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State or Municipal Franchise?

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Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

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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Postal's argument that various acts under which the city was vested with the "entire control" of its streets was superceded by Public Acts 1885, Chapter 66, Section 1 of which is presently codified as T.C.A. §§ 65-21-201—202.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].

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[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).


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