Opinion No. 50-5279

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BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Earl Hartley City Attorney Clovis, New Mexico

*{*126}* We are in receipt of your letter asking for an opinion as to whether a telephone cooperative organized to serve only its members is subject to the jurisdiction of the State Corporation Commission and whether the cooperative would be under the duty of obtaining a certificate of convenience and necessity.

A review of the decisions appeared to us to lead to the following inescapable conclusions.

1. A telephone cooperative serving only its members is not subject to the regulatory rate authority of the Corporation Commission over telephone companies under Article 11, Sec. 7 of the New Mexico Constitution in view of:

(a) The restrictive interpretation that has been placed upon this constitutional provision by decisions of the New Mexico Supreme Court. Article 11, Section 7 of the Constitution reads as follows:

"The Corporation Commission shall have the power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping car, and other transportation and transmission companies and common carriers within the state . . . . The commission shall have the power to charge or alter such rates, to change, alter or amend its orders, rules, regulations or determinations, and to enforce the same in the manner prescribed herein; provided, that in the matter of fixing rates of telephone and telegraph companies due consideration shall be given to the earnings, investment and expenditures as a whole within the state."

In the case of In Re Wallace Transfer Company, 1931 35 N.M. 652, P. 2d 199, the court dealt with the question of whether the Corporation Commission has jurisdiction, under Article 11, Section 7 of the New Mexico Constitution, to regulate time schedules of passenger motor carriers. It was held that Sec. 7 "gives to the Corporation Commission . . . jurisdiction in the matter of regulating *{*127}* rates and charges of common carriers. In the matter of service, however, the jurisdiction to regulate seems to apply to the railway companies only."

The case of LaFollette v. Albuquerque Gas & Electric Company's rates, (1932), 37 N.M. 57, 17 P.2d 944, answers the question of whether the phrase "and other transportation and transmission companies" was intended to cover local gas and electric companies. The Court held that through the word "transmission" could possibly be considered as

referring to the electric companies, this construction would result in a division of the regulatory power over electric companies between the Commission and the Legislature, the latter being charged with the regulation of the generating company, while the jurisdiction over the distributing company would be given to the commission. It was indicated that this was not the intent of the Constitution makers. Consequently, local gas and electric companies could not be held to have been included under the phrase "other transmission companies".

If it had been "desired to confer jurisdiction over such utilities in the corporation commission, the framers of the Constitution would have said so in apt words".

In the case of In Re Atchison, Topeka & Santa Fe Railroad Company (1933), 37 N.M. 194, 20 P.2d 918, the Supreme Court had the occasion to consider Article 11, Section 7 of the New Mexico Constitution. There it was emphasized that the section was meant to apply only to common carriers and public service corporation. It was clearly the policy of the framers of the Constitution and the people in adopting it to take the powers of regulation of common carriers in certain respects from the legislative branch and vest them in the Commission.

A like interpretation was placed upon this constitutional provision by the state legislature which, by Section 74-801 of the 1941 Compilation, generally prohibits the duplication of facilities for furnishing any public utility service contemplated by Art. 11, Sec. 7 of the Constitution unless a certificate of convenience and necessity is obtained from a local District Court.

(b) The numerous decisions in many states which have held under similar statutory or constitutional provisions that commission jurisdiction exists only over a public utility company that has devoted their property to the use of the general public, and which even in the absence of qualifying words and the statutory grant of authority to the commission, have restricted commission jurisdiction to such public utilities. See Colo. Utility Corp. v. Public Service Commission, 275 Mo. 483, 205 S.W. 36.

(c) The interpretation placed upon this constitutional provision by the N.M. Legislature in Section 74-801 of the 1941 Compilation which, in referring to the type of services placed under the Corporation Commission regulation by Article 11, Section 7 of the Constitution, speaks of the furnishing of any public utility service contemplated by Article 11, Section 7 of the Constitution.

(d) The complete inapplicability in the case of non-profit cooperatives serving only members, of any of the reasons for the commission regulation you are referred to the case of AT&ST, supra, which stated that the reason for the exercise of such regulatory power was simply this: To protect a consuming public from unreasonable rates and charges. Since the members of the cooperative constitutes its owners as well as its consumers, there is obviously no factual basis for the Corporation Commission *{*128}* to protect the consumers from unreasonable rates. It would be absurd to protect the members from themselves.

Additional light is shed on the purpose and reason for the inclusion of telephone companies in Art. 11 Section 7, by the provision that section that in the matter of fixing rates of telephone and telegraph companies due consideration shall be given to the earnings, investment and expenditure as a whole in one state. But consideration of those factors in the case of the mutual non-profit cooperatives there is not useful whatever. If the rates are too high, the surplus collected is returned to the consumers prorata. If the rates are too low, the consumer must accept curtailed service or provide financial contribution to the corporation. Garkane Power Co. v. State Public Service Co. of Utah, 100 P.2d 571.

2. A telephone cooperative serving only its members could not be deemed subject to the certificate of convenience and necessity requirement of Section 74-801 of the 1941 Compilation since, in addition to the foregoing reasons, the statute plainly and expressly restricts its requirements to those companies which furnish "public utility service" and the overwhelming weight of authority holds that non-profit cooperatives which serve only their members lack the essential element of service to the general public which is required for designation as a public utility.