BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 15, 2002

IN RE:	)	
	)	
PETITION OF UNITED CITIES GAS FOR APPROVAL OF VARIOUS FRANCHISE AGREEMENTS	)	**DOCKET NO. 00-00562**
	)	
	)	

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT WITHOUT PREJUDICE

This matter is before the Hearing Officer for consideration of the *Motion for Partial Summary Judgment* (the "*Motion*") filed by United Cities Gas Company ("United Cities" or the "Company").

Background

United Cities filed its *Petition for Approval of Various Franchise Agreements* (the "*Petition*") on June 30, 2000, in which it requests Authority approval, pursuant to Tenn. Code Ann. § 65-4-107, of franchise agreements contained in ordinances and resolutions passed by three municipalities and one county. As stated in United Cities' *Petition*, the pertinent resolution or ordinance and the terms of each franchise agreement are as follows:

a) City of Kingsport ordinance effective April 5, 2000 for a term of 20 years;
b) City of Bristol ordinance effective November 8, 1999 for a term of 30 years;
c) City of Morristown ordinance effective January 4, 2000 for a term of 18 years;
d) Maury County resolution effective October 18, 1999 for a term of 30 years.[1]

On August 15, 2000, the Consumer Advocate and Protection Division of the Office of Attorney General (the "Consumer Advocate") filed a *Petition for Information, Or*

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[1] *Petition*, pp. 1-2.

Alternatively to Intervene (the "*Petition to Intervene*"). The Consumer Advocate challenged certain provisions regarding franchise fees in the Kingsport, Bristol, and Morristown franchise ordinances. The Consumer Advocate also objected to a provision in the Kingsport ordinance which, the Consumer Advocate stated, purports to impose non pro rata billing of United Cities' customers for franchise fees, in violation of Tenn. Code Ann. § 65-4-105.[2] The Consumer Advocate objected to the Bristol and Morristown franchise agreements, on the grounds that they require United Cities to pay franchise fees to the cities based on gross revenues, which, the Consumer Advocate alleges, violates a recent holding of the Tennessee Court of Appeals, *City of Chattanooga v. BellSouth Telecommunications, Inc.*, No. E1999-01573-COA-R3-CV, 2000 WL 122199, at *3 (Tenn. App. Jan. 26, 2000).[3] The Consumer Advocate filed a list of eight (8) questions to be answered by United Cities as an attachment to its *Petition to Intervene*.

The Consumer Advocate requested, pursuant to Tenn. Code Ann. § 65-4-118(c)(2)(B), that the Authority obtain information from United Cities regarding the actual cost to Kingsport, Bristol, and Morristown of the use of their rights of way and facilities by United Cities, and further that the Authority suspend a hearing on the Kingsport, Bristol, and Morristown agreements until United Cities provides information sought by the Consumer Advocate in its *Petition to Intervene*. At the August 29, 2000 Authority Conference, the counsel for the Consumer Advocate informed the Directors of the Authority that the Consumer Advocate no longer objected to or sought intervention as to the Maury County franchise agreement.[4]

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[2] *Petition to Intervene*, p. 3.
[3] *Id.*
[4] Transcript of Authority Conference, August 29, 2000, pp. 61-62.

At the August 29, 2000 Authority Conference, the Directors voted unanimously to convene a contested case in this matter and appoint the Authority's General Counsel or his designee as Pre-Hearing Officer, and to grant the Consumer Advocate's *Petition to Intervene* and allow the Consumer Advocate to intervene in this matter as to the Kingsport, Bristol, and Morristown agreements. An Order reflecting this action was issued on October 23, 2000. On October 17, 2001, the Authority received United Cities' response to the questions attached to the Consumer Advocate's *Petition to Intervene.*

On October 26, 2001, United Cities filed a *Motion for Partial Summary Judgment* (the *"Motion"*), along with the *Affidavit of Bob Elam*[5] in support of its *Motion.* On November 14, 2001, the Consumer Advocate filed the *Attorney General's Response to United Cities Gas Company's Motion for Partial Summary Judgment* and *Attorney General's Motion for Extension of Time to Respond.* This filing contained a brief discussion of United Cities' *Motion* and requested additional time to file a further response. This request was granted.[6] On November 21, 2001, the Consumer Advocate filed its *Response to Motion for Partial Summary Judgment* (the "*Response*").

On November 27, 2001, a Pre-Hearing Conference was held for the purpose of hearing oral argument on United Cities Motion. The following parties were in attendance:

> United Cities Gas Company – **Joe A. Conner, Esq.**; 1800 Republic Center, 633 Chestnut Street, Chattanooga, TN 37450
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> The Consumer Advocate and Protection Division of the Office of Attorney General – **Timothy C. Phillips, Esq.**; 425 Fifth Avenue North, Nashville, TN 37243

[5] Filed October 29, 2001.
[6] *Order Granting Attorney General's Motion for Extension of Time to Respond* (November 16, 2001).

Further, on November 27, 2001, the City of Morristown ("Morristown") filed a *Motion to Intervene* and a *Memorandum in Support of the City of Morristown's Motion to Intervene.* On November 30, 2001, the Consumer Advocate filed the *Attorney General's Response to the City of Morristown's Motion to Intervene.* In its filing, the Consumer Advocate did not object to Morristown's request for intervention, but rather disputed certain comments made in Morristown's *Memorandum* regarding the franchise fees. On December 11, 2001, the City of Bristol ("Bristol") filed the *Motion of City of Bristol to Intervene.* Both Morristown and Bristol have been granted intervention in this proceeding.[7]

Franchise Fee Provisions in the Contested Ordinances

Section III of Bristol Ordinance No. 99-13 requires United Cities to "pay the City during the remaining term of this franchise an amount equal to six (6%) percent of its annual gross revenues from the sale of the Company's manufactured, natural or co-mingled gas sold within the City through the system."[8]

Section XVIII of Kingsport Ordinance No. 4742 reserves to the City the right to impose a uniform franchise fee applicable to all of the Company's customers, provided all privately owned suppliers of natural gas within the corporate limits of the City are required to pay an identical franchise fee. Such a fee "shall be based upon a percentage of the Company's gross revenues derived from the retail sale of natural gas within the corporate limits of the City."[9] The amount of the fee "shall not exceed the highest franchise fee percentage then in effect under any other franchise of the Company in the State of Tennessee."[10]

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[7] *Order Granting Motion to Intervene Filed by the City of Morristown* (February 4, 2002); *Order Granting Motion to Intervene Filed by the City of Bristol* (February 4, 2002).
[8] Bristol Ordinance No. 99-13, p. 2, attached to United Cities' *Petition.*
[9] Kingsport Ordinance No. 4742, p. 12, attached to United Cities' *Petition.*
[10] *Id.*

Section IX of Morristown Ordinance No. 3022 requires United Cities to "collect and pay annually to the City a sum equal to five percent (5%) of the gross receipts from retail gas sales."[11]

POSITIONS OF THE PARTIES

The Consumer Advocate's *Petition to Intervene*

In its *Petition to Intervene*, the Consumer Advocate cites the Tennessee Court of Appeals' decision in *City of Chattanooga v. BellSouth Telecommunications, Inc.*, No. E1999-01573-COA-R3-CV, 2000 WL 122199 (Tenn.App. Jan. 26, 2000), as barring the franchise agreements with Kingsport and Bristol.[12] The Consumer Advocate states: "the relationship of the cost of gas sold or a company's receipts bear no relationship to a just rate for the use of a city's rights of way and facilities. Furthermore, the Franchise Agreement will increase the exaction from Tennessee consumers solely on the basis of increases in the cost of gas."[13]

United Cities' Response to the Consumer Advocate's Questions

In response to question No. 4[14] submitted with the *Petition to Intervene*, United Cities cited Tenn. Code Ann. §§ 65-4-105(e) and 65-26-101. United Cities also cited *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931), in which, United Cities states, the Tennessee Supreme Court "held that § 65-26-101 gives cities the right to negotiate a contract, in their proprietary capacity, that requires the gas company to pay a franchise fee based on gross revenues."[15]

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[11] Morristown Ordinance No. 3022, p. 4, attached to United Cities' *Petition*.
[12] *Petition to Intervene*, p. 3.
[13] *Id.*, p. 4.
[14] ("Please provide the statutory authority for a city to charge UCG a franchise fee based on a percentage of revenues").
[15] United Cities' Response to Consumer Advocate's Questions, p. 2.

In response to question No. 5 ("If UCG supports the proposed franchise fees as being legal, please provide the rationale that differentiates UCG's situation from the appellants in *City of Chattanooga v. BellSouth*"), United Cities stated that in *City of Chattanooga* the Court of Appeals did not overrule either *Lewis* or *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941), a subsequent case in which the Supreme Court "again reaffirmed a city's right to contract, in its proprietary capacity, for franchise fees based on a percentage of revenues."[16] United Cities distinguished *City of Chattanooga* from its own situation by noting that in *City of Chattanooga* the City "was not attempting to enforce a franchise fee that had been established pursuant to individually negotiated contracts, but instead had enacted an ordinance that required all telecommunications providers to pay a gross receipts fee, including those which had already been granted franchises by the City."[17] Therefore, United Cities states, the Court of Appeals found that the City must necessarily have been acting in its governmental capacity. United Cities concluded,

> Unlike the retroactive franchise ordinance in *BellSouth*, UCG's proposed franchise fees are the result of individual contract negotiations with the various cities. Therefore, the franchise fees are the result of the cities' exercise of their proprietary functions, and under *Lewis v. Nashville Gas & Heating Co.*, are valid. Because the cities are acting in their proprietary, and not governmental capacity in imposing the fees on UCG, the *BellSouth* requirement that the fees be cost-based does not apply.[18]

United Cities' *Motion for Partial Summary Judgment*

In its *Motion*, United Cities requests partial summary judgment on the following issue:

> Whether the decision of the Tennessee Court of Appeals in City of Chattanooga v. BellSouth Telecommunications, et al., 2000 WL 122199 (Tenn. Ct. App. Jan. 26, 2000) renders the franchise fee provisions of the Morristown and Bristol franchise agreements invalid although each

[16] *Id.*, p. 4.
[17] *Id.*
[18] *Id.*, p. 5.

municipality acted in its proprietary capacity in the negotiation of the agreements with United Cities.[19]

United Cities relies on the following statement of the facts, which derives from the Affidavit of Bob Elam:

> When United Cities negotiated the franchise agreements with the City of Morristown and the City of Bristol, it was operating under existing franchise agreements with both municipalities. See Affidavit of Bob Elam. Morristown had granted United Cities a 20-year franchise on December 18, 1979 pursuant to Ordinance No. 2203. This franchise did not initially provide for a franchise fee, although it allowed the City the right to levy such a fee in the future. Morristown exercised this option on January 4, 1983, when it negotiated with United Cities and passed Ordinance No. 2344 which imposed a 5% gross receipts franchise fee on all gas sales by United Cities within the corporate limits of the City. Prior to the expiration of the this [sic] franchise, the City of Morristown passed Ordinance No. 3022 granting United Cities the franchise that is currently before the TRA for approval. This franchise is for a 15-year term, with the same 5% franchise fee on gross receipts from retail gas sales. This new franchise with the City of Morristown resulted from a series of negotiations over the terms and conditions numerous substantive provisions in the agreement. The franchise agreement was extensively modified from its previous form to include several new provisions including maintaining an office within the City, specifying the gas main extension policy and a default and cure provision. The 5% franchise fee, however, remained unchanged. Id.
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> In Bristol, United Cities was operating under the franchise granted by Ordinance No. 95-60 at the time it entered negotiations with the City in 1999. This franchise imposed a 5% franchise fee on gross revenues from the gas sold by United Cities within the City. In 1999, by mutual agreement, the City of Bristol and United Cities entered a series of negotiations to amend the franchise. The negotiations resulted in the agreement that is currently before the TRA for approval. The new agreement extends the franchise for a period of 30 years from the date of amendment, increases the franchise fee by 1%[20] and give the City a right of first refusal to purchase the United Cities assets in the City on the same

[19] *Motion*, p. 3.

[20] The amendment also included a provision to allow the City to increase the franchise fee by 1% every ten years, but not to exceed 8%. Any increase would be subject to TRA approval and subject to refund should it not be approved by the TRA. [Footnote in original].

terms and conditions of any offer presented to United Cities by a third party.[21] Id.

On or about October 5, 1999, the City of Bristol passed Ordinance No. 99-13 on final reading which incorporated the terms and conditions of the amended franchise agreement negotiated between the City and United Cities.

The negotiations between Morristown and Bristol and United Cities were at arms length and resulted in substantive modification of the then-existing franchise agreements. Clearly, both Morristown and Bristol were operating in their proprietary capacities throughout the negotiations. Id.[22]

United Cities argues that the "Consumer Advocate's reliance on the *BellSouth* case is entirely misplaced," because the "Consumer Advocate ignores the legal distinction recognized in BellSouth between a municipality acting in its proprietary capacity verses [sic] its governmental capacity when instituting a franchise fee."[23] United Cities cites the following language from the *Chattanooga* case:

> Acting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way, but in its governmental capacity, it may only act through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee.[24]

United Cities notes that the Court of Appeals held that the City of Chattanooga had acted in its governmental capacity and thus the franchise fee imposed by the City "had to bear a reasonable relation to the cost of the regulation."[25] United Cities states that the "actions taken by the City of Chattanooga in the BellSouth case are totally distinguishable from the steps taken by either Morristown or Bristol in our case":

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[21] A statutory merger, consolidation recapitalization, or sale or transfer of the common stock of the company would not constitute a sale subject to the right of first refusal provisions. The City would have a 60-day period to exercise the right and an additional 60 days to close the transaction. [Footnote in original].
[22] *Motion*, pp. 2-3.
[23] *Id.*, p. 4.
[24] *City of Chattanooga*, 2000 WL 122199, at *1.
[25] *Motion*, p. 4, *citing City of Chattanooga*, 2000 WL 122199, at *1.

> First, Chattanooga adopted an ordinance which imposed the 5% gross revenue fee across the board on all companies providing telecommunication services within the City. Second, Chattanooga passed the ordinance without negotiating with the individual companies then providing or planning to provide telecommunication services within the City. Third, two of the defendants held prior franchise agreements with the City that did not provide for a 5% franchise fee. The ordinance at issue served to retroactively modify the pre-existing franchise agreements.
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> In the instant action, United Cities entered into direct negotiations with Bristol and Morristown. Substantive negotiations were conducted with both municipalities which resulted in specific modifications of several provisions in the agreements. In the case of Morristown, the fee was not changed. Although the fee was modified in the Bristol agreement by one percent, other substantive changes were made. Unlike the City of Chattanooga, neither Bristol or Morristown acted unilaterally to increase the franchise fee, nor did they apply increase [sic] fees retroactively in disregard of existing agreements or pass ordinances which imposed a higher uniform fee on a general class of industries or utilities.[26]

United Cities concludes, "Accordingly, the Consumer Advocate's objection to the franchise fees imposed in the Bristol and Morristown franchise agreements based on the holding in the BellSouth case is misplaced and should be dismissed."[27]

The Consumer Advocate's *Response* to United Cities' *Motion*

In its *Response*, the Consumer Advocate does not rely exclusively on *City of Chattanooga*, but rather states three grounds for objection to United Cities' *Motion*. The *Response* states that "the request by United Cities is procedurally defective, contrary to the law and sound public policy, and not supported by the facts presented in the record in this docket."[28]

The Consumer Advocate argues that United Cities' *Motion* is procedurally defective because United Cities has not satisfied the requirement of Rule 56 of the Tennessee Rules of

[26] *Motion.*, pp. 4-5 (Emphasis in original).
[27] *Id.*, p. 5.
[28] *Response*, p. 1.

Civil Procedure that a "separate concise statement" of material facts accompany a motion for summary judgment.[29] The Consumer Advocate states that United Cities "appears to assume that the assessments involved are not cost based."[30] The Consumer Advocate then complains that

> since they did not provide the "statement" required in Rule 56 this is not readily apparent. The same holds true for numerous other facts asserted by United Cities, including its claims with respect to the municipalities functioning in their proprietary capacity and United Cities' unsubstantiated claims of arms length negotiations.[31]

Second, the Consumer Advocate argues that allowing the "tax" contained in the franchise agreements "is contrary to sound public policy and the law."[32] The Consumer Advocate begins this argument by explaining that while *City of Chattanooga* is a "rather important case," the Consumer Advocate's objection to the franchise ordinances "extends beyond the issues raised by United Cities in its motion."[33] The Consumer Advocate then states that "[a]pproval of this petition is not appropriate as the petition is contrary to the Tennessee tax structure," and that "the petition is not consistent with sound public policy."[34] The Consumer Advocate states that pursuant to Tenn. Code Ann. § 65-4-107 the Authority must determine whether each of the ordinance provisions involved is "necessary and proper

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[29] Rule 56.03 states, in pertinent part:

> In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

[30] *Response*, p. 2.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

for the public convenience and properly conserves the public interest."[35] The Consumer Advocate states that "[c]learly, a franchise tax based on United Cities' gross revenues has no relation to the city's costs."[36] The Consumer Advocate then questions who would be accountable to those rate-payers, arguing that "[u]nlike franchise agreements of the early 1900s, these ordinances were not submitted to the voters for approval."[37]

The Consumer Advocate argues that the affidavit submitted with the *Motion* does not address and therefore does not support United Cities' central point, which is that the municipalities were acting in their proprietary capacity when they enacted the franchise ordinances.[38] The Consumer Advocate disputes United Cities' claim that the franchises were negotiated between United Cities and the municipalities.[39]

The Consumer Advocate then states:

> More importantly, regardless of which capacity a municipality is acting in, a municipality cannot tax certain things. *See* Tenn. Code Ann. § 67-4-101. Under general revenue law, municipalities may not tax gas, water, or electric companies. Tenn. Code Ann. § 67-4-404.[40] Furthermore, municipalities do not have the power to levy any kind of franchise tax. Tenn. Code Ann. § 67-4-2102.[41]

The Consumer Advocate states that "[n]o concessions will be offered by the Attorney General in this matter on the idea that the measures submitted for approval are anything but a tax," observing that the Morristown ordinances even use the word "tax."[42] The Consumer Advocate cites *City of Chattanooga* in support of this assertion, and argues that "[i]t is simply

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[35] *Id.*, p. 3.
[36] *Id.*
[37] *Id.*
[38] *Id.*, pp. 3-4.
[39] *Id.*, p. 4.
[40] There is no such section. The Consumer Advocate may be referring to Tenn. Code Ann. § 67-4-405, which is discussed further below.
[41] *Response*, p. 4.
[42] *Id.*

not enough to demonstrate the functional capacity of the cities involved, but United Cities has the burden of demonstrating that these measures are not a tax."[43]

The Consumer Advocate states that under Tenn. Code Ann. § 65-21-103, "a municipality is permitted to exact a rental for the use of rights-of-way under its governmental, or police powers."[44] The Consumer Advocate goes on to state, however, that in such circumstances "[t]he fact that the fees charged produce more than the actual cost and expense of enforcement and supervision, is not an adequate objection to the exaction of the fees. *The charge made, however, must bear a reasonable relation to the thing being accomplished.*"[45]

The Consumer Advocate's third argument is that the Bristol and Morristown franchises fall under the restrictions stated in *City of Chattanooga* because these franchises were imposed upon United Cities, thus impairing United Cities' rights. The Consumer Advocate states:

> At the time the City of Bristol and United Cities entered into negotiations for a new franchise agreement, United Cities was operating under the franchise agreement granted by Ordinance No. 95-60. This franchise agreement imposed a five percent fee on all gross revenues received by United Cities from the sale of gas within the City. In 1999, the City of Bristol and United Cities reached an agreement on a new franchise. The new franchise agreement extends the period of the franchise for a period of 30 years from the date of the amendment, gives the City of Bristol a right of first refusal to purchase United Cities' assets in the City of Bristol on the same terms and conditions of any offer presented to United Cities by a third party, and increases the franchise fee by one percent. *See* affidavit of Bob Elam.

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[43] The Consumer Advocate cites the following language:

> An important characteristic and distinguishing feature of a tax is that it is designed and imposed for the purpose of raising revenue. *City of Tullahoma*, 938 S.W.2d at 412; *Memphis Retail Liquor*, 547 S.W.2d at 245-6. If the revenue raised by the government assessment provides a general benefit to the public of a sort typically financed by a general tax, then the assessment will usually be deemed a tax rather than a fee.

City of Chattanooga, 2000 WL 122199, at *6-7, *quoted in Response*, pp. 4-5

[44] *Response*, p. 5.

[45] *Id., quoting City of Chattanooga*, 2000 WL 122199, at *4 (emphasis added in *Response*).

> United Cities also had a prior franchise agreement with the City of Morristown. This franchise was for 20 years and was granted on December 18, 1979 pursuant to Ordinance No. 2203. This franchise agreement did not provide for a franchise fee, but did leave that option open for the City. The City exercised this option in 1983 by imposing a five percent fee on gross receipts on gas sales within the corporate limits of the City. The current franchise before the Authority also places a five percent fee on the gross receipts. This new franchise agreement also requires United Cities to maintain an office within the City, to specify the gas main extension policy, and to specify a default and cure provision. *See id.*[46]

Citing *City of Chattanooga*,[47] the Consumer Advocate argues that these modifications to the preexisting agreements mean that Bristol and Morristown were acting in their governmental capacity.[48] The Consumer Advocate states that "[a]lthough the actions of the city in City of Chattanooga are somewhat dissimilar to the actions taken by the City of Bristol, the City of Bristol still acted to modify the franchise agreement so as to impair the rights of United Cities that the City of Bristol had previously extended."[49]

The Consumer Advocate states that "[a]lthough the court in *Lewis v. Nashville Gas & Heating Co.* did state that a city is acting in its proprietary capacity where a franchise fee is negotiated as a contract between a city and an individual utility, the court in *City of Chattanooga* has since refined this notion by finding that if the negotiations lead to impairment of rights previously given by the city to the utility then the city is acting in its proprietary capacity."[50] The Consumer Advocate also points to "critical differences" between this docket and *Lewis* and *Nashville*.[51] The first difference the Consumer Advocate cites is

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[46] *Response*, pp. 8-9.
[47] "Acting in its proprietary capacity, a municipality may not revoke or impair rights previously given by it to a third party by a subsequent enactment." *City of Chattanooga*, 2000 WL 122199, at *1, *quoted in Response*, p. 9.
[48] *Response*, p. 10.
[49] *Id.*
[50] *Id.*, p. 11.
[51] *Id.*

the age of these two cases. The Consumer Advocate states that "[e]ach predates important tax legislation outlined in this response."[52] The Consumer Advocate adds: "Moreover, and this goes to the concept of what is sound public policy in this case as well, in *Lewis v. Nashville Gas* and *Nashville Gas & Heating Co. v. Nashville* the measures involved called for acceptance by the voters of the special contracts imposing these taxes. This is not the case in the present situation."[53]

In conclusion, the Consumer Advocate states:

> In the instant action, the City of Bristol and the City of Morristown "negotiations" lead [sic] to an increase in the franchise fee (in one instance, the City of Bristol) and requirements that effectively impaired the rights previously given to United Cities by the cities. Because the rights of United Cities were impaired in this manner, according to the *City of Chattanooga*, the City of Bristol and the City of Morristown were acting in their governmental capacities.
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> Because the cities were acting in their governmental capacities, the franchise fee imposed in both of the new franchise agreements must be exacted only by the cities acting through an exercise of [their][54] police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee. Moreover, when exercising police power, any charges exacted by the municipalities must bear a reasonable relation to the objective to be accomplished.
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> Based on the foregoing reasons, the Attorney General requests that the Authority deny United Cities' motion for partial summary judgment. . . .[55]

The Tennessee Court of Appeals' Decision in *City of Chattanooga*

In *City of Chattanooga v. BellSouth Telecommunications, Inc.*, No. E1999-01573-COA-R3-CV, 2000 WL 122199 (Tenn.App. Jan. 26, 2000), several telecommunications providers challenged a 1996 Chattanooga ordinance which required any franchisee occupying

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[52] *Id.*
[53] *Id.*
[54] In brackets in the original.
[55] *Response*, p. 12.

any city right-of-way to pay a franchise fee of five percent (5%) of its gross revenues to the City each year. The Court of Appeals based its decision striking down the ordinance on the distinction between two types of municipal authority: "A municipality has authority to act in either its *proprietary* capacity or its *governmental* capacity."[56] The Court cites *Bristol Tennessee Housing Auth. v. Bristol Gas Corp.*, 407 S.W.2d 681 (Tenn. 1986).[57]

The Court of Appeals in *City of Chattanooga* further states that "[a]cting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way, but in its governmental capacity, it may act only through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee."[58] The Court cites *Bristol Gas* for this principle as well as *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997)[59] and *City of Paris v. Paris-Henry County Public Utility District*, 340 S.W.2d 885

[56] 2000 WL 122199, at *1 (Emphasis provided).

[57] In *Bristol Gas*, the Tennessee Supreme Court held that although the City granted a franchise to the gas company "acting in its proprietary capacity" and the franchise was "a binding contract which cannot be revoked or impaired by the city," nevertheless "such rights are subject to the lawful and reasonable use, by the City, of the police power delegated to it by the state." 407 S.W.2d at 683. Thus the City had the authority, under its police power, to require the gas company to relocate its lines at its own expense.

[58] 2000 WL 122199, at *1.

[59] In *City of Tullahoma*, the Tennessee Supreme Court distinguished between a tax, which is "a revenue raising measure levied for the purpose of paying the government's general debts and liabilities," and a fee, which "is imposed for the purpose of regulating a specific activity or defraying the cost of providing a service or benefit to the party paying the fee." 938 S.W.2d at 412.

(Tenn. 1960).[60]

The Court of Appeals in *City of Chattanooga* determined that the "franchise fees imposed by the Ordinance under consideration must necessarily come under the City's governmental function and not its proprietary function."[61] The reason is that "[a]cting in its proprietary capacity, a municipality may not revoke or impair rights previously given by it to a third party by a subsequent enactment."[62] The Court cites *Bristol Gas* and *Shelby County v. Cumberland Telephone & T. Co.*, 203 S.W. 342 (Tenn. 1918).[63]

The Court of Appeals in *City of Chattanooga* states: "Because two of the defendants hold prior franchises granted to their predecessors, the City may not modify the franchise by imposing a fee under the City's proprietary functions."[64] The Court's reasoning, based on

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[60] In *City of Paris*, the gas utility district operated under a franchise granted by the City in an ordinance, which "became a franchise and a contract, binding the City in its proprietary capacity, and giving the Defendant the right to make use of the streets in installing its pipes; and that this contract right could not be revoked or impaired by the City." 340 S.W.2d at 888. The Supreme Court states that "[s]uch right, however, was subject to regulation by the City, acting in its governmental capacity under the police power, delegated to it by the State, to regulate and control its streets for the public health and safety." *Id.* The City passed a later ordinance requiring a permit for excavating in a street as well as a fee. The utility district challenged this permit fee on the grounds that it would impair the district's franchise, which contained a provision excluding the payment of fees. The Court distinguished the permit fees from the franchise fee (or, more accurately, non-imposition of a fee) under the original franchise. The franchise fees "were a matter of contract, or rather were forbidden by the contract, between Defendant and the City acting in its proprietary capacity." *Id.*, at 889.

The Court in *City of Paris* cites *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409. (see below). The Court in *City of Paris* states that the permit fees "are exacted by the City, acting in its governmental capacity, as an incident to the enforcement of police power regulation, and were not, and could not be, controlled or limited by the contract." *Id.*, at 889. Regarding the particular permit fee, the Court states: "It does not appear that the amount of such fees is unreasonable. Upon its face, the ordinance will be presumed to be reasonable in the absence of a showing to the contrary. It is not shown that these fees will amount to more than the cost of enforcing this police regulation. 'Mathematical nicety is not exacted in cases where a license fee is charged as an incident to the enforcement of a police power ordinance.'" *Id.*, citing *Rutherford v. City of Nashville*, 79 S.W.2d 586; *Hermitage Laundry Co. v. City of Nashville*, 209 S.W.2d 5.

[61] 2000 WL 122199, at *1.

[62] *Id.*

[63] In *Shelby County*, a County resolution sought to impose a pole rental fee on the telephone company, to be paid only if the company did not furnish "proper and adequate service" throughout the county at rates fixed by the resolution. 203 S.W. at 343. The pole rental fee was by its own terms a penalty for bad service. The Supreme Court ruled that the County would have been able, under its police (governmental) power to impose a fee "to defray the expenses of supervision and inspection of the telephone lines nor of their subsequent maintenance," *id.* at 344, but the City was not acting under its police power.

[64] 2000 WL 122199, at *1.

City of Paris and *Bristol* Gas, is that a subsequent modification of previously granted franchise rights can be revoked or modified if, and only if, the City is acting in its *governmental* capacity.[65] The question then becomes whether the fee fits within the restrictions on what a city can do in its governmental capacity. This analysis suggests that a city is less restricted if it acts in its proprietary capacity. The key determination, under the Court of Appeals' reasoning, is whether the City is acting in its proprietary or governmental capacity.

The Court of Appeals also cites Tenn. Code Ann. § 65-21-103, which it states "requires such fees to be imposed without discrimination," and Tenn. Code Ann. §§ 67-4-401 and 67-4-406, which it states "prohibit a city from taxing providers of telecommunications services for the privilege of doing business within the city."[66]

On this basis, the Court states, "[a]ccordingly, to be valid, the fee imposed by Ordinance 10377 must be enacted under an exercise of the City's police powers, and cannot constitute a tax."[67] The Court relies on the distinction between a fee and a tax set forth in *City of Tullahoma*: "An important characteristic and distinguishing feature of a tax is that it is designed and imposed for the purpose of raising revenue."[68] The Court disagrees with Chattanooga's argument that the franchise fee was a permissible rental.[69]

The Court then analyzes the fee on the basis of its proprietary/governmental and fee/tax distinctions:

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[65] The Court, citing *Bristol Gas* and *Shelby County v. Cumberland Telephone and Telegraph Co.*, 203 S.W. 342 (Tenn. 1918), stated that "[a]cting in its proprietary capacity, a municipality may not revoke or impair rights previously given by it to a third party by a subsequent enactment." *Id.*, at *2.
[66] 2000 WL 122199, at *1.
[67] *Id.*, at *2.
[68] *Id.*, at *3.
[69] *Id.*

> The City's urged construction of the term "rental" to allow for revenue above mere "compensation", would enable the City to exact the same charge in its exercise of its police powers as it can in the exercise of its proprietary powers, thereby rendering meaningless our Supreme Court's decisions making this distinction. In *Porter v. City of Paris*, the Supreme Court held under the City's police powers, the fee imposed must "bear a reasonable relation to the thing being accomplished." 201 S.W.2d at 691. Recently the Court defined "fee" as that which is "imposed for the purpose of regulating specific activity or defraying the cost of providing a service or benefit to the party paying the fee." *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997).[70]

The Court goes on to state:

> The record reveals that the 5% fee does not necessarily bear any relation to the cost to the City of the franchisees' use of the City's rights-of-way. The fee varies based upon the provider's gross revenue, and is therefore measured by the provider's earnings and not to the burdens assumed by the city in regulating the particular provider. This is particularly true because a telecommunications provider must pay 5% of its gross receipts, regardless of the extent to which the provider uses the City's rights-of-way.[71]

Here, the Court cites a case applying § 253 of the 1996 Federal Telecommunications Act (the "1996 Act" or the "FTA"):

> *Cf. Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F.Supp.2d 805, 818 (D.Md. 1999), appeal docketed, 9901784 (4th Cir. June 14, 1999) (holding that under § 253(c) of the FTA, fees for access to public rights-of-way must be directly related to the "cost of the [local government] of maintaining and [using] the public rights-of-way .... These costs must be apportions to [a telecommunications provider] based on its degree of use, not its overall level of profitability.")[72]

Although Chattanooga offered evidence of its expenditures on street repairs, as well as evidence that such repairs were made more frequent by damage from utility companies, the

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[70] 2000 WL 122199, at *3.
[71] *Id.*
[72] *Id.* The Court of Appeals does not state that the 1996 Act or *Prince George's County* is controlling or is anything other than reinforcement for its analysis based on the state law distinction between governmental and proprietary functions. The Court does not state that § 253 of the 1996 Act alters the Court's own clear indication that a fee imposed under a city's proprietary function does not have to be related to the cost to the city of regulating the payer.

Court did not find that this evidence was specific enough to show a direct correlation between the amount of the fee and the cost to the City.[73] For this reason, the Court of Appeals struck down the franchise fee provision.

Lewis* and *City of Nashville

United Cities cites two cases to demonstrate that the Tennessee Supreme Court has upheld the assessment of franchise fees. The first, *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931), held valid an ordinance granting Nashville Gas a franchise and requiring Nashville Gas to pay the City five percent (5%) of its gross receipts from the sale of gas. The Court's reasoning is not at all inconsistent with that in *Chattanooga v. BellSouth*, if the governmental/proprietary distinction is viewed as a threshold question:

> 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 also its power of contract. 44 C.J. 997.
>
> The Constitution of this state and no statute limited or restrained either the city or the gas company in the exercise of their contractual powers. Both parties could contract, and the city was expressly authorized to prescribe the conditions and terms upon which the gas company might exercise its franchise within the city limits.
>
> . . .
>
> The contract was not *ultra vires*. *The exercise of the right of contract by the municipality is not to be confused with the limited power of sovereignty delegated to municipal corporations.* They are dual entities, possessing both corporate and limited governmental power. As an agency of the State, the municipality could exercise such governmental power as was delegated to it.

[73] The Court rejected the City's reliance on *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 1999 WL 1037160 (S.C. November 8, 1999), in which the South Carolina Supreme Court upheld a fee of five percent (5%) of gross revenues imposed on BellSouth by the City of Orangeburg. The Court of Appeals distinguished *City of Orangeburg* on the grounds that the South Carolina legislature had granted the City broad powers not granted to Chattanooga, which had only limited police powers.

> As a corporate entity endowed with proprietary or corporate rights, it could, to a certain extent, contract.[74]

The Court quotes "19 R.C.L., p. 1153, § 427, where it is said":

> 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 is 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 it need not accept the franchise.[75]

The Court distinguishes *Shelby County*: "Allusion in the opinion to cases holding that municipalities may levy a charge under the police power for inspection and service, provided such power was given by the state, bears no relation to the rule that a municipality may exact as a condition precedent to the grant an annual charge for entering and laying pipes under the streets."[76]

The second case United Cities cites is *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941). In that case, the Supreme Court was asked to declare the identical provision at issue in *Lewis* requiring Nashville Gas to pay a franchise fee invalid in light of the recent passage of a Tennessee statute requiring gas companies to pay a state privilege tax. That statute is now codified at Tenn. Code Ann. § 67-4-405. Operating

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[74] 40 S.W.2d at 412 (Emphasis provided.).
[75] *Id.*, at 413.
[76] *Id.* One important aspect of *Lewis* is that the City's limited power to "regulate" utilities was in effect "grandfathered"; the City was granted this power before the State assumed regulatory control over utilities and the power survived the state's action. This raises the question of whether municipal franchise fees are consistent with state regulation of utilities. As United Cities argues, such fees do appear to be consistent with state regulation. Tenn. Code Ann. 65-4-105(e) clearly contemplates the payment of franchise fees to municipalities. This section suggests that the TRA's role in approving franchise fees is very limited. It provides that "[a]ny franchise payment" made after February 24, 1961 shall "to the extent practicable" be billed pro rata "and shall not otherwise be considered by the authority in fixing the rates and charges of the utility."

together with Tenn. Code Ann. § 67-4-405, Tenn. Code Ann. § 67-4-401 prohibits municipalities from imposing "any tax" upon gas companies. As the Court stated: "It thus appears that if the contractual payment of the Gas Company to the City of Nashville was or is a "tax" within the class dealt with in the revenue act, then its collection was prohibited by the express terms of this section of the act itself."[77]

Relying on its earlier decision in *Lewis*, the Court held the franchise fee was not a tax but rather a "voluntary, contractual charge, by way of compensation."[78] Because it was not a tax, the franchise fee was not prohibited by the revenue act (Tenn. Code Ann. § 67-4-405). The Court of Appeals in *City of Chattanooga* states that Tenn. Code Ann. § 67-4-401 and Tenn. Code Ann. § 67-4-405 prohibit the franchise fee in that case.

Summary Judgment

Summary judgment is an appropriate method of resolving issues in administrative proceedings, and the standard for determining whether summary judgment should be granted generally follows the standard applied in the courts.[79] The Authority's Rules specifically provide for resolution of issues through summary judgment. Authority Rule 1220-1-2-.22 states:

> General Procedural Powers.
>
> In any contested case the Authority or the Hearing Officer:
>
> (1) may determine that there is no genuine issue as to any material fact. In reaching such determination, the Authority or Hearing Officer may, in its discretion, hear and determine all or any part of a case, without hearing oral testimony;

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[77] 152 S.W.2d at 231.
[78] *Id.*, at 233.
[79] *See e.g. Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996); *Puerto Rico Aqueduct and Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600, 605-06 (1st Cir. 1994); *Contini v. Board of Education of Newark*, 668 A.2d 434, 441-42 (N.J. App. 1995); *Massachusetts Outdoor Advertising Council v. Outdoor Advertising Board*, 405 N.E.2d 151, 156-57 (Mass. App. 1980).

(2) may, on its own motion or the motion of any party, allow amendments, consolidate cases, join parties, sever aspects of the case for separate hearings, permit additional claims or contentions to be asserted, bifurcate or otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority; and

(3) shall afford all parties an opportunity to be heard after reasonable notice before exercising these general procedural powers.

Because United Cities' *Motion* is being considered under TRA Rule 1220-1-2-.22, and not strictly under Rule 56.03 of the Tennessee Rules of Civil Procedure, Rule 56.03's requirement of a "separate concise statement" of the material facts at issue is not applicable.

Findings

Tenn. Code Ann. § 65-4-107 provides that no grant of a privilege or franchise from the State or a political subdivision of the State to a public utility shall be valid until approved by the Authority. Approval pursuant to Tenn. Code Ann. § 65-4-107 requires a determination by the Authority, after hearing, that "such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest."[80] Tenn. Code Ann. § 65-4-107 further provides that in considering such privilege or franchise, the Authority "shall have the power, if it so approves, to impose conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require . . ."[81] Further, in considering a petition for approval of a franchise, as in all other matters, the Authority is prohibited from taking action which is contrary to law. See Tenn. Code Ann. § 4-5-322(h).

As the Supreme Court held in *Lewis*, a municipality has broad authority to contract in its proprietary capacity. This authority is reflected in the Court of Appeals' statement in *City*

[80] Tenn. Code Ann. § 65-4-107.
[81] *Id.*.

of Chattanooga that "[a]cting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way."[82] *Bristol Gas* and *City of Paris*, two cases the Court of Appeals relied upon in *City of Chattanooga*, clarify the limits of a municipality's ability to alter or revoke the franchise granted in a municipal ordinance. Beginning with the general rule that a party to a contract may not unilaterally modify its terms, these cases hold that an exception exists in the case of a municipality, which must retain the authority to carry out its police duties. *Bristol Gas* and *City of Paris* illustrate the principle that unilateral alteration of the rights of a utility is possible under a city's police powers, notwithstanding the city's prior grant of franchise rights to the utility. In *City of Chattanooga*, the Court of Appeals drew from these cases the sound conclusion that such unilateral alteration or revocation of a utility's franchise rights could **only** be based upon the city's police powers. Accordingly, the Court of Appeals held that such alteration must be a justifiable exercise of the police powers. As the Court stated, "in its governmental capacity, it may only act through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee."[83] The Court held that in order for the fee imposed to be a justifiable exercise of the municipality's police powers, it "must bear a reasonable relation to the objective to be accomplished."[84] This conclusion is supported by *Bristol Gas* and *City of Paris*. It is not inconsistent with *Lewis* or *Nashville Gas*.

Although *City of Chattanooga* is an unpublished opinion of the Court of Appeals, it should by no means be disregarded, as United Cities implies. Nor, however, should it be

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[82] 2000 WL 122199, at *1.
[83] *Id.*
[84] *Id.*, at *2.

interpreted too broadly. It could not be clearer that *City of Chattanooga* poses as a **threshold** test the question whether the municipality imposing the franchise fee in question is acting in its proprietary or governmental capacity. If the municipality is acting in its proprietary capacity, the municipality "may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way."[85] If the city is acting in its governmental capacity, any fee the city charges must be related to the cost to the city caused by the presence of the utility, under the Court of Appeals' holding. The key, in fact the only, criterion the Court offers for making this threshold determination is whether or not the municipality alters or revokes previously granted franchise rights. If it is determined, based on this criterion, that the municipality is acting in its proprietary capacity, it is not necessary for the municipality to show that the fee it seeks to impose is related to the cost of regulation. It would be improper to strike down such a fee because it resembles a tax, because the examination of the fee/tax distinction which occupied the Court of Appeals is itself both unnecessary and improper, given the broad contracting authority of the municipality acting in its proprietary capacity.

Nashville Gas holds that franchise fees, though based on a percentage of revenues, are fees, not taxes, and in any event, regardless of label, do not impose impermissible taxes. The franchise fee in *Nashville Gas* did not violate the statutory provisions codified at Tenn. Code Ann. §§ 67-4-401 and 67-4-401, which together act to prohibit a county or municipality from imposing a privilege tax upon a utility in conflict with a state privilege tax. Nor, by the same reasoning, does such a fee violate the 1999 tax law the Consumer Advocate relies upon, which is codified at Tenn. Code Ann. § 67-4-2102. As the Court held in *Nashville Gas*, such a fee, though based on revenues, is not a tax but rather a charge which a municipality is entitled to

[85] *Id.*, at *1.

impose.[86] *City of Chattanooga* is consistent with this conclusion; the Court of Appeals does not state that the "fee" would be an improper tax if the threshold question results in a finding that the municipality is acting in its proprietary capacity. In other words, a revenue-based, as opposed to a cost-based, fee can be found to be an improper tax only after the municipality is found to be operating in its governmental capacity. Acting in its proprietary capacity, the municipality can impose a revenue-based fee.

The question, then, is whether the municipalities in this case, as a result of the franchise ordinances in question, have altered or revoked the previously existing franchise rights of United Cities. The *City of Chattanooga* opinion offers little about the precise manner in which the telecommunications companies' rights were altered. It simply says that two of the companies held previously granted franchise rights. It appears from statements made in the record that United Cities had an existing franchise with both Bristol and Morristown, the terms of which differ from the franchise provisions in the ordinances in question. At the same time, certain factors may distinguish the Bristol franchise from the franchise ordinance at issue in *City of Chattanooga*. In that case, the fee appears to have been imposed as an additional burden without negotiations and without the consent of the utilities,

[86] The Consumer Advocate attempts to sidestep *City of Chattanooga* in section two of its argument, *see Response*, pp. 2-7, by arguing that the fee is a tax simply because it is based on a percentage of revenues and not on the municipality's costs. This approach is inconsistent with *City of Chattanooga*, in which the Court of Appeals only held the fee/tax determination to be necessary after it has been determined that the municipality is operating in its governmental capacity. This is the more sound approach, and it is consistent with the Tennessee Supreme Court's thorough examination of the issue in *Nashville Gas*.

upon a municipality's police power, as stated in *City of Chattanooga*, the Hearing Officer must also be cognizant of a municipality's power to contract, although, as *City of Chattanooga* instructs, such power must be exercised under the municipality's proprietary capacity.[87] Such authority should include 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.

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. In that event, neither the Court's decision in *City of Chattanooga* nor any other provision of state law renders a franchise fee based upon a percentage of the utility's gross revenues per se

[87] Tenn. Code Ann. § 6-2-201 grants a municipality the authority, among other things, to "[c]ontract and be contracted with" and to "[g]rant to any person, firm, association or corporation (including the municipality) franchises for public utilities and public services to be furnished the municipality and those therein." Tenn. Code Ann. § 6-2-201(4),(12). *See also Lewis*, 40 S.W.2d at 412-13.

invalid.[88] If United Cities does not make the requisite showing of negotiations and consent,[89] 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.

Regardless of whether the municipality is determined to have acted in its proprietary or governmental capacity, and regardless of whether the franchise fee is held to be invalid under

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[88] This reading of *City of Chattanooga* is consistent with the analysis already set forth by the Supreme Court in 1931 in *Lewis*:

> 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 . . . 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 proprietor of its streets.

Lewis, 40 S.W.2d at 412-13. The Court in *Lewis* goes on to state that the "gas company having voluntarily obligated itself, as provided in section 14 of Ordinance 155, the continued exaction of the payments thereunder violates no right guaranteed by the State or the Federal Constitution." *Id.*, at 413. In distinguishing a previous case, *Shelby County v. Cumberland Telephone & Tel. Co.*, 203 S.W. 342 (Tenn. 1918), the Court in *Lewis* makes the same distinction between a municipality's broad power to impose a revenue-based fee under its proprietary function and its narrower power to impose a cost-based fee under its governmental function that the Court of Appeals made in *City of Chattanooga*:

> Allusion in the [*Shelby County*] opinion to cases holding that municipalities may levy a charge under the police power for inspection and service, provided such power was given by the state, bears no relation to the rule that a municipality with power to refuse or give assent may exact as a condition precedent to the grant an annual charge for entering and laying pipes under the streets.

Id.

[89] At this point, United Cities has only asserted that the "new franchise agreement resulted from a series of negotiations over the terms and conditions of several substantive provisions." *See* Affidavit of Bob Elam, p. 2. This statement alone is insufficient to establish the form, extent and genuineness of the negotiations. At the November 27, 2001 Pre-Hearing Conference, counsel for United Cities made several assertions regarding the extent of negotiations between United Cities and the municipalities, and Morristown added similar assertions in its Memorandum. The Hearing Officer agrees with the Consumer Advocate that such assertions, in the absence of supporting testimony or documentation, were improperly presented and will not consider them as part of the record at this time.

the Court's reasoning in *City of Chattanooga*, United Cities must also produce evidence sufficient to show that such franchise fee is in the public interest, in accordance with Tenn. Code Ann. § 65-4-107.

Conclusion

On the current state of the record, United Cities' *Motion* for summary judgment as to the Consumer Advocate's objection to the franchise fees on the basis of City of Chattanooga cannot be granted. The record does not contain evidence sufficient to show that, as United Cities states, the municipalities were acting in their proprietary capacities. As explained above, such a showing would require evidence that the franchise terms were negotiated between the municipalities and United Cities and not simply imposed upon United Cities, in such a manner as to render the agreements part of the proprietary function under Tennessee law.

Therefore, the Hearing Officer denies United Cities' *Motion* without prejudice. United Cities may proceed to present evidence regarding the franchise agreements, including evidence on the issue of the proprietary capacity, through pre-filed and live testimony. This matter may proceed to a hearing on the merits of United Cities' *Petition*. United Cities may refile its motion for summary judgment at any time. Further, the Hearing Officer finds that unless it can be shown that the municipalities were acting in their governmental and not their proprietary capacities, the Court of Appeals' ruling in *City of Chattanooga* does not render any franchise fee imposed in the franchise agreements invalid as an improper tax.

Procedural Matters

On February 4, 2002, the Authority issued a *Notice of Hearing* stating that a hearing on the merits with regard to the Bristol and Kingsport franchises had been scheduled for

February 20, 2002. On February 11, 2002, the Consumer Advocate filed the *Attorney General's Motion for Rescheduling Hearing*, in which the Consumer Advocate requests the rescheduling of the Hearing set for February 20, 2002, stating, in part, as grounds that the Consumer Advocate was not aware of the Hearing date until February 11, 2002, and that the interventions of the Cities of Bristol and Morristown granted on February 4, 2002, necessitate additional time for discovery from these interveners. In addition, the Consumer Advocate expressed a need for a ruling by the Hearing Officer on United Cities' *Motion*.

Without addressing the Consumer Advocate's other grounds for its request, the Hearing Officer agrees that the Consumer Advocate should have the opportunity to obtain discovery from the interveners and that this Order will assist the parties in preparation for a hearing on the merits. Therefore, the Consumer Advocate's request to reschedule the hearing is granted. The Hearing Officer directs the parties to confer and agree upon a new hearing date and submit the date to the Hearing Officer. The new hearing date should be within two (2) weeks of the original date of February 20, 2002. The Consumer Advocate shall complete any discovery it requests before the agreed hearing date.

IT IS THEREFORE ORDERED THAT:

1. United Cities' *Motion* is denied without prejudice.

2. The Consumer Advocate's request to reschedule the hearing set for February 20, 2002 is granted.

3. The parties shall confer and agree upon a new hearing date and submit the date to the Hearing Officer, such new date to be within two (2) weeks of the date of February 20, 2002, established in the Authority's *Notice of Hearing* issued on February 4, 2002.

Jonathan N. Wike, Hearing Officer

ATTEST:

K. David Waddell, Executive Secretary