Commission, Post
Office Box 1357, Santa Fe, New Mexico 87501

QUESTIONS

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Can the Public Service Commission delegate to the Liquefied Petroleum Gas
Commission the duty to inspect liquefied petroleum gas utilities?

CONCLUSION

Yes, but see analysis.

OPINION

{*60} ANALYSIS

An answer to this question begins logically with a discussion of the respective powers of the two commissions regarding liquefied petroleum gas utilities. It is clear from the statutes that the Liquefied Petroleum Gas Commission has no jurisdiction over liquefied petroleum gas utilities to the extent those utilities are subject to the New Mexico Public Utility Act. See Section 65-7-19, N.M.S.A., 1953 Comp. The Public Service Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . ." Section 68-5-4(A), N.M.S.A., 1953 Comp. (P.S.). This includes the power to make safety regulations and enforce them through inspections. Sections 68-5-19, 68-5-20, 68-5-21, 68-5-23 and 68-5-24, N.M.S.A., 1953 Comp. The only exception to this jurisdiction is utilities owned and operated by municipalities or H class counties. Section 68-5-4(A), **supra**.

This delineation of authority is not as clear as it seems because there is some question about the definition of "liquefied petroleum gas utility." The Public Utilities Act does not define "liquefied petroleum gas utility"; rather, it defines what a liquefied petroleum gas utility is **not**. Section 68-3-2(F) (2), N.M.S.A., 1953 Comp. (P.S.) states that the term "public utility" includes:

"any plant, property, or facility for the manufacture, storage, distribution, sale or furnishing of . . . liquefied petroleum gas . . . but the term 'public utility' or 'utility' shall not include any plant, property, or facility used for or in connection with the business of the

manufacture, storage, distribution, sale or furnishing of liquefied petroleum gas in enclosed containers or tank truck for use by others than consumers who receive their supply through any pipeline system operating under municipal authority or franchise and distributing to the public . . ."

We infer from this proviso that a liquefied petroleum gas utility includes any plant, property, or facility used for or in connection with the furnishing of liquefied petroleum gas to the public through a pipeline system by an entity operating under municipal franchise.

To summarize the relative jurisdictions of the two commissions, we conclude that the Public Service Commission has exclusive jurisdiction over the rates, service, and inspections of facilities used for or in connection with the furnishing of liquefied petroleum gas to the public through a pipeline {61} system by an entity operating under municipal franchise. The Liquefied Petroleum Gas Commission has no independent authority over any aspect of these utilities. See Opinion of the Attorney General No. 62-7.

As noted earlier, the Public Service Commission is specifically given the power to promulgate safety regulations and to provide for inspections and testing. The commission also has the authority "to do all things necessary and convenient in the exercise of its power and jurisdiction." Section 68-5-4, **supra**. The Liquefied Petroleum Gas Commission has the personnel, equipment and expertise for inspections and testing of liquefied petroleum gas facilities. The Public Service Commission does not presently have these resources. Provision for the Liquefied Petroleum Gas Commission to inspect and test liquefied petroleum gas utilities is clearly "necessary and convenient" to the exercise of the Public Service Commission's power and jurisdiction. The statutes governing the Public Service Commission allow, or at least they do not forbid, delegation of inspection and testing duties to the Liquefied Petroleum Gas Commission.

The extent of the Public Service Commission's power to subdelegate its authority and duties is more precisely articulated in the common law. The general rule is:

". . . powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered to subordinates in the absence of statutory authorization. . . . On the other hand, public agencies may delegate the performance of ministerial tasks including the investigation and determination of facts preliminary to agency action. . . . Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act which becomes the act for the agency itself."

California School Employees Ass'n v. Personnel Comm'n of Pajaro Valley Unified School Dist. of Santa Cruz Co., 89 Cal. Rptr. 620, 474 P.2d 436 (1970).

The application of the rule to our question is clear. Inspection and testing are ministerial activities; they constitute investigation and determination of facts preliminary to agency

action. Consequently, they may be subdelegated. The promulgation of safety regulations and their enforcement through the application of sanctions are discretionary activities and may not be subdelegated. The Public Service Commission may, however, accept the recommendations of the Liquefied Petroleum Gas Commission on safety regulations and enforcement. It suffices if the judgment and discretion finally exercised and the orders finally made by the Public Service Commission are its own. See **Schechter v. County of Los Angeles**, 65 Cal. Rptr. 739 (1968).

It should be noted that most of the cases discussing subdelegation concern attempts by an agency or agency director to subdelegate a portion of its authority to a subordinate. The situation here is slightly different. One agency wishes to subdelegate a portion of its authority to another agency. We think, however, that the general rule is equally applicable to this situation.

Two cases support this position: **Sacramento Chamber of Commerce v. Stephens**, 212 Cal. 607, 299 P. 178 (1931), and **Garvey v. Trew**, 64 Ariz. 342, 170 P.2d 845 (1946), cert. denied 392 U.S. 784, 67 S. Ct. 297, 91 L. Ed. 2d 673. In the **Stephens** case the city charter authorized the city council to appropriate and spend moneys for the reception of guests, the encouragement of immigration, and the general advertisement of the city. The city council contracted with the chamber of commerce to perform these tasks with the proviso that all plans were to be approved in advance by the city council. This contract was attacked as an illegal delegation. The court upheld the delegation on the principle that "ministerial or administrative functions may be delegated to subordinates or agents." **Sacramento Chamber of Commerce v. Stephens, supra**.

The **Garvey** case considered the authority of the Arizona Corporation Commission to contract with the Federal Power Commission to assess the value of public service corporations' property in order to determine rate bases. The law appropriating money for this purpose was challenged. The court defended the law in part by saying that the law did not give the corporation commission any power it did not already have. The state constitution imposed upon the corporation commission the duty to ascertain the fair value of public service corporation property. The court held the commission "is not limited as to the agencies it may employ for this purpose." **Garvey v. Trew, supra**.

These two cases reflect the general trend in administrative law: ". . . the push toward more subdelegation is strong and firm. It comes from Congress, from the courts, from the agencies, and from bar groups." 1 Davis, **Administrative Law Treatise**, § 9.07.

For these reasons we conclude that the Public Service Commission is authorized by Section 68-5-4, **supra**, and by the common law to delegate its authority to inspect and test liquefied petroleum gas utilities to the Liquefied Petroleum Gas Commission. Only the Public Service Commission can promulgate safety regulations, however, and it must make the final order regarding any violations of regulations.