Opinion 14-01

OPINION OF GARY K. KING, Attorney General

February 17, 2014

BY: Luis G. Carrasco, Assistant Attorney General

TO: The Honorable Michael S. Sanchez, New Mexico State Senator, 03 Bunton Road, Belen, NM 87002

QUESTION:

Do New Mexico counties have the authority to charge utility companies a fee for the use of rights-of-way pursuant to any legal principle or law, including NMSA 1978, Section 62-1-3?

CONCLUSION:

Yes. New Mexico counties are authorized to charge utility companies a fee for the use of rights-of-way pursuant to New Mexico statutes and case law.

ANALYSIS:

New Mexico law evinces a clear intent to permit counties to assess both private and public utility companies a fee for the reasonable actual expenses incurred in granting rights-of-way for the use of public highways, streets and alleys in unincorporated towns, and places certain limitations on the conferral of such rights-of-way. These rights-of-way are typically known as "franchises." NMSA 1978, Section 62-1-3 (1987) provides:

> The boards of county commissioners of the several counties are authorized to permit corporations organized pursuant to Section 62-1-1 NMSA 1978, public utilities under the Public Utility Act and companies that provide public telecommunications service pursuant to the New Mexico Telecommunications Act to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures; provided that such use shall not unnecessarily obstruct public travel and provided further that the boards of county commissioners and municipal authorities of incorporated cities and towns are authorized to grant franchises not exceeding twenty-five years' duration to corporations for such purposes within their respective jurisdictions. A board of commissioners is authorized to impose charges for reasonable actual expenses incurred in the granting of any franchise pursuant to this section.

(Emphasis added).1 Under NMSA 1978, Section 62-1-2 (1909), utility companies are authorized "to place their pipes, poles, wires, cables, conduits, towers, piers, abutments,

stations and other necessary fixtures, appliances and structures, upon or across any of the public roads, streets, alleys, highways and waters in this state subject to the regulation of the county commissioners and local municipal authorities."

The term "right-of-way" refers to the "right to pass through property owned by another." Black's Law Dictionary 1351 (8th ed. 2004). "The term franchise usually means a grant of the right to use highways, streets and alleys." City of Roswell v. Mountain States Tel. & Tel. Co., 78 F.2d 379, 383 (10th Cir. 1935). "A franchise is a special privilege conferred by government upon individuals, and which does not belong to the citizens of a county generally, or common right . . . . [and] is historically a device of the sovereign to induce or encourage an individual or group of common endeavor to direct his or its business for the benefit of the community well being and to realize, in consideration for such efforts, a field free from all competition." N.M. Att'y Gen. Op. 57-51 (1957) (citations omitted).

Section 62-1-3, as quoted above, expressly authorizes a county to "impose charges for reasonable actual expenses incurred in the granting of any franchise," which might be construed to limit permissible franchise fees to those necessary to recoup expenses incurred during the process of granting a franchise. However, New Mexico courts have not construed a county's authority to impose franchise fees so narrowly.2 According to the New Mexico Supreme Court, the amount of a fee in exchange for a franchise granted under Section 62-1-3 is a matter of contract between the county and the utility and "is paid by the utility to the county for use of the county's right of way. . . ." El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n, 2010-NMSC-048, ¶ 13, 149 N.M. 174 (emphasis added) (distinguishing franchise fees from rates within the jurisdiction of the Public Regulation Commission). See also N.M. Att'y Gen. Op. No. 78-3 (1978) (a franchise may be viewed as a contract between a utility and a county and may impose on the utility charges constituting the reasonable expenses incurred in the granting and exercise of the franchise).

Similarly, in the context of a franchise issued by a municipality,3 the Supreme Court explained that a franchise:

> merely entitles the utility to use the municipality's streets and rights of way to construct and operate its facilities and distribution system. . . . 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.

City of Albuquerque v. N.M. Pub. Serv. Comm'n, 1993-NMSC-021, ¶ 37, 115 N.M. 521 (citations omitted). See also Moongate Water Co. Inc. v. City of Las Cruces, 2009-NMCA-117, ¶ 3, 147 N.M. 260 (upholding the terms of a franchise granted by the City of Las Cruces to a water utility which required the utility to pay a yearly franchise fee based on the number of customers it served), cert. denied, 2009-NMCERT-009, 147 N.M. 421; GTE Southwest Inc. v. Taxation and Revenue Dep't, 1992-NMCA-024, ¶ 22,

113 N.M. 610 (municipalities impose charges on utilities that “cover the reasonable expenses incurred in the granting and exercise of the franchise”), cert. denied, 113 N.M. 605, 830 P.2d 157 (1992).

Based on the statutory and judicial authority described above, we conclude that a county board of commissioners may enter into franchise agreements with utility companies and impose a franchise fee in exchange for the county’s reasonable expenses incurred in granting the franchise and for the utilities’ use of public highways, streets and alleys under the franchise agreements.

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[1] Section 62-1-1, referenced in Section 62-1-3, provides: "Corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity or steam for lighting, heating, power, manufacturing or other purposes may be organized under the general incorporation laws of this state." See also NMSA 1978, § 62-1-1.1 (1979) (stating that foreign corporations which are duly qualified to do business in this state and are public utilities under the New Mexico Public Utility Act shall have the same rights and privileges as domestic corporations of like character for the purposes identified in Section 62-1-1).

[2] In Bd. of Cnty. Comm'rs of Grant Cnty. v. Qwest Corp., 169 F.Supp.2d 1243 (D.N.M. 2001), a utility challenged a county's authority to impose user fees under Section 62-1-3, contending that permissible fees were limited to those necessary to recover the county's actual expenditures during the application process, including the expenses of publishing an ordinance and holding a special election. Id. at 1250-1251. The federal district court did not decide the issue because it found authority for the county's user fee under federal law. Id. at 1251 (citing 47 U.S.C. § 253(c)).

[3] The Municipal Code authorizes a municipality to "grant, by ordinance, a franchise to any person, firm or corporation for the construction and operation of any public utility." NMSA 1978, § 3-42-1(A) (1965). Although Section 3-42-1(E) provides that "[t]he expense of publishing the franchise ordinance and of holding a special election shall be paid by the applicant for the franchise," the statute does not provide municipalities with express authority to charge a franchise fee. Despite this, as discussed in the text, the New Mexico Supreme Court has upheld the authority of municipalities to impose fees in exchange for granting a franchise.