Opinion No. 78-03

January 16, 1978

OPINION OF: Toney Anaya, Attorney General

BY: A. Joseph Alarid, Assistant Attorney General

TO: Eloy F. Martinez, District Attorney, First Judicial District

COUNTY COMMISSIONS; FRANCHISE FEES

Lists conditions under which a county may impose fees incident to the granting of a utility franchise. Such fees may be charged by a county to cover costs incurred in the granting or exercise of the franchise.

QUESTIONS

Under what conditions, if any, may a county commission impose a charge on a public utility in granting a franchise?

CONCLUSIONS

See Analysis.

ANALYSIS

It is well established that a county, as a political subdivision of the State, possesses only such powers as are expressly granted to it by the legislature, together with those necessarily implied to implement those expressed powers. See e.g., **El Dorado at Santa Fe, Inc. v. Board of County Commissioners,** 89 N.M. 313, 317, 551 P.2d 1360 (1976). Clearly, a county commission is authorized to grant franchises to public utilities. Section 68-1-3, N.M.S.A. 1953 Comp. There exists no statute expressly authorizing the county to impose charges on a public utility to which a franchise has been granted and, in Opinion of the Attorney General No. 57-51, dated March 15, 1957, this office ruled that counties may not exact from the utility a franchise tax. Further, in Opinion of the Attorney General No. 57-124, dated June 10, 1957, this office ruled that a county may not impose a charge in the nature of rental for the use of public property.

OPINION

And, an ordinance granting a franchise in consideration for 2% of the gross receipts of the public utility was characterized by the Court as one which could not be classed as a police power regulation but rather, primarily a revenue measure. **Mountain State Telephone and Telegraph Company v. Town of Belen,** 56 N.M. 415, 244 P.2d 1112

(1952). While the Court ruled the ordinance invalid for other reasons, it implied that using a franchise as a revenue measure was not a proper exercise of the police power.

On the other hand, public utilities may be required to pay certain expenses in connection with the franchise. Under Section 14-43-1(E), N.M.S.A. 1953 Comp. when a municipality grants franchise to a public utility, the expense of publishing the franchise ordinance and upholding the special election shall be paid by the public utility. In other cases, public utilities have been required to pay the expenses of removal and relocation of utility lines as a condition of its franchise. See e.g. **Southern Union Gas Company v. City of Artesia,** 81 N.M. 654, 472 P.2d 368 (1970).

A public utility franchise may be viewed as a contract between the utility and the county. **Las Cruces Urban Renewal Agency v. El Paso Electric Company,** 86 N.M. 305, 523 P.2d 549 (1974). Such contracts may provide for the payment of expenses incident of the granting of the franchise. Thus, in response to your question, we would conclude that, in accordance with the applicable law and consistent with previous opinions, charges may be imposed on utilities which constitute reasonable expenses incurred in the granting and exercise of the franchise.

ATTORNEY GENERAL

Toney Anaya, Attorney General