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Franchise and Police Power Fees

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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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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.

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