

Opinion No. 41-3761

April 7, 1941

BY: EDWARD P. CHASE, Attorney General

TO: Mr. C. R. Sebastian State Comptroller Santa Fe, New Mexico

{*56} This will acknowledge receipt of your letter of the 27th wherein you desire to know if the Tucumcari Electric Light and Power Company, a municipally owned utility, is violating Section 112-107, New Mexico Statutes, Annotated, 1929 Compilation, by reason of its having investments in bonds of {*57} out-of-state municipalities. It is my understanding that a special fund designated as the Electric Light and Power fund has been set up for the purpose of paying for the said investments, and I presume that all of the proceeds in the said fund are derived solely from the revenue collected by the utility company for its services.

Section 112-107, New Mexico Statutes, Annotated, 1929 Compilation, as amended by Section 4, Chapter 175, Session Laws of 1933, reads in part as follows, to-wit:

"* * * County, city or town treasurers, by and with the advice and consent of their respective boards of finance charged with the supervision and control of the respective funds, shall have the power to invest all sinking funds or moneys remaining unexpended from the proceeds of any issue of bonds or other negotiable securities of any county, city, town or school district which are now or may hereafter by law be intrusted to their care and custody **and all moneys not immediately necessary for the public uses of such counties**, cities, towns or school districts in bonds or negotiable securities of the United States of America, the state of New Mexico, or of any county, city, town or school district of New Mexico, if such city, town, or school district has a taxable valuation of real property for the last preceding year of at least one million dollars, and shall not have defaulted in the payment of any interest or sinking fund obligation or failed to meet any bonds at maturity at any time within five (5) years last preceding."

From reading the foregoing portion of the statute, it would appear at first blush that such action as outlined above by the Tucumcari Electric Light and Power Company is in violation of the same. There is, however, a grave doubt in the writer's mind that the operation of the municipally owned utility company is of such a "governmental nature" as to come within the purview of the statute. I am inclined to the view that such an arrangement, and funds or revenue so derived, should be classed as "private", and not "governmental" in nature.

The Supreme Court of Pennsylvania, in the case of Shirk vs. City of Lancaster, 90 A.L.R. 688, quoting from Page 694, said:

"Though a municipality has no vested right in the powers conferred for governmental purposes, and the public moneys raised through such functions (taxes) are subject to

the primary powers of the state to control and make appropriate provision therefor, **revenues derived in its private capacity, as a return from its water or other utility works, are trust funds, and cannot be controlled or taken directly for state purposes.** See Board of Commissioners of Tippecanoe County vs. Lucas, 93 U.S. 108, 23 L. Ed. 822; People vs. Ingersoll, 58 N. Y. 1, 17 Am. Rep. 178; Cary Library vs. Bliss, 151 Mass., 364, 25 N.E. 92, 7 L. R.A. 765. This is so even if such revenues were to be used for public purposes: they fall within the protection of the Fourteenth Amendment."

In view of the foregoing case and other authority therein cited, I am of the opinion that the instant practice on the part of the Tucumcari Electric Light and Power Company is without the control of the legislature, and therefore not in violation of Section 112-107, New Mexico Statutes, Annotated, 1929 Compilation, as amended by Section 4, Chapter 175, Session Laws of 1933.

In closing, however, I wish to call to your attention the fact that our Supreme Court has never passed on the instant question, and {^{*58}} it is, therefore, moot in this state

Trusting that the foregoing sufficiently answers your inquiry, I am,

By HOWARD F. HOUK,

Asst. Atty. General