In your memorandum of February 8, 1996, to this office you indicated your office has received inquiries about various "franchise" fees or local taxes that are separately described on bills for services provided by various local utilities to state agencies. These fees and taxes have been routinely paid by the state in the past. You provided this office with several examples of bills received from utility companies which depict separate charges for a franchise fee or a local tax in addition to the charge for provided services. Accordingly, you have requested an opinion from this office on the following question:

QUESTION

Are state agencies exempt from paying franchise fees or similar types of local taxes or fees that are passed on by local utility companies in their bills for services provided to the state agencies?

ANALYSIS

Local governments are empowered to grant franchises to utility companies pursuant to provisions of ch. 709 of the Nevada Revised Statutes. Under the franchise agreement with the local government, a utility is required to make a payment to the county school district fund of an amount equal to 2 percent of its net profits. *See* NRS 709.110; NRS 709.230.

Local governments are also authorized by statute to "fix, impose and collect a license tax for revenue or for regulation, or for both revenue and regulation, on [all] trades, callings, industries, occupations, professions and businesses." NRS 244.335(1)(b); NRS 268.095(1)(a). This authority includes imposing license taxes on utility companies operating in the city or county for the purpose of raising revenue, unless the specific franchise agreement between the local government and the utility precludes them. *See City of N. Las Vegas v. Cent. Tel. Co.*, 85 Nev. 620, 622-23, 460 P.2d 835-36 (1969).

In 1995 the legislature enacted legislation designed to clarify ch. 354 of Nevada Revised Statutes pertaining to authority of local governments to impose license fees and taxes on public utilities operating in the local jurisdiction. *See* Act of July 5, 1995, ch. 591, §§ 1-11, 1995 Nev. Stat. 2187. The amount of the business license fee on public utilities that a local government may impose is limited by provisions of NRS 354.59883. The total measure of all fees (as defined in NRS 354.59881(2)) can be no more than 5 percent of the gross revenues that the utility derives from services provided within the jurisdiction of the city or county. NRS 354.59883(3)(b). The ordinance imposing the fee cannot alter the terms of any franchise agreement between the local government and the utility. NRS 354.59883(1).

It is apparent that the fees which local governments are authorized to impose on public utilities are intended primarily for general revenue raising purposes, not for the purpose of regulating these industries. Accordingly, these fees are in substance "taxes" designed for the general support of the local government. *See Cotton States Mut. Ins. Co. v. DeKalb County*, 304 S.E.2d 386, 387 (Ga. 1983); *Consol. Coal Co. v. Emery County*, 702 P.2d 121, 123 (Utah 1985); *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 105 S.E.2d 260, 272-73 (W.Va. 1958).

NRS 354.59887 governs how the fees imposed on public utilities are to be collected as follows:

> 1. The entire amount of any fee to which the ordinance applies must be imposed at the same rate upon each public utility that provides similar services within the jurisdiction of the city or county.
> 2. The city or county:
> (a) Shall require the quarterly payment of all fees imposed upon each public utility to which the ordinance applies.

(b) May, to the extent it determines that it is impracticable to collect from a public utility to which the ordinance applies any of the fees it imposes upon the public utility, collect any of those fees directly from the customers of the public utility located within the jurisdiction of the city or county in proportion to the amount of revenue the public utility derives from each of those customers.

(c) May, except as otherwise provided in this paragraph, assess combined penalties and interest of not more than 2 percent per month of the delinquent amount of any fee to which the ordinance applies. If a city annexes any land, it may not assess any penalties or interest pursuant to this paragraph regarding any fee imposed for the operation of a public utility within the annexed land during any period:

(1) Before the effective date of the annexation; or

(2) More than 30 days before the city provides the public utility with notice of the annexation, whichever occurs later.

3. A public utility to which the ordinance applies shall, except for any fees collected by the city or county pursuant to paragraph (b) of subsection 2, collect the aggregate of all its fees imposed by the city or county directly from its customers located within the jurisdiction of the city or county in proportion to the amount of revenue the public utility derives from each of those customers. The fees may be shown on a customer's bill individually or collectively.

Terms of this statute suggest the legislature envisioned a collection scheme whereby the fees imposed on public utilities would be borne ultimately by customers of the public utilities. The statute even provides for a local government to collect the fees directly from the customers of the utility if it is "impracticable" to collect them from the utility. Accordingly, under the recently enacted statutory scheme, the local government could bill the state directly for the fees it ostensibly imposes on the public utilities. There are no statutes in chs. 354, 244, or 268 of Nevada Revised Statutes that specifically exempt a federal, state, or local governmental entity from paying any of utility franchise fees, taxes or license fees, or taxes imposed by local governments that are passed through to the government as a consumer of those services by the utility. However, the issue to resolve is not whether the state is exempt from paying these fees, but whether the state is *immune* under principles of sovereign immunity from paying these fees.

There is a presumption that the legislature does not intend to subject publicly owned property to taxation by the state or local governments, and that such property is impliedly immune from taxation unless an intention to tax such property is clearly manifested. *State v. Lincoln County Power Dist.*, 60 Nev. 401, 407, 111 P.2d 528, 530 (1941). The weight of authority seems to indicate that in those jurisdictions that recognize an implied state immunity from taxation in the absence of express statutory authority, the same is true of excise taxes imposed by a local government on the state or its political subdivisions. *King County v. City of Algona*, 681 P.2d 1281, 1283 (Wash. 1984); *City of Tempe v. Ariz. Bd. of Regents*, 461 P.2d 503, 504 (Ariz. App. 1969); *Dickinson v. City of Tallahassee*, 325 So.2d 1, 3 (Fla. 1975); *Commonwealth Edison Co. v. Community Unit Sch. Dist. No. 200*, 358 N.E.2d 688, 692 (Ill. App. 1976); *cf. Waukegan Community Unit Sch. Dist. 60 v. Waukegan*, 447 N.E.2d 345, 350-51 (Ill. 1983) (wherein the court explained that in Illinois there is no established concept of implied state or local governmental immunity from taxation, including property tax). While the legislature typically has indicated its intent by expressly exempting state and local governments from those taxes it believes these governments should be exempted from, including property taxes (*see, e.g.*, NRS 372.325, NRS 361.055, NRS 361.060, and NRS 364A.020(3)(b)), under sovereign immunity analysis reliance on a statutory exemption is immaterial. *Dickinson*, 325 So.2d at 3; *King County*, 681 P.2d at 1283. Thus, absent an express waiver of that immunity by statute or constitutional provision, a local government is generally held to be without the power to impose a tax on the state. *Dickinson*, 325 So.2d at 3 (a case invalidating a local ordinance that imposed a 10 percent tax on the purchase of utility services as applied to purchases made by state agencies); *but see Manhattan & Queens Fuel Corp. v. County of Nassau*, 497 N.Y.S.2d 843 (N.Y. App. Div. 1986), (wherein the court reviewing

legislative history of a state fuel tax concluded legislature intended to tax fuel sales to state agencies).

The next issue is whether the statutory scheme for the business license fees on public utilities constitutes a tax imposed on the state agencies. This issue requires a consideration of where the legal incidence of the tax falls. While the statutory scheme in NRS 354.59887 places the primary burden of collecting and remitting the fee on the public utilities, there are two aspects of this statute that suggest the true legislative intent was to lay this tax on the utility customers. First, the statute *requires* the utilities to pass on the fees to their customers. Second, the customers of the public utilities may be billed for the fees *directly* by the local government if it is impracticable to collect the fees from the utility. This latter provision might be applicable in the situation where the franchise agreement between the local government and the utility prohibits imposition of a license fee on the utility in addition to the franchise fee provided for in NRS 709.110 and NRS 709.230. It is uncertain whether this provision would authorize the local government to pursue collection from the customers whenever payment was not received from the utility. However, the legislative history of this statute does not reveal any statements that explain why this provision was included.

In *Commonwealth Edison*, a case involving a municipal utility tax, the court concluded that where the statute specifically levied the tax on the utility companies, the legal incidence falls on the utilities, despite the fact that the economic burden of the tax was contemplated to be passed on to the customers of the utilities. The court noted that if the tax is not remitted by the utility, the city cannot pursue collection from the customers. The court also noted that the pass-through was not actually required by law, even though it is passed through in practice. Thus, the municipal utility tax examined in *Commonwealth Edison* was held to be valid because the pass-through of the tax was not mandatory, nor was the city given statutory authority to collect the tax directly from the customers (for example, the state.) *Commonwealth Edison*, 358 N.E.2d at 692-93. On the other hand, in *First Nat'l Bank of Stillwater v. Oklahoma ex. rel. Tax Commission*, 466 P.2d 644, 646 (Okla. 1970), the court held that the legal incidence of the Oklahoma sales tax fell on the purchaser where the vendor was statutorily required to collect the tax from the purchaser.

The Nevada sales tax is imposed on retailers of tangible personal property. NRS 372.105. However, the tax is to be collected from consumers insofar as it can be done. NRS 372.110. The Nevada Supreme Court has implied in the sales tax context that the legal incidence of the tax is on the purchaser, at least where the federal government is the purchaser of tangible personal property. As a result, the court held that the sale could not be taxed due to the constitutional immunity of the federal government from state taxation. *See Scotsman Mfg. Co. v. State, Dep't of Taxation*, 107 Nev. 127, 134, 808 P.2d 517, 521 (1991), *cert. denied* 502 U.S. 1100, 112 S. Ct. 1184 (1992).

Given the obvious legislative mandate for the customers of the utilities to bear the burden of paying the business license fees on utilities imposed under NRS 244.335(1)(b), NRS 268.095(1)(a), and NRS 354.59881-.59889, inclusive, it is our opinion that the state and its political subdivisions are immune from having to remit these fees either to the utility companies or to the local governments directly in the absence of an express waiver of that immunity by the legislature. On the other hand as a result of the absence of any statutory requirement to collect franchise fees from its customers, to the extent that the economic burden of franchise fees imposed under the provisions of NRS 709.110 and NRS 709.230 are passed on to the state as a customer of a utility, the state is not immune from paying them.

CONCLUSION

The state and its agencies are immune from paying the franchise taxes or fees imposed by local governments on public utility companies providing services within the county or incorporated city pursuant to NRS 244.335(1)(b) and NRS 268.095(1)(a) and billed to the state as a customer of the utility in the absence of a specific statutory waiver of that immunity. The state and its agencies are

not immune from bearing the economic burden of a franchise fee imposed on a utility under the provisions of NRS 709.110 and NRS 709.230.

FRANKIE SUE DEL PAPA
Attorney General

By: JOHN S. BARTLETT
Senior Deputy Attorney General

OPINION NO. 96-18TAXES; PENALTIES; PROPERTY: A person who seeks relief from penalties imposed pursuant to provisions of NRS 361.483 must make application to the Nevada Department of Taxation. The Nevada Department of Taxation has the sole authority by statute to consider waiver or reduction of tax penalties imposed under NRS 361.483.

Carson City, July 3, 1996

Mr. James I. Barnes, Deputy District Attorney, Washoe County District Attorney's Office, Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Barnes:

By your letter of May 14, 1996, you have informed me that an issue has arisen with respect to whether a person who wishes to assert a claim for refund of a property tax penalty must file the claim with the Nevada Department of Taxation. In that regard, you have requested an opinion from this office in answer to the following question:

QUESTION

Must a person who desires to seek a waiver or refund of a property tax penalty file a claim with the Nevada Department of Taxation?

ANALYSIS

Property taxes are imposed pursuant to provisions of ch. 361 of Nevada Revised Statutes. According to NRS 361.483, property taxes on real property may be paid in installments as provided in that statute. Failure to make a timely installment payment of property taxes subjects the taxpayer to a penalty of 4 to 7 percent. NRS 361.483(5). Failure to pay property taxes on a mobile home results in imposition of penalties of 10 percent or more. NRS 361.483(6). The *ex officio* tax receiver for each county is required to notify every person who may be subject to the penalties imposed pursuant to the foregoing sections of NRS 361.483 of the existence of the person's rights to seek relief under NRS 360.410 and NRS 360.419. *See* NRS 361.483(7).

In accordance with NRS 361.483(7), the Washoe County Treasurer places the notice on each tax bill mailed. However, apparently the treasurer still receives petitions from taxpayers who seek a reduction or elimination of penalties imposed due to late payment of taxes. In accordance with past practice the treasurer forwards the petition to the district attorney.

No statutory authority exists which permits the tax receiver to accept or reject taxpayer petitions to reduce or eliminate property tax penalties imposed under NRS 361.483. The legislature has clearly indicated its intent that taxpayers file their petition for relief from property tax penalties with the Nevada Department of Taxation pursuant to provisions of either NRS 360.410 or NRS 360.419. The former statute states: