BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	'02 APR 15 PM 2 56
	)	OFFICE OF THE
UNITED CITIES GAS PETITION FOR	)	EXECUTIVE SECRETARY
APPROVAL OF NEW OR REVISED	)	Docket No. 00-00562
FRANCHISE AGREEMENTS WITH	)	
KINGSPORT, BRISTOL, MORRISTOWN	)	
AND MAURY COUNTY	)	
	)	
	)	

REPLY OF UNITED CITIES GAS COMPANY TO ATTORNEY GENERAL'S POST-HEARING BRIEF

United Cities Gas Company ("United Cities"), submits this reply to the post-hearing brief filed on April 8, 2002 by the Consumer Advocate and Protection Division of the Office of the Attorney General (the "Attorney General").

The Attorney General intervened in this case and objected to United Cities' request for approval of the Bristol and Morristown franchise agreements on the grounds that the agreements impose franchise fees based on gross revenues, which the Attorney General alleges violates the Tennessee Court of Appeals holding in City of Chattanooga v. BellSouth Telecommunications, Inc., No. E1999-01573-COA-R3-CV, 2000 WL 122199 (Tenn. Ct. App. Jan. 26, 2000). (2/15/02 Order Denying Mot. for Partial Summ. p.2.) In its February 15, 2002 Order, the Authority held that under the BellSouth case, if the cities were acting in their proprietary capacity, the franchise agreements may include franchise fees unrelated to the costs they incur by virtue of United Cities' use of the public streets. (Order p. 24.) It is only if the cities imposed the franchise fees in their governmental capacities that the fees must be related to costs. (Id.)

In the Order, the Authority found that the only criterion the BellSouth court offered for making the threshold determination of whether the cities acted in proprietary or governmental capacity was whether the cities altered or revoked previously granted franchise rights. (Order p. 24.) The BellSouth court found that the franchise imposed in that case was a governmental, not proprietary action, because the fee ordinance was passed without negotiations with or the consent of the utilities involved. Instead the BellSouth fee ordinance retroactively and unilaterally nullified the utilities' existing franchise agreements, which did not include the franchise fee imposed by ordinance. (Order p. 25.)

After reviewing the BellSouth case, the Authority made the following ruling regarding the legal standards that would apply in this case:

> If United Cities produces evidence sufficient to show that the Bristol, Morristown, and Kingsport franchise fee provisions are the result of negotiations between those municipalities and United Cities and United Cities consents to such provisions, United Cities will have established that the provisions were made pursuant to the municipalities' proprietary capacity...If United Cities does not make the requisite showing of negotiations and consent, and it appears that one or more of the franchises alters or revokes pre-existing franchise rights held by United Cities, the municipality must be held to have acted in its governmental capacity, and any franchise fee, to be valid, must be related to the costs incurred by the municipality as a result of the franchise.

(Order pp. 26-27.) The testimony at the March 14, 2002 hearing in this matter clearly established that the franchise fees were not unilaterally imposed, but were the product of negotiations between the cities and United Cities and were included in the franchise agreements upon consent of both parties. As such, the cities acted in their proprietary capacities and the franchise fees are not invalid because they are based on gross revenues and not the actual costs incurred by the cities. In addition, the testimony clearly established, as required by Tenn. Code Ann. § 65-4-107, that the franchise agreements are "necessary and proper for the public convenience and properly conserve the public interest."

In its post-hearing brief, the Attorney General does not contest that the franchise agreements are necessary and proper for the public convenience and properly conserve the public interest, but instead focuses on whether the testimony established that the cities were acting in their proprietary capacity. The brief begins with a glaring misstatement of the law. The Attorney General states that "this Authority, after its review of the current law, may find it lacking or outdated and determine that modifications to the current law are appropriate." (Brief p. 2.) This is the exact reverse of the actual nature of the Authority's power. As recognized in the Authority's February 15 order in this case the Authority is not a lawmaking body, but must merely implement the law as set forth by the legislature and courts. (Order p. 22.)

The governing law in this case was concisely set forth in the Authority's February 15 Order: if the franchise fees were included in the agreements as a result of negotiations and were consented to by United Cities, the fees did not impair or revoke previously existing franchise rights and were thus within the cities' proprietary capacity. In its brief, the Attorney General concedes that the franchise agreements were negotiated, but argues that the fees were not the result of "arms-length" negotiations because they were colored by the "economic stress" that United Cities was under. Even assuming the Attorney General's characterization of the negotiations were correct (which the testimony directly contradicts) it makes no difference. The standard is whether there were negotiations and consent, not whether the negotiations were "arms length" or free from economic realities. The testimony clearly established that, unlike the franchise fee in the BellSouth case, which was imposed by ordinance and not accepted by the utilities, the Bristol and Morristown franchise fees were part of a franchise agreement freely negotiated and consented to by both parties.

The Authority explicitly recognized in its February 15 Order that the cities' proprietary power to contract includes "the ability to modify the terms of an agreement after negotiations with and with the consent of the other party, as well as to enter into an entirely new agreement with the other party." (Order p. 26.) That is precisely what happened in this case. In the case of the Morristown franchise, the previous franchise had expired, and the parties negotiated a new one. (Tr. p. 78.) In Bristol, United Cities agreed to enter into negotiations which involved various concessions on both sides and which resulted in a modification of the existing franchise agreement. (Tr. pp. 141-49.) In neither instance did the cities do what was invalidated in the BellSouth case. In BellSouth, the city of Chattanooga passed an fee ordinance, without negotiating with or obtaining the consent of the utilities, which nullified the utilities' existing franchise agreements, which did not provide for such a fee. The sole reason the BellSouth court found that the city of Chattanooga was acting in its governmental capacity in that case was because the city's fee ordinance changed the terms of the existing franchise agreements without the acceptance or consent of the utilities.

In its brief, the Attorney General also argues that regardless of the BellSouth case, the Authority should nevertheless consider the "reasonableness" of the fee and that the fee must have some relation to the rental value of the rights of way. (Br. p. 12.) The sole authority the Attorney General cites in support of this proposition is the statutory rate-making provision, Tenn. Code Ann. § 65-5-201. That statute has no relevance whatsoever to the determination of the validity of franchise fees imposed by municipalities. The statute gives the Authority the power to fix just and reasonable rates to be **imposed by public utilities**. Tenn. Code Ann. § 65-5-201. It does not restrict in any manner the franchise fees **imposed by municipalities,** nor does it impair the municipalities' statutory right to impose franchise fees set forth in Tenn. Code Ann.

§§ 65-26-101 and 65-4-105(e) and repeatedly affirmed by the Tennessee Supreme Court in Nashville Gas & Heating Co. v. City of Nashville, 152 S.W.2d 229 (Tenn. 1941) and Lewis v. Nashville Gas & Heating Co., 40 S.W.2d 409 (Tenn. 1931).

There is no authority whatsoever for the Attorney General's assertion that the franchise fees must be reasonable or somehow related to the rental value of the streets. In fact, the Tennessee Supreme Court has specifically held numerous times that the franchise fees "may be a definite sum arbitrarily selected." City of Nashville, 152 S.W.2d at 233; Lewis, 40 S.W.2d at 413.

The Attorney General's objections to the Bristol and Morristown franchises boil down to a pure policy argument: the Attorney General claims that it is unfair that the cities and utilities together set the amount of the franchise fee that is ultimately paid by the consumers. However "unfair" the Attorney General may think it is, that is the legal framework that has been structured by the state legislature and the Tennessee Supreme Court. The legislature has expressly granted municipalities the power to impose franchise fees. Tenn. Code Ann. §§ 65-26-101 and 65-4-105(e). The legislature has also specifically required that those franchise fees be billed to the consumers. Tenn. Code Ann. § 65-4-105(e). The Tennessee Supreme Court has held repeatedly that a city can impose whatever amount franchise fee it desires, as long as the city first obtains the utility's consent through negotiations, regardless of whether the franchise fee has any relation whatsoever to the actual costs incurred or the rental value of the streets. BellSouth, 2000 WL 122199 at *1; City of Nashville, 152 S.W.2d at 233; Lewis, 40 S.W.2d at 413. The Attorney General is arguing for a change in the law. Despite the Attorney General's unsupported assertions to the contrary, the Authority is not empowered to change the law.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, to the following person(s) , this 15th day of April, 2002.

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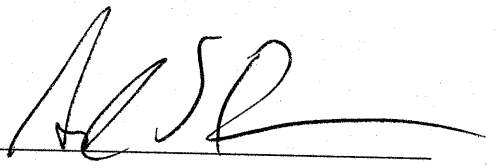
By: 

The testimony at the hearing in this matter clearly established that Morristown and Bristol obtained United Cities' consent to the franchise fees through negotiations before the fees were included in the franchise agreements. As such, it cannot be argued that the cities were acting in anything but their proprietary capacities, and the fees are valid. The testimony also established that the franchise agreements are necessary for the public convenience and properly conserve the public interest. Therefore, United Cities respectfully requests that the franchise agreements be approved.

Respectfully submitted,
BAKER, DONELSON, BEARMAN,
& CALDWELL, P.C.

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