



Attorney General of New Mexico

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November 19, 2002

The Honorable Mary Helen García
New Mexico State Legislature
State Capitol
Santa Fe, New Mexico 87501

Re: Opinion Request – Utilities Franchise Fees over State Land

Dear Representative García:

This office has completed its review of the question raised in your October 16, 2002 opinion request to Attorney General Patricia Madrid relating to a local government's authority to impose franchise fees for utilities on state lands. More specifically, you ask "[w]hether cities and counties may impose franchise fees on a utility pursuant to Sections 3-42-1 and 4-37-1 NMSA 1978 if the State Land Commissioner has already charged the utility for a right of way on state land located within a city's or county's boundaries pursuant to Section 19-7-57 NMSA 1978." The short answer is no. A city or county may not impose franchise fees on utilities over land not owned by the city or county.

As a preliminary matter, NMSA 1978, § 4-37-1, provides that "[a]ll counties are granted the same powers that are granted municipalities except for those that are inconsistent with statutory or constitutional limitations placed on counties." Consequently, NMSA 1978, § 3-42-1, authorizing a municipality by ordinance to grant a franchise for the construction of any public utility, applies equally to counties and cities. Moreover, the state legislature has specifically authorized the board of county commissioners of any county to (1) permit any public utility to use the public highways and the streets and alleys of unincorporated towns (the county) for their pipes, poles, wires, etc., and (2) impose on the utility a franchise fee for the reasonable actual expenses incurred in granting the franchise. § 62-1-3. The only limitation on a city or county's authority to negotiate a franchise relates to its term. No franchise ordinance adopted pursuant to § 3-42-1 or franchise granted by a city or county pursuant to § 62-1-3 may exceed a period of twenty-five (25) years.

With respect to a city or county's authority to impose franchise fees on public utilities for rights way over state lands, Section 3-42-1 simply states that a municipality may grant "a franchise to any person, firm or corporation" without reference to its location. The following provision contemplates the obligations of a newly incorporated municipality with respect to rights of way previously granted by the county "over, upon, in and about the streets of the municipality." § 3-42-2.

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It is well established that a franchise granted by a city or a county to a utility merely entitles the utility to use **the city's or county's streets and rights of way** to construct and operate its facilities and distribution systems. City of Albuquerque v. New Mexico Public Service Commission, 115 N.M. 521, 533 (1993) (emphasis added); see also City of Roswell v. Mountain States Telephone & Telegraph Co., 78 F.2d 379, 383 (10th Cir. 1935). It also is well established that, in exchange for granting a franchise, a city or county may exact consideration from the utility in the form of a franchise fee for the actual expenses incurred by the city or county in granting the franchise. *Id*; see also N.M. AG Op. No. 78-3 (1978) (a county may impose charges on utilities which constitute the reasonable expenses incurred by the county in the granting and exercise of the franchise). It necessarily follows that a city or county may not impose a franchise fee on a utility for the use of a street or a right of way not owned by the city or county. A city or county may grant a right to use only that which it owns or controls. Because a city or county does not own state trust lands and has no authority to grant a franchise over state-owned lands, it also may not impose franchise fees on a utility running over the same lands, whether or not the State Land Commissioner has already charged the utility for a right-of-way pursuant to § 19-7-57.¹

If we may be of further assistance concerning this or another matter, please let us know. Your request to us was for a formal Attorney General Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are not providing you with a formal Attorney General Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Very truly yours,



Sally Malavé
Assistant Attorney General

Cc: Stuart Bluestone, Deputy Attorney General
Albert J. Lama, Civil Division Director
Rachel Ray, Legislative Council Service

¹ The State Land Office informs us that public utilities wishing to construct and operate utility lines over state lands in fact must purchase rights-of-way from the state land commissioner as trustee and fee simple owner of the land.