

Opinion No. 78-10

June 12, 1978

OPINION OF: Toney Anaya, Attorney General

BY: Paul L. Biderman, Assistant Attorney General

TO: The Honorable Tom Rutherford State Senator 3323 Princeton, N.E. Albuquerque, New Mexico 87107

PUBLIC UTILITIES; INSPECTION AND SUPERVISION FEES; PUBLIC SERVICE COMMISSION

A state law which requires regulated public utilities to pay annual fee to state for "inspection and supervision" does not entitle the N.M. Public Service Commission to expend entire amount, in absence of specific statutory language appropriating these fees to Commission, and in view of legislature's deletion of former language which did so appropriate these funds.

QUESTIONS

Does Section 68-6-8 N.M.S.A. 1953, which requires regulated utilities to pay the State an annual fee "for the inspection and supervision of such business," entitle the Public Service Commission to expend the entire amount received?

CONCLUSIONS

No.

ANALYSIS

Section 68-6-8, N.M.S.A. 1953 provides as follows:

"Inspection and Supervision. - Each utility doing business in this state and subject to the control and jurisdiction of the [Public Service] commission with respect to its rates or service regulations, shall pay annually to the state a fee **for the inspection and supervision of such business**, an amount equal to one-half of one percent (1/2%) of its gross receipts from business transacted in New Mexico for the preceding calendar year . . ." [Emphasis added].

OPINION

In recent years, the Public Service Commission has collected increasing amounts in inspection and supervision fees from regulated public utilities within its jurisdiction pursuant to Section 68-6-8, **supra**. These fees are passed through as an expense item

to the ratepayers of these utilities. All money collected by the Commission goes directly into the State general fund from which the Legislature then appropriates an amount each year to the Commission to support its operations.

The amount appropriated from the general fund for the operations of the Commission has been considerably less, however, than the amount collected as inspection and supervision fees. Indeed, in the last six (6) fiscal years, including the current year, the Commission has been appropriated as little as one-third (1/3) the amount collected in inspection and supervision fees, and in no year has the Commission been budgeted for over 43%.

In effect, this procedure requires utility ratepayers to bear the full cost of fees, through their utility rates, less than half of which are actually spent by the Public Service Commission on the inspection and supervision of utility services. In so far as this raises a question of policy, it must be resolved by the Legislature. With respect to the legal effect of Section 68-6-8, **supra**, in this regard, however, we conclude that it does not allocate or appropriate the total amount of these inspection and supervision fees to the exclusive use of the Public Service Commission.

Although Section 68-6-8, **supra**, provides that the fees are imposed for the purpose of inspection and supervision of regulated utilities, the statute supplies no specific direction as to how the moneys collected are to be applied toward this purpose. The fees are to be paid to "the state," and no language in the statute directly allocates the money to the Public Service Commission. Instead, Section 68-6-9.1, N.M.S.A. 1953, requires that:

"[a]ll fees and money collected under the provisions of the Public Utility Act shall be remitted by the commission to the state treasurer not later than the day following the receipt thereof."

In accordance with the procedure established in Section 11-2-3, N.M.S.A. (1953), for the remission of funds to the State Treasurer, this results in the deposit of these receipts into the general fund under Section 11-2-3.1, N.M.S.A. (1953). General funds may be expended "only in accordance with appropriations authorized by the Legislature." See also Article IV, Section 30, New Mexico Constitution.

The Legislature has annually appropriated funds to the Public Service Commission and other state agencies under the General Appropriations Act and special appropriations bills. All such appropriations have been specific in amount and have stated the purposes toward which the appropriations may be expended by the state agencies. Article IV, Section 30 of the New Mexico Constitution, provides that "[e]very law making an appropriation shall distinctly specify the sum appropriated and the object to which it is applied." Section 68-6-8, **supra**, specifies no sum, and does not even directly make an appropriation at all. Article IV, Section 30 imposes "strict provisions . . . designed to secure to the Legislature the exclusive power of deciding how, when, for what purposes, and in what amounts the money in the treasury shall be paid out." **McAdoo Petroleum**

Corp. v. Parkey, 35 N.M. 246 at 249 (1930). Section 68-6-8, **supra**, is simply not an appropriations bill.

Had the Legislature intended by Section 68-6-8, **supra**, to allocate all inspection and supervision fees to the Commission, it would have employed clear language expressing that intent. For example, in appropriating funds to the State Game Commission, the statute provides that money collected for license and other fees "shall be paid over to the State Treasurer **to the credit of the game protection fund and shall not be transferred to another fund**, and this act shall be guaranty to the person who pays for hunting and fishing licenses and permits, **that the money in said fund shall not be used for any purpose other than as provided in this act.** . . .," Section 53-1-8, N.M.S.A. (1953). [Emphasis added]. Indeed, until 1957, appropriation language **did** exist in the Public Utility Act. Laws 1941, Ch. 84, Section 45 provided:

"All fees and monies collected under the provisions of this Act . . . shall bw remitted forthwith by the Commission to the State Treasurer **and by him covered into the Public Utility Fund for the purpose of defraying the salaries and expenses of the Commission, and said monies shall be used for no other purpose.** " [Emphasis added].

To emphasize the point further, the same Act provided at Section 81 that:

"The Commission shall charge and collect the following fees, which shall be remitted to the State Treasurer, and which, with the charges in § 44 [current Section 68-6-8] required of utilities, shall constitute the Public Utility Fund **to be paid out for the purposes of this act and for no other purpose.** . . . [Schedule of filing and administrative fees omitted].

"All proceeds covered into said Public Utility Fund as above provided **are hereby appropriated for the payment of salaries and expenses of the Commission**, and no part of said fund shall revert to the General Appropriations Account of the State at the end of any fiscal year," [Emphasis added].

These provisions left no doubt that fees paid in to the Commission by utilities were appropriated to it to cover its costs of regulating public utilities. The substitution of the current Section 68-6-9.1, **supra**, by Laws 1957, Ch. 25, Section 1, similarly leaves no doubt that the Legislature has now chosen to assert a greater degree of fiscal scrutiny over the Commission's annual appropriations. The Legislature, in amending these statutes to eliminate the Public Utility Fund, must be presumed to have intended to change the law as it had theretofore existed. **Bettini v. City of Las Cruces**, 82 N.M. 633, 485 P.2d 967 (1971). The legislative intent under current law is that the fees collected go to the State, not to any specific fund. Once deposited with the State, in the general fund, they may be appropriated by the Legislature as it sees fit. Thus, the Public Service Commission is **only** entitled for its operation to such money generated by the fees collected pursuant to Section 68-6-8, **supra**, as the Legislature may appropriate.

In summary, it is our opinion that had the Legislature intended the inspection and supervision fees to be appropriated entirely to the Public Service Commission, it would have done so by express and specific language; it would not have enacted subsequent lesser appropriations to the Commission; and it would not have deleted the former language depositing all fees in an account created exclusively for Commission expenditures.

ATTORNEY GENERAL

Toney Anaya, Attorney General