Opinion No. 63-66

June 13, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Abner Schreiber Assistant District Attorney First Judicial District P. O. Box 800 Los Alamos, New Mexico

QUESTION

Questions;

1. In an "H" class county such as Los Alamos may the County Commission require that a telephone utility obtain a county franchise?

2. Does the New Mexico State Corporation Commission have any authority to grant territorial or operating rights to such telephone utility?

3. Do the so-called no duplication of service provisions of Section 69-8-1 through 69-8-3, N.M.S.A., 1953 Compilation, apply where a telephone company has been present in Los Alamos County only as a contractor for the Federal government, and has not operated the telephone system?

4. If the telephone company has operated the telephone system but has operated it without a franchise, do the statutory provisions just mentioned: (a) obviate the necessity of a county franchise or (b) limit the power of the County Commission to grant a franchise to the company which has so operated?

CONCLUSIONS

1. Yes, see analysis

2. No.

3. No, assuming the facts stated in your question to be true.

4-a. Yes, but it is still a permissive use.

4-b. No.

OPINION

*{*140}* **ANALYSIS**

Prior to 1909 there appear to have been no express statutory provisions governing the matter of public utility franchises in either municipalities or counties. However, our Supreme Court held that counties had the general power to grant franchises to utilities authorizing the use of public ways for the equipment of the utility. **Agua Pura Co. v. Mayor and Board of Aldermen of the City of Las Vegas,** 10 N.M. 6;

Mountain States Telephone & Telegraph Co., V. Town of Belen, 56 N.M. 415.

In 1909, Section 68-1-1 through 68-1-3, N.M.S.A., 1953 Compilation were enacted. Section 68-1-1 provides that utilities organized for specific purposes may be organized under the general incorporation laws of the State. Section 68-1-2 provides, among other things, that such corporations are authorized to place their equipment and facilities upon or across any of the public roads, streets, alleys, highways and waters of the State, subject to the regulation of the county commissioners and local municipal authorities. Section 68-1-3 authorizes a board of county commissioners to permit such corporations to use the public ways for their equipment, provided such use does not unnecessarily obstruct public travel, and county commissioners and municipal authorities are authorized to grant franchises not exceeding 25 years duration for such purposes. Our Supreme Court has held that Sections 68-1-1 through 68-1-3, supra, are applicable to telephone utilities. **Village of Ruidoso v. Ruidoso Telephone Company,** 52 N.M. 415; **Mountain States Telephone & Telegraph Company v. Town of Belen,** 56 N.M. 415; see **City of Roswell v. Mountain States Telephone & Telegraph Company,** 78 F.2d 379.

We would also point out that Los Alamos County has "all those powers and authorities now or hereafter granted in incorporated municipalities including those powers and authorities by which incorporated municipalities are or may be empowered to enact ordinances." Section 15-36-13, N.M.S.A., 1953 Compilation (P.S.). One such power is that contained in Section 14-39-1, N.M.S.A., 1953 Compilation, providing that cities can "grant by ordinance, franchises and privileges. . . for the construction and operation of public utilities," public utility being defined in **Socorro Electric Co-op, Inc. v. Public Service Company,** 66 N.M. 343, 348 P. 2d 88 as a utility which holds itself out as supplying a product or service to the public as a class as distinguished from holding itself out as serving or ready to serve only particular individuals.

Mention should perhaps be made that there is in existence a document purporting to be a 99 year franchise dated in April, 1905 granted by Sandoval County to a private telephone utility company covering the County of Sandoval *{*141}* as it existed in 1905 and out of which was carved the presently urban portion of Los Alamos County. What effect if any, this document has we are not in a position to say. To construe its effect would involve certain factual determinations such as operation under the document, if any, the effect of Federal jurisdiction over the area and a determination as to who is operating and who has operated, in fact, the telephone utility in the Los Alamos area. In connection with this entire problem it is well to keep in mind that exclusive rights, franchises and privileges can not be granted. Article IV, Section 26, New Mexico Constitution.

Counties are given the authority to issue franchises to public utilities by virtue of Section 61-1-3, N.M.S.A., 1953 Compilation, and as mentioned above cities have that authority by virtue of Section 14-39-1, N.M.S.A., 1953 Compilation (P.S.). While we think that public utilities may operate in counties and cities without franchises on a permissive use basis, we conclude that "H" class counties may require franchises from public utilities for the use of their public streets and ways, if any they have.

The answer to your second question is that the New Mexico State Corporation Commission does not have any authority to grant territorial or operating rights to a telephone utility. While Article XI, Section 7 of the New Mexico Constitution specifically grants to the Corporation Commission the power to fix, determine, supervise, regulate and control "all charges and rates of . . . transmission companies," neither this Article nor the statutes vest the Corporation Commission with the authority to grant territorial or operating rights to a transmission utility.

Occasions have arisen, in connection with telephone utility territorial rights, where certificates have been obtained from the State Corporation Commission in order that there be a record on file as to the operations of particular telephone companies in particular areas. However, such a certificate creates no territorial rights for the particular telephone company.

In question number 3 you ask whether the provisions of Section 69-8-1 through 69-8-3, N.M.S.A., 1953 Compilation, apply where a telephone company has been present in Los Alamos County only as a contractor for the Federal Government, but has not operated the telephone system.

The statutes to which you refer are the "no duplication" provisions contained in Sections 69-8-1 through 69-8-3, supra, the first of which reads as follows:

"It shall hereafter be unlawful to construct, own, operate, manage, lease, or control any plant or equipment for the furnishing of any public utility service contemplated by Article XI, Section 7 of the Constitution of the state of New Mexico, in the same municipality, field or territory where there is in operation any such plant or equipment engaged in a similar service unless public convenience and necessity shall require such second plant or equipment."

Section 69-8-2, supra, sets up the procedure for the hearing in district court on convenience and necessity, and Section 69-8-3, supra, sets up a procedure whereby a second utility proposing to furnish a service similar to one already being provided can be enjoined *{*142}* from doing so by "the owner or owners, operator or operators, manager or managers, lessee or lessees of any plant or equipment then in operation in said municipality, field or territory and engaged in a similar service."

The answer to your third question is based solely upon the facts you assume to be true in your question. Whether the private telephone utility which to use your language is "present" in Los Alamos is the owner, operator, manager or lessee of the telephone

plant and equipment, we are not in a position to say since the answer depends upon such factors as the terms of the contracts and physical operation of the property the overall facilities and the degree of control retained by the government. This issue is what is usually denominated a mixed question of law and fact and it is not the function of this office to resolve disputed questions of fact.

Your fourth question contains two parts, the latter of which we shall answer first. You ask whether there fact that a telephone company has operated in the County without a franchise limits the power of the county commission to grant a franchise to that company. The answer is no. As previously stated, the obtaining of a franchise is not mandatory, and operating without one is legal. However, use of the public ways for the utility equipment is simply a revocable permissive use in the absence of a franchise, and presumably the county commission would eject such a utility from streets and ways.

The other part of your final question asks, in effect, whether the provisions of Sections 69-8-1 through 69-8-3, supra, apply where the telephone utility has been operating in the "municipality, field or territory" without a franchise. The answer is yes.

Section 69-8-1, supra, is concerned with prevention of certain duplicate utility services unless the Court finds that public convenience and necessity require a second plant or equipment to furnish a similar service. However, here again, in the absence of a franchise the use of the public ways by the telephone utility is permissive use only.

By: Oliver E. Payne

Assistant Attorney General