April 29, 2009 Ute Reservoir Water Project

The Honorable Clinton D. Harden, Jr.
New Mexico State Senator
1348 CRH
Clovis, NM 88101

Re: Opinion Request - Ute Reservoir Water Project

Dear Senator Harden:

You have posed several questions to this office relating to a proposed water project anticipated to cost approximately $400 million that would provide water to residents of several eastern New Mexico communities. Specifically, you ask:

1. Is it lawful for the City of Clovis to enact a surcharge on water customers of New Mexico American Water Company, to be collected by New Mexico American Water Company and paid to the City of Clovis for dedication to the proposed project construction? If so, is Public Regulation Commission approval required?

2. Can the City of Clovis increase its franchise fee that New Mexico American Water Company pays to the City to enable the City to pay for its contribution to the financial plan requirements?

3. Can the City of Clovis enact a direct assessment to its residents pursuant to the authority set forth in Section 3-18-25 NMSA 1978 and/or Section 3-27-4 NMSA 1978 that is dedicated to the project and designed to implement the financial plan? If so, what steps are necessary for the City of Clovis to impose the direct assessment?

As discussed in detail below, we conclude:

1. The City of Clovis might enact such a surcharge, but any such surcharge that is part of the water rates to be charged to water customers by the New Mexico American Water Company, a private company that is a regulated utility, likely would be considered a “rate” that is subject to approval by the Public Regulation Commission. Because there is currently pending a rate hearing involving New Mexico American Water Company, it should be recognized that this question may be decided by the Public Regulation Commission should the surcharge be enacted.

2. The City of Clovis may increase its franchise fee that the New Mexico American Water Company pays to the City to enable the City to pay for its contribution to the financial plan requirements, subject to any applicable provisions of a franchise ordinance.

3. The City of Clovis can enact a direct assessment or service charge to its residents pursuant to the authority set forth in Section 3-18-25 NMSA 1978 and/or under its home rule power that is dedicated to the project and designed to implement the financial plan.

FACTS:

The project involves the construction of a pipeline and other infrastructure, including a water treatment facility, necessary to the distribution of water from Ute Reservoir to service residents of the communities within Curry and Roosevelt Counties, including the residents of Clovis, Grady, Texico, Portales, Elida and Melrose.

The project would be funded primarily by federal funds. It is expected that the federal government would provide 75% of the necessary funds for this project. Congressional legislation has not yet been passed to accomplish the funding of this project, although it is anticipated that such legislation will be passed in the near future. State funds contributed by the Water Trust Board would also fund the proposed project. Local funds from these communities would provide 10% of the funding for this project.

The local communities involved in this project have, over the years, made payments to the Interstate Stream Commission for the purpose of reserving water in the Ute Reservoir in anticipation of a project of this nature to enable water use by those communities of the Ute Reservoir. Deadlines are at present outstanding for these communities to utilize their water reservations.

According to the financial plan that these local communities have developed to accomplish this project, a fund will be created that is committed to completion of design and commencement of construction. To provide monies to this fund, those communities that own their water supply distribution systems anticipate assessing the necessary surcharges for this purpose commencing July 1, 2009. The City of Clovis, also a participant in this project, is situated differently from the other local communities involved in this project because it does not own its own water system. Rather, its residents are serviced by the New Mexico American Water Company, a private company that is regulated by the Public Regulation Commission. A rate proceeding is currently pending before the Public Regulation Commission concerning the water rates to be charged by this water company for its water service to Clovis residents.

ANALYSIS:

Question #1:

As more fully explained in our answer to question 3, the City of Clovis might enact such a surcharge on water customers of New Mexico American Water Company. However, any such surcharge that is part of the water rates to be charged to water customers by the New Mexico American Water Company, a private company that is a regulated utility, likely would be considered a “rate” that is subject to approval by the Public Regulation

Commission. Under Article XI, Section 2 of the New Mexico Constitution, the Public Regulation Commission is responsible for regulating public utilities, including water companies in such manner as the legislature provides. "[T]he Legislature specifically delegated the exclusive authority to regulate a utility's rates to the PRC [Public Regulation Commission] …". City of Albuquerque v. New Mexico Public Regulation Comm'n, 2003-NMSC-028, ¶18, 134 N.M. 472, 79 P.3d 297 (legislature explicitly acknowledged in statute that a "tariff" is included within PRC's ratemaking authority).

Under the Public Utility Act, NMSA 1978, §§ 62-1-1 to 62-13-14 (1887, as amended), the PRC has "exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations." NMSA 1978, Section 62-6-4 (A) (2003). Under Section 62-3-3 (H) (2005), "rate" means: "[E]very rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility.…" The term "utility" means: "[E]very person … that may own, operate, lease or control … any plant, property or facility for the supplying … or furnishing to or for the public of water for … municipal, domestic or other uses.…" NMSA 1978, Section 62-3-3 (G) (2005).[1] The proposed surcharge, under the authority of *City of Albuquerque*, likely would be considered a "charge or other compensation for utility service" within the meaning of Section 62-6-4 (A) and Section 62-3-3 (H), and, therefore, constitute a "rate" that is subject to the regulatory approval of the PRC. Because there is currently pending a rate hearing involving New Mexico American Water Company, it should be recognized that this question may be decided by the PRC should the surcharge be enacted.

Question #2:

Municipalities are statutorily authorized to grant franchises to utility companies. See NMSA 1978, § 3-42-1 (A) (1965) ("A municipality may grant, by ordinance, a franchise to any person, firm or corporation for the construction and operation of any public utility"). Franchise fees are authorized. See NMSA 1978, § 3-42-1 (F) (1965) ("No franchise ordinance shall be in effect for more than twenty-five years. The municipality may contract with the public utility for such services as are necessary for the health and safety of the municipality and may pay a sum agreed upon by the contracting parties").

A franchise granted by a municipality to a public utility merely entitles the utility to use the municipality's streets and rights of way to construct and operate the utility's facilities and distribution system. See City of Albuquerque v. New Mexico Public Service Comm'n, 115 N.M. 521, 533, 854 P.2d 348, 360 (1993). "In exchange for granting a franchise, a municipality may exact consideration from the utility, usually in the form of a franchise fee…. This may equal some percentage of the utility's gross revenues or net earnings, or it may equal some other proportion of the utility's income derived from providing service in the municipality." Id. (quoted in In re Adjustments to Franchise Fees Required by the Electrical Utility Industry Restructuring Act of 1999, 2000-NMSC-035, ¶ 2, 129 N.M. 787, 14 P.3d 525). Cf. Mountain States Tel. & Tel. Co. v. Town of Belen, 56 N.M. 415, 421, 430, 244 P.2d 1112, 1116, 1122 (1952) (new franchise ordinance sought to be imposed by the town upon telephone company that held a previous franchise was invalid as a contractual impairment, because it was primarily a revenue

measure, as distinguished from a police power measure; observing: “We think it beyond question that the providing of an adequate supply of water for municipal and domestic purposes” is a legitimate purpose; also stating that the previous governmental body granting a franchise could not divest the town of its governmental police power).

The purpose of the suggested franchise fee increase here is the provision of an adequate water supply to inhabitants of the City of Clovis, which is a legitimate governmental objective. Among the general “police powers” of municipalities is the power to protect inhabitants and to preserve peace and order within municipal limits, and they may adopt ordinances “providing for the safety, preserving the health, promoting the prosperity and improving … the comfort and convenience of the municipality and its inhabitants.” NMSA 1978, §§ 3-17-1(1993), 3-18-1 (1972). See also City of Hobbs v. Biswell, 81 N.M. 778, 780, 473 P.2d 917, 919 (Ct. App.), cert. denied, 81 N.M. 772, 473 P.2d 911 (1970) (municipal enactment is sustainable as a proper exercise of police power if reasonably necessary to preserve public health, safety, morals or general welfare). See also 6A Eugene McQuillin, The Law of Municipal Corporations, § 24.10, at 50-51 (3d ed., rev. vol. 2007) (“In a general way, the police power extends to all the great public needs. It is the power to anticipate and prevent dangers and to protect the inhabitants of a community…. [T]he power extends to regulations designed to promote public morals, safety, health, convenience, welfare, and general prosperity”).

Based on this authority, we believe that the City of Clovis may increase its franchise fee that the New Mexico American Water Company pays to the City to enable the City to pay for its contribution to the financial plan requirements, subject to any applicable provisions of a franchise ordinance. The suggested franchise fee increase here would be within the City of Clovis’ statutory police and franchise powers, which empower the City to provide its inhabitants with an adequate supply of water.

Question #3:

NMSA 1978, Section 3-18-25 (1965) provides:

A. For purposes of Sections 3-27-1[2] …, a municipality may:

(1) open, construct, repair, keep in order and maintain water mains, laterals, reservoirs, standpipes, sewers and drains; and

(2) assess and collect as other assessments and collections are made the amount necessary to cover the cost of the work.

B. The assessment against the lot or land along or through which the street runs shall be made in such portion as is just and equitable according to the benefits accruing to the lot or land and to its value.

The thrust of Section 3-18-25 is to permit the imposition of assessments to pay the necessary costs of construction work associated with the storage and distribution of water and related infrastructure, such as a water treatment plant and necessary appurtenances.

NMSA 1978, Section 3-27-4 (1994) provides, in part:

A. A municipality owning and operating a water utility may, for purposes of maintaining, enlarging, extending, constructing and repairing water facilities …, levy by general ordinance a just and reasonable service charge upon a front-foot, volume-of-water or other reasonable basis on:

(1) an improved or unimproved lot or land that adjoins a street in which a water supply system exists or which is otherwise accessible to such water supply system; and

(2) premises and improvements otherwise situated but connected to the water supply system.

The thrust of Section 3-27-4 is to permit the levying of a "just and reasonable service charge" for the purpose of maintaining and enlarging water facilities. The authority is expressly granted to those municipalities "owning and operating a water utility." Although Clovis does not "own and operate" its own water utility, for the reasons that follow, the legislative grant of power by this provision of law should not be construed to deny similar power to the City of Clovis in the circumstances here, nor does this statute purport to do so.

As a "home rule" municipality, having adopted a charter pursuant to Article X, Section 6 of the New Mexico Constitution and the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1971, as amended), the City of Clovis "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." Article X, Section 6 (D). "A liberal construction shall be given to be powers of [chartered] municipalities." Article X, Section 6 (E). Among the benefits to becoming a home-rule municipality, is the "generous grant of authority by the home rule amendment, which gives the municipality blanket authority to act as long as the legislature has not expressly denied that authority." New Mexicans for Free Enterprise v. City of Santa Fe, 2006-NMCA-007, ¶ 14, 138 N.M. 785, 126 P.3d 1149.[3] See also Smith v. City of Santa Fe, 2006-NMCA-048, 139 N.M. 410, 133 P.3d 866, aff'd, 142 N.M. 786, 171 P.3d 300 (upholding the City of Santa Fe's authority, as a home rule municipality, to prohibit the drilling of domestic wells, finding no legislative intent in the statutes providing authority to the state engineer to negate or preempt the city's power to prohibit drilling; noting also the many statutes that provide for municipal regulation and conservation of water,[4] which, read together with the state engineer's permitting authority, did not evidence an intent to grant exclusive authority to the state engineer regarding domestic wells).

In light of the "liberal construction" to be afforded to the powers of home rule municipalities, and finding no general law that would deny authority here, the City of Clovis might, under its home rule power, enact by ordinance measures conducive to the health, safety and welfare of the city, which may include maintaining, enlarging and extending water facilities and levying a just and reasonable service charge. See New Mexicans for Free Enterprise v. City of Santa Fe, Id. ¶ 16 ("home rule amendment was clearly intended to devolve onto home rule municipalities remarkably broad powers … amendment is intended to provide chartered municipalities with the utmost ability to take policymaking initiative").

Similarly, the assessment authority provided by Section 3-18-25 should be liberally construed to permit the City of Clovis to make assessments, "as other assessments and collections are made," such necessary assessments to provide for the City's contribution to the fund, which has, as its purpose, the acquisition of a water supply and necessary facilities and appurtenances to assure a sufficient supply of water to the residents of the affected local communities, including the residents of the City of Clovis. Such assessments must be necessary, just and equitable, and reasonable.[5] Similarly, the "surcharge" mentioned in question 1, if just, equitable and reasonable, could be made, finding no general law that would deny authority to the City to enact such charge.

Based on this authority, we believe that the City of Clovis can enact a direct assessment or service charge to its residents pursuant to the authority set forth in Section 3-18-25 NMSA 1978 and/or under its home rule power that is dedicated to the project and designed to implement the financial plan. The choice among alternatives is a matter for the reasonably exercised discretion of the City and its governing body.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's 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.

Sincerely,

ANDREA R. BUZZARD
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The definition of "utility" does not include a municipally owned water system, and the PRC does not have jurisdiction to regulate water rates charged by municipalities. See Section 62-3-3 (E) (2005) (excluding from the definition of "person" as used in the Public Utility Act a municipality unless the municipality has elected to come under the Public Utility Act); Section 62-6-5 (1993) (permitting an election by voters of a municipality to come within the provisions of the Public Utility Act and to allow the PRC to regulate

municipally owned and operated utilities); Section 62-6-4 (A) (2003) (exempting municipally owned and operated utilities from rate and service regulation by the PRC). See also United Water New Mexico, Inc. v. New Mexico Public Utility Comm'n, 1996-NMSC-007, 121 N.M. 272, 277, 910 P.2d 906, 911 (1996) ("[T]he legislature has made it very clear that municipalities are excluded from the definition of public utilities under the Act, unless they elect to be governed by the Act"); City of Sunland Park v. New Mexico Public Regulation Comm'n, 2004-NMCA-024, ¶ 19, 135 N.M. 143, 85 P.3d 267 ("PRC has no jurisdiction over public utilities that are owned and operated by a municipal corporation, unless they agree otherwise"); Fleming v. Town of Silver City, 1999-NMCA-149, ¶ 6, 128 N.M. 295, 992 P.2d 308 (a municipal water system does not fall within the purview of the Public Utility Act, except that, under Section 62-3-2.1 (C), the Public Utility Act prohibits municipal water facilities or service from operating within the service area of a regulated public utility until the municipality exercises its option to subject itself to regulation under the Public Utility Act).

[2] Section § 3-27-1 NMSA 1978 (1965) provides, in part:

> A municipality, within and without the municipal boundary, may:
>
> A. acquire water facilities which may include but are not limited to:
>
> (1) wells, cisterns and reservoirs;
>
> (2) distribution pipes and ditches;
>
> …
>
> (5) water treatment plant; and
>
> (6) their necessary appurtenances;

[3] The exercise of municipal authority as a home rule municipality must not be denied by general law, meaning a law that applies generally throughout the state or is of statewide concern, as contrasted to local law. New Mexicans for Free Enterprise, ¶ 18.

[4] See NMSA 1978, § 3-53-1 (1965) (granting municipalities the authority to regulate, inter alia, wells); NMSA 1978, § 3-53-2 (1965) (granting municipalities the authority to regulate and restrict the use of water); NMSA 1978, 3-27-1 (1965) (granting municipalities the authority to acquire and operate water facilities, including wells); NMSA 1978, § 3-27-3 (1994) (granting jurisdiction over water supply for the purpose of providing a municipal water system).

[5] See Apodaca v. Wilson, 86 N.M. 516, 524, 525 P.2d 876, 884 (1974) (city must fix "reasonable" rates for water and sewer service).