

April 10, 2015 Advisory Letter — Opinion Request — Municipality’s Authority to Impose a Technology Infrastructure Fee

The Honorable Kelly Fajardo
New Mexico State Representative
1125 North Molina
Belen, NM 87002

Re: Opinion Request — Municipality’s Authority to Impose a Technology Infrastructure Fee

Dear Representative Fajardo:

You requested our advice regarding whether the Village of Los Lunas is authorized to impose a technology infrastructure fee on utility customers. Specifically, you asked:

1. Is the Village of Los Lunas authorized to adopt a technology infrastructure fee by ordinance?
2. If yes, may the governing body place a question on the municipal election ballot allowing the voters to vote on the adoption of the ordinance and imposition of the specified fee?
3. If the answer to 2 is no, is there a method for the governing body to place the question on the municipal election ballot?

As discussed below, we conclude:

1. If the proposed technology infrastructure fee constitutes a tax, the Village may be authorized to impose it under Section 3-18-2 of the Municipal Code.
2. Section 3-18-2 permits a municipality to impose an excise tax if the products or services to be taxed are specifically named in the authorizing ordinance and the ordinance is approved by a majority of the municipality’s voters.

Your request suggested that the Village of Los Lunas is exploring the option of imposing a “technology infrastructure fee that would be collected from all utility customers on a monthly basis to help fund a public wifi system and other technology related projects.” Before determining whether the Village is authorized to impose this fee, we examine whether the proposed fee constitutes a “tax.”

The New Mexico Supreme Court has recognized that “[a] tax is a charge imposed that is not related to the services rendered. In contrast, a fee is related to a particular benefit or service.” *El Paso Elec. Co. v. New Mexico Pub. Regulation Comm’n*, 2010-NMSC-048, ¶ 15, 149 N.M. 174, 179 (citation omitted). According to the New Mexico Court of Appeals, “a trait that distinguishes fees from taxes is that fees, unlike taxes, only cover the agency’s reasonably anticipated costs of providing the services for which the fees are charged.” *New Mexico Mining Ass’n v. New Mexico Mining Comm’n*, 1996-NMCA-098, ¶ 24, 122 N.M. 332, 339 (citation omitted).

In this instance, the proposed technology infrastructure fee would be collected from utility customers “to help fund a public wifi system and other technology related projects.” From the information provided in your request, it does not appear that the Village would be charging the fee for utility services or other services, or that the fee would reflect the Village’s reasonably anticipated cost of providing services. Instead, the Village apparently intends to use the proceeds of the fee charged to utility customers to fund future technology projects, such as a public wireless internet system. Because, under the current proposal, the fee imposed on utility customers would not relate to services or benefits provided to the utility customers, we believe the fee is more properly characterized as a tax.

The Village of Los Lunas is organized as a mayor-council form of government under NMSA 1978, Sections 3-11-1 to -7 (1965, as amended through 1985). Because the Village is not a home-rule municipality, state law must grant express or implied authority for the Village to act. See *State ex rel. Haynes v. Bonem*, 1992-NMSC-062, 114 N.M. 627; *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 17, 119 N.M. 150, 157 (“A municipality may exercise only those powers granted to it by the legislature.”).

The New Mexico legislature has specifically authorized municipalities to impose excise taxes. With certain exceptions not relevant here, a municipality may impose excise taxes of the sales, gross receipts or any other type on specific products and services, other than ... [tobacco, liquor, motor fuels, and motor vehicles], if the products and services taxed are each named specifically in the ordinance imposing the tax on them and if the ordinance is approved by a majority vote in the municipality.

NMSA 1978, § 3-18-2(D). While Section 3-18-2 constitutes specific authorization for municipal taxing authority, it also creates certain restrictions. An excise tax authorized by Section 3-18-2(D), such as the tax on utility customers contemplated here, may come into effect only if the municipality first names in an ordinance the specific services to be taxed and the ordinance is approved by a majority of voters in the municipality.

Although Section 3-18-2, on its face, does not preclude the Village from imposing an excise tax on utility customers, the Village should consider other laws that might affect its authority to impose the tax. For a tax on customers of a utility service under the jurisdiction of the Public Regulation Commission (“PRC”), this would include the Public Utilities Act. The Public Utilities Act authorizes a municipality and a utility to establish rates and service regulations by contract with the approval of the PRC. See NMSA 1978, § 62-6-15 (1979). Nevertheless, “local governments cannot create the equivalent of a statewide policy governing utilities or use their police power in a manner that will detrimentally affect utility rates for the State as a whole.” *City of Albuquerque v. New Mexico Pub. Regulation Comm’n*, 2003-NMSC-028, ¶ 8, 134 N.M. 472, 477 (citations omitted). Depending on the utility customers affected, the Village’s proposed charge might be restrained by the PRC’s “general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service

regulations...” NMSA 1978, § 62-6-4(A) (2003). See also *City of Albuquerque v. New Mexico Public Service Commission*, 1993-NMSC-021, ¶¶ 24, 25, 115 N.M. 521, 530 (because the PRC retains plenary authority over ratemaking, a municipality’s statutory authority to establish rates by contract with a utility is not binding without the PRC’s approval).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

CAROLINE MANIERRE
Assistant Attorney General