

Opinion No. 69-146

December 16, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General James C. Compton, Jr.,
Assistant Attorney General

TO: Mr. Arthur Ulibarri, Chairman, New Mexico Public Service Commission, State
Capitol Building, Santa Fe, New Mexico 87501

QUESTIONS

FACTS

The City of Gallup, New Mexico furnished electric service more than five miles from its municipal boundaries for some time prior to March 13, 1959, the date Chapter 74, Section 2, Laws of 1959, became effective. This section is now compiled as Section 14-23-9 (B), N.M.S.A., 1953 Compilation. The City of Gallup continued to furnish such electric service for the period from March 13, 1959, to July 28, 1969. On July 28, 1969 the City of Gallup submitted a contract to the Public Service Commission for proposed service to an industrial load outside the five mile limits. The City of Gallup did not pay the fee required by Section 14-23-9 (B), supra, for the period between March 13, 1959 and July 28, 1969. The city, however, now intends to pay the required fee for the period beginning July 28, 1969.

1. Must the City of Gallup pay to the State of New Mexico a fee equal to one-half of one percent of its gross receipts derived from electric utility service furnished in an area more than five miles beyond its municipal boundary for the period between March 13, 1959 and July 28, 1969, when, in fact, the Public Service Commission did not incur any expenses in regulating this electric service during this period?
2. If the City of Gallup is obligated to pay this fee for this period, what is the effect of the fact that the city has made no budgetary provisions for the payment of this fee, either in previous years or in the current budgetary year?

CONCLUSIONS

1. Yes.
2. See Analysis.

OPINION

{*233} ANALYSIS

1. Section 14-23-9 (B), N.M.S.A., 1953 Compilation, provides in pertinent part:

"To defray any expenses incurred by the commission in the exercise of the jurisdiction conferred upon it by this section, the municipality shall pay annually to the State of New Mexico a fee equal to one-half of one percent [1/2%] of its gross receipts derived from the electric utility service furnished in that area five [5] miles beyond its boundary for the preceding calendar year. . . ."

Jurisdiction is conferred upon the Public Service Commission for rates, charges and service conditions in the area more than five miles from the municipal boundary. Section 14-23-9 (A) (2), supra. This jurisdiction was automatically conferred upon the Public Service Commission when the original act went into effect on March 13, 1959. See Laws of 1959, Chapter 74, Section 4. Since Section 14-23-9 (A) (2), supra, states that "such rates, charges and service conditions are subject to the disapproval of the New Mexico Public Service Commission", it must be considered that from the effective date of the Act the municipality complied with the statute and submitted its proposed rates and charges to the Public Service Commission. Accordingly, the Public Service Commission must be considered to have exercised the jurisdiction conferred upon it by Section 14-23-9, supra.

That the Public Service Commission did not in fact incur any expenses in the exercise of this jurisdiction is immaterial to the municipality's obligation to pay the fee. The express purpose of the fee, of course, is "to defray any expenses incurred by the commission in the exercise of the jurisdiction conferred upon it by this section. . . ." Section 14-23-9 (B), supra. But the mandatory expression of "shall pay annually" indicates {234} that the municipality must pay this fee each year, regardless of any other factors. In general, see the reasoning in **Sunset Package Store, Inc., v. City of Carlsbad**, 79 N.M. 260, 442 P.2d 572 (1968).

In passing, it should be noted that in some years the expenses incurred by the Public Service Commission will be less than the amount of the fee paid by the municipality. But in other years it is very likely that such expenses will exceed the fee paid by the municipality. In these latter years, it would be hoped that the overpayments from other years will compensate for the disparity. Accordingly, the City of Gallup must pay to the State of New Mexico the fee required for the period between March 13, 1959, and July 28, 1969.

2. Section 14-23-9 (A) (1), supra, enables a municipality to "establish, maintain and collect rates or charges for service in that area which are just and reasonable." Presumably, the municipality will insure that within these overall rates and charges there is an allowance for the fee to be paid to the state under Section 14-23-9 (B), supra. Assuming, however, that the municipality does not allow for such a fee when the rates and charges are established, then the municipality must pay the fee out of its general financial resources within the statutory provisions relating to municipal expenditures.

Section 11-2-57 (H), N.M.S.A., 1953 Compilation, provides that the Local Government Division of the State Department of Finance and Administration may:

"With written approval of the Director of Finance and Administration and the Attorney General, increase the total budget of any local public body in the event such local public body undertakes an activity, service, project or construction program which was not contemplated [sic] at the time the final budget was adopted and approved and which activity, service, project or construction program will produce sufficient revenue to cover such increase in the budget of such local public body has surplus funds on hand not necessary to meet the expenditures provided for in the budget with which to cover such increase in the budget."

If no surplus funds are available in the present year and if there can be no effective cover under the alternative provided in this statute, then the expenditure for past due fees should be postponed to the next budgetary year. Since the fee is to be paid in quarterly installments under Section 43-23-9 (B), supra, the payment of the overdue fees could be made to the state in similar quarterly installments.