

## **Opinion No. 66-07**

January 14, 1966

**BY:** OPINION OF BOSTON E. WITT, Attorney General Wayne C. Wolf, Assistant Attorney General

**TO:** W. Peter McAtee, Special City Attorney for the Villages of Estancia, Moriarty and Willard, 117 Marquette, N. W., Albuquerque, New Mexico

### **QUESTION**

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1. The Cities of Estancia, Moriarty, and Willard, New Mexico, have, pursuant to statutory authority, formed a corporation authorized to operate a gas public utility system. This corporation is jointly owned and jointly controlled by the Cities and it is operated by a joint board composed of representatives of each of the three Municipalities mentioned. This Corporation is known as the EMW Gas Association. Are purchases made by EMW Gas Association subject to the Public Purchasing Act?
2. To what extent does the State Board of Finance have jurisdiction over the operation of the EMW Gas Association?
3. Does the State Auditor have any jurisdiction or control over the EMW Gas Association?
4. Other than the Public Service Commission, are there any agencies of the State of New Mexico having supervision or jurisdiction over the operations of the EMW Gas Association?
5. Are the employees of the EMW Gas Association entitled to be included under the provisions of the State Personnel Act?

#### **CONCLUSION**

1. Yes.
2. See Analysis.
3. Yes, see Analysis.
4. See Analysis.
5. No.

## OPINION

### {\*9} ANALYSIS

In your first question you have asked about the applicability of the Public Purchases Act to the EMW Gas Association. In answering this question it is important to note that the EMW Gas Association is jointly controlled by the three Cities of Estancia, Moriarty and Willard and the corporation is operated jointly pursuant to the Joint Powers Agreement Act. Thus while it is apparent that this Organization is not a municipality, it is true that it is a corporation whose main purpose is to perform a service for three separate municipalities and the revenue derived from the sale of this service comes from the same source as the revenue derived by a municipally operated utility. Thus, for the purposes of the Public Purchases Act it would appear that the EMW Gas Association stands on the same footing as does a municipal utility which is subject to Public Purchases Act. See Attorney General's Opinion No. 64-60.

The first section of the Public Purchases Act also seems to include the EMW Gas Association within the meaning of the word "purchaser" as that word is used in the Act. The final clause of the first section of the Public Purchases Act provides that the word "purchaser" includes every person charged with the duty of spending public money in the State. See Section 6-5-1, N.M.S.A., 1953 Compilation. It is therefore our conclusion that the Public Purchases Act applies to purchases made by the EMW Gas Association.

In your second question you have asked for a determination of the extent of jurisdiction of the State Board of Finance over the operations of the EMW Gas Association. It appears that the Joint Powers Agreements Act (Section 4-22-1 to 4-22-7, N.M.S.A., 1953 Compilation) provides that the State Board of Finance shall approve the terms of any agreement executed pursuant to the Act. This is the only statutory section which gives the State Board of Finance specific control over the EMW Gas Association. This control by the State Board of Finance exists because of the Joint Powers Agreement executed by the three Cities. It would unduly lengthen this opinion to recite the jurisdiction of the State Board of Finance in order to exhaust all possible situations in which the EMW Gas Association might be subject to the control of the State Board of Finance. Suffice it to say that other than those financial matters which might possibly come before the Board of Finance, the major item concerning the EMW Gas Association which is subject to the control of the State Board of Finance is the Joint Powers Agreement Creating the EMW Gas Association.

In your third question you have asked whether or not the EMW Gas Association is subject to the jurisdiction of the State Auditor. The jurisdiction of the Auditor is primarily given by Sections 4-24-2 and 4-24-24, N.M.S.A., 1953 Compilation. Section 4-24-2, supra, defines the various entities which are subject to the audit responsibilities of the State Auditor under the Legislative Audit Act. That Section divides the entities into two classifications. One is for State agencies and the other for local public bodies. It is apparent that the EMW Gas Association would not come within the definition of State agency as contained in that Section; however, the definition of "local public body" in that

Section is more comprehensive and would seem to include the EMW Gas Association. Political subdivisions spending public monies from whatever source they are derived and incorporated cities, towns or villages are all included within the meaning of "local public bodies". The EMW Gas Association is not one municipality but is a corporation controlled by three separate municipalities. Its revenues are obtained in a manner similar to any other municipally owned utility system. As we indicated in answer to your first question the EMW Gas Association uses public monies the same as does a municipally owned utility. It is therefore, our conclusion {*\*10*} that the affairs of the EMW Gas Association are subject to audit by the State Auditor under the Legislative Audit Act. This conclusion is in accord with our conclusion in Opinion No. 63-147 in which we said that the EMW Gas Association was subject to those provisions of the School Tax Act which referred to the municipal utilities.

Your fourth question asks if any State agency other than the Public Service Commission has any jurisdiction or control over the EMW Gas Association. Again, as in answer to your second question, we cannot enumerate all the possible exigencies which might call for action from any myriad of State agencies of the State of New Mexico. We note that Sections 14-27-1 through 14-28-18, N.M.S.A., 1953 Compilation which govern the operations of a inter-community natural gas supply association mention no other state agency for control of the operations of such utilities other than the New Mexico Public Service Commission. As we have indicated earlier in this opinion, we feel that some aspects of the EMW Gas Association are subject to control of different state agencies, such as the State Auditor and State Board of Finance. However, we could not possibly list all of the state agencies which could be involved in any particular activity of the EMW Gas Association. We therefore conclude that insofar as the utility operation of the EMW Gas Association is concerned, the New Mexico Public Service Commission is the major agency exercising jurisdiction over the EMW Gas Association.

In your fifth and final question, you ask if the employees of the EMW Gas Association are eligible to participate under the provisions of the State Personnel Act. Turning to the State Personnel Act we find that in the definition section only employees of the State of New Mexico are covered. See Section 5-4-30, N.M.S.A., 1953 Compilation. For instance, that Section defines "position" to mean "any State office, job or position of employment;" , Section 5-4-30, *supra*. By the same token Section 5-4-31, N.M.S.A., 1953 Compilation provides that the Personnel Act covers State positions. Since the employees of the EMW Gas Association work for a corporation controlled by three separate municipalities rather than for the State itself, it is apparent that employees of the EMW Gas Association are not entitled to participate under the provisions of the State Personnel Act.