Opinion No. 52-5609

October 10, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer State Highway Department Santa Fe, New Mexico

*{*322}* On June 12, 1952, two employees of the Highway Department, in setting a warning post on U. S. 85 in Las Vegas, damaged an underground cable used for street lights. The Public Service Company of New Mexico repaired the damage and have requested payment from the Highway Department for their services and materials furnished in connection with this in the sum of $ 413.13. You asked the opinion of this office whether this bill may be lawfully paid.

The cable in question was purchased and installed by the Public Service Company for the Highway Department pursuant to letter contract dated October 3, 1950, Project *{*323}* No. U. I. 152(5). This project as approved by the Bureau of Public Roads for federal aid included the purchase and laying of the cable. You have assured us that either the Commission nor any of its agents or employees requested the Public Service Company to repair the cable after its damage, and although there may have been an agreement between the Public Service Company and the City of Las Vegas for continued service and maintenance, there was none between the Public Service Company and the State of Now Mexico.

A tort action will not lie against the State Highway Commission. Lucero v. State Highway Department, 55 N.M. 157. However, here there appears to be no evidence that the cable damaged was the property of the Public Service, and therefore considerable doubt as to whether a tort was committed against it.

If the Public Service Company was not requested to do the work and furnish the materials for which its statement has been rendered, there could have been no contract between it and the State.

Although the Commission has complete charge of the expenditure of its funds, N.M. Constitution Art. V, Sec. 14, this is subject to legislative control as to the object for which the expenditure is to be made. Gamble v. Velarde, 36 N.M. 262. Unless legal liability exists, the expenditure of state funds for past services is at best poor business practice, although legislation authorizing such payments has been held constitutional. State ex rel Sedillo v. Sargent, 24 N.M. 333.

Since 1917, the Highway Commission has constructed, improved and maintained highways either with its own forces or by contracts let after advertising for bids. Sec. 58-232 N.M.S.A. 1941 so required. This has remained the policy of the Commission even

after the adoption of Art. V, Sec. 14 of the Constitution. Such a policy prohibits payment for labor and material voluntarily performed regardless of benefits derived.

On August 21, 1950, the Commission entered into a contract with the City of Las Vegas whereby the City agreed that it would maintain and operate the electric lighting system and the appurtenances thereto, and would save the State free and harmless from all claims, damages, and the expenses or liabilities of any nature whatsoever. Part of this contract reads: "and the City agrees to make ample provision in its budget each year for the costs of such operation and maintenance." Accidental damage to the lighting system was, therefore, foreseen by the parties involved. Perhaps insurance protection was secured by the City, at least the contract is in the nature of an indemnity to the State. Springer Transfer Co. v. Board of Commissioners, 43 N.M. 444, see p. 450.

I can only conclude therefore that there is no legal liability upon the part of the Commission to pay this claim, and that its payment would be contrary to the statutes and the policies and regulations of the State Highway Commission.