

Opinion No. 57-51

March 15, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
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TO: Mr. Paul W. Robinson, District Attorney, Second Judicial District, Bernalillo County
Court House, Albuquerque, New Mexico

QUESTIONS

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"May a county, in the process of granting a franchise to a public utility for operation in the county, exact from the utility a franchise tax?"

CONCLUSION

No.

OPINION

ANALYSIS

The question above stated lends itself to solution through the discovery and examination of two powers, inherent or delegated, as may be vested in the governing authority of the several counties of the State. The first of these powers is that of privilege, or in a more restricted and proprietary sense; that of franchise.

"A franchise is a special privilege conferred by government upon individuals, and which does not belong to the citizens of a county generally, or common right The word is generic, covering all the rights granted by the legislature." 26 **RCL** 159.

The franchise is historically a device of the sovereign to induce or encourage an individual or group of common endeavor to direct his or its business for the benefit of the community well being and to realize, in consideration for such efforts, a field free from all competition. In the realm of nations, this special privilege may be granted directly by the highest legislative authority or delegated by such authority to the various political subdivisions thereof as may be provided. In the instant situation we find such a delegated of authority in Section 68-1-3, N.M.S.A., 1953, wherein is stated:

"The county commissioners of the several counties are hereby authorized to permit such corporation (utility) to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures; Provided, that such use shall not

unnecessarily obstruct public travel and such county commissioners and municipal authorities of incorporated cities and towns are hereby authorized to grant franchises not exceeding twenty-five years (25) duration to corporations for such purposes within their respective jurisdictions."

The second power herein contemplated is that of taxation. In discussing the franchise as a privilege subject to the state's taxing authority, the following is presented **in 26 RCL 159-60:**

"Private corporations may be taxed by the state for the support of the state government. Their privileges and franchises, unless exempted in items which amount to a contract, are legitimate subjects of taxation, - as much so as any other property of the citizen which enjoys the protection and is within the control of the sovereign power of the state, The state power to tax such franchises and privileges is independent of the federal government. And the taxation of corporate franchises and privileges vested in the discretion of the legislature of the taxing state, which may decide whether the sums to be levied be a fixed one, and, if not, in what manner and by what means the amount shall be determined. The grant of a franchise by the state carries within it no implication that the franchise thus granted is exempt from taxation."

Immediately, question arises, from the impact of the sentence last quoted, as to an implied power to tax by virtue of a legislative grant to franchise. It is our opinion that such is not the rule.

In giving consideration to the subject of political subdivision authority to impose and collect taxes for local use, **51 Am. Jur., at 92-3 presents the following:**

"Local political subdivisions of a state, such municipal corporations, counties, towns and townships, school districts, etc., unlike the state itself, **have no inherent power of taxation.** Their power to tax derives entirely from **statutory or constitutional** grant delegating to them the power to impose taxes."

and continuing:

"With respect to counties it is clear that their power to tax, which exists through delegation from the state, may, in the absence of constitutional prohibitions, be withdrawn by the state, the legislature of which may itself assess taxes for county purposes. When taxing power is exercised by county authorities, it is merely the exercise of the taxing power of the state, delegated to them, and is consequently subject to every constitutional limitation to which the taxing power of the state is subject.

Returning to the instant case, a thorough search of both our constitutional as well as statutory provisions, reveals **no** delegation of taxing authority to the counties which may be impliedly joined within the delegation of franchise authority cited in Section 68-1-3, supra. Section 51-13-2, N.M.S.A., 1953 Compilation, provides that:

"Every domestic or foreign corporation for profit engaged in any business in this state, . . . shall pay to the corporation commission, . . . , an annual franchise tax at the rate of one dollar (\$ 1.00) for each one thousand dollars (\$ 1,000) or fraction thereof, of the par value of that proportion of its authorized and issued capital stock represented by its property and business in this state, to be assessed by the state corporation commission as provided in this act. The tax hereby imposed shall be in addition to all property taxes and other taxes and fees now or hereafter required by law."

Accordingly, it is concluded that a utility franchised under the provisions of Section 68-1-3, supra, is not the subject of a county franchise tax in the absence of a specific legislative declaration thereof.