Opinion No. 57-101

May 14, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Assistant Attorney General

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

QUESTIONS

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1. May customer water meter deposits paid to a municipally owned utility be invested with the Savings and Loan Association or other finance institution for the purpose of realizing interest thereon?

2. Does interest have to be paid to depositing customers; and

3. May interest realized by a city from investing customer deposits be used in the operation of the utility?

CONCLUSIONS

1. Yes, subject to all restrictions provided in § 11-2-7, N.M.S.A., 1953 Compilation, governing the investment of public funds.

2. No, in the absence of a requirement to that effect created by ordinance or by regulation by the Public Service Commission in the case of private utilities.

3. Yes.

OPINION

ANALYSIS

The rule is firmly established that a public utility may require a deposit to assure payment of accumulating charges for service or for protection of utility owned equipment such as meters. To this effect, see Oklahoma Natural Gas Co. v. Young, 116 F.2d 723 (C.C.A. 10th, 1940) in which is found the following language:

"The general rule is that a public service company furnishing gas may require the charges to be paid for a reasonable time in advance or be secured by a reasonable deposit by the consumer."

See also Sheppard v. Milwaukee Gas Light Co., 6 Wis. 539; Tacoma Hotel Co. v. Tacoma Water Co., 3 Wash. St. 316, 28 P. 516; and Harbison v. Knoxville Water Co., 53 S. W. 993. In each of these cases a rule requiring security or deposit of money in advance was approved. Of course, such rules must be reasonable and not impose an undue burden on the consumer. (American Waterworks Co. v. State ex rel. Walker, 46 Neb. 194, 64 N.W. 711.) And finally, in 43 Am. Jur. at 604:

"It is well settled by authorities that a public service company may enforce a regulation requiring a customer to make a reasonable deposit or payment in advance. Such a regulation enables the company to assure itself of compensation for its service and to protect itself against unknown or irresponsible persons."

After a careful analysis of the true nature of such a deposit, it is the opinion of this office that exaction of such a deposit by a public utility gives rise to a debtor-creditor relationship. Although exhaustive research has failed to find a case in which specific language to that effect was used, this relationship appears to have been traditionally assumed by the Courts to be one of debtor-creditor. Supporting this contention are the following cases: In the case of Union Light, Heat & Power Co. v. Mulligan, 177 Ky. 662, 197 S.W. 1081, the Kentucky Court of Appeals was concerned with the reasonableness of a public utility regulation which required advance payments or deposits of money to secure the payment of gas consumed by the depositors. In holding that the regulation was reasonable, the Court was greatly concerned with the element of interest:

". . . The rule permitting the company to require the deposit does not permit the company to hold the consumer's money without paying interest thereon . . . . Manifestly it would not be right to permit the company to hold and use the consumer's money or property gratis; . . ."

And in Collins v. Miami County Gas Co., et al., 180 P. 769, involving an action very similar to the one above, the Kansas Supreme Court, after citing the above case, went on to say:

"In the Kentucky case, the court required the gas company to pay interest on the deposit. In the present case, the rule established by the defendant utility provided that the interest on the deposit would be paid to the consumer on the return of the deposit."

The Court then went on to hold the required deposit valid. Thus, we see that in both cases the Court was greatly concerned with the element of interest. And since the element of interest becomes relevant only in cases where there exists a relationship of debtorcreditor, we must conclude that the Courts in the two cited cases regarded the payment of a deposit as giving rise to a debtor-creditor relationship.

But, let us further analyze the transaction by studying the rights and obligations of both the depositor and the utility. The former, by virtue of paying his deposit, has the right to be provided with water for so long as he pays his bill. The utility on the other hand must furnish water to the depositor until such time as the latter becomes delinquent in his

payments, or desires that the service be terminated. The utility has become the depositor's debtor in the amount of the deposit. The debt becomes due and payable when the service is discontinued. The utility, just as any other debtor, may use the subject matter of the debt in any way it sees fit. When service to the depositor is discontinued for one reason or another, the deposit must be returned. At this point, the utility has the right to set-off against the deposit any claim it might have against the depositor for any unpaid bill or damage to utility equipment. This element of set-off, available to the utility in this situation, is another factor which strongly characterizes the transaction as one of debtor-creditor.

It should be pointed out at this juncture that any investment of municipal funds must comply with all provisions found in § 11-2-7, N.M.S.A., 1953 Compilation, relative to investment of public funds.

The further question arises as to whether a utility is required to pay interest on the deposit to the depositing creditor. Generally, a debtor is not required to pay interest on money advanced him in the absence of contractual agreement to that effect. On the other hand, a depositing customer is a member of a captive group forced to contract with a public sanctioned monopoly. Because of this inequality of bargaining power, public utilities are held to be affected with a public interest and subject to reasonable regulation by the State. They may enact certain rules and conditions in dealing with the consuming public, but these rules and conditions must be reasonable. The question then becomes this: Is it reasonable for a public utility to require a deposit to assure payment of accumulating charges for service or for protection of utility owned equipment without paying interest thereon?

On this question, the Courts are in conflict. Many Courts hold that it is unreasonable to allow a utility to hold and use money deposited with it without paying the depositor for that use. Union Light, Heat & Power Co. v. Mulligan, supra; Collins v. Miami County Gas Co., supra. On the other hand, there are numerous cases in which the Courts are not particularly concerned with the problem of interest. See Peddicord v. Tri-City Gas Co., 168 So. 166 (Ala., 1936); Sheppard v. Milwaukee Gaslight Co., supra, and Tacoma Hotel Co. v. Tacoma Water Co., supra.

The Public Service Commission is given authority by virtue of § 68-5-4, N.M.S.A., 1953 Compilation, to regulate and supervise every private utility in respect to its rates and service regulations. This same statute specifically withholds from the Commission any jurisdiction to regulate or supervise the rates or service of any utility owned and operated by a municipal corporation either directly or through a municipally owned corporation unless said municipality shall exercise its option to come within the provisions of the Public Utility Act as provided in § 68-5-5. To date, no municipality has seen fit to come within the provisions of the Act.

In the absence of a holding on this point by our Supreme Court, we conclude that a public utility is acting reasonably in requiring a deposit to assure payment of accumulating charges for service or for protection of utility owned equipment without the

payment of interest thereon to the depositing customer. We arrive at this conclusion by virtue of the fact that the consuming public is adequately protected in that it may require the payment of interest on said deposits by ordinance in the case of a municipality owned utility, and in the case of a privately owned utility, by appropriate provision in the latter's franchise.

This conclusion should not be construed as denying the Public Service Commission the power to require by appropriate regulation under § 68-5-4 the payment of interest to the depositing customers by all privately owned utilities and those municipal utilities which might in the future exercise their option to come within the provisions of the Public Utility Act. Should the Commission, at some date in the future, determine that the public interest would best be served by such a requirement, this office could not say as a matter of law that its action was unreasonable.

The final question is answered in the affirmative. In view of our holding that the exaction of such a deposit gives rise to a debtorcreditor relationship, the depositing customer may not be heard to object to the use made of the money. Nor do we find any law which would prohibit its use in the operation of the utility. Rather it would seem but logical to conclude that any income derived, either directly or indirectly, from the operation of a municipal water works should rightly be used to improve the system or lower existing rates so that the consuming public might receive the maximum benefit from the use of its money.