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Franchises to Use Streets

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

Sincerely,

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Franchises to Use Streets

Reference Number: MTAS-717

A franchise has been defined as the "grant of a right or privilege by the sovereign power usually with respect to streets or highways primarily to enable the grantee to perform a public service or benefit....", and that, "It is everywhere agreed that the right to lay pipes in the public highways is itself a franchise" [*Johnson City v. Milligan Utility District*, 276 S.W.2d 748 (Ct. App. 1954); *Nashville Water Co. v Dunlap*, 138 S.W.2d 424 (1940)]. It has also been expressly and impliedly held that a public utility must obtain a franchise to use a city's rights of way [*Knoxville v. Park City*, 130 Tenn. 626 (1914); *Lewis v. Nashville Gas & Heating Co.*, 162 Tenn. 268 (Tenn. 1931); *Franklin Light & Power Company v. Southern Cities Power Company*; 47 S.W.2d 86 (Tenn. 1932); *Holston River Electric Co. v. Hydro Electric Corp*, 64 S.W.2d 509 (Tenn.1933); *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (Tenn. 1938); *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941); *Patterson v. City of Chattanooga*, 241 S.W.2d 291 (Tenn. 1951); *Briley v. Cumberland Water Company*, 389 S.W.2d 278 (Tenn. 1965)].

State or Municipal Franchise?

Reference Number: MTAS-1475

The power to issue franchises in city streets resides in the state. *The state can either grant franchises directly to public utilities, or it can delegate to its municipalities its power to grant franchises to public utilities* [*Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (1931); *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (1938); *City of Memphis v. Postal Tel. Cable Co.*, 145 F. 602 (6th Cir. 1906)].

It is often difficult to determine whether a public utility's franchise has been granted by the state or by the municipality. It has been unsuccessfully argued by a privately owned utility that its state charter operated as a state-granted franchise [*City of Chattanooga v. Tennessee Electric Power Company*, 112 S.W.2d 385 (1938)].

Telephone and telegraph companies have extremely broad statutory rights to use public rights-of-way to install their lines and infrastructure under T.C.A. § 65-21-101. In addition, T.C.A. § 65-21-102 provides that

Any person or corporation organized for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence the equivalent thereof, which may be invented or discovered, may construct, operate and maintain telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over public highways and streets of cities and towns....

Those statutes appear to constitute a state-granted franchise for such companies to use municipal streets for the installation of their communications equipment. But *City of Memphis v. Postal Telegraph Cable Co.*, 145 F. 602 (6th Cir. 1906), appears to hold otherwise. There the Court rejected Postal's argument that various acts under which the city was vested with the "entire control" of its streets was superceded by Public Acts 1885, Chapter 66, Section 1 of which is presently codified as T.C.A. §§ 65-21-201—202. Although that act has been amended several times, it is substantially the same with respect to the broad powers it grants to telegraph and telephone companies to use municipal rights-of-way.

But in *Lewis v. Nashville Gas & Heating Co.*, 40 S.W. 409 (1941), the Court speaks at length on "conditional" franchises granted by the state. The question there was whether the city could charge the gas company a 5 percent franchise fee. Yes, answered the Court, under the city's *proprietary* powers. That was true because even though the gas company had a state-granted franchise, that franchise was conditioned upon the consent of the city, and the city's consent was subject to contractual bargaining between the city and the gas company.

The city was authorized by statute to prescribe the terms and conditions upon which the gas company might enter and establish its business. That, it appears, was done through negotiations with the gas

company, and the obligation, voluntarily assumed by it, was not the result of the exercise of a governmental power, but of contract which both parties could make [Citation omitted], and the annual payments prescribed by Section 14 of the ordinance were compensation to be paid the city for the exercise of the *franchise, conditionally granted by the state, subject to assent of the city as the proprietor of its streets*.... [At 412-413] [Citations omitted].

Franklin Light & Power Company v. Southern Cities Power Company, 47 S.W.2d 86 (1932), suggests that where a municipality has in its charter the authority to grant franchises in its streets to various public utilities, a utility desiring to provide its services inside the municipality must obtain the municipality's consent unless the utility can point to express statutory authority exempting it from obtaining such consent. There the City of Franklin had in its charter the power

.... to grant the right of way over streets, alleys, avenues, squares, and other public places of said town, for the purposes of street railroads or other railroads, telephones, telegraphs, gas pipes, electric lights, and such other purposes as the board may deem property; provided that they shall not grant the exclusive right... to any person, company, or corporation for more than twenty years' and that no general law will be construed by implication to repeal this special enactment [At 87].

The Utilities Act of 1919 (presently codified at T.C.A. §§ 65-4-101 *et seq*.) gave the Public Service Commission [now the Tennessee Regulatory Authority] "general supervision and regulation of, jurisdiction and control over all public utilities, and also over their property, property rights, facilities and franchises, so far as may be necessary for the purpose of carrying out the provisions of this Act." But the Court rejected the utility's argument that the Utilities Act of 1919 extinguished the city's right to require a utility to obtain a franchise to use its streets. It reasoned that the statute giving the Public Service Commission power over utilities and utility franchises ".... nowhere included or conferred the power to grant to a public utility the privilege of entering upon the territory of a municipality and there conducting its business without the consent of the municipality" [At 91].[1]

Furthermore, in *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (1938), the state granted a charter to an electric company to provide electric service in Hamilton County or any village therein. However, the City of Chattanooga's charter provided that the city had the authority to

open, alter, widen, extend, establish grade or otherwise improve, clean, and keep in repair streets, alleys and sidewalks and to have the same done "and" to pass all ordinances not contrary to the constitution and laws of the state that may be necessary to carry out the full intent and meaning of this Act and to accomplish the purpose of their incorporation [At 388].

Those charter provisions, held the Court, compelled the electric company to obtain from the City of Chattanooga a franchise before it could use the city's streets for its utility services. Indeed, it was said in that case that the city's power to grant franchises in its streets need not even be express:

While the charter did not in express terms delegate to the city general control over its streets and alleys, the powers in reference thereto were so numerous and sweeping as to be the equivalent of general control. This seems to be conceded by counsel for the city, for they say in their brief: "The charter of the City of Chattanooga, enacted in 1869, gave the city general control and supervision of its streets.

In the case of *American Car and Foundry Co. v. Johnson County*, 147 Ky. 69, 71, 143 S.W. 773, 774, quoted with approval by the Supreme Court of the United States in *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U.S. 58, 67, 33 S. Ct. 988, 991, 57 L.Ed. 1389, 1394, it appears that the county fiscal courts were given, by statute, "general charge and supervision of the public roads," etc. Ky. St. Section 4306. Concerning the power resulting from the grant by the state to control streets or public highways, the court said:

"The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so municipal corporations may grant franchises to use the streets and public ways of a city."

In *Humes v. Mayor of Knoxville*, 20 Tenn. 403, 1 Humph. 403, 34 Am.Dec. 657, it was held that a municipal corporation is the proprietor of the public streets, which are held in trust for the convenience of the citizens, and as such proprietor may grade and otherwise improve them. Under its charter, the City of Chattanooga had the general control and supervision of its streets, in trust, for the convenience of its citizens [At 388-89].

[1] The definition of a "public utility" for the purposes of T.C.A., Title 65, Chapter 4, expressly excludes "[a]ny county, municipal corporation or other subdivision of the state of Tennessee." It also excludes a number of other governmentally owned utilities T.C.A. § 65-4-101(a)(2).

Counties & Utility Districts Providing Service to Municipalities

Reference Number: MTAS-718

T.C.A. § 5-1-118 gives counties authority to establish and operate utility systems, including sewer systems, through the device of permitting them by resolution to exercise certain powers given to municipalities under the general law mayor-aldermanic charter, including those contained in T.C.A. § 6-2-201(3) B(8), (10)B(13), (18), (19), (26), and (29). But there is no suggestion in that statute that counties can establish sewer systems inside municipalities.

Counties are also authorized under T.C.A. §§ 5-16-101 *et seq*. to establish and operate "urban type public facilities," which means sanitary and storm sewer lines and facilities, plants for the collection, treatment and disposal of sewage and waste matter, facilities and plants for the incineration or other disposal of garbage, trash, ashes and other waste matter, or water supply and distribution lines, facilities and plants, chemical pipelines and docks, or all of these things, and fire protection and emergency medical services. T.C.A. § 5-16-101(b)(2)That authority extends to "any area or areas within their border" [T.C.A. § 5-16-101(a)]. Notwithstanding that language, it does not appear that the county has authority to extend sewer service within the corporate limits of a municipality without its permission. Upon the annexation or incorporation of territory, the annexing or incorporating municipality has the exclusive authority to provide the urban type public facilities in question and to take over such facilities. In addition, the county cannot extend any urban services type facilities within five miles of an existing municipality

.... unless such incorporated city or town has failed to take appropriate action to provide a specified public service facility or facilities in a specified area or areas for a period of ninety (90) days after having been petitioned to do so by resolution of the county legislative body or other governing body.... (T.C.A. § 5-16-111).

That statute appears to permit the county to provide the urban type public facility within five miles of the municipality and to its very doorstep upon the appropriate petition, but probably cannot be read broadly enough to permit the provision of such a facility within the corporate limits of the municipality without its consent.

T.C.A. § 7-51-401 provides that

"(a) Except as provided in § 7-82-302 [the Utility District Act] each county, utility district, municipality, or other public agency conducting any utility service specifically including waterworks, water plants and water distribution systems, and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality, or public agency to customers desiring such service."

but that

(c) No such county, utility district, municipality, or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as other public agency continues to render such service.

That statute authorizes the named political subdivisions, including counties, to extend their utility systems outside their boundaries. It can be argued that it implies that those political subdivisions have the authority to make such extensions into other political subdivisions, provided that the streets proposed for use contain no other utility lines belonging to another utility and already providing the utility service in question. But *Knoxville v. Park City*, 130 Tenn. 626 (1914), and *Franklin Light & Power Company v. Southern Cities Power Company*, 47 S.W.2d 86 (Tenn. 1932), require that a utility's authority to extend its service *into* a municipality without that municipality's consent be express authority. It is not enough that the statute authorizes the utility to extend its system *outside* its boundaries.

T.C.A. §§ 7-34-101 *et seq.* authorizes municipalities, including both counties and cities, to construct various "public works," including sewer systems [T.C.A. § 7-34-102], but also declares that, "[n]o municipality shall construct public works wholly or partly within the corporate limits of another

municipality, other than to perform maintenance on or make improvements to its existing public works system in its service area, except with the consent of the governing body of the other municipality" [T.C.A. § 7-34-105].

Municipalities, including counties and cities, are also authorized to establish and operate electric systems under T.C.A. § 7-52-101 *et seq.* and to transfer to the utility board any sewage works that it "now or hereafter" owns and operates. But that statute provides that the municipality has the power to "[a]cquire, improve, operate and maintain within and/or without the corporate or county limits of such municipality, and within the corporate limits of any other municipality, *with the consent of such other municipality*, an electric plant...."

T.C.A. § 5-1-113 appears to give counties broad general authority to enter into "contractual relations" with municipalities lying within their boundaries, to "conduct, operate or maintain, either jointly or otherwise, desirable and necessary services or functions." They also have the power to "contract and be contracted with" under T.C.A. § 5-1-118(1). T.C.A. §§ 5-16-101 *et seq.* authorize counties to establish and operate urban type public facilities, including sewer systems. Section 5-16-109(a) gives the board, with the approval of the county legislative body, broad authority to enter into contracts with municipalities and other governments "for the furnishing of services and facilities within the purview of this chapter...."

Among the utility laws that give both cities and counties the authority to establish and operate sewer systems outside their territorial limits, T.C.A. §§ 7-34-101 *et seq.* obliquely permit both entities to provide sewer service in the other, by consent [T.C.A. § 7-34-105]. It is not clear whether the same is true under T.C.A. §§ 7-52-101 *et seq.* That statute specifically applies to electric systems, but cities and counties may also transfer to the utility board various utilities, including sewer systems [T.C.A. § 7-52-111]. One of the powers of such utility boards is the power to extend *electric* service across city and county lines, with the consent of the city or county in question. That power may not apply to a sewer system operated by the utility board.

Franchise and Police Power Fees

Reference Number: MTAS-727

Paris v. Paris-Henry County Utility District, 340 S.W.2d 885 (Tenn. 1960), supports the proposition that municipalities can charge a franchise fee for the use of their streets by public utilities, as well as certain police power fees, the former of which are imposed under a municipality's proprietary, the latter under a municipality's governmental, powers. An ordinance in that case gave the utility district a franchise to use the city's streets for the installation of its gas pipes, but did not provide for a franchise fee. The Court said that, the "*fees, charges, or licenses," referred to in that franchise, "were a matter of contract, or rather were forbidden by the contract, between Defendant and the City acting in its proprietary capacity*" [At 889] [Emphasis mine]. The Court cited for support *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931).

In *Lewis v. Nashville Gas & Heating Co,* Section 14 of the franchise agreement provided for the payment of 5 percent of Nashville Gas & Heating's revenues to the City of Nashville. After concluding that the city had authority in its charter to control its streets and regulate the granting of franchises, and that the statutes giving the Public Service Commission the power to regulate utilities did not supercede the city's right to require the utility to obtain a franchise to use its streets, the Court discussed at length the nature and implications of franchises.

Under the statutes referred to, the gas company's franchise was dependent upon approval and consent of the municipal government and upon such terms and conditions as it might impose. The power to assent and impose conditions thus recognized by the Legislature carried with it the correlative right of the city to make terms and impose conditions [Citations omitted].

The annual payments which the gas company agreed to make to induce the city to let it in and to use then existing and subsequently extended streets were not exacted through the exercise of governmental power. The provision of Section 14 of the ordinance requiring these payments was the result of negotiations, culminating in a contract between the city acting in its corporate and proprietary capacity and the gas company exercising its power to contract.

One of the conditions which a municipal corporation can lawfully attach to the grant of a franchise is the payment of money; and the payment need not be such as imposed upon all others similarly situated, as

in the case of a tax, or the equivalent of the cost of inspection and replacement, as in the case of a license fee imposed under the police power, but may be a definite sum arbitrarily selected, and if the company does not wish to pay it need not accept the franchise....

The gas company having voluntarily obligated itself, as provided in Section 14 of Ordinance 155, the continued exaction of the payment thereunder violates no right guaranteed by the State or the Federal Constitution [At 412-13].

Also see *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941).

Under T.C.A. § 9-21-107, a city may contract with another city to provide gas within its municipal boundaries, as it was found in **Town of Middleton v. City of Bolivar,** Slip Copy, 2012 WL 286596 (Tenn.Ct.App.,2012). In 1953 and 1954 respectively, the Town of Middleton and the Town of Whiteville passed ordinances based upon an agreement reached between them and the City of Bolivar. Under these ordinances, the Bolivar Gas Company was granted the right to occupy property within Middleton and Whiteville's corporate limits for purposes of providing gas to the residential and commercial consumers located in Whiteville and Middleton. The Court of Appeals ultimately upheld an arrangement between the cities, but the case illustrates the complexities of how such agreements need be financially structured and reduced to an interlocal agreement.

The franchise fee-police power fee distinction appears again in the unreported case of *City of Chattanooga v. Bellsouth Telecommunications*, 2000 WL 122199 (Tenn. Ct. App.). There the City of Chattanooga adopted an ordinance imposing a franchise fee of 5 percent of the gross revenues of telecommunications companies using the city's streets. The Court, pointing to *Paris v. Paris-Henry County Utility District*, 340 S.W.2d 885 (Tenn. 1960), and other cases, declared that any fee charged by the city must rely upon the city's governmental (police power), rather than its proprietary, powers. The Court did not mention T.C.A. § 65-21-103, which authorizes municipalities to charge telegraph and telephone companies police power "rent," but declared that because two of the parties to the case already had a franchise (which apparently did not provide for a franchise fee) which were not subject to alteration, and because the city could not discriminate against the providers of telecommunications service, the city could not impose franchise fees upon any of the parties. The 5 percent franchise fee could not survive as a police power rent because it bore no relationship to the city's cost of regulating the telecommunications provider’s use of the streets.

Cable Television Franchises

Reference Number: MTAS-812

The Cable Television Act of 1977, found at T.C.A. § 7-59-101, expressly declares that

The governing body of *each municipality in each county in this state* [T.C.A. § 7- 59-102 (2015)] has the power and authority to regulate the operation of any cable television company which serves customers within its territorial limits, by the issuance of franchise licenses after public notice and showing the terms of any proposed franchise agreement and public initiation for fees and not inconsistent with any rules and regulations of the federal communications commission [Emphasis is mine].

Cable television providers must also obtain a franchise to use municipal streets to provide such services [T.C.A. §§ 7-59-101 *et seq.*; *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338 (Tenn. App. 1991)].

The Cable Television Act of 1977 provides that, "A county shall not issue a franchise within any municipality" [T.C.A. § 7-59-101(c)]. In addition, 1999 amendments to that Act provide that even electrical systems operating under the Municipal Electrical Plant Law of 1935, and that provide cable television services, must obtain a franchise "from the appropriate municipal governing body or county governing body" [T.C.A.§ 7-59-102], and that

Nothing contained in this section shall be interpreted to limit the authority of the franchising authority to collect franchise fees, control and regulate its streets and public ways, or enforce its powers to provide for the public health, safety and welfare [T.C.A. § 7-59-102(k)].

That Act and its 1999 and extensive 2008 amendments undoubtedly speak of the "municipality" of the "county," and of the "franchising authority," respectively, as an incorporated municipality within a county, as the territory in the county excluding incorporated municipalities, and as the municipality when the

cable television service is provided within a municipality, and as the county when the cable television service is provided within a county outside an incorporated municipality.

Limiting Character of Franchises

Reference Number: MTAS-1476

Changing terms of a franchise. Rights vest in the franchise holder during the life of the franchise. Generally, those rights cannot be impaired or revoked by the municipality [*City of Paris v. Paris-Henry County Public Utility District*, 340 S.W.2d 865 (Tenn. 1960)]. It is further said in *City of Chattanooga v. Tennessee Electric Power Company*, 112 S.W.2d 385 (Tenn. 1938), citing 12 R.C.L. 213, 214, that

The grant of a franchise to a public utility company is, according to the weight of authority, a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the municipality making the grant. If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy [At 389-90].

Footnote 3 of *James Cable Partners, L.P., v. City of Jamestown*, 818 S.W.2d 338 (Tenn. Ct. App. 1992), declares that

Once an ordinance which grants a franchise is accepted and "all conditions imposed instant to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a vested right." 12 McQuillin, *Municipal Corporations* § 34.06. This contract once established has the same status and effect as any other contract enforceable under the law [36 Am.Jur.2d Franchises § 6 (1968)].

The contractual nature of franchises severely limits the right of municipalities to charge franchise fees where there is no record in the initial or subsequent line of franchises that provide for such fees.

Regulation of Franchises

Reference Number: MTAS-1477

T.C.A. Title 65, particularly Chapters 4 and 5, give the Tennessee Public Utility Commission extensive authority to regulate privately owed public utilities, and limited authority to regulate municipally owned public utilities. Tennessee municipal utilities are expressly excluded from the definition of "public utilities" for those purposes in T.C.A. § 65-4-101(a)(2). But the Tennessee Public Utility Commission's regulation of municipal utilities comes through its right to regulate the relationship between public utilities and municipalities.

Franchise payments by a public utility for the use of municipal streets made after February 24, 1961, are, insofar as practicable, to be billed pro rata to the public utility's customers. T.C.A. § 65-4-105(e).

Franchises granted to any public utility by the state or any political subdivision must have the approval of the Tennessee Public Utility Commission, which must hold a hearing to determine whether the franchise is necessary for the public convenience. T.C.A. § 65-4-107. T.C.A. § 65-4-201 prohibits a public utility from extending services to a municipality already being served by another utility unless it obtains a certificate of convenience.

A public utility can appeal to the Tennessee Public Utility Commission any order or regulation made by a municipality, and the Tennessee Public Utility Commission can resolve such an appeal. T.C.A. § 65-4-109.

Administrative changes made to this chapter on April 27, 2018 pursuant to Public Chapter 94 of 2017; “Tennessee Regulatory Authority” references were changed to “Tennessee Public Utility Commission,” “Authority” references were changed to “Commission,” “Authority Director” references were changed to “Commissioner,” and “Chief” references were changed to “Director.”