

Opinion No. 62-16

January 26, 1962

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

TO: Mr. L. J. Chambard, Chairman, Public Service Commission, State Capitol Building, Santa Fe, New Mexico

QUESTION

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When should the Public Service Commission begin collecting the inspection and supervision fees provided for in 68-6-8, N.M.S.A., 1953 Comp. (PS)?

CONCLUSION

See analysis.

OPINION

ANALYSIS

It is necessary to determine when the rural electric cooperatives come under the jurisdiction of the Public Service Commission to ascertain when the Commission collects the fees as provided by statute and on what basis the fees are collected.

Section 68-6-8 provides:

"Each utility doing business in this state and subject to the control and jurisdiction of the commission with respect to its rates or service regulations, including corporations organized under Sections 45 - 4 - 1 through 45-4-32, N.M.S.A., 1953 Comp., shall pay annually to the state a fee for the inspection and supervision of such business, an amount equal to one-half of one per cent [1/2%] of its gross receipts from business transacted in New Mexico for the preceding calendar year. Said sum shall be payable in equal quarterly installments on or before January 20, April 20, July 20 and October 20, in each year. . . ."

The above-quoted section of the statute is susceptible to two interpretations in our opinion. One is that as the statute provides for the fee of one-half of one per cent of the gross receipts for the preceding calendar year, this would mean that the rural electric cooperatives are required to pay a fee on their gross receipts for the calendar year 1960. The other interpretation is that as the cooperatives were not under the jurisdiction and partial control of the Public Service Commission until July 1, 1961, that the fee can

only be assessed on one-half of one per cent of their gross receipts for the six months remaining in calendar year 1961.

In order to understand the problem better, it is important to ascertain whether the "fee" is actually a fee or a tax.

In **Stewart v. Verde River Irrigation and Power District**, 68 P. 2d 329, the following language is found:

"The word 'fee' is defined to be 'a charge fixed by law for the service of a public officer'. . ."

In **State ex rel. Attorney General, et al. v. Wisconsin Constructors, Incorporated, et al.**, 268 N.W. 238, the Wisconsin court stated:

"Taxes are imposed for the purpose of general revenue. License and other fees are ordinarily imposed to cover the cost and expense of supervision or regulation."

Further, in **Tesch v. Board of Deposits of Wisconsin**, the Wisconsin court was considering certain constitutional limitations and requirements as to taxes and distinguishing taxes from fees and the court held:

"The constitutional tests are whether the action was in a legitimate field for the exercise of police power to promote public welfare and whether the means bears a reasonable relation to that end." (297 N.W. 379).

It is further important, in the determination of whether the fee provided in 68-6-8, supra, is actually a fee or a tax, to analyze the intent of the legislature as to whether this was a revenue-producing measure or intended to compensate the Public Service Commission for the supervision and inspection of the rural electric cooperatives in addition to exercising the legal right of the Commission for the welfare of the consumers.

We note that all fees and money collected under the provisions of the Public Utility Act shall be remitted by the Commission to the state treasurer. 68-6-9.1, N.M.S.A., 1953 Comp. While this section of the statute might give some support to the argument that the legislature intended for the Act to be revenue-producing, it is not conclusive. As yet, the legislature has not indicated any intention that the Public Service Commission be self-supporting in that all income be deposited for the benefit of the Commission and, therefore, as the legislature still desires to supervise the expenditures and income of the Commission, it is felt that the fact the fees and money go to the state treasurer has no particular bearing on the matter.

It is noted that the rural electric cooperatives are not subject to the jurisdiction of the Public Service Commission as far as the rates charged except under certain conditions stated in the statute. It is, therefore, our conclusion that the purpose of putting these rural electric cooperatives under the partial supervision and jurisdiction of the Public

Service Commission was to better supervise their services and the safety measures taken by these cooperatives were satisfactory. This can only be done by periodic inspection and exercising the supervisory powers given the Commission when necessary.

It is, therefore, our conclusion that the inspection and supervision fees are in fact fees charged for the services of the Public Service Commission in supervising and inspecting these rural electric cooperatives.

It then naturally follows that before a fee would be due and payable, the Public Service Commission must have inspected and supervised these cooperatives. As the Commission had no jurisdiction until July 1, 1961, they could not have inspected and supervised prior to that time. Therefore, an interpretation which would allow the fee to be computed on one-half of one per cent of the gross receipts for the calendar year 1960 would be improper as the Commission was not supervising or inspecting during the calendar year 1960.

Our conclusion is that the fee should be collected on a quarterly basis as provided in the statute commencing with January 20, 1962 and that the amount of fee will be determined by one-half of one per cent of the gross receipts for business transacted in New Mexico from July 1, 1961 until December 31, 1961.