

**Opinion No. 46-4879**

March 14, 1946

**BY:** C. C. McCULLOH, Attorney General

**TO:** Mr. Allan D. Walker Attorney at Law Alamogordo, New Mexico

{\*207} In your letter dated March 12, 1946, you state that the village of Capitan is negotiating with the Otero County Electric Cooperative, Inc. for the sale of the Capitan light and power plant and distribution system. You are wondering whether the sale can only be held after an election by the municipality to obtain approval from the electors pursuant to Section 14-4301 of the 1941 Compilation, or whether Section 14-4305 and subsequent sections would govern.

Section 14-4301 was originally passed in 1921 and amended in 1927, and required municipalities to submit the question of sale of a light plant to a vote of the people. However, Section 14-4305 was passed in 1937 and specifically repealed that portion of the previous section so far as the same is in conflict therewith.

The only question remaining to be considered is whether a municipal electric light plant is property used strictly in carrying out an essential governmental function. I am inclined to agree with you that an electric utility is not an essential governmental function, but is a proprietary function of the municipality {\*208} and may be operated merely for the benefit of the citizens thereof.

The distinction between governmental functions and proprietary functions in municipalities is set out in 43 C. J., Sections 179 and 180. In view of the distinction there given, the operation of a municipal light plant is not a governmental function, strictly speaking, and certainly is not an essential governmental function as shown by the fact that many municipalities do not own and operate municipal electric utilities.

For that reason, I believe the sale could be made pursuant to Section 14-4305, subject, of course, to the right to have the matter voted upon at an election pursuant to the subsequent sections relating to protests.