

STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 05-006

Sale of Memphis Light, Gas and Water

QUESTIONS

1. Memphis Light, Gas and Water ("MLGW") is a division of the City of Memphis. May its Board of Directors sell MLGW, or does it require a referendum of the customers?
2. If a customer referendum is required, would the customers be the residents of the City of Memphis or also the residents of Shelby County that use services from MLGW?
3. Could the MLGW Board of Directors recommend a sale with the approval of the Memphis City Council?
4. What is the procedure for selling MLGW?

OPINIONS

1. MLGW is a department of the city, and no state statute or provision of the Memphis City Charter provides for its sale. The Board of Directors of MLGW may not sell all of its assets without the approval of the Memphis City Council. No state statute or provision of the Memphis City Charter requires the Memphis City Council to obtain customer approval for such a sale. Any sale would also be subject to bond covenants and other contractual obligations of MLGW and the City of Memphis. If the electric plant was acquired with bonds issued under Tenn. Code Ann. §§ 7-52-101, *et seq.*, then its sale must be approved in a referendum election.
2. Since no state statute or provision of the Memphis City Charter requires customer approval for such a sale, this question is moot.
3. Yes.
4. The Memphis City Council may sell its utility systems by approving the contract of sale in a resolution.

ANALYSIS

1. Sale of Memphis Light, Gas and Water Utility Systems

This opinion addresses several questions about the sale of Memphis Light, Gas and Water (“MLGW”). MLGW is not a separately chartered corporation but is a division of the City of Memphis, created by a private act amendment to the Memphis City Charter, 1939 Tenn. Priv. Acts Ch. 381, as subsequently amended. No statute provides for the sale of an entire city department. Since the same result could be accomplished by selling the assets of the department, this opinion will address the authority to sell the utility systems operated by MLGW. Of course, in addition to statutory limitations, such a sale would also have to comply with contractual obligations of MLGW as well as obligations the City of Memphis may have incurred on MLGW’s behalf. These obligations would include bond covenants that are still outstanding. This Office has not reviewed any of these contracts. Interpretation of these contracts should be referred to counsel for MLGW, including bond counsel for outstanding bonds issued to finance any of its assets.

The City of Memphis adopted home rule in 1963. The General Assembly may act with respect to a home rule municipality only by laws that are general in terms and effect. Tenn. Const. art. XI, § 9. A home rule city charter may be amended by ordinance, which must then be approved by a majority vote of qualified city voters voting on the issue. *Id.* A home rule city may amend its charter to provide for its “governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision . . . shall be effective if inconsistent with any general act of the General Assembly.”

As an initial matter, charter restrictions on the sale of MLGW would not be inconsistent with any mandatorily applicable general act of the General Assembly. No general law prohibits the sale of a city utility. The Tennessee Supreme Court has concluded that a utility district is not authorized to sell its system and terminate its corporate existence. *United Cities Gas Co. v. Wigington*, 815 S.W.2d 506, 508 (Tenn. 1991). But that conclusion was based on the reasoning that a utility district was created and exists for the purpose of providing utilities to its customers. By contrast, MLGW is a department of the City of Memphis, not a separate legal entity. Since the sale would only affect one department of the city as a whole, the sale would not cause the City of Memphis to terminate. The reasoning in *Wigington*, therefore, would not necessarily prevent a sale of all the assets of MLGW. In general, statutes authorizing cities to operate public utilities and other public projects expressly provide that they are supplemental to other applicable law. *See, e.g.*, Tenn. Code Ann. § 7-34-118 (sewers and waterworks); 7-35-432 (sewers and waterworks); Tenn. Code Ann. § 7-52-133 (electric companies); Tenn. Code Ann. § 9-21-124 (public works projects).

Article 65 of the Memphis City Charter governs MLGW. MLGW was created under 1939 Tenn. Priv. Acts Ch. 81, and that statute, as amended, appears in Article 65. In 1980, city voters also adopted Ordinance No. 3054 amending the Charter regarding the management of MLGW. The Ordinance does not contain direct amendments to Article 65, but modifies and clarifies certain provisions of that Article. The Ordinance, therefore, must be read in conjunction with Article 65. Under Section 666 of the Memphis City Charter, “[a]ny municipal utility system or systems

heretofore or hereafter acquired *by the City of Memphis* for the manufacture, production, distribution or sale of electricity, natural or artificial gas, or water, and the properties, agencies and facilities used for any such purpose or purposes” will be under the jurisdiction of MLGW. (emphasis added). Under Section 684 of the Memphis City Charter, title to property condemned by MLGW must be taken in the name of the City of Memphis. Presumably, then, utility property managed by MLGW is property of the City of Memphis.

MLGW is a division with a board of light, gas, and water commissioners. Charter, § 667. MLGW is subject to supervision by the City Council in several respects. MLGW is required to submit its annual budget to the City Council. Memphis Municipal Code, 2-258. Under the 1980 Ordinance, “[a]ny matters requiring Council approval shall be forwarded through the Mayor’s designated liaison to the City Council for approval.” The Ordinance also provides that the Memphis City Council may by ordinance raise the compensation for MLGW employees “or others requiring City Council approval.” Under the Ordinance, the MLGW commissioners have the power and authority to “construct, purchase, improve, operate and maintain, within the corporate limits or elsewhere within the limits of Shelby County, or as permitted by State law . . . energy systems . . . including all necessary equipment, property, rights-of-way, easements, and all other appurtenances usual for such facilities.” The Ordinance also provides that the MLGW board:

shall have the right to make any and all contracts concerning such energy systems in accordance with the provisions now provided for contracts and have all other powers which presently exist in said Board as now provided in the Charter of the City of Memphis. The Memphis Light, Gas & Water Division, *with the consent of the City Council*, may contract with any person, federal agency, municipality, or public or private corporation for the construction or purchase of energy systems including joint ventures, partnership, or other financial arrangements under such terms and conditions *as are approved by the City Council*.

Ordinance, § 1 (emphasis added). The MLGW is given broad authority to manage and maintain electric, gas, and water systems. Memphis City Charter, § 677 (electric), § 678 (gas), § 679 (water). But the charter does not expressly authorize MLGW to sell an entire utility system. In addition, the charter places certain limits on MLGW’s authority to contract. Under Section 681 of the Memphis City Charter, the MLGW commissioners may not make a contract entailing an obligation or involving an expenditure in excess of five thousand dollars without the approval of the Memphis City Council. Under Charter Section 686, the MLGW commissioners may not issue any obligations constituting a lien upon utility properties except with the consent of the Memphis City Council. Based on all these provisions, and given the absence of any provision in the Charter expressly authorizing MGLW to dispose of an entire utility system, it appears that the MLGW commissioners could not sell all MLGW’s assets without the approval of the Memphis City Council.

At the same time, the Memphis City Council is generally authorized to sell city property. Article 50, Section 452 of the Memphis City Charter authorizes the governing authorities to convey any property held by the City of Memphis “not used for municipal purposes.” Article 78, Section

869 of the Memphis City Charter grants the City broad powers to acquire and dispose of any property in connection with a public works project. The term “public works project” explicitly includes electric and water utilities. Memphis City Charter, § 868. In addition, cities have broad powers to acquire, operate, and dispose of public works projects under Tenn. Code Ann. §§ 9-21-101, *et seq.* Tenn. Code Ann. § 9-21-107(10). “Public works project” includes electric, water, and natural gas systems. Tenn. Code Ann. § 9-21-105(21)(A). Under these statutes, the Memphis City Council is authorized to approve the sale of utility systems operated by MLGW.

No statute requires customer approval for the sale of utility systems owned by the City of Memphis. If the electric plant was acquired with bonds issued under Tenn. Code Ann. §§ 7-52-101, *et seq.*, then its sale must be approved in a referendum election. Tenn. Code Ann. § 7-52-132.

2. Requirement of Customer Approval

Neither the Memphis City Charter nor any applicable statute requires MLGW customers to approve the sale of its utility systems. For this reason, Question 2 is moot.

3. Sale of Utility System by Memphis City Council

The next question is whether the MLGW Board of Directors is authorized to recommend a sale of its utility systems with the approval of the Memphis City Council. This recommendation would fall within the board’s power to manage and operate the utility systems under its control. Further, as discussed above, the Memphis City Council is authorized to sell city utility systems.

4. Procedure for Selling Utility Systems

The last question is the procedure for selling MLGW utility systems. Neither the Memphis City Charter nor the Memphis Municipal Code addresses the procedure for selling city property. No state statute requires the sale of city property to be authorized by a municipal ordinance. In the absence of any mandatory requirement set forth in the charter or other statute, a city contract may be authorized by a resolution of the municipal governing body. *Keenan & Wade v. City of Trenton*, 130 Tenn. 71, 168 S.W. 1053, 1055 (1914); McQuillin, *Municipal Corporations* § 29.19 (1999). The Memphis City Council, therefore, may sell its utility systems by approving the contract of sale in a resolution.

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