

Opinion No. 61-100

October 5, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General L. D. Harris, Assistant Attorney General

TO: Mr. Victor C. Breen, District Attorney, Tenth Judicial District, Tucumcari, New Mexico

QUESTION

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Can a municipal corporation in New Mexico lawfully install television transmitters, the cost of installation and upkeep being paid out of the electric utility funds?

CONCLUSION

No.

OPINION

ANALYSIS

It would appear significant that the payment for the installation of the television transmitters and their upkeep will come from the electric utility system's income. It is felt that at the time Attorney General's Opn. No. 57-109 was written, Section 14-39-26, N.M.S.A., 1953 Comp., was inadvertently overlooked. In substance, this section provided that the revenue of the municipal utility would be applied to

1. Maintenance of the utility and improvement and extension thereof,
2. The payment of interest on the bonds, and
3. To create a sinking fund.

It should be noted that no other purpose was allowed by the statute and consequently in **Scott v. City of Truth or Consequences**, 57 N.M. 688, 262 P. 2d 780, injunctive relief was granted against the city which was attempting to divert earnings of the electrical and sewer systems to the General Fund for other corporate purposes.

We recognize, however, that Section 14-39-26, N.M.S.A., 1953 Comp., was amended in 1959 (Ch. 203, § 1) and there is now a provision where, after certain conditions have been met, any excess revenue can be transferred to the General Fund to be spent as the governing body shall direct.

Section 14-21-3, N.M.S.A., 1953 Comp., states as follows:

"The city council and board of trustees in towns shall have the following powers:

To control the finances and property of the corporation.

To appropriate money for **corporate purposes only**, and provide for payment of debts and expenses of the corporation . . ." (Emphasis ours)

It is apparent that there must be a determination as to whether or not the installation, maintenance and upkeep of television transmitters would be a corporate purpose and, therefore, whether the appropriations referred to in Sec. 14-21-3 would be for corporate purposes. It is the conclusion of this office that such an appropriation would not be for corporate purposes within the meaning of the statute and, therefore, expenditures for the installation, maintenance and upkeep of television transmitters would be in violation of Sec. 14-21-3, supra.

We have arrived at this conclusion by determining whether or not such a program as outlined in the question would be a governmental or a proprietary function of the municipality. If it is a proprietary function, we do not find any specific authority from the legislature to the municipality to so engage in a program of maintaining television transmitters. As there is no express permission, such action cannot be taken in the absence thereof, and it is not a corporate purpose.

"Proprietary powers are those particular powers usually referred to as incidental to home rule or local self government, and, when acting in its proprietary capacity, the municipal corporation does so by force of permissive legislative enactments." 62 C. J. S., § 110(c).

In volume 2 of **Antieau's Municipal Corporations**, § 19.05, pp 640-641, we find:

"It is with virtual unanimity held that it is in its proprietary rule, comparable to a private utility that a municipal corporation owns and operates a water, gas, or light and power utility."

The two above authorities are quoted to point out that the necessary permission for the municipality to own and operate an electric utility is by specific permission of the New Mexico legislature. There are many statutes, which will not be quoted, which authorize the municipalities to engage in proprietary functions and short of such statutory authority the municipalities do not and cannot engage in a proprietary function.

In **State v. City of Jacksonville**, 50 So. (2d) 552, p. 534, the court states:

"That the legislature may validly confer proprietary functions and powers upon municipal corporations is not open to question. What shall constitute municipal function is for the

legislature to determine and its decision in the matter will not be subject to interference by the courts unless a clear abuse of discretion is shown."

In the above-cited case, the City of Jacksonville had maintained a city-owned and operated radio station and was in the process of installing television equipment. The court pointed out that the City was authorized to install radio broadcasting equipment by a specific Florida statute and there was implied authority to install television equipment even though it was not known at the time the act was passed. Note the specific authority granted by the Florida legislature.

In **Clark v. LaGuardia, Mayor, et al.**, 281 N.Y.S. 54, New York City was prevented from owning and operating a city bus service as there was no specific authority from the New York legislature giving this power to New York City.

We, therefore, conclude that the installation, maintenance and upkeep of a television transmitter would be classified as a proprietary function, and as there is no specific legislation whereby the legislature of New Mexico has granted this authority to municipalities, such procedure would not be for corporate purposes and would be in violation of Sec. 14-21-3.

We call attention to Attorney General's Opn. No. 57-27 where this office pointed out that a town could not contribute to the construction of a county fair building, in the absence of specific legislative authority.

It is pointed out that on the basis of the statutes applicable to electric utility systems that revenue from the system cannot be used for such a purpose as is indicated in the question, but after the conditions are met can be transferred to the General Fund. As pointed out herein, lacking the requisite permission from the legislature, the expenditure of money from the General Fund would be in violation of our statutes. We also conclude that it would be in violation of our statutes to use funds from any source, not just utility income, in the absence of permission from the legislature.

Attorney General's Opn. No. 57-109, being in conflict herewith, is withdrawn.