

Opinion No. 57-109

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BY: OPINION OF FRED M. STANDLEY, Attorney General Paul L. Billhymer, Assistant Attorney General

TO: Mr. Edward M. Hartman, State Comptroller, Santa Fe, New Mexico

QUESTIONS

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A municipal corporation in New Mexico asks if it may lawfully install three television translators at a cost of \$ 25,000 plus upkeep in order that television programs may be received. Payment would be out of Electric Utility Funds. Inasmuch as no cables or other connections are contemplated by the plan, no direct charge could be made to the individual TV user. Specifically two questions arise out of this factual situation, which are:

1. May a monthly charge be levied on all users of electricity to defray the cost of installation and upkeep, even though not all users of electricity would avail themselves of this service?
2. May the service be provided free of any charge?

CONCLUSIONS

1. No.
2. Yes.

OPINION

ANALYSIS

We do not believe that there is a need for citation of authorities to show that the Electric Utility of Gallup can only charge a user for the electricity which is used by such user.

No special monthly charge can be made on all the users of electricity to defray the cost of the installation and operation of a television translator.

We note further that there are outstanding Electric Revenue Bonds, and it is likely that such bonds contain a provision limiting the expenditure of the Electric Utility Revenues; therefore the use of this specific fund for the installation and operation of the television translators might be prohibited.

We now turn to the question of whether the City of Gallup can provide free-of-charge this television translator service. This question turns upon the construction of § 14-25-1, N.M.S.A., 1953 Compilation, which reads as follows:

"Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by law, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, . . ."

This section is known as the general welfare clause. There is a cleavage among the authorities as to the proper construction to be placed upon such clause. One group of cases hold that such provision is a grant of power which authorizes the municipality to take necessary steps for the preservation and promotion of the health, welfare, comfort and convenience of such municipality. See § § 24.3 and 24.4 **Mc Quillin on Municipal Corporations**, Vol 6. The other group of cases hold that the general welfare clause is not a grant of power but must be considered in the light of specific grants of municipal power in other statutes. See **McQuillin on Municipal Corporations**, §§ 24.45 and 24.46.

We think that a careful reading of the New Mexico cases, particularly **Daniel v. Clovis**, 34 N.M. 239, 280 P. 260, and **State ex rel. Coffin v. McCall**, 58 N.M. 534, 273 P. 2d 642, aligns the State of New Mexico on the side of those cases which follow the rule that the general welfare clause is a grant of power within itself and such is sufficient to authorize the municipality to take definite action.

We are of the opinion, further, that the providing of television translators could certainly be considered as a promotion of the prosperity, comfort and convenience of the inhabitants of the municipal corporation. We further think that the method of providing for the comfort, convenience, health and welfare of the municipality is the problem for the legislative branch of such municipality and it is not a question of the wisdom of such action that must be determined by this opinion. We thus come to the conclusion that the municipality can provide for such facilities provided that they have unencumbered funds with which to make such payments.