Opinion No. 72-29

June 26, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General James N. Russell, Jr., Assistant Attorney General

TO: Honorable Eugene R. Cinelli, New Mexico State Representative, Bernalillo County - District 5, 901 Third Street, S.W., Albuquerque, New Mexico 87102

QUESTIONS

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1. Are Albuquerque Ordinances Nos. 20-1968 and 88-1968 invalid by reason of their having been adopted prior to the Home Rule Constitutional Amendment (N.M. Const. Art, X, Sec. 6), and at a time when there was no legislative authority given the City to grant franchises to any companies other than public utilities?

2. If not invalid under paragraph 1, above, are Albuquerque Ordinances, Nos. 20-1968 and 88-1968, invalid as a consequence of the enactment of the new Federal regulations appearing in Chapter I, Title 47 of the Code of Federal Regulations promulgated on February 2, 1972 to become effective March 31, 1972?

3. If Albuquerque Ordinances Nos. 20-1968 and 88-1968 are invalid for the reasons set forth in either of the above paragraphs, numbered 1 or 2, or both, then must the City, if it still desires to franchise a CATV system in the City of Albuquerque, enact new ordinances to comply with the new Federal regulations, or may it amend the existing ordinances to conform to the new regulations?

4. If the existing Albuquerque ordinances are invalid under either of the above paragraphs, numbered 1 or 2, or both, then regardless of whether the City must enact new ordinances or amend the present ones, must the City resubmit the franchise for applications so as to give parties who might be interested in the franchise, under the new regulations, an opportunity to bid thereon?

CONCLUSIONS

1. Yes.

2. See analysis.

3. See analysis.

4. See analysis.

FACTS

On February 19, 1968, the City of Albuquerque enacted Ordinance No. 20-1968, purporting to authorize the granting of a franchise for the construction and operation of a CATV system in the City. Then, on June 10, 1968, the City of Albuquerque adopted Ordinance No. 88-1968 whereby it granted the franchise authorized under Ordinance No. 20-1968.

Following the enactment of Ordinances No. 20-1968 and 88-1968, the Federal Communications Commission adopted new rules and regulations pertaining to CATV systems. These rules and regulations appear in Chapter I, Title 47 of the Code of Federal Regulations. It is sufficient to state that these new regulations made changes affecting the franchise which had been granted by the City of Albuquerque.

OPINION

*{*50}* ANALYSIS

The ordinances in question were adopted prior to the adoption of N.M. Const. Art. X, Sec. 6 on November 3, 1970 which provided in part:

"D. A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter."

Therefore, the law of New Mexico which existed prior to the adoption of the aforesaid "Home Rule Amendment" would govern the questions here in issue. Prior to the adoption of the said amendment, the New Mexico Supreme Court repeatedly and consistently held that municipalities in New Mexico derived their powers solely from the state and could only act as permitted by state statutes. **Bowdich v. City of Albuquerque,** 76 N.M. 511, 416 P.2d 523 (1966); **City of Las Cruces v. Rio Grande Gas Co.,** 78 N.M. 350, 431 P.2d 492; **City of Santa Fe v. Gamble-Skogom, Inc.,** 73 N.M. 410, 389 P.2d 13 (1964). Therefore, unless the City of Albuquerque was accorded the requisite authority under state statutes, it had no authority to enact Ordinances No. 20-1968 and 88-1968.

Municipal power to grant franchises to use public streets and other public property had to be created by state statute. In **Albuquerque Bus Co. v. Everly,** 53 N.M. 460, 211 P.2d 127 (1949) the New Mexico Supreme Court stated that:

"When a municipality grants a franchise it is acting as the agent of the state, and absent a grant of power by the state it could, of course grant none."

The right to use public streets in New Mexico in a manner not available to the general public "is a special franchise" that can only be granted by the state or by a municipality as an agent of the state. **City of Roswell v. Mountain States Telephone & Telegraph Co.,** 78 F.2d 379 (10th Cir. 1935). The precedents, went on to state further that:

"The authorities place beyond question that title to the streets and alleys of a municipality is in the first instance vested in the state. It may make a direct grant of the right to use and occupy them or it may delegate that power to the municipality, but unless and until it is delegated the municipality has no proprietary authority to grant a franchise for such purpose."

A municipality in New Mexico was authorized by statute to grant certain types of franchises. The state legislature provided such power in clear language, with the full knowledge that the use of public streets and other public property by certain types of private enterprises was essential for the well-being and convenience of city residents. However, the New Mexico Legislature did not give cities an open license to permit any use of the public domain by private persons. In Section 14-43-1A, N.M.S.A., 1953 Comp., the legislature carefully and purposefully limited municipal franchise power:

"A. A municipality may grant, by ordinance, a franchise to any person, firm, or corporation **for the construction and operation of any public utility."** (Emphasis added)

Therefore, in so limiting the municipal franchise power, the state legislature expressed its intention that public property of municipalities could be used by commercial enterprises **only** where such enterprises performed essential public services.

It is significant to note that in Ordinance No. 20-1968 in Section 2(c) (7), the City of Albuquerque specifically provided that a grantee of a CATV franchise "is not a public utility."

Furthermore, there is no basis for inferring the necessary authority in the City of Albuquerque to pass the referenced ordinances from the powers granted by the state to municipalities to regulate public properties. Section *{*51}* 14-40-1, N.M.S.A., 1953 provides in part:

"A municipality may lay out, establish, open, vacate, alter, repair, widen, extend, grade, pave, or otherwise improve streets; . . . and may:

A. Regulate their use and the use of structures under them;

I. Regulate and prohibit their use for signs, signposts, awnings, awning posts, telegraph poles, horse troughs, posting handbills and advertisements;

Also, Section 14-17-1, N.M.S.A., 1953 Comp. provides that:

"A municipality is a body politic and corporate under the name and form of government selected by its qualified electors. A municipality may:

A. Sue or be sued;

B. Enter into contracts;

C. Acquire and hold property, both real and personal;

D. Have a common sale which may be altered at pleasure;

E. Exercise such other privileges that are incident to corporations of like character or degree that are not inconsistent with the laws of New Mexico;

F. Protect generally the property of its municipality and its inhabitants; and

G. Preserve peace and order within the municipality."

The necessary authority may not be inferred from the foregoing because municipal power to confer franchises for essential public services is contained in an express, specific statute on franchises. Under accepted rules of statutory construction, if a specific and limited power is contained in one statutory provision, a separate and more general provision should not be construed as broadening that power. The City of Albuquerque's franchise power is contained in Section 14-43-1A, **supra,** and it should not be expanded by reference to other less specific and more vague statutes such as Sections 14-50-1 and 14-17-1, **supra.** As stated by the court in **City of Tulsa v. Southwestern Bell Telephone Co.,** 75 F.2d 343 (10th Cir. 1935):

"Legislative grants to municipal corporations are to be strictly construed and any reasonable doubt is to be resolved against the grant. And the enumeration of specific powers operates to exclude those not enumerated."

A number of cases have flatly rejected the theory that franchise power can in any case be implied from the power to regulate the streets. **Continental Illinois National Bank & Trust Co. v. City of Middlesboro,** 109 F.2d 960 (6th Cir. (1940); **City of Tulsa v. Southwestern Bell Telephone Co., supra.**

In **City of Roswell v. Mountain States Telephone and Telegraph Co., supra,** the court sharply distinguished between city authority to grant franchises and city police power to regulate use of its streets.

"The exercise of the police power in regulating the manner in which streets and alleys shall be used is ordinarily accomplished through ordinances and resolutions, not franchises."

In New Mexico, then the municipal power to regulate and control streets is separate and distinct from the municipal power to grant franchises for the use of streets. If the specific franchise power conferred by the state does not extend to a certain type of business, additional franchise authority cannot be implied from the police power to regulate and control the streets.

Therefore, it is the opinion of this office that the answer to question number 1 posed by you would be in the affirmative. In light of this result, there is no need for this office to answer question number 2. As for question number 3, it is the opinion of this office that since the original ordinances were invalid, the City of Albuquerque may not make them valid by merely amending them to conform to the changed Federal Regulations, but rather it must enact new ordinances under its new authority conferred upon it by the adoption of the "Home Rule Amendment." And of course the new ordinances must comply with the Federal Regulations. As to question number 4, this office *{*52}* must refrain from issuing an opinion in light of the fact that litigation may arise in the future concerning this issue.

While you do not raise the issue, it must be noted that the City of Albuquerque adopted Ordinance No. 41-1970 on March 16, 1970, also prior to the adoption of the "Home Rule Amendment." This ordinance was a virtual carbon copy of Ordinance 20-1968 which had been held invalid by the District Court of Bernalillo County on February 24, 1970. Ordinance No. 41-1970 purported to grant a "revocable" or "temporary" permit while Ordinances Nos. 20-1968 and 88-1968 purported to grant a ten-year franchise terminable prior to the end of the term only upon the meeting of certain conditions.

It is the opinion of this office that Ordinance 41-1970 is essentially the same as the prior ordinances and, therefore, the foregoing discussion as to them is equally applicable to this ordinance as well.