

Opinion No. 43-4395

October 14, 1943

BY: EDWARD P. CHASE, Attorney General

TO: New Mexico Public Service Commission, P. O. Box 561, Santa Fe, New Mexico

In your letter dated October 11, 1943, you state that the town of Las Cruces is contemplating the purchase of the electric property of the El Paso Electric Company known as the Mesilla Valley Division and operating in Sierra and Dona Ana Counties, with headquarters at Las Cruces. This division furnishes electricity over an area extending approximately 40 miles southeast of Las Cruces and approximately 60 miles northwest of Las Cruces.

In connection with the duties of the Public Service Commission you ask the following questions:

1. "Do present New Mexico laws permit, under the circumstances recited, an incorporated municipality to own and operate transmission and distribution lines and services in widely separated communities and areas outside the corporate limits of the municipality where there is no community interest factor whatever existing?"
2. "If such authority is provided under the law, is the municipality privileged to own and operate such facilities as a municipal corporation or as a separate public utility corporation?"
3. "What is the authority of the New Mexico Public Service Commission with respect to the operation of such facilities beyond the limits of the municipality in the event ownership under the law is permissible?"

In answer to the first question, under the great weight of authority a municipal corporation has only such powers as may be granted to it by the Legislature and although a municipality may acquire an electric light plant and operate the same within the corporate limits of the municipality, under the majority view such a municipal corporation has no power, in the absence of statutory authority, to furnish service beyond its corporate limits. The cases supporting the majority view, as well as the minority, are annotated in 49 A. L. R. 1239 and 98 A. L. R. 1001. A statement of the general law to this effect is also to be found in 38 Am. Jur. Sec. 570, page 258.

Under the minority rule a municipality may sell its surplus product of the public utility plant outside the corporate limits of the Municipality, but has no power to extend its service lines beyond the corporate limits for the purpose of selling such product. The minority rule seems to be gaining in later cases, especially in connection with the extension of service lines for the purpose of selling the surplus product.

In view of the fact that the Mesilla Valley Division purchases all of its electricity from the Reclamation Service and the town of Las Cruces, likewise, if it acquired the property, would purchase all of its electricity from this source, there would be no surplus product created by the plant of the utility and for that reason the minority rule would not apply in any event.

For this reason, and in view of the great weight of authorities above mentioned, I am of the opinion that an incorporated municipality may not operate and furnish services of an electric light plant to persons outside the corporate limits of such municipality until such time as the Legislature may grant the authority so to do.

In view of the answer to question No. 1, I do not deem it necessary to answer question No. 2 at this time.

In answer to question No. 3, in the event our Supreme Court should hold with the minority rule above mentioned to the effect that a municipality may operate a public utility and furnish services beyond the corporate limits of the municipality, the authorities are divided concerning the authority of Public Service Commissions to regulate the operation of such facilities outside the corporate limits of the municipality. Section 72-504 of the 1941 Compilation provides as follows:

"Nothing in this act, however, shall be deemed to confer upon the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipal corporation. either directly or through a municipally owned corporation, and no inspection or supervision fees shall be paid by such municipality or municipally owned corporation."

Under a strict construction of this language, I am of the opinion that the Public Service Commission would have no authority to regulate or supervise the rates or service of such utility respecting its operation inside or outside the corporate limits of the municipality.

By C. C. McCULLOH,

First Asst. Atty. General