

Attorney General of New Mexico

HAL STRATTON
Attorney General

HENRY M. BOHNHOFF
STEPHEN WESTHEIMER
Deputy Attorneys General



P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6000

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OPINION
OF
HAL STRATTON
Attorney General

Opinion No. 88-80

BY: Tiane L. Sommer
Assistant Attorney General

TO: Hon. John L. Morrow
New Mexico State Senator
State Capitol
Santa Fe, New Mexico 87503

QUESTION:

Is a state agency, by law, exempt from payment of late charges to a utility when it fails to process bills in a timely manner and becomes a delinquent customer?

CONCLUSION:

No. State agencies, like other customers, have a statutory obligation to pay utility rates, including any late charges that the New Mexico Public Service Commission approves.

ANALYSIS:

A utility's "late charge" is a penalty for late payment of a bill for service. It falls within the definition of "rate" in Section 62-3-3(H) of the Public Utility Act, Sections 62-3-1 through 62-13-14 NMSA 1978 ("Act").

"[R]ate" means every rate, tariff, charge or other compensation for utility service rendered, or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff, or part of a schedule or tariff thereof....

(Emphasis added.) The New Mexico Public Service Commission ("Commission") has general and exclusive power and jurisdiction to regulate and supervise every public utility's rates. Section 62-6-4(A).

Pursuant to Section 62-8-3 of the Act, every public utility must file schedules with the Commission that show all rates to be collected and enforced. These schedules must set forth the classification of users and the rates to be charged each classification. Section 62-8-4. The Commission must approve the schedules and any changes. Sections 62-6-4 and 62-8-7. Therefore, a utility may impose a late charge if the Commission approves a schedule that contains one. A state agency that takes utility service is a user of that service, and like other users is obligated to pay the rate applied to the classification of users within which it is placed. Section 62-8-4.

We are aware of no statutory or case law that exempts state agencies from utility rates, including late charges.¹ While a utility conceivably could file and ask the Commission to approve a rate schedule exempting state agencies from late charges imposed on other delinquent customers,² the utility would have to prove to the Commission that the exemption was "just and reasonable."

1 Under the common law, a sovereign is immune from interest and late charges in the absence of an authorizing statute. Bradbury & Stamm Construction Co. v. Bureau of Revenue, 70 N.M. 226, 238, 372 P.2d 808, 816 (1962); Att'y Gen. Op. 87-51 (1987). As stated above, Section 62-3-3(H) authorizes utility late charges against a state agency. Also, under the Procurement Code, Sections 13-1-1 through 13-1-199 NMSA 1978, the State has no duty to pay late charges or interest penalties unless the responsive bid or proposal and the contract specifically require it. However, the Code's provisions do not apply to purchases of "publicly provided or publicly regulated gas, electricity, water, sewer and refuse collection services." Section 13-1-98.

2 A utility could not simply decide not to charge state agencies a late charge that the applicable schedule otherwise requires. Section 62-8-7(B) prohibits a utility from changing any rate without notifying the Commission. The Commission in turn would determine whether the change was "just and reasonable." Section 62-8-7.

Section 62-8-7(A).³ We are not aware of any such schedule that has been proposed or approved in New Mexico.

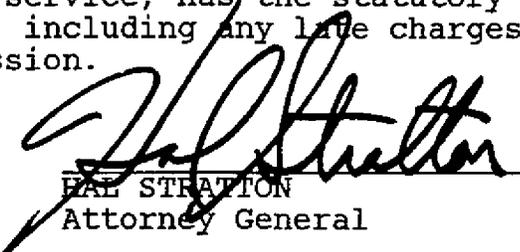
Section 37-1-23(A) NMSA 1978 states: "Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." However, the state agency's obligation to pay the rate is statutory. A utility's tariff is not a contract; it is the law. First Central Serv. Corp. v. Mountain Bell Telephone, 95 N.M. 509, 623 P.2d 1023 (1981).⁴ Therefore, Section 37-1-23(A) is inapplicable.

3 Section 62-8-5 provides that no "person" shall be charged or shall pay any compensation greater or lesser than that prescribed in the rate schedule. Section 62-8-6 prohibits any utility from granting any rate preference to "persons" within any classification, and from discriminating between different classifications. However, Section 62-3-3(E)'s definition of "person," i.e., "individuals, firms, partnerships, companies, rural electric cooperatives... [citations omitted], corporations and lessees, trustees or receivers," does not include state agencies. The New Mexico Supreme Court has ruled that this definition does not include the United States or other governmental bodies. Southern Union Gas Co. v. New Mexico Pub. Serv. Comm'n, 82 N.M. 405, 482 P.2d 913 (1971), overruled on other grounds, De Vargas Savings & Loan Ass'n v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975). Thus, Sections 62-8-5 and 62-8-6 would not prohibit a utility from not imposing late charges on state agencies, assuming the Commission would approve such a tariff provision.

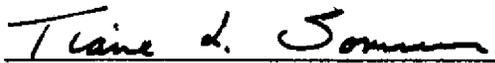
4 See also Gonzales v. Pub. Serv. Comm'n, 102 N.M. 529, 532, 697 P.2d 948, 951 (1985) (no implied contract between utility and its customers); City Messenger Serv. of Hollywood, Inc. v. Capitol Records Distrib. Corp., 446 F.2d 6 (6th Cir. 1971), cert. denied, 404 U.S. 1059 (1972) (despite written contract, statute of limitations applicable to liability created by statute governed action to recover tariff rate); Carter v. American Tel. & Tel. Co., 365 F.2d 486 (5th Cir. 1966) (tariff is not a mere contract, but is the law). Moreover, while this analysis centers on utilities regulated by the Public Service Commission, the First Central case indicates the analysis also applies to telephone companies subject to rate regulation by the State Corporation Commission.

Moreover, while some of the utilities within New Mexico require that the governmental agencies they serve sign a written contract for service, written contracts for utility service still are subject to the rate schedule and the Commission's jurisdiction. The Commission has general and exclusive jurisdiction over the utility's rates under Section 62-6-4(A).

For the foregoing reasons, we conclude that a state agency, like any other user of utility service, has the statutory obligation to pay the rates therefor, including any late charges, under schedules approved by the Commission.



PAUL STRATTON
Attorney General



TIANE L. SOMMER
Assistant Attorney General