S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

September 20, 2000

Opinion No. 00-145

Franchise Agreement by City of Franklin

QUESTIONS

1. Is the City of Franklin authorized to impose a franchise fee on the Middle Tennessee Electric Membership Cooperative for use of city rights-of-way as part of its renewal of its franchise agreement?

2. Is the electric cooperative authorized to pass this cost on to its customers?

OPINIONS

1. Yes, the city may impose a reasonable fee upon the Cooperative for the use of city rights-of-way.

2. We think a court would conclude that a franchise fee paid to a city for use of city rights-of-way is an expense of the Cooperative that may be reflected in its rates to customers.

ANALYSIS

This opinion concerns negotiations between the City of Franklin and the Middle Tennessee Electric Membership Cooperative (the "Cooperative") to renew the city's franchise agreement with the Cooperative. The request indicates that the city recently passed an ordinance for renewal of this agreement. This Office has not reviewed the agreement in question, the ordinance passed by the city council, or the charter of the Cooperative. This opinion will address whether, under the Franklin City Charter and statutes of general applicability, the city may impose a franchise fee and the Cooperative may pass the fee to its customers.

The Franklin City Charter expressly provides:

> The City shall have power to:
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> * * * *
>
> (9) Grant to any person, firm, association, or corporation franchises for public utilities and public services to be furnished the city and those therein. Such power to grant franchises shall embrace

> the power hereby expressly conferred, to grant exclusive franchises, and whenever an exclusive franchise is granted, it shall be
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> exclusive not only as against any other person, firm, association, or corporation, but also as against the city itself. Franchises may be granted for the period of thirty (30) years or less, but no longer. The Council may prescribe in each grant of a franchise, the rate, fares, charges, and regulations that may be made by the grantee of the franchise. Franchises may by their terms apply to the territory within the corporate limits of the city at the date of the franchises, and as said corporate limits thereafter may be enlarged; and to the then existing streets, alleys, and other thoroughfares that thereafter may be opened.

Franklin City Charter, § 1(9). This Office has concluded that a similar statutory provision applicable to cities incorporated under the mayor-aldermanic form of government includes the power to levy a franchise fee by clear implication. Op. Tenn. Atty. Gen. 98-233 (December 15, 1998).[1] Further, the request refers to Tenn. Code Ann. §§ 65-25-201, *et seq.*, regarding electric cooperatives. We assume, therefore, that the Cooperative is organized and operates under this statutory scheme. Under Tenn. Code Ann. § 65-25-205(a)(11), electric cooperatives are generally authorized to build and maintain power lines along public thoroughfares, with the following caveat:

> provided, that the respective authorities having jurisdiction thereover shall consent thereto; provided, however, that such consent shall not be *unreasonably withheld or conditioned* or withheld or conditioned for the purpose of enabling such an authority to gain competitive advantage with respect to the rendition by itself or any other entity of a service which the cooperative also has a right to render[.]

Tenn. Code Ann. § 65-25-205(a)(11) (Supp. 1999) (emphasis added). We conclude that the city charter and this statute, read together, authorize the City of Franklin to impose a reasonable fee upon the Cooperative for the use of city rights-of-way.

The second question is whether the Cooperative may pass the franchise fee to its customers. As noted above, we assume that the Cooperative is organized and operates under Tenn. Code Ann. §§ 65-25-201, *et seq.* Electric cooperatives are nonprofit organizations. Tenn. Code Ann. § 65-25-203. Under Tenn. Code Ann. § 65-25-212, an electric cooperative must return excess revenues to its customers, either as a refund or in reduced rates. But this statute applies to revenues in excess of the amount necessary to defray its expenses, pay its debt and provide for other matters listed in

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[1] The 1998 opinion notes that a privilege or franchise granted to a "public utility" by a political subdivision of the State must be approved by the Tennessee Regulatory Authority under Tenn. Code Ann. § 65-4-107. But the term "public utility" under this statute does not include any cooperative organization, association or corporation not organized or doing business for profit. Tenn. Code Ann. § 65-4-101(a)(5). It therefore appears that a franchise agreement between a city and an electric cooperative is not subject to approval by the Tennessee Regulatory Authority.

the statute. We think a court would conclude that a franchise fee paid to a city for use of city rights-of-way is an expense of the Cooperative that may be reflected in its rates to customers.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable L. Mike Williams
State Representative
17 Legislative Plaza
Nashville, TN 37243