

Opinion No. 66-135

December 8, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General Myles E. Flint, Assistant Attorney General

TO: Murray E. Morgan, Chairman, State Corporation Commission, State Capitol, Santa Fe, New Mexico

QUESTION

QUESTION

Are mobile radio telephone companies operating as "miscellaneous common carriers" subject to certification pursuant to the Telephone and Telegraph Certification Act being Sections 69-10-19, et seq., N.M.S.A., 1953 Compilation (P.S.)?

CONCLUSION

See Analysis.

OPINION

{*178} ANALYSIS

In order for these companies to fall within the confines of this enactment they must qualify as "telephone company" as that term is used in Section 69-10-2 (B), N.M.S.A., 1953 Compilation (P.S.). That section defines such companies as follows:

"B. The term 'telephone company' means a company, corporation, partnership, individual or others, not engaged solely in interstate business, furnishing public telephone or telegraph service contemplated by article XI, section 7 of the Constitution of the state of New Mexico, and includes telephone cooperatives operating in the state of New Mexico."

The first question to be answered is what was contemplated by Article XI, Section 7, New Mexico Constitution. That section in so far as pertinent here provides as follows:

"The commission shall have power and be charged with the duty of fixing, determining, supervising, regulating and controlling all charges and rates of railway, express, telegraph, telephone, sleeping car and other transportation and transmission companies and common carriers within the state and of determining any matters of public convenience and necessity relating to such facilities as expressed herein in the manner which has been or shall be provided by law; . . ."

No definitions were included in the sections of the State Constitution outlining the scope of authority of the State Corporation Commission. We can, however, find assistance as to the meaning of the terms contained in the constitutional provision by reference to **LaFollette v. Albuquerque Gas and Electric Co.'s Rates**, 37 N.M. 57, 17 P. 2d 944 (1932). Article XI, Section 7 has been amended since that case was decided but not in a manner which affects that decision.

In **LaFollete**, the State Supreme Court was faced with the issue of whether the gas and electric utilities were "transmission companies" as that term is used in Article XI, Section 7 and therefore subject to the jurisdiction of the Commission. The Supreme Court held that "transmission companies" did not include gas and electric companies. In so concluding that Court stated that "transmission companies" had to be defined in connection with telephone and telegraph companies. Those companies were stated to "transmit messages". {*179} From this it appears that as used within Article XI, Section 7, "telephone and telegraph companies" is a generic term referring to those companies which transmit messages.

Do, then, the mobile radio telephone companies fall within the definition contained in Section 69-10-2 (B)? It is our opinion that those companies are telephone companies which must be certificated under the terms of that enactment. Our understanding is that these companies hold themselves out to the public generally as providing mobile telephone services within certain areas for a certain cost. This type of service has been recognized to be telephone service, **Commercial Communications v. Public Utilities Commission**, 50 Cal. 2d 512, 327 P. 2d 513 (1958); **Keith v. Bay Springs Telephone Co.**, 251 Miss. 106, 168 So. 2d 728 (1964), and in the **Keith** case, supra, that it was the type of service for which certification is needed.

Some argument may be made that the operations may be distinguished from the usual telephone companies because of the lack of land line facilities and the like. This distinction, however, will not stand in view of the use of microwave facilities by telephone companies.

It should also be noted that this opinion is consistent with prior practice of the Commission. In prior telephone area certification cases, the Commission has, in its certification orders, included certification for mobile radio telephone services.