

Opinion No. 53-5715

March 26, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. L. W. Leibrand, Chairman New Mexico Public Service Commission P. O. Box 561 Santa Fe, New Mexico

{*109} This is in answer to your request for an opinion upon the following hypothetical question: Is a person, firm or corporation who furnishes water from privately owned sources through privately owned facilities to a gate at a municipality in New Mexico for distribution by the municipality to the public for a stated price, a public utility subject to regulation by the New Mexico Public Service Commission.

In order to answer this question three sections of our Statute should be first stated and read together. Section 72-302, N.M.S.A., 1941 Compilation, as amended, Laws 1941, Ch. 4, Section 1, sub-section (f) performs the basic function of defining what the Legislature intended to mean by the words "Public Utility" as it appears in the Act:

"The term 'public utility' or 'utility' when used in this act shall mean and include every person not engaged solely in interstate business and except as hereinafter stated, that now does or hereafter may own, operate, lease, or control: . . . (3) Any plant, property, or facility for {*110} the supplying, storage, distribution, or furnishing **to or for the public** (Underline Mine) of water for manufacturing, municipal, domestic, or other uses, provided,"

Under the hypothetical case here involved, it is clear that the only factor that would possibly exempt this wholesale of water would be whether he could be considered as supplying "to or for" the public. Our law does not define what is meant by "to or for the public", nor is there comparative legislation in other jurisdictions that would give us the answer.

Resort to other parts of the Act as to a means to gain the full legislative intent is necessary in order to arrive at the intent of the Legislature on what "to or for the public" means.

Section 72-303, N.M.S.A., 1941 Comp., as amended, Laws 1941, Ch. 84, Sec. 2, states that the Legislature intended would not be a utility within the terms of the Statute, and also certain exemption of a utility:

"The term 'public utility' or 'utility' when used in this act shall not include any person not otherwise a public utility, who furnishes the service or commodity only to himself, his employees or tenants, when such service or commodity is not resold to or used by others; . . . (exemption for railroad companies) . . . **The business of any public utility**

other than of the character defined in sub-division (f) of section 1 hereof is not subject to provisions of this act:" (Underlines mine)

It is clear that the Legislature here attempted to set up several exemptions to the definition in Section 72-302, supra. Certain railroad activities are specifically exempted and strictly private usages are not utilities. The underlined portion brings out the recognition of the Legislature that there may be public utilities as such who do not come within the provisions of those defined under Section 72-302 (f) and recognizes the differentiation between "business" regulation, and "rates and service" regulation. With this in mind, Section 72-504, N.M.S.A., 1941 Comp., as amended, Laws 1941, Ch. 84, Sec. 17, describes the jurisdiction of the Public Service Commission over public utilities, as follows:

"The commission shall have general and exclusive power and jurisdiction to regulate and supervise **every public utility** (Underlines Mine) in respect to its **rates and service** (Underlines Mine) regulations, and in respect to its securities, all in accordance with the provisions and subject to the reservations of this act, and to do all things necessary and convenient in the exercise of such power and jurisdiction. 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 either directly or through a municipally owned corporation, and no inspection or supervision fees shall be paid by such municipalities or municipally owned corporations"

and then, the next paragraph touches on the point here before us,

"The sale, furnishing or delivery of gas, water or electricity by **any person** (Underlines Mine) to a utility for resale to or for the public shall be subject to regulation by the commission, but only to the extent necessary to enable the commission to determine {*111} that the cost to the utility of such gas, water or electricity at the places where the major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate;"

This clearly sets out that the Legislature intended for specified purposes, not to exempt **any individual**, and it does not state utility such as appears in Section 72-302 (f), who sells for resale to or for the public.

It is our opinion that the Legislature by this section recognized the "public" nature of the wholesaler's operation, and recognized that by mere legislative word, one cannot be made a "utility" **43 Am. Jur. Sec. 5, P. 574.**

In the comparable field of gas regulation, in **Louisiana Public Service Commission vs. Southern Gas Line, Incorporated** P.U.R. 1831C, 300, the Commission stated:

"* * * this Commission would be powerless to fix reasonable and just gas rates in Louisiana if we were denied the right to regulate and fix the rates to be charged by the wholesalers of the gas to the local distributing companies. * * * for instance, if this

Commission cannot say how much the pipe line companies shall pay for the gas it sells at the city or town gate, such gate, such gate rate could be fixed at any level that the owners of the pipe line might please to sell it, and the local distributing companies could then offer as a defense in a proceeding before this Commission to fix reasonable rates in the town or towns served by it that it could not reduce its rates to the consumer to a fair level because the wholesaler could not reduce his rate at the city or town gate to a fair level."

See **Louisiana Public Service Commission vs. United Gas Pipe Line Company**, 28 P.U.R. (N.S.) 139; **La Follette vs. Albuquerque Gas & Electric Company's Rates**, 37 N.M. 57, 17 P 2d 944; **Illinois Public Utilities Commission re: East St. Louis Light & Power Company**, P.U.R. 1919E, 379. The wholesale distributor of gas to companies who serve the public causes the wholesaler to assume a public duty which may be regulated. **Board of Education of City of Guthrie vs. Guthrie Gas, Light, Fuel & Improvement Co. & Oklahoma Natural Gas Co.**, P.U.R. 1915B, 177. It is not necessary within the definition of public utility that it serve everyone but it is sufficient if service is rendered to a certain class of the public only . **Cities Service Gas Co., Mo. Pub. Serv. Com.**, P.U.R. 1931 E, 11. **N. J. Board of Public Utility Co., Town of Kearney vs. N. J. Suburban Water Company**, P.U.R. 1926C; **Industrial Gas Co. vs. Public Utilities Commission of Ohio**, 135 Ohio St. 408, 21 N.E. 2d 166; **Chicago District Pipeline Co. vs. Illinois Commerce Commission**, 361 Ill. 296, 197 N.E. 873.

It is therefore the opinion of this office, under the hypothetical statement of facts stated above, that an individual operating a water service and selling at wholesale water to a municipally owned utility would be a public utility as to the extent this operation effects the public interest and as such would be subject to the jurisdiction of the New Mexico Public Service Commission.

By: William J. Torrington

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