

Opinion No. 14-1203

April 24, 1914

BY: IRA L. GRIMSHAW, Assistant Attorney General

TO: Mayor B. D. Oldham, Clovis, New Mexico.

TELEPHONE COMPANIES.

Telephone companies cannot use streets of city without permission, but are not liable for payment of an occupation tax.

OPINION

{*64} We have your letter of the 22nd inst., asking for information in reference to the right of the City of Clovis to tax the Mountain States Telephone & Telegraph Company.

Your letter seems to convey the idea that the tax you propose to make upon the company is an occupation tax, a tax upon a line of business. The statutes of the State of New Mexico provide for the taxation of certain lines of business, the proceeds of which go to the city authorities and constitute city revenues. The statutes on this subject, however, do not include the taxation of the telephone business, and therefore under the laws of the state you have no right, power or authority to predicate a tax upon that theory so far as the telephone company is concerned.

Jurisdiction over streets, alleys and highways within a municipality is given to municipalities by sub-section 7 of Section 2402 of the Compiled Laws of 1897. That sub-section authorizes the city authorities to regulate the use of the streets, alleys and highways within the municipality. The ninetieth sub-section of Section 2402 empowers the city to grant, by ordinance, privileges and franchise for street car lines, water works, for lighting purposes and other public conveniences and comforts. In our judgment a telephone company falls within this latter provision. Whether it does or not, it is nevertheless quite clear that the right to regulate the use of the streets is vested exclusively in the municipality, and you may exercise this power in relation to this company in the present instance. "The Mountain States Telephone and Telegraph Company" is a corporation organized in a foreign jurisdiction, but authorized to do {*65} business in this state. This authorization to do business in this state does not confer upon it the right to make use of the streets and highways within the jurisdiction of a municipality without the consent of that municipality. The Telephone and Telegraph Company in this case has no right to erect a pole or maintain it until it has been authorized to use the streets by your city government authorities.

The erection and maintenance of poles, posts and wires by the company in the streets, alleys and highways of your city, without your permission constitutes a nuisance and a trespass. Each day constitutes a separate and distinct act of trespass, and the company

is liable in damages for such action on its part. You may enfranchise the company to use your streets upon reasonable conditions and restrictions. You may also, at any time, provide by ordinance for the supervision and inspection of their poles and wires, under the police power delegated to municipalities. A charge only sufficient to meet the cost of such inspection may be imposed. This would constitute a police power measure, and must not be made to raise revenue.