## Opinion No. 73-26

March 6, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** Mr. Joe C. Castellano District Attorney First Judicial District Santa Fe County Courthouse Santa Fe, New Mexico 87501

## QUESTIONS

QUESTIONS

1. (a) What rights do public utilities and pipeline companies have to use rights-of-way of county roads, and

(b) Are these rights the same whether such rights-of-way were acquired by dedication, by statute, by eminent domain, or by prescription?

2. What regulatory powers does a board of county commissioners have over such use of rights-of-way of county roads by public utilities and pipeline companies?

3. May a board of county commissioners require

(a) A public utility or (b) a pipeline company to secure a franchise for such use of rights-of-way of county roads, and may it charge a tax or fee for such use?

4. May a board of county commissioners require

(a) A pipeline company to pay a fee to cover the cost of reviewing an application to use rights-of-way of county roads?

5. May a county insist on making all cuts in the surfaces of county roads required to install utilities and pipelines and require the public utilities or pipeline companies to pay the costs thereof?

6. May a board of county commissioners require

(a) A public utility or (b) a pipeline company to make a surety bond to guarantee payment of expenses that may be incurred by the county in making repairs made necessary either by the original installation or by subsequent failure of the installation?

CONCLUSION

1. (a) See analysis. (b) Yes.

2. See analysis.

3. (a) No. (b) Yes.

4. (a) No. (b) Yes.

5. No, unless by contract.

6. (a) No. (b) Yes.

## OPINION

*{*43}* **ANALYSIS**

At the outset we must distinguish carefully between public utilities and those pipeline companies which are engaged in the transportation of oil, natural gas, or the products therefrom. Originally there was no such distinction in the statutes pertaining to the subject-matter of this opinion, but since 1921 there has been. Although some of the pre-1921 statutes mention pipelines, their application to oil and gas pipe lines, as such, is very limited. Therefore, to avoid confusion, the first portion of this opinion will be confined as much as possible to the consideration of the right-of-way problems of public utilities, and those of the oil and gas pipelines will be considered later.

When we use the term "pipeline company" we mean one that does not have a certificate of public convenience and necessity from the public service commission, is engaged in the transportation of oil, natural gas, or their products, and does not serve the ultimate consumer, though it may serve a public utility.

There are a number of legislative enactments which bear on the questions propounded, not only as they concern the public utilities and pipeline companies **vis a vis** the boards of county commissioners, but also as they involve the powers in this field of the state highway commission, the state corporation commission, and the public service commission. These statutes are a patchwork, the pieces of which span 60 years, from 1909 to 1969, and in some respects are contradictory.

In 1909 the incorporation of public utilities ("Corporations for the generation, production, transmission, distribution, sale or utilization of gas, electricity, or steam for lighting, heating, power, manufacturing or other purposes") was authorized, and they were given broad grants of power

". . . to place their pipes, poles, wires, cables, conduits, towers, piers, abutments, stations and other necessary fixtures, appliances and structures, upon or across any of the public roads, streets, alleys, highways and waters in this state **subject to the regulation of the county commissioners and local municipal authorities."** (Emphasis supplied.) Laws 1909, ch. 141, §§ 1 and 2 §§ 68-1-2 and 68-1-3, N.M.S.A., 1953 Comp.

Electric cooperatives are granted even more explicit powers by § 45-4-3, NMSA, 1953 Comp. (Being Laws 1939, ch. 47, § 3) to:

"K. construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation, all roads, highways, streets, alleys and bridges and upon, under and across all publicly owned lands;".

Parenthetically, it should be noted here that § 55-7-23(B), NMSA, 1953 Comp. (being Laws 1959, ch. 310, § 1), contains a recitation that

"Utilities have been authorized by statute for many years to locate their facilities within the boundaries of public roads and streets in this state",

but this section grants no new powers and adds nothing to § 68-1-2, **supra.**

*{*44}* The powers of the county commissioners and municipal authorities are spelled out in more detail in § 68-1-3, NMSA, 1953 Comp. (being Laws 1909, ch. 141, § 3):

"The county commissioners of the several counties are hereby authorized to permit such corporation to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles, wires, cables, conduits, towers, transformer stations and other fixtures, appliances and structures; Provided, that such use shall not unnecessarily obstruct public travel and such county commissioners and municipal authorities of incorporated cities and towns are hereby authorized to grant franchises not exceeding twenty-five years (25) duration to corporations for such purposes within their respective jurisdictions."

Sections 68-1-1 to 68-1-3 were construed in **City of Roswell v. Mountain States Telephone & Telegraph Co.,** 78 F.2d 379 (10th Cir., 1935), the reasoning of which was approved by the Supreme Court of New Mexico in **Village of Ruidoso v. Ruidoso Telephone Co.,** 52 N.M. 415, 417, 200 P.2d 713 (1948). In **Roswell,** after construing the language of § 68-1-1 first quoted above as including telephone companies, the federal court held that, where a municipal franchise had expired, the City of Roswell had the right to bring an action to enjoin the telephone company from continuing to use the public streets and alleys for its poles and lines, saying,

"While the language used in the statute is inapt and not entirely free from uncertainty, we think that when both sections are construed together in their proper relation to each other and to the subject-matter, municipalities are vested with delegated power to grant franchises for the use of their streets and alleys for the purpose of maintaining telephone poles, wires, and other equipment and that the consent of the state to such use becomes effective when such franchise is obtained." **Id.,** at p. 384.

Thus it is apparent that the grant to public utilities is not as broad as it would seem at first glance. The counties and municipalities have the right to insist upon franchises for

use of the public roads, streets and alleys (except state highways) by utilities, and, under § 68-1-2, **supra,** to impose reasonable regulations -- unless the regulatory function has been completely delegated to other agencies by subsequent enactments. See Opinion of the Attorney General No. 63-66, dated June 13, 1963.

In 1919 the legislature gave the state highway commission power

"[t]o prescribe by rules and regulations the conditions under which pipelines, telephone, telegraph and electric transmission lines and ditches may hereafter be placed along, across, over and under **all public highways** in this state . . ." Laws 1929, ch. 110 § 55-2-7(c), NMSA, 1953 Comp. (Emphasis supplied.)

There were, of course, earlier enactments regarding the powers of the territorial and state highway commissions, and they are summarized in **Gallegos v. Conroy,** 38 N.M. 154, 29 P.2d 334 (1934), but the quoted statute is the one now in effect. **Gallegos** made it clear that the powers of the highway commission pertained to a system of highways "leaving the control of purely local county roads with the county board of commissioners." **Id.,** at p. 162.

Also, § 55-2-20 provides in part,

"No pipelines, poles or telephone or electric transmission lines or railways, authorized to be placed on or along roads constructed or improved under the provisions of this act, shall be located except in accordance with rules and regulations prescribed therefor by the state highway commission." Laws 1917, ch. 38, § 14.

It is clear from the context that "this act" refers to state highways. This office held in Opinion of the Attorney General No. 681, dated November 9, 1933, that county commissioners had no right to grant any easement to a public utility over a state highway, the right-of-way of which came under the control of the state highway commission after 1917.

The statutory grant of regulatory powers to county commissions contained *{*45}* in § 68-1-3 is very general, but such regulations would have to be reasonable and related to public health and safety -- in other words, to the design, construction, operation and maintenance of the facility. Since the state highway commission has developed a comprehensive set of regulations for use of rights-of-way under its jurisdiction by public utilities and pipeline companies, and since the state corporation commission has adopted regulations for the design, construction and maintenance of pipelines under the Pipeline Safety Act, **infra,** it would seem desirable from the standpoint of uniformity to adopt them for county roads, insofar as they are applicable. The test of reasonableness probably would be met by adopting these regulations. Also, it is doubtful that a county could adopt regulations in conflict with those of the two state agencies mentioned.

The questions of fees or rental charges for the use of rights-of-way of county roads is discussed at some length in two opinions of this office, No. 57-52, dated March 15,

1957, and No. 57-124, dated June 10, 1957, and it should be unnecessary to repeat their contents here. Suffice it to say that there is no statutory authority for a county to make such charges to a utility holding a certificate of public convenience and necessity from the public service commission. Neither is there any provision for the county's doing the installation work and making a charge therefor, but this could be done by contract, if the utility company was willing, under the authority granted each county by § 15-36-1, NMSA, 1953 Comp.,

"[t]o make all contracts and do all other acts in reference to the property and concerns necessary to the exercise of its corporate or administrative powers."

Pipeline companies are much more subject than public utilities to the powers of the county commissioners, who have specific statutory authority under §§ 65-4-11 and 65-4-12, NMSA, 1953 Comp. (being Laws 1921, ch. 22) to charge them fees for the use of the rights-of-way and for the cost of investigating an application for such use. First, there is a broad grant of power to the counties in § 65-4-11, which provides:

"The county commissioners of the various counties in the state are hereby empowered and authorized to grant rights of way for laying and maintaining pipelines for oil and gas transportation in, on or over public highways in their respective counties to all applicants **upon such terms and conditions as such county commissioners deem to be for the best interests of their respective counties,** and as prescribed by the terms of this act [65-4-11 to 65-4-13]." (Emphasis supplied.)

Then, in § 65-4-12, some of these powers are spelled out in more detail:

"Applicants for any such right of way shall present to the county commissioners of the county in which such right is desired, an application in writing giving the name and address of both the applicant and the person, or persons, who will own said pipeline or lines when installed, the highway or highways where it is desired to locate such pipeline or lines, and whether the same will be in, on or over such highway or highways, the place of beginning and ending of such line or lines; the purposes for which the same are to be used; and such further information as the county commissioners may deem to be necessary to enable them to take proper action on said application. **The application shall contain an agreement by the applicant to pay all expenses which may be incurred by the county commissioners in making such examination as they shall deem necessary** to determine whether the right of way applied for should be granted. Upon receipt of such application by the county commissioners they shall determine the probable expense which it will be necessary for them to incur to enable them to properly pass upon such application, and **shall require the applicant to deposit for their use the amount of such probable expenses** before taking further action on said application. After such deposit has been made, the county commissioners shall take such action and make such investigation as they may deem necessary to enable them to properly pass upon such application, and they shall without unnecessary delay, pass *{*46}* upon such application and allow the same upon such reasonable requirements as they find will adequately safeguard and protect the highway or highways where such

pipeline or lines are to be located, and that will fairly compensate the county for the use and occupancy of such highway or highways by said pipeline or lines unless the county commissioners find that said application cannot be granted without impairing the usefulness of such highway or highways for purposes of travel by the public. In the event that such application is rejected, the county commissioners shall enter of record their reasons for such action, and such action shall be subject to review, reversal or modification by the district courts of this state on appeal by the aggrieved party in the same manner as provided for appeals from orders of the board of county commissioners by sections 1224 [15-44-5] and 1225 [15-44-6] of the New Mexico Statutes Annotated, Codification of 1915.

"Where an application is allowed **the county commissioners shall,** before the issuance of a permit, **require the applicant to enter into an undertaking with adequate sureties** conditioned that the applicant, his, her or its successors or assigns will pay all extra expense which the county shall incur by reason of the location of said pipeline or lines in, on or over such highway or highways, and that applicant will save the county harmless from any and all damage it may be caused to pay, or sustain by reason of the laying or maintaining of such pipeline or lines upon said highway or highways, and that applicant will pay all sums due, or to become due, the county, for the use of said highway or highways, and such other conditions as may be found necessary to fully protect the interests of the county issuing the permit. Upon the presentation of such undertaking and the approval thereof by the county commissioners, they shall issue to the applicant a permit to lay and maintain a pipeline or lines in, on or over the highways and for such period of time, not to exceed ten [10] years, as shall be designated in said permit, and such permit so issued shall operate to give the one [1] to whom it shall be issued, or assigned, with the consent of the county commissioners, full right and authority to use the highway or highways in the manner and for the purpose designated in such permit." (Emphasis supplied.)

The foregoing statute also answers part of Question No. 6 regarding surety bonds. Since the legislature mandated the county commissioners to require such bonds from pipeline companies and did not do so with regard to public utilities, it must be assumed that no such authority was intended under the general grant of regulatory powers over public utilities in § 68-1-3, **supra.** The same reasoning compels the conclusion that the county commissioners cannot charge public utilites for the cost of a feasibility survey, as they can pipeline companies. The reasonableness of such a disparity may be questioned, but it may lie in the legislature's knowledge that any such costs would be passed on by the utilities through increased rates to local consumers, whereas pipeline companies normally would pass their costs on to more distant, wholesale customers.

It should be noted that county commissioners' powers to regulate pipeline companies is shared with the state corporation commission and the state highway commission. In § 65-4-17, NMSA, 1953 Comp. (being Laws 1969, ch. 71), the Pipeline Safety Act, the state corporation commission is empowered to

"A. promulgate, amend, enforce and repeal reasonable regulations establishing minimum safety standards for the transportation of oil and gas, and for the design, installation, inspection, testing, construction, extension, operation, replacement and maintenance of oil or gas pipeline facilities . . .

"E . . . Provided, however, the use of the term 'rights of way' does not authorize the commission to prescribe the location or routing of any oil or gas pipeline facility."

Also, under § 65-4-6, NMSA, 1953 Comp. (being Laws 1953, ch. 42),

"The **crossing** of any pipeline operated for the conveyance of oil, natural gas or the products derived therefrom under any railroad or **public road** or highway *{*47}* in this state, outside of the confines of any municipal corporation, shall be constructed and maintained according to reasonable rules and regulations adopted by the corporation commission of New Mexico, not inconsistent, however with the applicable requirements of the state highway department." (Emphasis supplied.)

Oddly enough, § 65-4-6 by its terms applies only to crossings and not to pipelines running longitudinally within rights-of-way. However, this section has been superseded by the later Pipeline Safety Act, pursuant to which the state corporation commission has adopted comprehensive regulations, which are identical to corresponding federal regulations prescribed by the department of transportation. It would appear that the counties and the state highway commission have little regulatory power left in this field, as a practical matter.

Part (b) of Question No. 1 inquires whether rights of public utilities and pipeline companies in rights-of-way of county roads "are the same whether such rights-of-way were acquired by dedication, by statute, by eminent domain, or by prescription." The manner of acquisition makes no difference. **Hall v. Lea County** Electric Cooperative, 78 N.M. 792, 438 P.2d 632 (1968). You have asked an ancillary question regarding section lines which a certain pipeline crosses "which in the future may be opened as county roads." It is assumed that you have reference to § 55-4-1, N.M.S.A., 1953 Comp., which says in part,

"[W]hen practicable the county commissioners shall declare all township and section lines, public highways of not less than forty [40] feet in width, and where there is no improvement, no compensation shall be paid for such highways."

This section and the following one, § 55-4-2, which requires county roads to be 60 feet wide unless the county commissioners order otherwise, have been interpreted in **Frank A. Hubbell Co., v. Gutierrez,** 37 N.M. 309, 22 P.2d 225 (1933), which held § 55-4-1 could not constitutionally create a right-of-way on private lands without compensation, and that a county commission could not create a right-of-way by simple resolution under this section without following the procedures set up by other statutes. So the quoted portion of § 55-4-1 is a nullity, for all practical purposes, and by the same token you

need not be concerned about a pipeline's crossing of section lines which are not now opened as county roads.

Lastly, you ask our opinion about a form used by the Board of Commissioners of Santa Fe County as a combination application and permit for use of rights-of-way of county roads by public utilities and pipeline companies. While this form is not objectionable as far as it goes, it is not as comprehensive as that used for the same purposes by the State Highway Department (Form Np. M.-202, Rev. 8/22/68), a copy of which is enclosed. Section 65-4-13, NMSA, 1953 Comp., requires the state highway commission to prepare the necessary blank forms for use in granting pipeline companies the use of rights-of-way under public roads and highways, presumably in the interest of uniformity among the various counties. The enclosed form is used by that commission for both public utilities and pipeline companies and appears to be the only form prepared pursuant to the statutory mandate. It does not, you will note, fulfill the cost deposit and surety bond requirements of § 65-4-12.

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