**Opinion No. 64-129**

October 16, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General George Richard Schmitt, Assistant Attorney General

**TO:** Mr. John M. Lenko, City Attorney, P. O. Box 760 Las Cruces, New Mexico

## QUESTION

FACTS

A private utility was granted a franchise by the Board of Commissioners of Dona Ana County under the authority of Section 68-1-3, N.M.S.A., 1953 Compilation, to use the public county highways for the location of its natural gas mains and distribution facilities. The same utility also holds a certificate of public convenience and necessity from the Public Service Commission of New Mexico. The certificate excludes and excepts the right of the utility to serve customers within the Las Cruces city limits. It also excludes the right of the utility to serve customers living in any area which is subsequently annexed by the city unless the utility company has previously started construction of any facilities therein.

QUESTION

Under the above stated facts, must the city of Las Cruces recognize the county franchise or the certificate granted by the Public Service Commission in duly annexed territories in which no construction of any facilities by the utility company has commenced?

CONCLUSION

No.

## OPINION

ANALYSIS

In this analysis, our attention is first drawn to the question of whether the franchise itself, granted by the Board of County Commissioners pursuant to the provisions of 68-1-3, supra, is ample authority for the private utility company to operate in the city of Las Cruces. Our answer must be in the negative in view of the following decision.

Around 1935 the city of Roswell was faced with a similar problem when the Mountain States Telephone & Telegraph Company contended upon the expiration of its city permit that under the terms of a county franchise it might continue to operate in the city

of Roswell, whether the city consented to such operation or not. This argument was finally decided by the U.S. Circuit Court of Appeals, Tenth Circuit, in the case of **City of Roswell, N.M. v. Mountain States Telephone & Telegraph Company,** 78 Fed. 2d 379. In its decision the court set forth the principle that title to the streets and alleys of a municipality is in the first instance vested in the state and any subsequent right which is granted to use the streets and alleys for a permanent purpose is a special franchise and must be strictly construed in favor of the public and against the donee. The court further observed that the state delegated this special franchise to municipalities in Section 68-1-3, supra. The court, then, proceeded to hold that the consent of the city by a special franchise must be obtained by a private utility company before it would be permitted to use the streets and alleys of same.

Thus, under the decision cited above, a county franchise standing alone would not appear to be sufficient authority for a private utility company to operate within the limits of a municipality in the absence of a municipality's consent. Furthermore, in this same case, the court also held that the telephone company's expenditures for replacements, additions, improvements, free services to the city, and the payment of ad valorem taxes and license fees to the city did not prevent the city from questioning the company's right to the perpetual use and occupancy of the city streets and alleys. No grounds for estoppel as against the city arose where the company did not rely and act on anything the city did or failed to do but relied exclusively on its own judgment with full knowledge of the situation. The court concluded by stating that the telephone company was only entitled to reasonable notice before ejectment proceedings could be undertaken by the city of Roswell.

We do note an apparent exception or modification of the above stated doctrine appearing in Section 14-21-48, N.M.S.A., 1953 Compilation, and which has been interpreted by the New Mexico Supreme Court in the cases of **Hobbs v. Mann,** 39 N.M. 76, 39 P. 2d 1025, and the **Village of Ruidoso v. Ruidoso Tel. Co.,** 52 N.M. 415, 200 P.2d 713. In these cases our Supreme Court held that a franchise granted to a private utility company by a county board before the incorporation of a village or town was adequate authority for the utility company to remain in said town until such time as the village or town offered a fair and equitable franchise to the utility company to operate therein for the maximum number of years prescribed by law. The court, however, hastened to point out that under Section 14-21-48, a municipality was not forced to recognize any such pre-existing rights of a private utility company unless said company had erected or constructed, or in good faith commenced, the erection or construction of works for a utility system in the area before said area was **incorporated.**

Turning now to the question at hand, we conclude under the authorities and facts set out above, that Las Cruces is not bound by law to recognize the county franchise issued to a private company to operate in territories which have now been annexed by the city. We also note the facts do not indicate any ground for estoppel on the part of Las Cruces since the company has not relied on any particular activity conducted by the Las Cruces City Commission, which has adversely affected the utility company's present position. Furthermore, a possible argument that the decisions in the New Mexico cases cited

above also apply to pre-existing rights of a utility company prior to **annexation** of their territory by a municipality is also untenable. This is so because the company in question did not begin the construction of any facilities in the surrounding area of the city before it was annexed. Nor can any argument be offered with respect to the certificate of convenience and necessity issued by the Public Service Commission since the certificate itself prohibits the utility company from operating in the city and the territory annexed.

Thus, under the foregoing analysis, the utility company in question is clearly prohibited from serving customers in any area subsequently annexed by the city unless the city voluntarily consents thereto by the granting of a special franchise authorizing the utility company to do business in said area.