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March 27, 2000

Via Hand-Delivery

K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Re: Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water Division, a Division of the City of Memphis, Tennessee ("MLGW") and A&L Networks-Tennessee, LLC ("A&L") for Approval for Agreement Between MLGW and A&L regarding Joint Ownership of Memphis Networx, LLC; Docket No.99-00909 – Pre-Filed Rebuttal Testimony of the Applicant and Joint Petitioners

Dear Mr. Waddell:

Enclosed you will find the original and thirteen (13) copies of the Pre-hearing Brief of the Applicant and Joint Petitioners in this docket.

Sincerely,

D. Billye Sanders

D. Billye Sanders

DBS:lmb
Enclosures

cc: Parties of Record
John Knox Walkup, Esq.
J. Maxwell Williams, Esq.
Ward Huddleston, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
APPLICATION OF MEMPHIS	)	
NETWORX, LLC FOR A CERTIFICATE OF	)	
PUBLIC CONVENIENCE AND	)	
NECESSITY TO PROVIDE INTRASTATE	)	
TELECOMMUNICATIONS SERVICES	)	DOCKET NO. 99-00909
AND JOINT PETITION OF MEMPHIS	)	
LIGHT GAS AND WATER DIVISION,	)	
A DIVISION OF THE CITY OF MEMPHIS,	)	
TENNESSEE ("MLGW") AND A&L	)	
NETWORKS-TENNESSEE, LLC ("A&L")	)	
FOR APPROVAL OF AGREEMENT	)	
BETWEEN MLGW AND A&L REGARDING	)	
JOINT OWNERSHIP OF MEMPHIS	)	
NETWORX, LLC	)	

PRE-HEARING BRIEF OF MEMPHIS NETWORX, LLC, MLGW AND A&L

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NASHVILLE, TENNESSEE

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JOINT OWNERSHIP OF MEMPHIS	)	
NETWORX, LLC	)	

PRE-HEARING BRIEF OF MEMPHIS NETWORX, LLC, MLGW AND A&L

Memphis Networx, LLC (the "Applicant"), and the Joint Petitioners, Memphis Light, Gas & Water Division ("MLGW") and A&L Networks – Tennessee, LLC ("A&L") submit the following Pre-Hearing Brief in support of the application for a Certificate of Public Convenience and Necessity ("CCN") to provide intrastate intraLATA local exchange telecommunications services in Tennessee.

I. Introduction

The Pre-Hearing Officer's Report and Recommendation sets forth nine issues that range from procedural matters to questions of Tennessee Constitutional law. Time Warner Telecom of the Mid-South, L.P., Time Warner Communications of the

Mid-South, and the Tennessee Cable Telecommunications Association ("Intervenors") have filed a Pre-Hearing Brief which addresses, with varying degrees of specificity, the issues set forth by the Pre-Hearing Officer. None of the arguments raised by the Intervenors is sufficient to warrant the denial of the Application and Joint Petition. Furthermore, the Applicant and the Joint Petitioners assert that the information provided in the Application and Joint Petition, as well as the information and prefiled testimony of Applicant and Joint Petitioners, fully supports the conclusion that the Application and Joint Petition meet the statutory criteria for approval and should be granted.

The Applicant and the Joint Petitioners contend that Issues 1 and 2 are primarily issues of fact to be resolved at the hearing of this matter. Applicant and Joint Petitioner believe the evidence will show that they have met the statutory criteria of T.C.A. § 65-4-201 and T.C.A. §7-52-103(d) and that to the extent there are legal issues surrounding such compliance they are addressed in Issues 3-9. Therefore no questions of law have been briefed for Issues 1 and 2. Issues 4 and 5 are discussed more fully below and are primarily issues of law. Issues 3, 6, 7, 8 and 9 are primarily issues of fact dealing with compliance with the requirements of several Tennessee statutes as well as the question of whether any conditions, rules and/or reporting requirements should be established to ensure such compliance. These issues are also discussed more fully below.

The Intervenors contend in their Pre-Hearing Brief that the formal discovery process produced several "inconsistencies" which prevent them from addressing any

of the issues raised by the Pre-Hearing Officer other than issues 4 and 5. The alleged "inconsistencies" are merely a red herring to divert the TRA's attention from the relevant issues in this proceeding. The conclusions set forth in Mr. Barta's testimony are both unsupported and irrelevant to the issues presented in regard to this Application and Joint Petition. As pointed out in the pre-filed rebuttal testimony of the Applicant and Joint Petitioners, Mr. Barta has relied on several documents that predate the execution of the "Umbrella Agreement" and Operating Agreement of Memphis Networx, LLC between MLGW and A&L which were executed on November 8, 1999. Discussions, plans, ideas and brainstorming that may have occurred did not necessarily translate in to action. The documents that have been filed in this docket in support of the Application and Joint Petition embody the proposal for which the Applicant and Joint Petitioners seek approval.

II. Issue 3

What requirements, if any, are necessary to insure that start up expenses, already incurred, are correctly identified and properly allocated? (None.)

MLGW and Memphis Networx have presented testimony regarding the identification of start up expenses, recognition of those expenses on the books of Memphis Networx and allocation of appropriate expenses between the Electric Division and the Telecommunications Division of MLGW. Applicant and MLGW believe their identification, recognition and allocation of such expenses are appropriate and will comply with applicable law. The TRA will review this

information in this proceeding. No special requirements are necessary to insure that Applicant and Joint Petition will comply with the law.

III. Issue 4

Does the MLGW interest in Memphis Networx, LLC violate Article 2, Section 29 of the Tennessee Constitution? (No.)

A. MLGW Is Not a "County, City or Town" Subject to Article II, Section 29.

Intervenors do not address the threshold issue of whether MLGW is a "County, City or Town" subject to Article II, § 29. The Tennessee courts have clearly established that Article II, § 29 is only a limitation on the taxing powers of "counties, cities and towns". Where, as here, MLGW itself has no taxing power, has utilized no taxpayer funds, and neither the tax power nor the tax dollars of the City of Memphis are involved, Article II, Section 29 does not apply.

Both the plain language of Art. II, § 29 and the history behind this provision support a literal and narrow interpretation of this constitutional provision. The primary case on this issue, which Intervenors failed to discuss in their Brief, is *The Eye Clinic, P.C. v. Jackson-Madison County General Hospital*, 986 S.W.2d 565 (Tenn. Ct. App. 1998) (copy attached). Judge Holly Kirby Lillard noted that, prior to her opinion in that case, "[n]o published Tennessee decisions directly address[ed] the interpretation of the phrase, 'county, city or town,' in Section 29." *Id.*, at 570. The *Eye Clinic* decision includes a thorough analysis of the historical context of Art. II, § 29, noting that, prior to 1870, it consisted of the following single sentence:

> The General Assembly shall have the power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.

In 1870, the following additional language was added:

> But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority.

Id.

As the Court of Appeals held in *Eye Clinic,* 986 S.W.2d at 571, the second and third sentences of Art. II, § 29 qualify the first sentence, placing limitations only on taxing authorities. *Id.* at 571. As the Court of Appeals found in *Eye Clinic*, 986 S.W.2d at 570, constitutional provisions such as the 1870 amendment to Art. II, § 29 have been adopted in most states and were "designed to primarily prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." The *Eye Clinic* decision thus equates "county, city or town" with a taxing entity and establishes a source-of-funds test whereby Art. II, § 29, does not apply if the quasi-governmental entity at issue is itself without the power to tax and if a related taxing entity is not required to, or has not, obligated taxpayer funds in support of

the challenged enterprise.[1] Where as here, MLGW itself has no taxing authority, has not used taxpayer funds with regard to its investment in Memphis Networx, LLC, and MLGW's membership interest in Memphis Networx is contractually, statutorily, and organizationally isolated from the taxing power and the tax dollars of the City of Memphis, Art. II, § 29 simply does not apply.[2]

1. MLGW has no taxing authority and thus cannot be a "county, city or town" under Art. II, § 29.

Nothing in the City of Memphis Charter relative to MLGW gives MLGW any taxing authority. Rather, the MLGW Board has the authority "to make a schedule of rates for the several services and for different classes of consumers", with rate changes to be approved by the City Council. MLGW Charter, §680 (copy attached). *Accord* Charter §679A (same regarding rates for energy systems). MLGW cannot issue "any bonds or notes, or any obligation constituting a lien upon the properties

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[1] Contrary to Intervenors' characterization of several prior Tennessee cases as having found Art. II, § 29 applicable to various arms, agents, or instrumentalities of a city, or county, Intervenors' Brief, at 4, the *Eye Clinic* decision, 986 S.W.2d at 572, notes that the caselaw establishes that "so long as the municipality was not compelled to invoke its taxing power to make payment on the bond issuance", then "agencies and instrumentalities" of those municipalities have not been subject to Article II, § 29 with respect to those transactions. Intervenors' contention in their Brief, at 5, that because MLGW has been found to be an agency or arm of the City of Memphis for purposes of the Governmental Tort Liability Act (GTLA) it is necessarily an Art. II, § 29 "city" is also without merit. The *Eye Clinic* Court rejected an identical argument, finding that "the definition of 'governmental entities' pursuant to a statute such as the GTLA has no bearing on the definition of 'county, city or town' pursuant to Article II, § 29 and that "to determine the meaning of the phrase 'county, city or town' in Section 29, we must look to the intent of the framers of the Constitutional provision, not the intent of a later legislature in enacting a wholly unrelated statute." 986 S.W. 2d at 572-73.

[2] Nor does the decision in *Cleveland Surgery Ctr., L.P., et al. v. Bradley County Mem. Hosp., et al.*, No. 03A01-9804-CH-0120, 1999 Tenn. App. LEXIS 196 (March 24, 1999) (Supreme Court appeal pending) (copy attached), cited by Intervenors' Brief, at 4-5, support their position. The *Cleveland Surgery* Court, slip op at 9, applied the analysis issued by the *Eye Clinic* decision and noted that the Jackson-Madison County Hospital District in that case did not have the power to levy taxes nor had Madison County obligated taxpayer funds relative to the business venture at issue. In the *Cleveland Surgery* case, on the other hand, the Court, applying the *Eye Clinic* test, found that Bradley County had clearly obligated its taxing power. Slip op. at 11 n. 5, 12, 16.

used in the production and distribution of electricity, gas and water" without approval of the City Council. Charter, §686. Repayment of such bonds, etc., is not derived from taxpayer funds but from "[t]he revenue received each year from the operation of ...[the particular MLGW division]...". Charter § 690(2), § 692(2) and § 693(2).

In addition, MLGW's Board is authorized to "provide for the investment and reinvestment of its funds reserves as determined in the discretion of the board," and in doing so, "[t]he board shall not be limited but shall be able to make such investments as authorized by state law and as the board ... may deem best with such security as the board may deem proper." Charter, § 694. Profits or losses resulting from investments are not those of the City and its general fund but "shall be credited or charged to the several divisions in proportion to the respective funds so invested and reinvested." *Id.*

The MLGW Charter provisions clearly evidence a financial framework intended to allow MLGW to operate on a self-supporting and financially-sound basis from revenues derived from rates charged to consumers, not taxes levied on taxpayers. As provided in 1939 Tenn. Priv. Acts, Ch. 381, §7 (Charter, §680), the schedule of rates charged consumers is required to be established to "at all times pay operating expenses, interest, sinking funds, reserves for working capital, renewals and replacements, casualties and other fixed charges" as well as "all bonds or other indebtedness and interest thereon, including reserves therefore, and to provide for all expenses of operation and maintenance of said plants or systems,

including reserves therefor."[3] This financing structure does not implicate the taxing authority of the City.

2. MLGW's interest in Memphis Networx is contractually, statutorily and organizationally isolated from the taxing power and tax dollars of the City of Memphis.

Additionally, Art. II, § 29 does not prohibit MLGW's Telecommunications Division from owning a membership interest in Memphis Networx for any one of three reasons: (1) MLGW has contractually isolated its interest and participation in Memphis Networx from the taxing powers and the tax revenues of the City of Memphis; (2) the T.C.A. § 7-52-402 prohibition against municipal subsidization statutorily acts to isolate the Telecommunications Division of MLGW from the taxing powers and tax dollars of the City of Memphis; and (3) MLGW and its Telecommunications Division are organizationally isolated from the taxing powers and the tax dollars of the City of Memphis. Therefore, neither MLGW nor its Telecommunications Division is a "county, city or town" for purposes of Art. II, § 29.

a. The Telecommunications Division of MLGW is contractually isolated from the City of Memphis.

In structuring its participation in Memphis Networx, MLGW contractually isolated its interest in Memphis Networx in a manner that is consistent with a long line of Tennessee Supreme Court precedent interpreting and applying Art. II, § 29.

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[3] This provision is substantially similar to one governing MLGW's predecessor, the Memphis Light and Water Division. *See* 1935 Tenn. Priv. Acts, Ch. 616, §4 (repealed by the 1939 Private Act). A contract entered into between the predecessor Light and Water Division and TVA recognized that the Division was required to "operate and maintain [the] Board's electric system on a self-supporting and financially sound basis" through revenues derived from rates. *Memphis Power & Light Co. v. City of Memphis*, 112 S.W.2d 817, 820 (1937).

Both the Memphis Networx Operating Agreement (Exhibit E) and the "Umbrella Agreement" between MLGW and A&L (Supplemental Exhibit M) expressly isolate MLGW's interest in Memphis Networx from the tax revenues and the taxing power of the City of Memphis. Section 14.8 of the Memphis Networx Operating Agreement, at p. 38, provides, in relevant part:

> Limitation of Liability. The obligations of MLGW under this Operating Agreement shall be limited to the extent required by applicable state and federal law . . . . Without limitation of the foregoing, A&L acknowledges that (i) MLGW's liability for any tortious acts or omissions or breaches of contract under this Operating Agreement shall be limited to its Ownership Interest in the Company and the other resources and assets within, or allocated to, the Telecommunications Division of the Electric Division of MLGW; (ii) neither the Electric Division (except for its Telecommunications Division), the Gas Division nor the Water Division of MLGW assumes any financial obligation under this Operating Agreement; and (iii) **neither the tax revenues nor the taxing power of the City of Memphis, Tennessee are in any way pledged or obligated under this Operating Agreement.** (Emphasis added).

Similar language appears in Section 10, pp. 38-39, of the Umbrella Agreement. In addition, Section 8.1 of the Operating Agreement, p. 17, provides that no Member, Economic Interest Owner, Governor, manager, employee or agent of the Company has any personal obligation or liability for any acts, debt, liabilities or obligations of the Company or each other. These provisions contractually isolate MLGW's interest in Memphis Networx from the taxing power of the City of Memphis. MLGW submits that these contractual provisions, for the reasons discussed in Sections III.A.2.b. and III.A.2.c., below, merely restate the legal effect of MLGW's statutory

and organizational structure and its isolation from the City of Memphis for purposes of Art. II, § 29.

The Tennessee Supreme Court has repeatedly held that Art. II, § 29 does not apply to a governmental instrumentality or entity where the transaction is contractually or statutorily isolated from municipal/county tax revenues and tax powers. For example, in *West v. Industrial Development Board*, 332 S.W.2d 201 (Tenn. 1960), cited at page 4 of Intervenors' Brief, the Court considered whether a bond issue of the Industrial Development Board of the City of Nashville constituted an unlawful lending of credit under Art. II, § 29. The case arose in the context of an industrial development loan where the Industrial Development Board borrowed money for the purpose of purchasing property and leasing it to an industrial lessee. Even though the Court found that the Industrial Development Board was an agency or instrumentality of the City of Nashville, 352 S.W.2d at 203, the Court found that the bond issue did not constitute an unconstitutional lending of credit under Art. II, § 29. The Court's reasoning makes clear that the central inquiry under Art. II, § 29 is whether tax funds are obligated in the transaction or otherwise put at risk:

> Article 2, Section 29 of the State Constitution requires a municipal referendum only in cases where the credit of the City is to be given or loaned to or in aid of a person, company, association, or corporation.
>
> In no sense of the word can it be said that the credit of the City of Nashville is given or loaned to or in aid of [the industrial lessee] in the transaction involved in the case before us. The bonds are to be retired out of revenues from the project. Under no circumstances could a tax be levied by the City to retire any part of them.

Id.

Similarly, in *Fort Sanders Presbyterian Hospital v. The Health and Educational Facilities Board of the County of Knox*, 453 S.W.2d 771 (Tenn. 1970), also cited at page 4 of Intervenors' Brief, the Court considered an Art. II, § 29 challenge to a bond issue of an agency or instrumentality of Knox County. Relying upon its prior decision in *West*, the Court relied upon a statutory provision in the enabling legislation of the Health and Educational Facilities Board, which isolated the bonds from the taxing power of Knox County and noted that:

> This Court has held in [*West*] that Article 2, Section 29 of the State Constitution requires a municipal referendum only in those cases where the credit of the municipality is to be given or loaned to a person, association, or corporation. Section 12 of the Act now under consideration prohibits the municipality's credit to be given or its taxing power invoked to make any payment on the bond issue of the corporation.

Fort Sanders, 453 S.W.2d at 775.

More recently, in *Metropolitan Development and Housing Agency v. Leech*, 591 S.W.2d 427 (Tenn. 1979), the Court reaffirmed the holdings of *West* and *Fort Sanders* and found that Art. II, § 29 did not apply to a transaction that had been structurally isolated from the taxing powers of Davidson County and the City of Nashville. In *Leech*, the Court considered a challenge, among others, to 1978 amendments to Tennessee housing authority statutes and rejected the argument that the bond authorizations violated Art. II, § 29, finding that "[t]his argument must fail because, as the housing authority alone is liable on the bonds issued, there

is no lending of the credit of either the municipality or the county." *Leech*, 591 S.W.2d at 429.

These same principles apply to any stockholder limitations under the third sentence of Art. II, § 29. Just as an instrumentality or agency of a county, city or town can contractually structure bond financing in a manner that isolates the transaction from the taxing power of the county, city or town, so too can such an instrumentality or agency satisfy Art. II, § 29 by structuring a transaction involving joint ownership to isolate contractually the transaction from the taxing power of the county, city or town. The recent decision of the Court of Appeals in *Eye Clinic* further affirms this conclusion and summarizes the *West, Fort Sanders,* and *Leech* cases as follows: "In each of these cases, the Court narrowly defined the term 'county, city or town' and found that Section 29 did not prevent the entities from issuing bonds so long as the municipality was not compelled to invoke its taking power to make payment on the issuance." *Eye Clinic*, 986 S.W.2d at 572.

Just as the cities and counties involved in *West, Fort Sanders*, and *Leech* could not be compelled to exercise or invoke their taxing powers to make payment on the various bond issuances, neither can the City of Memphis be compelled to exercise its taxing power for any aspect of MLGW's participation in Memphis Networx. Accordingly, MLGW has appropriately contractually structured its membership interest in Memphis Networx, and Art. II, § 29 does not prohibit this transaction.

b. The Telecommunications Division of MLGW is statutorily isolated from the City of Memphis.

In addition to this clear contractual separation, the Telecommunications Division of MLGW is statutorily isolated from the taxing power of the City of Memphis. In authorizing municipal electric systems to provide telecommunications services in 1997, *see* T.C.A. §§ 7-52-401 through -407, and in subsequently granting these systems broad authorization in 1999 to enter into joint ventures and any other business relationship with one or more third parties, *see* T.C.A. § 7-52-103(d), the General Assembly established a clear statutory separation between these municipal systems' telecommunications projects and all other municipal operations. Even if the relationship between MLGW and the City of Memphis were such as to obligate the taxing power and tax funds of the City of Memphis to MLGW, the provisions of T.C.A. § 7-52-402 statutorily isolate MLGW's Telecommunications Division from the City of Memphis. *See* T.C.A. § 7-52-103(d) (incorporating T.C.A. § 7-52-402 by reference). The relevant provision of T.C.A. § 7-52-402 provides that "[a] municipality providing [telecommunications services] shall not provide subsidies for such services," and nothing in T.C.A. § 7-52-402 permits the City of Memphis to use its tax funds for the Memphis Networx project.

c. The Telecommunications Division of MLGW is organizationally isolated from the City of Memphis.

While the contractual and statutory separations between MLGW's Telecommunications Division and the City of Memphis, as discussed immediately above, are each independently sufficient to resolve all Art. II, § 29 issues in this

matter, MLGW further submits that the organizational separation between the Telecommunications Division and the City of Memphis additionally shows that the Telecommunications Division is not subject to Art. II, § 29. Indeed, the Resolution of the MLGW Board of Governors creating the Telecommunications Division isolates MLGW and its Telecommunications Division from the taxing powers and tax revenues of the City of Memphis. In fact, the MLGW Telecommunications Division (the holder of the membership interest in Memphis Networx) is itself organizationally isolated from the remainder of MLGW and is thus two steps removed from the taxing power and tax revenues of the City of Memphis.

Two recent opinions of the Court of Appeals validate the ability of MLGW to participate in Memphis Networx through the Telecommunications Division of MLGW, but only one of these cases is cited in the Pre-Hearing Brief of TCTA and Time Warner. In *Eye Clinic, supra*, the Court of Appeals relied upon three critical factors: (i) Madison County was not obligated to finance any deficits of the hospital authority; (ii) the revenues generated by the hospital authority are controlled solely by the hospital authority's board; and (iii) the hospital authority funds are autonomous from the general funds of both the City of Jackson and Madison County.

More recently, in *Cleveland Surgery Center, L.P. supra,* which is cited at pages 4-5 of the Intervenors' Brief, the Court of Appeals invalidated a joint venture between Bradley County Memorial Hospital, also a Private Act hospital authority, and a group of private physicians. *Cleveland Surgery* also supports the ability of

the Telecommunications Division of MLGW to hold a membership interest in Memphis Networx. In reaching its holding, the *Cleveland Surgery* Court identified the following factors from the earlier Court of Appeals holding in *Eye Clinic*: (i) Jackson-Madison County Hospital District did not have the "the power to levy taxes," or the power to compel either the City of Jackson or Madison County to invoke its taxing power or to appropriate funds; and (ii) the private ventures involved in *Eye Clinic* "could obligate only hospital-generated or physician-generated funds; no county taxes could be obligated by the public/private ventures in contravention of Article II, section 29." *Cleveland Surgery*, slip op. at 9. Based upon these factors and its analysis of the Private Act creating Bradley County Memorial Hospital, the *Cleveland Surgery* Court invalidated the public/private ventures involved in that case, holding:

> Considering the funding relationship between the county and the hospital as shown by the Bradley County Private Acts, along with the overwhelming evidence that the County has been fully obligated for the hospital's debts, we find that the partnership ventures . . . [violate] Art. II, § 29 of the Constitution of Tennessee.

Id. at 16; *see id.*, at 11 n.5 (stating that the essential distinction between the Private Acts considered in *Eye Clinic* and in *Cleveland Surgery* is whether the taxing power and full faith and credit of the county are pledged to the transaction).

In this case, like the Jackson-Madison County Hospital District in *Eye Clinic*, MLGW's Telecommunications Division is organizationally isolated from the taxing power of a county, city or town. The Telecommunications Division does not have the

power to tax, nor the power to compel the City of Memphis to invoke its taxing power or appropriate funds. Like Jackson-Madison County Hospital District, the Telecommunications Division cannot obligate city taxes but can instead only obligate its own revenues and the funds made available to it under an inter-division loan from the Electric Division. Therefore, as this organizational separation shows, MLGW's Telecommunications Division is not subject to Art. II, § 29 of the Tennessee Constitution.

This organizational separation is apparent from the enabling legislation of MLGW and the Resolutions of the MLGW Board of Governors creating and empowering the Telecommunications Division. For example, the MLGW enabling legislation plainly shows that MLGW is autonomous from the City of Memphis, subject only to limited oversight functions of the City of Memphis.[4]

[4] The General Assembly created MLGW by Chapter 381 of the Private Acts of 1939, amending the Charter of the City of Memphis and codified in Article 65 of the City of Memphis Charter. Section 666 of Article 65 establishes the Memphis Light, Gas and Water Division and places all light, gas and water operations "under the jurisdiction, control, and management" of MLGW and its Board of Commissioners. Other provisions of the MLGW enabling legislation further support the organizational separation from the City of Memphis, as well as within the various Divisions of MLGW itself. Sections 677, 678 and 679 of Article 65 authorize and empower MLGW's electric, gas and water operations, respectively, and Section 687 requires that MLGW keep separate books and records for each Division within MLGW. Section 687 also requires that each Division be "self-sustaining," thereby further isolating each Division of MLGW from the taxing powers and tax funds of the City of Memphis.

As was the case with respect to Jackson-Madison County Hospital in *Eye Clinic*, the City of Memphis is not obligated to finance any deficits of MLGW, the MLGW Board controls the revenues generated by MLGW, and MLGW's funds are autonomous from the City's general funds. Although the City of Memphis retains some oversight over the financial operations of MLGW this oversight does not alter the financial independence of MLGW from the City of Memphis. Like the *Cleveland Surgery* Court's characterization of the Hospital District's hospital and physician-derived revenues in *Eye Clinic*, MLGW can only obligate its own ratepayer – derived funds, and MLGW has no power to obligate the City of Memphis and its taxing power for the Memphis Networx transaction.

Further, the MLGW Board of Commissioners has taken an additional step to further isolate this transaction from the tax dollars and tax powers of the City of Memphis, and even from other Divisions of MLGW. In establishing the Telecommunications Division of MLGW, the Board of Commissioners established a structural separation from the other Divisions of MLGW and, in turn, yet another structural separation from the City of Memphis.[5]

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[5] By two separate resolutions, on August 19, 1999, the Board of Commissioners first created the Telecommunications Division as a division within the Electric Division of MLGW and then, in empowering the Telecommunications Division, limited the obligations of the Electric Division to its Telecommunications Division to a $20 million inter-division loan of electric system funds made in accordance with T.C.A. § 7-52-402. See Exhibit D to the Application of Memphis Networx, LLC. This second Resolution plainly states that the inter-division loan "shall not create any further obligations or liabilities of the Division in favor of the Telecommunications Division," thereby isolating the obligations and liabilities of the Telecommunications Division from its parent Electric Division.

Accordingly, not only is MLGW itself so organizationally isolated from the taxing power and the tax funds of the City of Memphis that it is not a county, city or town for purposes of Art. II, § 29, but its Telecommunications Division is also one further step removed. In accordance with the resolutions of the Board of Commissioners, the funds obligated to the Telecommunications Division are exclusively electric system funds that are traceable only to the operations of MLGW and are in no way traceable to or able to reach the tax revenues or general funds of the City of Memphis. Because the MLGW Board of Commissioners has organizationally structured its Telecommunications Division without further recourse to the Electric Division of MLGW, it is apparent that the Telecommunications Division cannot in any way obligate the general funds or taxing power of the City of Memphis.

B. Even If MLGW Is A "County, City Or Town", It Has Not Extended Its Nor the City's "Credit" To Memphis Networx, LLC

The *Eye Clinic* decision makes clear that it is the obligation of *taxpayer's* funds which is at the core of the lending of credit prohibition in Art. II, § 29. The Court noted several cases involving bonds issued by public entities (discussed in Section III.A.2.a. of this Brief above), in which it was found "that Section 29 did not prevent the entities from issuing bonds so long as the municipality was not compelled to invoke its *taxing power* to make payment on the issuance". 986 S.W.2d at 572 (emphasis added). Conversely, it was precisely because the *Cleveland Surgery* Court found in that particular case that Bradley County had pledged "its

full faith and credit and its taxing power to the payment of the bonds", slip op. at 11 n. 5, that it found Art. II, §29 to have been violated in this regard.

The *Eye Clinic* Court firmly recognizes this essential nexus to taxpayer funds. *See also McConnell v. City of Lebanon*, 312 S.W.2d 14 (1958) (it is "fundamental that the public taxes or, which is the same thing, the public credit can not be donated or applied to anything but a public use"); *West v. Industrial Dev. Bd.*, 332 S.W. 2d 201, 203 (1959) (because bonds issued by IDB "are to be retired out of revenues from the project", Court found that "[u]nder no circumstances could a tax be levied by the City to retire any part of them."); *Holly v. City of Elizabethton*, 241 S.W2d 1001, 1003 & 1005 (1951) (IDB revenue bond issue did not involve tax funds where purchaser had no right to compel City's exercise of its taxing power for payment and bonds provided that they were not a municipal indebtedness). Because the only obligation of MLGW in the Memphis Networx, LLC is that related to its investment in the LLC, an investment which is derived from surplus revenue (the source of which is rates charged to Electric Division consumer-ratepayers, *not* taxes raised from taxpayers), the Art. II, §29 prohibition against the lending of credit is inapplicable.

C. Even If MLGW is a "County, City or Town", Taxpayer Funds Have Not Been Used To Purchase Its Membership or Equity Interest in Memphis Networx, LLC

The *Eye Clinic* decision establishes that the stockholder prohibition of Art. II, § 29, like the lending of credit prohibition, must be read as a limitation on the taxing authority. 986 S.W. 2d at 571 ("the limitation in the third sentence [of

Section 29, prohibiting stock ownership] appears to apply only to cities, counties and towns with taxing powers"). The Court noted that the purpose of the prohibitions contained in Art. II, § 29 was "primarily to prevent the *use of public funds raised by general taxation* in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Id.*, at 570 (emphasis added).

The Jackson-Madison County General Hospital District's ownership interest in a private business entity was upheld by the *Eye Clinic* Court, in part, because its revenues were "autonomous from the general funds controlled by the city and county". *Id.* at 572. Those revenues were described by the *Cleveland Surgery* Court, slip op. at 9, as "hospital-generated or physician-generated funds." Just as the *McConnel, West, Fort Sanders, Leach, Holly*, and other cases previously cited in this Brief demonstrate that there must be a nexus between obligated taxpayer funds and the extension of credit prohibition, so too must there be a nexus between taxpayer funds and the stockholder prohibition. That nexus is completely missing with regard to MLGW's ownership interest in Memphis Networx, LLC.

D. Intervenors' "Private Purpose" Argument is Irrelevant; In Any Event, MLGW's Participation in Memphis Networx Serves a Public Purpose.

Intervenors make the vague and conclusory argument that MLGW's participation in Memphis Networx is somehow for the "nonpublic purpose of market expansion." However, as discussed above, because MLGW is not a "County, City or Town," or, even if it were, because neither the extension of credit nor stockholder

prohibitions of Art. II, § 29 apply because no public (taxpayer) funds are involved, obligated, or at risk, the issue of whether the statutes authorizing the Memphis Networx transaction or the transaction itself serves a "public" or "private" purpose is simply irrelevant.

Even if this were not the case, Intervenors' argument misinterprets the holding of *McConnell v. City of Lebanon*, 314 S.W.2d 12 (Tenn. 1958), with regard to public purposes for which taxpayer funds can constitutionally be spent pursuant to Art. II, § 29, and its application to this transaction. *McConnell* found stimulation of local industrial and economic growth (in that case the extension of credit of the City through bonds for the purpose of constructing a facility to be leased to private business) to constitute a public purpose.

MLGW submits that the participation of its Telecommunications Division in Memphis Networx is very much for a public purpose that the General Assembly recognized in 1997 and 1999. The TRA should honor the clear legislative intent to grant municipal electric systems broad powers to participate in ventures such as Memphis Networx. In 1999, the Tennessee General Assembly granted municipal electric systems such as MLGW the broad authority to "establish a joint venture or any other business relationship with one (1) or more third parties to provide [telecommunications] services, subject to the provisions of §§ 7-52-402 – 7-52-407

...." T.C.A. § 7-52-103(d).[6] The express reference to T.C.A. § 7-52-403(a) echoes the clear intent of the General Assembly to grant broad authorization to municipal electric systems, and that statute provides, in relevant part: "To the extent that it provides [telecommunications services], a municipality has all the powers, obligations and authority granted entities providing telecommunications services under applicable laws of the United States or the State of Tennessee." This clear legislative intent to grant municipal electric systems this authority forms the statutory backdrop for the TRA's consideration of this issue.

All entities engaging in telecommunications services are "public utilities" as defined by T.C.A. § 65-4-101 and are subject to regulation by the TRA. *See, e.g., Breeden v. Southern Bell Tel. & Tele. Co.*, 285 S.W.2d 346 (1955). As the Tennessee Supreme Court has noted, "the terms 'public use' and 'public utility' are synonyms." *Memphis Natural Gas. Co. v. McCanless*, 194 S.W.2d 476, 480 (1946). The regulation of such businesses is one which involves the public interest. *Tennessee Eastern Electric Co. v. Hannah*, 12 S.W.2d 372, 374 (1928). Certainly fostering the development of the telecommunications industry through the 1997 and 1999 statutory authorizations promotes a "public purpose" for purposes of Art. II, § 29.

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[6] It is both interesting and significant to note that Intervenors do not even mention these statutory provisions as being at issue. Indeed, the only statute specifically cited by Intervenors is T.C.A. § 7-52-401, which they conclude to authorize "the nonpublic purpose of market expansion." Intervenors' Brief, at 4.

E. Summary of Article II, Section 29 Argument.

MLGW's response to Issue No. 4 can be summarized as follows:

(A) As a threshold matter, MLGW is not a "County, City or Town" that is subject to the lending of credit or stockholder prohibitions of Art. II, § 29. First, MLGW itself is not an entity with taxing authority. Nor are taxpayer funds of the City of Memphis involved, obligated, or at risk relative to MLGW's interest in Memphis Networx, LLC. MLGW's participation in Memphis Networx, LLC is contractually, statutorily, and organizationally isolated from the taxing powers and public (tax) funds of the City of Memphis.

(B) Even if MLGW was considered to be a "County, City or Town" subject to Art. II, § 29, neither its nor the City's "credit" (i.e., taxpayer funds) have been given or loaned to Memphis Networx, LLC.

(C) Even if MLGW was considered to be a "County, City or Town" subject to Art. II, § 29, no taxpayer funds have been used to purchase its membership or equity interest in Memphis Networx, LLC.

(D) Because MLGW is not a "County, City or Town" and because no taxpayer funds are involved or obligated with respect to Memphis Networx, LLC, the Intervenors' "private purpose" argument is irrelevant. Even if it were considered relevant, it is clearly not supported by Tennessee case law.

IV. Issue 5

To what extent, if any, is MLGW's participation as a member of Memphis Networx, LLC in the proposal to offer telecommunications services affected by its charter and that of the City of Memphis? (It is permitted.)

The Applicant and the Joint Petitioners contend that MLGW may participate in a telecommunications joint venture as specifically authorized in T.C.A.. § 7-52-103(d), which provides, in pertinent part as follows:

> In addition to the authority granted under otherwise applicable law, each municipality operating an electric plant has the power and is authorized on behalf of its municipality, acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to establish a joint venture or any other business relationship with one (1) or more third parties to provide related services, subject to the provisions of §§ 7-52-402 – 7-52-407. (emphasis added)

The MLGW/City of Memphis Charter does not contain any provisions that are contradictory or inconsistent with the statute, but is simply silent as to the matters authorized by T.C.A. § 7-52-103(d).

As recently recognized by a Tennessee federal district court, "[u]nder Tennessee law, the rights, powers, and duties of a municipal corporation . . . are determined by the corporation's charter as well as the general law of the state." *Haines v. Metropolitan Government of Davidson County*, 32 F. Supp.2d 991, 994 (M.D. Tenn. 1998). See, e.g., *City of Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988) ("municipalities may exercise only those express or necessarily implied powers delegated to them in their charters or under statutes"). Thus, a municipal charter is not the sole source of authority for MLGW; rather, "the legislature may itself act directly for a municipality or authorize such an entity to exercise its delegated powers in such manner as the legislature thinks best." *State ex rel. Weaver v. City of Knoxville*, 188 S.W.2d 329, 330 (1945). This is precisely the case with T.C.A. § 7-52-103(d) which directly provides MLGW with the authority to enter into joint ventures or other business relationships for certain purposes, which

authority is "[i]n addition to the authority granted under otherwise applicable law," such as MLGW's Charter.

A particularly relevant case is *Barnes v. City of Dayton*, 392 S.W.2d 813 (1965). In *Barnes*, the City's charter was silent as to the regulation of beer within the city limits but a state statute, the predecessor to current T.C.A. § 57-5-106(a), provided that "[a]ll incorporated cities and towns in the state of Tennessee are authorized to pass proper ordinances governing the issuance and revocation of licenses" for the regulation of beer. *Id.* at 815. The City passed an ordinance pursuant to the statute, which was challenged on the basis that "since the Charter of the City of Dayton makes no reference to the sale or regulation of beer, etc., that the City has no authority to pass the ordinance and its action in so doing is null and void." *Id.* at 817.

The Court rejected this argument, noting that the City had no "power except such powers as given to it by its Charter *and the general law*," and that T.C.A. § 57-5-106(a) expressly provided the authorization for the adoption of the ordinance at issue. *Id.* (emphasis added). Further, the Court distinguished several prior cases, observing that although "the cities of Morristown and Harriman were given express authority in their charters to regulate the sale of alcoholic beverages, and the City of Dayton is not, we think that this is a distinction without a difference because the general law permits municipalities to pass ordinances regulating traffic in beer." *Id.*

The grant of authority to municipalities provided in T.C.A. § 7-52-103(d) parallels the grant of authority provided by the statute at issue in the *Barnes* decision and the absence of MLGW Charter provisions authorizing the subject business enterprise mirrors the absence of charter authority authorizing the City of Dayton to regulate beer. Thus, the MLGW/City of Memphis Charter does not prohibit MLGW's participation as a member of the Applicant in the proposal to offer telecommunications services.

At the Pre-Hearing Conference on March 24, 2000, the Pre-Hearing Officer asked if the Operating Agreement required approval by the Memphis City Council. T.C.A. 7-52-103(d) provides:

> In addition to the authority granted under otherwise applicable law, each municipality operating an electric plant has the power and *is authorized on behalf of its municipality, acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant to establish a joint venture or any other business relationship with one or more third parties for the provision of related services*, subject to the provisions of Sections 7-52-402 through 7-52-407 (emphasis added).

This statutory provision delegates any authority to approve the joint venture to the Board of the municipal utility. The Board of Commissioners approved the establishment of a telecom joint venture as evidenced by Board resolutions attached to the application as Exhibit D and the resolution attached hereto dated 10/21/99.

The only MLGW charter provision that may potentially be implicated in the approval of the Operating Agreement is the provision in Section 681 which requires contracts over $5,000 to be approved by the City Council. However, the Memphis

City Council passed an ordinance in 1985 (Ordinance No. 3509 – An Ordinance to Amend the Code of Ordinances of the City of Memphis Pertaining to the Budget, Salaries and Contracts of Memphis Light, Gas & Water Division, copy attached) which provides that in lieu of approval of individual contracts and salaries, the Council should approve the budget established by the Board of Commissioners of MLGW. On December 7, 1999, the Memphis City Council approved the MLGW budget for the year 2000, which includes the Electric Division loan to the Telecommunications Division in the amount of $20 million. Pursuant to Ordinance 3509, individual contracts regarding the disbursement of the $20 million need not be approved by the Council. Even absent Ordinance 3509, the MLGW Board would have the authority to approve the Operating Agreement pursuant to T.C.A.§ 7-52-103(d).

V. Issue 6

Whether MLGW and Memphis Networx have complied with the provisions of Tenn. Code Ann. §§ 7-52-402 through 405. (Yes.)

As are Issues 1, 2, and 3, this is primarily an issue of fact to be determined during the hearing of this matter. To the extent MLGW and Applicant can comply with T.C.A. § 7-52-402 prior to receiving TRA authority, they have done so. To the extent that ongoing compliance is required, MLGW and Applicant set forth their plans for compliance in the testimony of John McCullough and Ward Huddleston. MLGW has already obtained approval from the state director of local finance of an interdivisional loan pursuant to T.C.A. § 7-52-402 (See Exhibit N

to supplemental filing and Exhibit B to the pre-filed rebuttal testimony of John McCullough).

With respect to T.C.A. § 7-52-403(b), Applicant has indicated in its application and testimony that it does not intend to provide service in the territories of incumbent local exchange carriers with fewer than 100,000 access lines, except as allowed by state or federal law.

With respect to T.C.A. § 7-52-404, John McCullough stated in his testimony that MLGW plans to make payments in lieu of taxes as required.

With respect to T.C.A. § 7-52-405, MLGW and Applicant have testified that they, MLGW, will charge and Applicant will pay the appropriate pole attachment fees and rights-of-way charges required by T.C.A. §7-52-405(1) and (2).

Therefore, the TRA should find that MLGW and Memphis Networx have complied with the provisions of T.C.A. §§ 7-52-402-405.

VI. Issue 7

What conditions, rules and/or reporting requirements, if any, are necessary to insure compliance with the provisions of Tenn. Code Ann. §§ 7-52-402 through 405? (None.)

These sections establish certain criteria for the provision of services by a municipality as set forth in T.C.A. § 7-52-401. Section 7-52-402 prohibits a municipality that is providing any of the services set out in § 7-52-401 from

providing subsidies for such services. That same section does allow for the lending of certain funds by the municipality pursuant to certain safeguards and only with the advance approval of the state director of local finance.

Section 7-52-403 grants municipalities powers and obligations, pursuant to certain limitations, pertaining to the provision of telecommunications services pursuant to § 7-52-401. Section 7-52-404 makes certain provisions relating to tax equivalent payments. Finally, section 7-52-405 makes certain provisions for the allocation of costs associated with the provision of telecommunications services. Clearly each of these sections is designed to ensure competition within the market for telecommunications services.

The Applicant and the Joint Petitioners contend that these statutes themselves are the means of ensuring compliance. For example, § 7-52-402 requires the independent approval of the state director of local finance of any loans made by the municipality in regard to the provision of telecommunications services. The City of Memphis will ensure that MLGW makes the appropriate tax equivalent payments. With respect to those provisions that the TRA has jurisdiction to monitor and enforce, it can use its existing regulatory powers to ensure compliance. The TRA can respond to complaints (TRA Rule §1220-4-8-.09 (1999)) institute investigations on its own initiative, request voluntary compliance, issue show cause orders and issue orders directing compliance (T.C.A. §§ 65-2-106, 65-1-213). Given the pre-existing means of ensuring compliance, additional conditions, rules or

reporting requirements generated solely for this particular situation would be redundant and unnecessary.

VII. Issue 8

What conditions, rules and/or reporting requirements, if any, are necessary to insure Applicant's and Petitioners' compliance with the prohibition against anti-competitive practices provision of Tenn. Code Ann. § 7-52-103(d)? (None.)

As was the case with the statutes referenced in regard to Issue 7, the statute itself is the means of ensuring compliance. Section 7-52-103(d) provides:

> In addition to the authority granted under otherwise applicable law, each municipality operating an electric plant has the power and is authorized on behalf of its municipality, acting through the authorization of the board or supervisory body having responsibility for the municipal electric plant, to establish a joint venture or any other business relationship with one (1) or more third parties to provide related services, subject to the provisions of §§ 7-52-402--7-52-407. No contract or agreement between a municipal electric system and one (1) or more third parties for the provision of related services that provides for the joint ownership or joint control of assets, the sharing of profits and losses, or the sharing of gross revenues shall become effective or enforceable until the Tennessee Regulatory Authority approves such contract or agreement on petition, and after notice and opportunity to be heard has been extended to interested parties. Notwithstanding § 65-4-101(a)(2) or any other provision of this code or of any private act, to the extent that any such joint venture or other business relationship provides related services, such joint venture or business relationship and every member of such joint venture or business relationship shall be subject to regulation by the Tennessee Regulatory Authority in the same manner and to the same extent as

> other certified providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to the provision of related services. This provision shall not apply to any related service or transaction which is not subject to regulation by the Tennessee Regulatory Authority. (emphasis added)

As noted above, the TRA has the full power and ability to address and remedy any complaints that allege a violation of the anti-competitiveness provisions of the statute.

VIII. Issue 9

What conditions, rules or reporting requirements, if any, are necessary to insure Applicant's and Petitioners' compliance , to the extent applicable, with Tenn. Code Ann. § 65-5-208(c)? (None.)

T.C.A. § 65-5-208(c) contains a provision prohibiting "cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices." Applicant and Joint Petitioners contend that this provision applies to incumbent local exchange carriers, not competitive local exchange carriers (CLECs). In any event, these prohibitions against anti-competitive practices are almost identical to the protections found in T.C.A. §§ 7-52-402 through 405 and § 7-52-103(d). Therefore, the TRA need not decide whether T.C.A. § 65-5-208(c) applies to

CLECs in this case. The TRA has the authority to prevent such anti-competitive practices between MLGW and Memphis Networx under T.C.A. § 752-103(d).

For all of the reasons noted above relating to issues 7 and 8, the circumstances of this Application do not warrant the creation of a new and unique set of rules and reporting requirements to ensure that anti-competitive actions are not taken by the Applicant or Joint Petitioners. Existing safeguards and the enforcement power of the Tennessee Regulatory Authority are the appropriate vehicles to prevent such actions.

IX. Conclusion

For the foregoing reasons, there are no impediments to approval of the Application and Joint Petition and no new conditions, rules or reporting requirements need to be imposed upon the Applicant and Joint Petitioners. Consequently, the Application and Joint Petition should be approved.

CERTIFICATE OF SERVICE

I, D. Billye Sanders, hereby certify that on this 27th day of March, 2000, a true and correct copy of the foregoing was delivered by hand delivery, facsimile or U.S. Mail postage pre-paid to the Counsel of Record listed below.

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APPENDIX

CHARTER PROVISIONS OF THE CITY OF MEMPHIS
CREATING THE MEMPHIS LIGHT, GAS & WATER DIVISION
AND ESTABLISHING ITS POWERS AND DUTIES
AS AMENDED TO NOVEMBER 4, 1980

Article 65. Light, Gas and Water Division*

Sec. 666. Control and management of municipal electric, gas, water and other energy functions.

Any 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, shall be under the jurisdiction, control and management of [the] Memphis light, gas and water division, to be constituted and conducted as hereinafter set forth:

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* The Memphis light, gas & water division and the board of light, gas & water commissioners were created by Chapter 381 of the Private Acts of 1939 amending the Charter of the City of Memphis. Subsequent to that time, the Charter has been amended by various Private Acts of the Legislature amending the Charter of the City of Memphis by the Home Rule Referendum on November 4 1980. This compilation inserts the Home Rule amendment where applicable. The section headings are intended as mere catchwords to indicate the contents of the section and shall not be deemed or taken to be titles of such section or a part of the section.

The Memphis light, gas & water division shall have jurisdiction, control and management of energy systems such as coal gasification, fuel cell, solar, steam, cogeneration, and all other types of energy systems acquired by the City of Memphis for the manufacture, production, distribution or sale of all forms of energy including electricity, natural or artificial gas, steam or water, and the properties, agencies, and facilities used for any such purpose or purposes. The City Council of the City of Memphis may likewise assign the management or control of the manufacture, production, distribution and sale of energy from refuse or sludge or other properties collected and controlled by other departments of the City upon such terms and conditions as the Council shall prescribe. The Memphis light, gas & water division shall perform such other functions as prescribed by ordinance. (Priv. Act 1939 ch. 381 §1, Home Rule 1980)

Sec. 667. Composition of division and board of light, gas and water commissioners; bond and oath of commissioners.

The Memphis light, gas and water division shall consist of a board of light, gas and water commissioners composed of

five members, and such subordinate officers and employees as may be selected by said board of light, gas and water commissioners as hereinafter provided.

The board of light, gas & water commissioners shall provide for the organization of its own board and for such other subordinate officers and employees as the board deems appropriate. The board of light, gas and water commissioners shall establish such organization as it deems best and advisable for the efficient operation of the Memphis light, gas & water division as presently constituted and any future energy systems.

Each member of said board shall give bond in the sum of ten thousand dollars ($10,000.00), with good securities, conditioned to faithfully perform the duties of his office, and shall take and subscribe an oath to uphold the Constitution of the United States and of the State of Tennessee, and faithfully to discharge the duties of his office. Said bond shall be acceptable to and approved by the City Council of the City of Memphis, and said oath and bond shall be filed with the comptroller of the City of Memphis. (Priv. Acts 1939, ch. 381, §2; Priv. Acts 1945, ch. 422, §1; Priv. Acts 1951, ch. 388, §1; Home Rule 1980.)

Sec. 668. Appointment and terms of commissioners.

(a) The first board of light, gas and water commissioners shall be the members of the present board of light and water commissioners, as now constituted, who shall serve until the expiration of their present respective terms of office, and until their respective successors are duly elected and qualified, and upon the expiration of their respective terms of office their successors shall be elected by the City Council of the City of Memphis and shall serve for a term of three years, unless sooner removed; and in the event of a vacancy occurring by death, resignation or removal of any of said light, gas and water commissioners, their successors shall be elected only to fill the unexpired term of such commissioner. (Priv. Acts 1939, ch. 381, §10; Priv. Acts 1941, ch. 327, §1; Priv. Acts 1951, ch. 388, §2.)

(b) The board of five members provided in section 1 above [section 667] shall be the present members of the board of light, gas and water commissioners as now constituted, and two additional members to be elected by the board of commissioners of the City of Memphis, all of whom shall serve until the expiration of the terms of the present board

of light, gas and water commissioners, June 1, 1951, and until their successors are elected and qualified; and thereafter the City Council of the City of Memphis shall elect two members of said board to serve for a term of three years, two members to serve for a term of two years and one member, who shall serve for a term of one year, and upon the expiration of their respective terms of office, the successors of the board hereby created shall be elected for a term of three years by the City Council of the City of Memphis. (Priv. Acts 1951, ch. 388, §3.)

Sec. 669. Designation and terms of president.*

The President of the board of light, gas and water commissioners shall no longer be a member of the board of commissioners beginning June 1, 1981. The president shall thereafter be appointed for five year terms by the Mayor, and approved by the City Council of the City of Memphis. In the event of a vacancy occurring by death, resignation, or removal of the president, his successor shall be appointed

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* The Home Rule amendment repealed the provision for a vice president of the board. The board provides for its own organization by this amendment.

for a five year term commencing upon his appointment by the Mayor and approval by the City Council. The chairman of the board of light, gas & water commissioners shall perform any necessary acts until the appointment of a president.

Sec. 670. Meetings of commissioners; quorum.

The board of light, gas and water commissioners shall hold regular meetings at least once each week, at a definite time to be fixed by resolution of the board of light, gas and water commissioners, and such special meetings as may be necessary for the transaction of the business of the light, gas and water division. A majority of the board shall constitute a quorum for the transaction of business at any regular or special meeting. Notice of any special meeting may be waived, either before or after the holding thereof; and personal attendance at any special meeting shall constitut a waiver of notice by the members present; and absence of any member from the City of Memphis shall dispense with the necessity of giving such member any notice of any special meeting.

The number of required regular meetings may be changed with the approval of the City Council.

Sec. 671. Salary of president and commissioners.*

The salary of the president shall be fixed by the City Council of the City of Memphis, to be payable in monthly installments. The salary of the members of said board of light, gas and water commissioners shall be fixed by the City Council of the City of Memphis, payable in monthly installments. (Priv. Acts 1939, ch. 381, §11.)

Sec. 672. President to devote entire time to office; general powers and duties of president.

The president of the light, gas and water division shall give his entire time and attention to the duties of his office and shall not actively engage in any business or profession not directly connected therewith; and, subject to the regulations of the board of light, gas and water commissioner shall have general supervision over the operation of said light, gas and water division and of all officers and employees of said light, gas and water division. The president shall keep the board of light, gas and water commissioners advised

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* The provision for salary of the vice president of the board of commissioners was repealed by implication by the Home Rule amendment.

as to the general operating and financial condition of said light, gas and water division and he shall furnish a monthly report to the City Council of the City of Memphis with regard to the operation, maintenance and financial condition of the light, gas and water division, and from time to time shall furnish such other information to the City Council of the City of Memphis as they may request.

The president shall attend the meetings of the board of commissioners, but shall have no vote and shall give his entire time and attention to the duties of his office as presently provided in the Charter. The president may be removed in the same manner and subject to the same procedure provided for directors. (Priv. Acts 1939, ch. 381, §11; Home Rule 1980.)

Sec. 673. Duties of vice-president; right of vice-president to serve as chief engineer.*

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* This section repealed by 1980 Home Rule amendment.

Sec. 674. Selection, duties, etc., of chief engineer, secretary and attorneys.

The board of light, gas and water commissioners shall, as soon as practicable after their qualification and organizatic certify the nomination of the following subordinate officers to the City Council of the City of Memphis for approval, and said subordinate officers, after having been approved by the City Council, shall serve at the will and pleasure of the board of light, gas and water commissioners, the salaries of said subordinate officers to be fixed by the board of light, gas and water commissioners subject to approval by the City Council of the City of Memphis, to-wit:

(a) Chief engineer. (Repealed)

(b) Secretary. A secretary, who shall have charge and custody of all books, papers, documents and accounts of the light, gas and water division, and under whose supervision all necessary accounting records shall be kept, and all checks and vouchers prepared. The board of light, gas and water commissioners shall by resolution designate the persons who

shall sign checks, and all checks shall be signed and countersigned in such manner as the board of light, gas and water commissioners may provide by resolution. Said secretary shall be required to attend in person or by one of his clerks, all of the meetings of the light, gas and water commissioner and keep a correct record of all the proceedings of that body, and perform such other duties as may be imposed upon him by the board of light, gas and water commissioners. He shall have such clerical assistance in his work as the said board of light, gas and water commissioners shall deem necessary for the work to be properly performed. He shall make and file a bond in such sum as may be fixed by the board of light, gas and water commissioners and shall take the same oath required of members of the board of light, gas and water commissioners.

(c) Attorneys. One or more attorneys, who shall be practicing attorneys at law, and who shall make and file bonds in such sum as may be fixed by the board of light, gas and water commissioners and take the same oaths required of members of the

board of light, gas and water commissioners, and who shall act as general counsel for the light, gas and water division and advise the board of light, gas and water commissioners and other officers of the light, gas and water division in all matters of law which may arise, and who shall prosecute and defend, as the case may be, all suits brought by or against the said light, gas and water division and all suits to which the said board of light, gas and water commissioners shall be parties. (Priv. Acts 1939, ch. 381, §12; Priv. Acts 1947, ch. 723, §1; Home Rule 1980.)

Sec. 675. Employment, salaries, etc., of other subordinate officers and employees.

The board of light, gas and water commissioners shall be authorized to employ such other engineers, superintendents, assistants, consultants and other subordinate officers and employees as may be necessary for the efficient operation of said light, gas and water division, who shall hold office at the will and pleasure of the board of light, gas and water commissioners and shall receive such salaries as may be

fixed by the board of light, gas and water commissioners; provided that no salary shall be fixed in excess of the sum of four thousand dollars ($4,000.00) per annum without the consent and approval of the City Council of the City of Memphis; and provided further that the board of light, gas and water commissioners shall certify to the City Council of the City of Memphis for approval the nomination of all subordinate officers and employees whose salaries shall be fixed in excess of four thousand dollars ($4,000.00) per annum, but the consent and approval of the City Council to any salary or nomination shall not be necessary where the salary of any subordinate officer or employee shall be less than four thousand dollars ($4,000.00) per year.

Provided, further, that no salaries, fees or other compensation in excess of four thousand dollars ($4,000.00) shall be paid by the board of light, gas and water commissione: to engineers, auditors, attorneys, consultants, or any others employed to render extraordinary services to the light, gas and water division, unless such salaries, fees or compensation are approved by the City Council of the City of Memphis.

The City Council of the City of Memphis, by ordinance, may raise the amount of salaries or compensation for employees or others requiring City Council approval to such amount as it may deem appropriate. (Priv. Acts 1939, ch. 381, §13; Priv. Acts 1947, ch. 723, §2; Home Rule 1980.)

Sec. 676. Bonds of officers, agents and employees.

The Memphis light, gas and water division, if the board of light, gas and water division commissioners so elects, may insure the fidelity of any or all of its officers, agents, attorneys or employees, or may require them, or any of them, to execute bond; and the premium on any bond required by this Act, or on any of the aforesaid bonds that may be required by the board of light, gas and water commissioners, or the premium on any fidelity insurance, shall be paid out of the funds of the Memphis light, gas and water division and be charged to operating expenses, unless the board of light, gas and water commissioners shall otherwise expressly provide by resolution. (Priv. Acts 1939, ch. 381, §24.)

Sec. 677. Authority to construct, operate, etc., electric system; purchase of electricity.

The said board of light, gas and water commissioners shall have the power and authority to construct, purchase, improve, operate and maintain, within the corporate limits of the City of Memphis or elsewhere within the limits of Shelby County, an electric plant or system, including without limitation, power plants, transmission lines, substations, feeders, primary and secondary distribution lines, including turbines, engines, pumps, boilers, generators, converters, switchboards, transformers, poles, conduits, wires, cables, lamps, fixtures, accessory apparatus, buildings and lands, rights of way and easements, and all other appurtenances usual to such plants for the purpose of furnishing electric power and energy for lighting, heating, power or any other purpose for which electric power or energy can be used; provided no such electric plant or system shall be operated within the limits of any incorporated municipality, outside the corporate limits of the City of Memphis, without the consent of the governing body of such incorporated municipality

Said board of light, gas and water commissioners shall have the power and authority to purchase electric current from the Tennessee Valley Authority or from any other person, firm, or corporation as in the judgment of said board of

light, gas and water commissioners shall be proper or expedient and to make any and all contracts necessary and incident to carry out this purpose and to change, alter, renew or discontin any contracts entered into by them at any time, provided, that the said board of light, gas and water commissioners shall not enter into any contract for the purchase of electrici for a period longer than five years, unless said contract shall have first been approved by the City Council of the City of Memphis. (Priv. Acts 1939, ch. 381, §3.)

Sec. 678. Authority to construct, operate, etc., gas system; purchase of gas.

The said board of light, gas and water commissioners shall have the power and authority to construct, purchase, improve, operate and maintain, within the corporate limits of the City of Memphis or elsewhere within the limits of Shelby County, a gas plant or system, including without limitation, all accessory apparatus, buildings and lands, rights-of-way and easements, and shall have the power and authority to construct, purchase, improve, operate, maintain, abandon, sell, convey or remove within the corporate limits of the City of Memphis or elsewhere, all other appurtenances

to or accessories for such plants, it being the intention of this Act that the distribution or selling of such natural or artificial gas shall be limited to the City of Memphis or elsewhere in Shelby County.

The board of light, gas and water commissioners shall have power and authority to purchase natural gas from the Memphis Natural Gas Company, or from any other person, firm, or corporation as in the judgment of said board of light, gas and water commissioners shall be proper or expedient, and to make any and all contracts necessary and incident to carry out this purpose and to change, alter, renew, or discontinue any contracts entered into by them at any time, provided, that the said board of light, gas and water commissioners shall not enter into any contract for the purchase of natural gas for a period longer than five years, unless said contract shall have first been approved by the City Council of said City of Memphis. (Priv. Acts 1939, ch. 381, §4; Priv. Acts 1963, ch. 151, §1.)

Sec. 679. Authority to construct, operate, etc., water system.

The said board of light, gas and water commissioners shall have the power and authority to construct, purchase, improve, operate and maintain, within the corporate limits of the City of Memphis or elsewhere within the limits of Shelby County, a water plant or system, including, without limitation, wells, pumping plants, reservoirs, pipes, and all accessory apparatus, buildings and lands, rights of way and easements, and all other appurtenances usual to such plants or systems, for the purpose of producing, distributing, supplying or selling water to the City of Memphis, or to any person, firm, public or private corporation, or to any other user or consumer, in the City of Memphis or elsewhere in Shelby County. (Priv. Acts 1939, ch. 381, §5.)

Sec. 679A. Authority to construct, operate, etc., energy systems.

The board of light, gas & water commissioners shall have the power and authority to construct, purchase, improve, operate, and maintain, within the corporate limits of the

City of Memphis or elsewhere within the limits of Shelby County, or as permitted by State law, the energy systems as set forth above (Section 666) including all necessary equipment property, right of way, easements, and all other appurtenances usual for such facilities. The board of light, gas & water commissioners shall have authority to make a schedule of rates for said energy systems and for different classes of consumers in accordance with the provisions now provided for establishing service rates with any rates or any change in rates to be presented in an application to the Council of the City of Memphis as presently provided.

The board of light, gas & water commissioners 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, partnerships, or other financial arrangements under such terms and conditions as are approved by the City Council.

The present provisions of the Charter for rights of condemnation, establishing of rules and regulations, the use of rights of way, and the issuance of bonds, notes or other obligations with the consent of the City Council shall also be applicable to any new energy systems or divisions established.

The distribution of any revenue shall be in accordance with the same distribution as is provided for the disposition of revenue of the gas division as presently set forth in the Charter (Section 693), provided, however, that any surplus funds (sub-section 7) remaining over and above safe operating margins may be devoted to rate reductions or to capital projects for energy as a means of providing funds for energy systems.

The allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas & water commissioners in contracting with federal agencies or in the issuance and sale of any bonds or notes on behalf of or in conjunction with energy systems in the same manner as is now provided in the Charter for electric, gas or water divisions. (Home Rule 1980)

Sec. 680. Service rates.

Said board of light, gas and water commissioners shall have authority to make a schedule of rates for the several services and for different classes of consumers; and shall make such rates for the service rendered as will enable them at all times to pay operating expenses, interest, sinking funds, reserves for working capital, renewals and replacements, casualties and other fixed charges; but the rates charged users or consumers outside of the City of Memphis shall not necessarily be as low as the rates within the city. The said light, gas and water commissioners shall have the right to change the schedule of rates for both light, gas and/or water in the city and outside the city, from time to time, as in their judgment may be necessary or proper; provided, that before any change shall be made in rates, the board of light, gas and water commissioners shall be required to present an application to the City Council of the City of Memphis, setting forth the reason for said proposed changes in rates, and said changes in rates shall not become effective until they shall have been approved by said City Council, and provided further, that the board of light, gas and water commissioners and the City Council of the City of Memphis,

shall prescribe rates that will be sufficient to pay all bonds or other indebtedness and interest thereon, including reserves therefor, and to provide for all expenses of operation and maintenance of said plants or systems, including reserves therefor. (Priv. Acts 1939, ch. 381, §7.)

Sec. 681. Authority of commissioners as to contracts generally.

The light, gas and water commissioners shall have the right to make any and all contracts necessary or convenient for the full exercise of the powers herein granted, including, but not limited to, (a) contracts with any person, federal agency, municipality, or public or private corporation, for the purchase or sale of electric energy, gas, or water, and (b) contracts with any person, federal agency, municipality, or public or private corporation for the acquisition of all or any part of any electric, gas, or water plants or systems; (c) contracts for loans, grants or other financial assistance from any federal agency; and, notwithstanding any provision of this or any other Act, in contracting with any federal agency the light, gas and water commissioners shall have power to stipulate and agree to such covenants, terms and

conditions as the board may deem appropriate, including, but without limitation, covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues of the system or systems conducted and operated by the commission. Except as may be otherwise expressly provided herein, all contracts made by the light, gas and water division shall be entered into and executed in such manner as may be prescribed by the board of light, gas and water commissioners, but no contract for equipment, apparatus, materials, or supplies involving more than $2,000.00 shall be made except after said contract has been advertised in the manner now or hereafter provided by law for the advertisement of contracts made by the City Council of the City of Memphis in the making of city contracts

The light, gas and water commissioners shall have no authority to make any contracts entailing an obligation of or involving an expenditure in excess of five thousand dollars ($5,000.00), without the consent and approval of the City Council of the City of Memphis. The City Council of the City of Memphis may, by ordinance, raise the amount of contracts requiring City Council approval to such amount as

it may deem appropriate and may raise by ordinance, the amount of equipment, materials, or supplies requring newspaper advertisements for competitive bids.

Provided, however, the light, gas and water commissioners shall have authority to submit bids to and make purchases from the United States Government, or any of its agencies, departments, or divisions, of materials, supplies and equipment needed by the division without the necessity of advertising for or receiving bids for such purchases.

The board of light, gas and water commissioners may enter into such banking contract or contracts as it may determine under the procedures set forth for banking contracts for the City of Memphis with City Council approval. (Priv. Acts 1939, ch. 381, §15; Priv. Acts 1945, ch. 18, §2; Priv. Acts 1947, ch. 723, §3; Home Rule 1980.)

Sec. 682. Use of rights of way, easements, etc., held by state, county or other municipality.

The Memphis light, gas and water division may use any right of way, easement, or other similar property right

necessary or convenient in connection with the acquisition, improvement, operation, or maintenance of its electric system, gas system or water system, held by the State of Tennessee, Shelby County, or any other municipalities, provided that the State of Tennessee, Shelby County, or any other municipality shall consent to such use. (Priv. Acts 1939, ch. 381, §25.)

Sec. 683. Rules and regulations of commissioners.

Said board of light, gas and water commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said light, gas and water division. (Priv. Acts 1939, ch. 381, §8.)

Sec. 684. Right of condemnation.

The Memphis light, gas and water division is hereby authorized and empowered to condemn any land, easements, or rights of way, either on, under or above the ground, for any and all purposes in connection with the construction, operation

improvement or maintenance of said electric system, gas system, or water system. Title to such property so condemned shall be taken in the name of the City of Memphis. Such condemnation proceedings shall be pursuant to and in accordanc with Sections 23-1401, et seq.; provided, however, that where title to any property sought to be condemned is defectiv it shall be divested out of all persons, firms or corporations who have, or may have, any right, title or interest thereto, and be vested by decree of court; provided, further, that the court in which any such proceedings are filed shall, upon application by [the] Memphis light, gas and water division, and upon the posting of a bond with the clerk of the court in such amount as the court may deem commensurate with the value of the property, order that the right of possession shall issue immediately or as soon and upon such terms as the court, in its discretion, may deem proper and just.

Whenever the board of light, gas and water commissioners shall deem it necessary and proper, the right of condemnation herein granted shall extend to and include the right to condemn any property devoted to another public use, whether such property was acquired by condemnation or purchase;

provided, that no property devoted to another public use shall be condemned without the consent and approval of the City Council of the City of Memphis. (Priv. Acts 1939, ch. 381, §9.)

Sec. 685. Removal of commissioners.*

Sec. 686. Restriction as to issuance of bonds or notes, incurring indebtedness, etc.

Said board of light, gas and water commissioners shall have no authority to issue any bonds or notes, or any obligatio constituting a lien upon the properties used in the production and distribution of electricity, gas and water in the City of Memphis and Shelby County, except by and with the consent of the City Council of the City of Memphis.

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* This section repealed by Home Rule provisions adopting Mayor-Council form of government wherein all members of boards and commissions pursuant to Section 11 are subject to removal under the procedures provided for directors.

The City Council of the City of Memphis may, whenever requested by the board of light, gas and water commissioners, incur indebtedness and issue and sell bonds or notes on behalf of the light, gas and water division to such extent and in such manner as may now or hereafter be authorized by any applicable private or public act or general law of the State of Tennessee. (Priv. Acts 1939, ch. 381, §16.)

Sec. 687. Separate books and accounts to be kept on electric, gas and water operations.

The board of light, gas and water commissioners shall require that separate books and accounts be kept on the electric, gas and water operations, so that said books and accounts will reflect the financial condition of each division separately, to the end that each division shall be self-sustaining, and may require that the moneys and securities of each division be placed in separate accounts.

The board of light, gas & water commissioners shall have power to establish different divisions of the Memphis light, gas & water division for assigning of the separate energy functions or for the efficient operation of the Memphis light, gas & water division and provide for the keeping of such books and records as it may require to properly account for the equitable distribution of expenses. Each of such energy systems [is] to be financially separate with such joint or common expenses as shall be advisable and economical as determined by the board of commissioners. (Priv. Acts 1939, ch. 381, §17; Home Rule 1980.)

Sec. 688. Divisions to be operated independent of each other; exception.*

Each of said divisions (electric, gas and water) shall be operated independent of each other, except insofar as the board of light, gas and water commissioners may be of the opinion that joint operation shall be advisable, and economical

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* See section 657 for creating different divisions for effectual operation and division of expenses.

in which event the expense incurred in such joint operation, including the salaries of said commissioners, shall be prorated between the several divisions in such manner as the light, gas and water commissioners shall find to be equitable. (Priv. Acts 1939, ch. 381, §17.)

Sec. 689. Moneys and funds of one division may be loaned to another; restriction.

Notwithstanding any other provision of the Charter, the moneys and funds of any division may be loaned to another division in such amounts and upon such terms as the board of light, gas & water commissioners may authorize and approve. (Home Rule 1980)

Sec. 690. Authority to create revolving fund; loans to property owners for purpose of making service connections.

The light, gas and water commissioners are authorized and empowered to set aside from any available funds of Memphis light, gas and water division a revolving fund in an amount not to exceed one hundred thousand dollars, and said

commissioners are further authorized and empowered, at their discretion, to make loans not to exceed the sum of one hundred dollars per water service, or gas service, or electric service, to any one property owner who is a citizen and resident of the City of Memphis, or Shelby County, to enable said property owner to install water, gas or electric service connections and applicances. (Priv. Acts 1939, ch. 381, §18.)

Sec. 691. Disposition of revenue of light division.

The revenue received each year from the operation of the light division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the light division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the light division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the light division, said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the light division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the light plant or system and/or for the purchase of outstanding bonds that may have been issued for the benefit of the light division, as the board of light, gas and water commissioners may deem advisabl

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six

percent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the light division, the said percentage to be fixed by resolution of the City Council of the City of Memphis. Should the said percentage as fixed by the City Council of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the City Council of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the City Council and one member of the board of light, gas and water commissioners, who shall elect a third member, and the findings of this board of arbitration shall be final and binding on both the City Council and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the light division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas and water commissioners in contracting with the Tennessee Valley Authority for the purchase of power, or as may be deemed necessary by the City Council of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the electric system, or on behalf of the electric system in conjunction with the gas or water systems. (Priv. Acts 1939, ch. 381, §19.)

Sec. 692. Disposition of revenue of water division.

The revenue received each year from the operation of the water division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the water division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the water division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the water division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For the payment to the general funds of the municipal: a sum not to exceed a cumulative return of three percent (3%) per annum of the equity or investment, if any, of the municipality in the properties of the water division, the said percentage to be fixed by resolution of the City Council of the City of Memphis. Should the said percentage as fixed by the City Council of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and

water commissioners to the City Council of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the City Council of the City of Memphis and one member of the board of light, gas and water commissioners, who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the City Council of the City of Memphis and the board of light, gas and water commissioners.

(5) Any surplus thereafter remaining shall be retained by the board of light, gas and water commissioners and may be used by them for expansion and enlargement of the water division and/or purchase of bonds that may have been issued and outstanding for the benefit of said division.

(6) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the

City Council of the City of Memphis with the approval of the board of light, gas and water commissioners in the issuance and sale of any bonds or notes on behalf of the water system, or on behalf of the water system in conjunction with the gas or electric systems. (Priv. Acts 1939, ch. 381, §20.)

Sec. 693. Disposition of revenue of gas division.

The revenue received each year from the operation of the gas division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the gas division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the gas division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the gas division.

Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the gas division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the gas plant or system and/or for the purpose of outstanding bonds that may have been issued for the benefit of the gas division, as the board of light, gas and water commissioners may deem advisable.

(6) For the payment to the general fund of the municipalit a sum not to exceed a cumulative return of six percent (6%) per annum of the equity or investment, if any, of the municipality in the properties of

the gas division, the said percentage to be fixed by resolution of the City Council of the City of Memphis. Should the said percentage as fixed by the City Council of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the City Council of the City of Memphis shall be determined by a board of arbitration consisting of one member of the City Council of the City of Memphis and one member of the board of light, gas and water commissioners who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the City Council of the City of Memphis and the board of light, gas and water commissioners; provided that in no event shall the aforesaid payment to the Municipality for amy year exceed one-half of the net profits realized by the gas division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the City Council of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the gas system, or on behalf of the gas system in conjunction with the electric or water systems. (Priv. Acts. 1939, ch. 381, §22; Priv. Acts 1945, ch. 18, §1; Priv. Acts 1947, ch. 491, §1; Priv. Acts 1959, ch. 224, §1.)

Sec. 694. Investment and reinvestment of funds or reserves.

The board of light, gas & water commissioners shall provide for the investment and reinvestment of its funds and reserves as determined in the discretion of the board of commissioners, and the funds of all divisions may be combined for the purpose of obtaining the best investment. The board shall not be limited but shall be able to make such investmen

as authorized by state law and as the board of light, gas & water commissioners may deem best with such security as the board may deem proper. Any profit or loss resulting from any such investment or reinvestment shall be credited or charged to the several divisions in proportion to the respective funds so invested and reinvested. (Home Rule 1980.)

Sec. 695. Matters requiring Council approval.

Any matters requiring Council approval shall be forwarded through the Mayor's designated liason to the City Council for the City of Memphis for approval. (Home Rule 1980.)

Sec. 696. City, school board, hospital, crematory, police stations, etc., to be furnished water free of charge.

The light, gas and water commissioners shall furnish to the City of Memphis free, sufficient water for all fire hydrants of the city for fire protection and for sprinkling the streets of the city, and shall also furnish free, sufficient water for the school board, the general hospital, the city crematory, and the police stations, and may also furnish

free to said city such additional water as the light, gas and water commission may deem expedient for public purposes. (Priv. Acts 1939, ch. 381, §21.)

Sec. 697. City and its governmental agencies to be furnished electric current and gas; payment to be based on prevailing rate scales.

The light, gas and water commissioners shall furnish to the City of Memphis electric current and gas for all of its governmental agencies, and the City of Memphis shall be required to pay for said current and gas under the prevailing rate scales adopted for the sale of electric current and gas. (Priv. Acts 1939, ch. 381, §26.)

Sec. 698. Act not to impair existing obligations; existing contracts binding upon division.

This Act shall not in any way impair any obligations of the City of Memphis, or the board of water commissioners or the board of light and water commissioners of Memphis light and water division, to any person or persons, and shall not change or alter the obligations of any existing contracts,

but all contracts outstanding, heretofore made under the existing law, shall be binding upon Memphis light, gas and water division as herein established. (Priv. Acts 1939, ch. 381, §6.)

Sec. 699. Construction of Act.

The powers, authority and rights conferred by this Act shall be in addition and supplemental to, and the limitations imposed by this Act shall not affect the powers conferred by any other general, special, or local law; and this Act is hereby declared to be remedial in nature, and the powers hereby granted shall be liberally construed to effectuate the purpose hereof, and to this end the Memphis light, gas and water commissioners shall have power to do all things necessary or convenient to carry out the purposes hereof, in addition to the powers expressly conferred in this Act. (Priv. Acts 1939, ch. 381, §27.)

THE EYE CLINIC, P.C. and its shareholders; Dr. Ben House, Dr. Jim Price, Dr. Arthur Woods, Dr. Mark Bateman and Dr. Bruce Herron, Plaintiffs/Appellees,

v.

JACKSON-MADISON COUNTY GENERAL HOSPITAL, West Tennessee Healthcare, Inc., and Health Partners, Inc. Defendants/Appellants.

Court of Appeals of Tennessee at Jackson.

July 24, 1998.

Application for Permission to Appeal Denied by Supreme Court Jan. 11, 1999.

Eye doctors brought action against hospital district and health care companies, alleging that defendants' business activities violated state Constitution. The Chancery Court, Madison County, Joe C. Morris, Chancellor, granted summary judgment to doctors. Defendants appealed. The Court of Appeals, Lillard, J., held that: (1) district was not a "city, county or town" subject to restrictions on stock ownership; (2) district was not an arm of the state; and (3) denial of membership in preferred provider organizations (PPO) did not violate state due process equal protection provisions.

Reversed and remanded.

1. Constitutional Law ⇐14

In interpreting a constitutional provision, effect must be given to its ordinary and inherent meaning.

2. Constitutional Law ⇐13

Court's articulation of constitutional principles must capture the intentions of the persons who ratified the Constitution; these intentions are reflected in the words of the constitution itself, rather than court's own subjective notions of unexpressed constitutional intent.

3. Counties ⇐154(1)
Municipal Corporations ⇐873

For purposes of provision of State Constitution prohibiting county, city, or town from becoming a stockholder except upon election, phrase "county, city or town" is to be confined to its literal meaning. Const. Art. 2, § 29.

See publication Words and Phrases for other judicial constructions and definitions.

4. Hospitals ⇐3

Hospital district, which was a quasi-governmental entity created by private act, was not a "city, county or town" within meaning of provision of State Constitution prohibiting county, city, or town from becoming a stockholder except upon election. Const. Art. 2, § 29; Priv.Acts 1992, c. 165, § 1.

5. Hospitals ⇐3

Hospital district, which was a quasi-governmental entity created by private act, was not the "state" within meaning of provision of State Constitution prohibiting state from becoming stockholder with others in any association, company, corporation, or municipality. Const. Art. 2, § 29; Priv.Acts 1949, c. 686, § 3.

See publication Words and Phrases for other judicial constructions and definitions.

6. Constitutional Law ⇐26

The Tennessee Constitution is a limitation of powers, not a source of power. Const. Art. 1, § 1 et seq.

7. Statutes ⇐4

General Assembly may enact any legislation that is not forbidden by the Tennessee or Federal Constitutions.

8. Constitutional Law ⇐320.5
Hospitals ⇐3

"Law of the land" provision of State Constitution did not prohibit hospital district from owning preferred provider organizations (PPO). Const. Art. 1, § 8; T.C.A. § 7-57-603.

9. Constitutional Law ⇐251

Due process provision in State Constitution is consonant with the due process clause

in the Fourteenth Amendment of the United States Constitution. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 8.

10. Constitutional Law ⇐252.5

Claimant must have a vested right in order to assert due process provision of State Constitution. Const. Art. 1, § 8.

11. Constitutional Law ⇐251.1, 251.5

Once an entitlement is shown, state due process provision does not mandate that all government decisionmaking comply with standards that assure perfect, error-free determinations; instead, due process is flexible and calls for such procedural protections as the particular situation demands. Const. Art. 1, § 8.

12. Constitutional Law ⇐251.5

Three factors should be considered when determining the procedural safeguards that should be utilized under the due process provision of the state Constitution: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional safeguards; and (3) the government's interest. Const. Art. 1, § 8.

13. Constitutional Law ⇐276(2), 296(1)
Physicians and Surgeons ⇐13

Under due process provision of State Constitution, eye doctors did not have interest in indefinite continuation of their contractual relationship with preferred provider organization (PPO) created by hospital district that was a quasi-governmental entity, and did not have a right to membership in another PPO. Const. Art. 1, § 8.

14. Constitutional Law ⇐209

Equal protection analysis under the Tennessee Constitution is identical to equal protection analysis under the United States Constitution. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 8; Art. 11, § 8.

15. Constitutional Law ⇐213.1(2)

Under state equal protection analysis, if some reasonable basis can be found for the classification or if any state of facts may reasonably be conceived to justify it, the classification will be upheld; this is a lenient standard under which a defendant may satisfy its burden merely by demonstrating any possible reason or justification for the statute's passage. Const. Art. 1, § 8; Art. 11, § 8.

16. Constitutional Law ⇐238(1)
Hospitals ⇐3

Hospital district, which was a quasi-governmental entity, did not violate state equal protection provision by denying eye doctors membership in preferred provider organizations (PPO); doctors retained interest in outpatient ophthalmologic surgery center that competed with district. Const. Art. 1, § 8; Art. 11, § 8; T.C.A. § 7-57-501.

William H. West, Nashville, Tennessee, for the Plaintiffs/Appellees.

John Knox Walkup, Michael E. Moore, Ann Louise Vix, Nashville, Tennessee, for the Intervening Defendant/Appellant.

Gayle Malone, Jr., Dan H. Elrod, Mary Ellen Morris, Amanda Haynes Young, Nashville, Tennessee, for the Defendants/Appellants.

William B. Hubbard, Carlos C. Smith, Mark W. Smith, Jerry W. Taylor, Nashville, Tennessee, for the Amici Curiae, Tennessee Hospital Association, Tennessee Public and Teaching Hospitals, Inc. and Hospital Alliance of Tennessee, Inc.

OPINION

LILLARD, J.

This suit involves a challenge by various eye doctors to the business activities of a public hospital district and its spin-offs. The trial court granted summary judgment to the plaintiffs after determining that the defendants' business activities violated the Tennessee Constitution. We reverse.

Defendant/Appellant Jackson-Madison County General Hospital District ("the District") is a quasi-governmental entity created by a Private Act by the Tennessee legislature. The District was created to provide health care services for area residents. The District created Defendant/Appellant Health

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West, Nashville, Tennessee, for
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OPINION

I.

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l Defendant/Appellant Health Partners, Inc. ("Health Partners") and Defendant/Appellant West Tennessee Alliance for Healthcare, Inc. ("West Tennessee Alliance") to further its objectives. West Tennessee Alliance is a physician-hospital organization ("PHO"), created to permit hospitals and doctors to jointly obtain provider contracts with payors of health care benefits. The District owns fifty (50%) percent of West Tennessee Alliance, and the other fifty (50%) percent is owned by private physicians.

Health Partners is a preferred provider organization ("PPO"), and the District is its sole member. Health Partners contracts with health care providers to create a network to offer to customers. In addition, Health Partners contracts with third-party payors to offer health care services. In 1995, the District created another PPO called Sight Care Network ("Sight Care"). Sight Care is not an independent entity; it is a network of eye doctors created to provide services.

Plaintiff/Appellee The Eye Clinic, P.C. is a professional corporation. All of its shareholders are opthamologists and optometrists, who are also plaintiffs in this suit. All of the individual doctor plaintiffs had preferred provider agreements with Health Partners at one time, but they have since been terminated. The parties' stipulation explains the reason for the termination of the plaintiffs' agreements:

> After the effective date of those terminations, Health Providers, Inc., plans to limit its provider network in Madison County to The Jackson Clinic, P.A., the West Tennessee Alliance for Healthcare, L.L.C., and physicians practicing in specialties or subspecialties not available through either of those organizations.

None of the individual doctor plaintiffs are members of the Jackson Clinic and none were invited to participate in West Tennessee Alliance or Sight Care.

The plaintiffs filed this lawsuit, alleging that Article II, §§ 29 and 31 of the Tennessee Constitution prohibit the District from jointly owning provider networks with private individuals. In addition, the plaintiffs asserted that the Tennessee Constitution prohibits the District from operating PPOs, such as Health Partners and Sight Care. The plaintiffs maintained that the District's operation of such PPOs results in a public entity engaging in a business carried on by private enterprise and violates the constitutional provisions for due process and equal protection. The plaintiffs sought to enjoin the District from operating West Tennessee Alliance, and also sought to enjoin the defendants from engaging in any similar enterprises in the future.

The defendants filed a motion for summary judgment. The defendants argued that their actions were authorized by the Private Act Hospital Authority Act of 1996 ("Hospital Authority Act"), Tenn.Code Ann. §§ 7-57-601 et seq., and that the state constitution does not forbid their conduct. This motion was denied.

The plaintiffs filed a motion for partial summary judgment and for a preliminary and permanent injunction. The trial court issued an order mandating notification to the State Attorney General that the constitutionality of portions of the Hospital Authority Act were being challenged. Consequently, the Attorney General intervened as a defendant in this action. The defendants then filed a cross motion for partial summary judgment.

In a cursory opinion, the trial court granted summary judgment in favor of the plaintiffs, concluding that the defendants' actions violated Article II, §§ 29 and 31 of the Tennessee Constitution. The trial court found that the District "is a joint venture of the City of Jackson and Madison County." The defendants were also enjoined from operating West Tennessee Alliance or any other company in which it co-owned shares of stock with private entities. The defendants were also enjoined from operating PPOs, such as Health Partners and Sight Care. From this order, the defendants now appeal.

On appeal, the defendants contend that the trial court erred by concluding that Article II, §§ 29 and 31 prohibit the District from co-owning with private entities shares of West Tennessee Alliance or any other company. They argue that the District is not a "county, city or town" within the meaning of

Article II, § 29 of the Tennessee Constitution. They note that the Hospital Authority Act authorizes the District to own a provider network jointly with private individuals. They contend that Article II, § 31 of the Tennessee Constitution, prohibits "the State," but not an entity such as the District, from operating PPOs, such as Health Partners and Sight Care. The Attorney General asserts that the trial court erred to the extent that it found that the Hospital Authority Act violates the Tennessee Constitution.[1]

Summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.03. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.* at 210–11. Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. *Id.* Therefore, our review of the trial court's grant of summary judgment is *de novo* on the record before this Court. *Id.*

LEGISLATION

The defendants argue first that their actions are not prohibited by Article II, § 29 of the Tennessee Constitution because the District is not a "county, city or town" within the meaning of that provision. Against the background of the pertinent legislation, we shall examine Section 29.

The Hospital Authority Act was passed to enable private act hospitals to compete in the health care market. Several of its provisions incorporate by reference the Private Act Metropolitan Authorities Act of 1995 ("Metropolitan Authorities Act"), Tenn.Code Ann. §§ 7–57–501 et seq. (Supp.1997). The Metropolitan Authorities Act sets forth its purpose:

> The general assembly hereby finds that the demand for hospital, medical and health care services is rapidly changing as is the way and manner in which such services are purchased and delivered; that the market for hospital and health care services is becoming increasingly competitive; and that the hospital and other health care providers need flexibility to be able to respond to changing conditions by having the power to develop efficient and cost-effective methods to provide for hospital, medical and health care needs. The general assembly also finds that the increasing competition and changing conditions forces hospitals and other health care providers to develop market strategies and strategic plans to effectively compete. The general assembly further finds that public hospitals in metropolitan areas are presently at a competitive disadvantage, and that significant investments in the public assets of private act metropolitan hospital authorities could be jeopardized by inability to compete with private hospitals because of legal constraints upon the scope of their operations and limitations upon the power granted to public hospitals under existing law.

Tenn.Code Ann. § 7–57–501(b).

The Hospital Authority Act broadened the powers of hospitals created by private act. The broadened powers include the power to:

> participate as a shareholder in a corporation, as a joint venturer in a joint venture, as a general partner in a general partnership, as a limited partner in a limited partnership or a general partnership, as a member in a nonprofit corporation or as a member of any other lawful form of business organization, which provides hospital, medical or health care or engages in any activity supporting or related to the exer-

1. An Amici Curiae brief was filed by the Tennessee Hospital Association, the Tennessee Association of Public and Teaching Hospitals, Inc., and the Hospital Alliance of Tennessee, Inc.

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Tenn.Code Ann. § 7-57-603 (incorporating Tenn.Code Ann. § 7-57-502(b)(1)). Such hospitals may:

acquire, manage, lease, purchase, sell, contract for or otherwise participate solely or with others in the ownership or operation of hospital, medical or health program properties and facilities and properties, facilities, and programs supporting or relating thereto of any kind and nature whatsoever and in any form of ownership whenever the board of trustees in its discretion shall determine it is consistent with the purposes and policies of this part or any private act applicable to it, and may exercise such powers regardless of the competitive consequences thereof.

Tenn.Code Ann. § 7-57-603 (incorporating Tenn.Code Ann. § 7-57-502(c)).

The District was created by Chapter 686 of the 1949 Private Acts to own the Jackson-Madison County General Hospital. Its "mission and purpose":

shall be for the benefit of the City of Jackson, Tennessee and Madison County, Tennessee, to provide, on a fee-for-service basis with due regard for the needs of low-income and indigent patients, the full range of health care (including mental illness), illness prevention and allied and incidental services and operations.

1992 Tenn.Priv. Acts ch. 165, § 1. The Act created a Board of Trustees, whose directors are to serve without compensation. 1949 Tenn.Priv. Acts ch. 686, § 3. The Board's power includes:

full, absolute and complete authority and responsibility for the operation, management, conduct and control of the business and affairs of the Hospital District herein created, which business and affairs may include without limitation the provision of health care services for persons in their homes;.... Said authority and responsibility shall include, but shall not be limited to, the establishment, promulgation and enforcement of the rules, regulations, and policies of the District, the upkeep and maintenance of all property, the administration of all financial affairs of the District, the execution of all contracts, agreements and other instruments, and the employment, compensation, discharge and supervision of all personnel.

Id. ch. 686, § 8 (as amended by 1989 Tenn. Priv. Acts ch. 26, § 2). The private act provides that:

the County Legislative Body of Madison County is hereby authorized to appropriate to the Hospital District from the General Fund of the County one-half of such sums as may be required to commence the operation of said District, and thereafter one-half of such sums as may be required to pay any deficits arising in the operation and maintenance of said District; and are authorized and empowered, also, to levy a tax sufficient for the purpose upon all taxable property within the said County.

Id. ch. 686, § 13 (as amended by 1992 Tenn. Priv. Act ch. 165, § 2).

SECTION 29

Article II, § 29 of the Tennessee Constitution states as follows:

The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. *Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of a like majority. ...*

(emphasis added).

The defendants argue that the trial court effectively declared the Hospital Authority Act unconstitutional by interpreting Section 29 to include the District within the meaning of the phrase, "county, city or town." Since

the trial court's ruling precludes the District from exercising powers expressly authorized by the Hospital Authority Act, they contend that the trial court has rendered the statute a nullity.

The plaintiffs maintain that the defendants have exaggerated the consequences of the trial court's ruling. They insist that the trial court at no point deemed the statute to be unconstitutional. They note that the Metropolitan Hospital Authorities Act limits the powers granted under the statute "to the extent at the time [that the powers granted are] not prohibited by the Constitution of Tennessee." Tenn.Code Ann. § 7-57-502(b). They emphasize that the Hospital Authority Act does not explicitly authorize the District to co-own shares with *private* entities. The plaintiffs assert that the trial court's holding is limited to the determination that the District itself acted *ultra vires* by unconstitutionally co-owning shares with others.

In response to the defendants' argument on the meaning of Section 29, the plaintiffs argue that the District is encompassed within the meaning of "county, city or town." The trial court found that the District "is a joint venture of the City of Jackson and Madison county." The plaintiffs contend that the District's ownership of West Tennessee Alliance is prohibited since the District co-owns shares of the PHO with private entities. The defendants argue that, as a matter of law, the District is a distinct entity from the City of Jackson and Madison County and that, therefore, Section 29 does not apply. They assert that the District's ownership of West Tennessee Alliance is explicitly authorized by the Hospital Authority Act.

No published Tennessee decisions directly address the interpretation of the phrase, "county, city or town," in Section 29. Originally, Section 29 consisted of only the first sentence. The remaining language was added in 1870 during the period of Reconstruction.[2] Tennessee, like many other states, added this prohibition to its Constitution to prevent itself from becoming burdened by debt resulting from "public financial support of privately sponsored 'internal improvements.'" Lewis L. Laska, *A Legal and Constitutional History of Tennessee, 1772–1972*, 6 Mem.St.L.Rev. 563, 640–41 (1976). The reason for these provisions has been described as follows:

> Early in the nineteenth century it seems to have been the general practice of states to encourage the building of railroads by permitting the state or a subdivision thereof to purchase stock in railroad corporations, to issue bonds or lend credit in aid of railroads, or to make outright donations to them. However, due to the large number of insolvencies of railroads, caused by frauds or economic conditions, states and subdivisions thereof found themselves largely indebted, and were themselves occasionally insolvent because of large investments in such enterprises. Therefore a reversal of policy set in. As early as 1851 Ohio adopted a constitution containing a provision prohibiting stock subscriptions or other forms of aid to corporations. In the ensuing twenty-five years most of the other states adopted similar provisions, either prohibiting aid altogether or requiring a vote of the people before a subscription to stock or other sort of aid could be made or extended.

Annotation, *Constitutional or statutory provisions prohibiting municipalities or other subdivisions of the state from subscribing to, or acquiring stock of, private corporations*, 152 A.L.R. 495, 495–96 (1944). Adoption of such provisions:

> represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.

Thaanum v. Bynum Irr. Dist., 72 Mont. 221, 232 P. 528 (1925); *see also* Arthur P. Roy, Note, *State Constitutional Provisions Prohibiting the Loaning of Credit to Private Enterprise—A Suggested Analysis*, 41 U.

2. Article II, § 31 was also added to the Tennessee Constitution at this time.

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Colo. L.Rev. 135 (1969); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legisla- tive Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L.Rev. 1301 (1991).

[1–3] In interpreting a constitutional provision, effect must be given to its "ordinary and inherent meaning." *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn.1983). The intent at the time of enactment must be examined: Since constitutions derive their power and authority from the people, our articulation of constitutional principles must capture the intentions of the persons who ratified the constitution. These intentions are reflected in the words of the constitution itself, rather than our own subjective notions of unexpressed constitutional intent. *Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn.App.1995) (internal citation omitted). The language of Section 29 suggests that the drafters intended that the phrase, "county, city or town," be confined to its literal meaning. The first sentence of Section 29 empowers the General Assembly to authorize counties and towns to impose taxes. The second sentence limits the ability of cities, counties, and towns to lend credit. The second sentence begins with the word, "but." The third sentence, prohibiting such cities, counties, and towns from co-owning stock, begins with the word, "nor." Considering these three sentences together, the limitations in the second and third sentences plainly modify the entities described in the first sentence.

In *Lipscomb v. Dean*, 69 (1 Lea) Tenn. 546 (Dec. Term 1878), the Court considered whether the General Assembly could delegate the power to levy taxes to school districts or civil districts within a county. Finding that the General Assembly could not delegate such a task, the Court reasoned as follows:

> The power to authorize incorporated towns and counties to levy taxes for corporation and county purposes, is the only part of our Constitution which we can find that gives the Legislature any power to delegate the right of taxation. The clause appeared for the first time in the Constitution of 1834, and was copied in that of 1870.
>
> It is a sufficient fact, that in the constitutional convention of 1870, when sec. 29, art. 2, was under consideration, Mr. Seay offered an amendment to insert civil districts after the word counties, so as to give the Legislature power to authorize the civil districts to levy and collect taxes, but the amendment offered was at once rejected.
>
> All the authorities, as well as common sense, agree in the rules that language must be interpreted in the light of things surrounding the parties using the words to be interpreted. When the Constitution of 1834 was framed and ratified, there was no such thing in this State as an incorporated town other than one of *fixed and defined limits*, invested with powers of municipal government, and this for local and police purposes. Such was the condition of things in 1870, and such alone is the sense in which the "incorporated towns" were used, and to this it must be confirmed.

Id. at 552–53 (emphasis added).

Thus, the Court in *Lipscomb* indicates that the drafters of the Constitution intended for only cities, counties, or towns, in the plain sense of the words, to have the power to levy taxes. It notes that an effort to broaden the phrase to include "civil districts" was defeated during the 1870 constitutional convention. *Id.* Since the third sentence of Section 29 refers to such cities, counties, or towns, the limitation in the third sentence appears to apply only to cities, counties, and towns with taxing powers.

In *Gibson County Special School District v. Palmer*, 691 S.W.2d 544 (Tenn.1985), the Court addressed whether a special school district, created by the General Assembly, could assess taxes. The Court held:

> Article 2, § 29 of the Tennessee Constitution permits the legislature to delegate its taxing power to counties and towns. It has been previously held by Tennessee courts that special school districts do not fall within the purview of § 29 of Article 2 and that legislation granting to special school districts the power to levy taxes is an unconstitutional delegation of the taxing authority.

Id. at 549 (citing *Williamson v. McClain*, 147 Tenn. 491, 249 S.W. 811 (1923)); *see also West Tennessee Flood Control & Soil Conserv. Dist. v. Wyatt*, 193 Tenn. 566, 247 S.W.2d 56 (1952) (holding that the West Tennessee Flood Control and Soil Conservation District was not authorized to assess taxes).

Several Tennessee cases have addressed whether agencies and instrumentalities of municipalities have the power to issue bonds without being subject to the limitation set forth in the second sentence of Section 29. In each of these cases, the Court narrowly defined the term "county, city or town" and found that Section 29 did not prevent the entities from issuing bonds so long as the municipality was not compelled to invoke its taxing power to make payment on the issuance. *See West v. Industrial Dev. Bd.*, 206 Tenn. 154, 159, 332 S.W.2d 201, 203 (1960) (bonds issued by an industrial development board); *Fort Sanders Presbyterian Hosp. v. Health & Educ. Facilities Bd.*, 224 Tenn. 240, 250, 453 S.W.2d 771, 775 (1970) (bonds issued by health & educational facilities board); *Metropolitan Dev. & Housing Agency v. Leech*, 591 S.W.2d 427, 429 (Tenn.1979) (bonds issued by housing agency).

[4] In this case, we must determine whether the District should be considered a city, county, or town. The District is a "quasi-municipal corporation." *Finister v. Humboldt Gen. Hosp.*, 970 S.W.2d 435, 439–40 (Tenn.1998); *Professional Home Health & Hospice, Inc. v. Jackson–Madison County Gen. Hosp. Dist.*, 759 S.W.2d 416, 419 (Tenn. App.1988).

The plaintiffs argue that the Private Act creating the District obligates Madison County to finance any deficits that may arise. However, the Private Act states only that Madison County "is hereby authorized to appropriate" funds to commence operations and pay operating deficits; it is not *obligated* to do so. *See* 1949 Tenn.Priv. Acts ch. 686, § 13 (as amended by 1992 Tenn.Priv. Act. ch. 165, § 2). The record indicates that revenues generated by the District are controlled solely by the District's Board and are autonomous from the general funds controlled by the city and county. Under these circumstances, the District is clearly not a taxing power within the meaning of the phrase "city, county or town" in Section 29. Instead, it is an autonomous quasi-municipal entity.

This conclusion is consistent with the Tennessee Supreme Court's holding that the office of trustee for the hospital authority in Chattanooga–Hamilton County is not a "county office" within the meaning of Article XI, § 17 of the constitution, but "rather an office of an independent governmental entity." *Chattanooga–Hamilton County Hosp. Auth. v. City of Chattanooga*, 580 S.W.2d 322, 329 (Tenn.1979). The plaintiffs respond that, nine years later, the Supreme Court, interpreting the same private act hospital authority, held that the authority was "a subdivision of the state and county." *Johnson v. Chattanooga–Hamilton County Hosp. Auth.*, 749 S.W.2d 36, 37 (Tenn.1988). In *Johnson*, however, the Court held that the Chattanooga–Hamilton County Hospital Authority was exempt from the worker's compensation statute, which does not apply to "the state of Tennessee, counties thereof, and municipal corporations." *Id.* at 37–38; Tenn. Code Ann. § 50–6–106 (Supp.1997); *see also Finister, supra*, at 439–40 (holding that a hospital district is an "exempt quasi-municipal corporation" pursuant to the Tennessee Workers' Compensation Act). The determination of whether a hospital authority is exempt from the worker's compensation statute is an issue separate from whether a hospital authority is a "county, city or town" within the meaning of the Tennessee Constitution. As noted above, to determine the meaning of the phrase "county, city or town" in Section 29, we must look to the intent of the framers of the Constitutional provision, not the intent of a later legislature in enacting a wholly unrelated statute.

Similarly, the plaintiffs cite *Crowe v. John W. Harton Memorial Hospital*, 579 S.W.2d 888 (Tenn.App.1979), for the proposition that a public hospital is considered to be an "instrumentality" of a municipality so that it is covered by the Governmental Tort Liability Act ("GTLA"), Tenn.Code Ann. §§ 29–20–101 et seq. (1980 & Supp.1997). The GTLA applies to "governmental entities," which include:

the meaning of the phrase or town" in Section 29. In- n autonomous quasi-municipal

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Tenn.Code Ann. § 29–20–102(3) (Supp.1997). Again, the definition of "governmental entities" pursuant to a statute such as the GTLA has no bearing on the definition of "county, city or town" pursuant to Article II, § 29.

This holding is consistent with decisions interpreting similar constitutional provisions of other states. The language "city, county or town," contained in Article II, Section 29 of the Tennessee Constitution is more narrow than the language found in the correlating provisions of the majority of the constitutions of other states. The constitutions of most states extend restrictions on stock ownership to entities beyond counties, cities and towns.[3]

In *Harshman v. Bates County*, 92 U.S. 569, 23 L.Ed. 747 (1875), *overruled on other grounds by Cass County v. Johnston*, 95 U.S. 360, 365, 24 L.Ed. 416 (1877), the United States Supreme Court considered a Missouri constitutional provision restricting the state legislature from "authoriz[ing] any county, city or town to become a stockholder in ... any company, association or corporation." The issue concerned whether the phrase, "county, city or town," included townships, which were subdivisions of counties. *Harshman*, 92 U.S. at 569–74, 23 L.Ed. at 747. The Court held that the "manifest intention and spirit" of the term included townships, since they had "no power to act as corporate bodies." *Id.* The Court, nevertheless, surmised that:

> [h]ad counties alone been mentioned, there might have been no restriction as to cities and towns; because they are separate and distinct organizations, corporate in character, and often clothed with legislative functions.

Id.

The Kentucky Court of Appeals considered whether a municipal housing commission could privately insure its housing projects in *City of Louisville Municipal Housing Commission v. Public Housing Administration*, 261 S.W.2d 286 (Ky.1953). The applicable constitutional provision prohibits "any county or subdivision thereof, city, town, or incorporated district, [from] becom[ing] a stockholder in any company, association or corporation." Ky. Const. § 179. The commission, formed by the Kentucky legislature, retained "some of the attributes of a state agency although it [was] controlled by the Mayor of Louisville." *City of Louisville*, 261 S.W.2d at 287. The parties did not contend that the commission was a county, subdivision of a county, city, or town; instead the issue concerned whether the commission qualified as an "incorporated district" pursuant to the constitutional provision. *Id.*

After applying an "ordinary and commonly accepted" interpretation of the terminology, as well as taking into consideration the intent of the drafters, the Court held that "the ordinary meaning of the word, 'Commission,' denotes something different from 'District.'" *Id.* at 288. The Court found that the fact that the commission operated within defined territorial boundaries did not "transform the Commission into a District." *Id.* The Court reasoned that the commission:

> is neither "fish nor fowl" within the definitive ter[m] of sectio[n] ... 179. It may be said to be a hybrid, conceived for a purpose not contemplated by the framers of our Constitution.

Id.

In *Thaanum v. Bynum Irr. Dist.*, 72 Mont. 221, 232 P. 528 (1925), the Montana legislature created an irrigation district for

3. *See, e.g.*, Ala. Const. art. IV, § 94 ("county, city, town, or other subdivision of this state ..."); Ark. Const. XII, § 5 ("county, city, town or other municipal corporation ..."); Fla. Const. art. VII, § 10 ("state nor any county, school district, municipality, special district, or agency of any of them ..."); Ky. Const. § 179 ("county or subdivision thereof, city, town, or incorporated district ..."); Miss. Const. art. VII, § 183 ("county, city, town, or other municipal corporation ..."); Mo. Const. art. XIII, § 1 ("state, nor any county, city, town, municipality, nor other subdivision of the state ..."); Okl. Const. art. X, § 17 ("county or subdivision thereof, city, town, or incorporated district ..."); Tex. Const. art. III, § 52 ("county, city, town or other political corporation or subdivision of the State ...").

the purpose of irrigating land in the Grand Teton area. The district's board was granted broad authority to take steps to accomplish its objective. *Id.* The suit arose after the district acquired an option to purchase certain shares of stock of a private company or, alternatively, the right to purchase from the acquirers of these shares the right to use the water owned by the private company. *Id.* The Montana Constitution proscribes the "state, nor any county, city, town, municipality, nor other subdivision of the state" from becoming a "subscriber to, or a shareholder in, any company or corporation...." Mont. Const. art. 13, § 1.

After considering the history behind the constitutional provision, the Court concluded that the irrigation district did not constitute the "state, ... county, city, town, municipality, [or] other subdivision of the state." *Id.; Thaanum*, 232 P. at 530–31. The Court noted that one characteristic that distinguished the district from the entities expressly mentioned in the constitutional provision was the power to impose taxes. *Id.* at 531.

In *Day v. Buckeye Water Conservation Drainage Dist.*, 28 Ariz. 466, 237 P. 636 (1925), an irrigation district was formed pursuant to an Arizona statute. The district entered into an elaborate agreement with a private company. *Id.* at 637–38. The plaintiff challenged the district's conduct based on Article IX, § 7 of the state constitution. This provision provides that:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law.

Ariz. Const. art. IX, § 7. The issue in *Day* was whether the district was included within the phrase, "other subdivision of the state." *Day*, 237 P. at 638.

After considering the history behind the provision and after applying the canon of *ejusdem generis*, the Court found that the district was not within the phrase "other subdivision of the state" as contemplated by the framers of the Arizona Constitution. *Id.* The Court found that the district's functions were markedly dissimilar from the functions of counties, cities, towns, and municipalities mentioned in the provision. *Id.* The Court noted that:

> irrigation districts and similar public corporations, while in some senses subdivisions of the state, are in a very different class. Their function is purely business and economic, and not political and governmental.

Id.

The Court also emphasized that a contrary ruling would jeopardize the viability of such public corporations. It reasoned:

> In many cases the only way in which they can carry out the sole purpose of their existence is by some plan of joint control or ownership forbidden by section 7, supra. To hold that they belong to the "other subdivisions of the state" referred to in that section would be in effect to prohibit their existence.

Id. at 638–39. Citing *Thaanum*, *supra*, the Court held that the district did not fall within the ambit of the constitutional provision. *Day*, 237 P. at 639; *see also Maricopa County Mun. Water Conserv. Dist. No. 1 v. La Prade*, 45 Ariz. 61, 40 P.2d 94, 99–100 (1935). Courts of other states utilized similarly narrow interpretations of comparable constitutional provisions in decisions rendered not long after the provisions were ratified. *See, e.g., In re Bonds of Madera Irrigation Dist.*, 92 Cal. 296, 28 P. 675, 676 (1892) ("This prohibition in the constitution is Limited [sic] to the public corporations enumerated in that section, viz., 'county, city, town, township, board of education, or school-district,' and, under familiar rules of construction, cannot be extended to any other public corporation."); cases cited in Ann., 152 A.L.R. at 505–08.

In *Arkansas Uniform & Linen Supply Co. v. Institutional Services Corp.*, 287 Ark. 370, 700 S.W.2d 358 (1985), a group of plaintiffs operating commercial laundries challenged

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activity of an Arkansas city and a hospi-
located within the city. The city owned
hospital facility and the land, and leased
n to the hospital. *Id.* at 359. New board
mbers of the hospital were nominated by
e board, and confirmed by the city council.
In the event that the hospital should
dissolve, the city was granted ownership of
of the hospital's assets. *Id.* The plaintiffs
brought suit when the hospital incorporated
laundry service business. *Id.* The plain-
ffs claimed that the defendants violated Ar-
cle XII, § 5 of the Arkansas Constitution,
ce the city was lending credit to and be-
oming a stockholder in a private company.[4]
Id.

The Arkansas Supreme Court held that
e issue was whether the hospital was the
alter ego" of the city council. *Id.* at 360.
Although the city council confirmed the
board's nominees, the Court noted that it had
never rejected any of the board's nominees in
the past. *Id.* The Court also pointed out
that the dissolution provision was drafted to
comply with a statutory charitable tax ex-
emption provision and that the leasing ar-
rangement between the city and the hospital
was expressly authorized by an Arkansas
statute. *Id.* Thus, the Court found that the
hospital was sufficiently autonomous to avoid
being "the arm of the city council." *Id.* at
361; *see also Fairfax County Indus. Dev.
Auth. v. Coyner*, 207 Va. 351, 150 S.E.2d 87,
94 (1966) (industrial development authority
not a "county, city or town" when it issues
revenue bonds since no municipality "grants
its credit or becomes liable in any manner for
the payment of the bonds and obligations of
the [a]uthority."); *Public Utility Dist. No. 1
v. Taxpayers & Ratepayers of Snohomish
County*, 78 Wash.2d 724, 479 P.2d 61, 63–64
(1971) (joint ownership of power plant by
municipal corporations and private compa-
nies did not violate state constitution since
the public shareholders retained veto power
and, thus, were not "subject to the overriding
control of a shareholder majority."); *but cf.
Wilmington Parking Auth. v. Ranken*, 105
A.2d 614, 627–28 (Del.1954) (constitutional
phrase "county, city, town or other municipality" included a parking authority).

Consequently, we hold that the District is not a "county, city or town" within the meaning of Article II, Section 29 of the Tennessee Constitution and that, therefore, the defendants' actions do not violate Section 29. The trial court is reversed on this issue.

SECTION 31

[5] Article II, § 31 of the Tennessee Constitution states:

> The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality; nor shall the State become the owner in whole or in part of any bank or a stockholder with others in any association, company, corporation or municipality.

Since the trial court found that the District's part ownership of West Tennessee Alliance violated Section 31, it implicitly found that the District is an "arm of the State." The defendants contend that the provision applies only to the State itself. In the alternative, the defendants maintain that even if the District is an "arm of the State," the District's activities do not violate Section 31 since it is performing a public function, rather than a proprietary function.

The plaintiffs cite no cases indicating that the term "State" as set forth in Section 31 should be construed broadly, so as to include an "arm" of the State. Indeed, if "State" in Section 31 were broadly construed, Section 29 would be unnecessary. Section 29 permits a county, city or town to own stock with others if the arrangement is approved by the electorate. If the term "State" in Section 31 were interpreted broadly, it would include counties, cities and towns and would render Section 29 meaningless. The existence of Section 29 indicates that the term "State" in Section 31 should be narrowly construed. *See Summers v. Thompson*, 764 S.W.2d 182, 195 (Tenn.1988) (holding that the Tennessee

4. This provision states:

> No county, city, town, or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual.

Ark. Const. art. 12, § 5.

Constitution must be construed *in pari materia*).

Courts in other states have also interpreted the term narrowly when considering comparable constitutional provisions. In *City of Louisville, supra*, the Kentucky Court of Appeals considered whether a constitutional provision barring "the Commonwealth [from] becom[ing] an owner or stockholder" proscribed the housing commission's activities. *City of Louisville*, 261 S.W.2d at 287 (citing Ky. Const. § 177). The Court held that "[o]bviously, the Housing Commission is not the Commonwealth." *Id.* The Court maintained that, regardless of whether the commission is considered an agency of the Commonwealth, "[w]e have no doubt the prohibition in that section is directed to the Commonwealth as such and not to an agency such as this Housing Commission is shown to be." *Id.* Thus, the Court held that the commission was "neither 'fish nor fowl' within the definitive terms" of the constitutional provisions. *Id.* at 288.

Oklahoma, like Tennessee and Kentucky, has separate constitutional provisions that address governmental aid to corporations. Article X, § 15 of the Oklahoma Constitution prohibits the "State" from becoming a stockholder. Article X, § 17 prohibits "any county or subdivision thereof, city, town, or incorporated district" from becoming a stockholder. Oklahoma courts have held that § 15 does not apply to municipalities since that provision is limited to the state. *See Fretz v. City of Edmond*, 66 Okla. 262, 168 P. 800, 804 (1916); *Lawrence v. Schellstede*, 348 P.2d 1078, 1081 (Okl.1960).

In *Andres v. First Arkansas Development Finance Corp.*, 230 Ark. 594, 324 S.W.2d 97 (Ark.1959), the Arkansas legislature passed a statute creating corporations to provide financial assistance to industrial development. The plaintiffs claimed that the statute violated a state constitutional provision restricting the state from "lend[ing] its credit."[5] *Id.* at 100. The Court dismissed the argument that the development corporations were an alter ego of the state. *Id.* The Court reasoned that "[t]he State is not 'lending its credit' merely because it authorizes the organization of a corporation which may finance industrial development corporations." *Id.*

Plaintiffs in *Steup v. Indiana Housing Finance Authority*, 273 Ind. 72, 402 N.E.2d 1215 (1980), challenged a statute by the Indiana legislature creating a finance authority. The finance authority was authorized to create an entity to provide facilities for lower income persons and families. *Id.* at 1220. The plaintiffs alleged that this authorization violated a constitutional provision prohibiting the state from "becom[ing] a stockholder." *Id.*; Ind. Const. art. XI, § 12. Finding that the authority "is not the state in its sovereign capacity," the Indiana Supreme Court held that the constitutional provision was inapplicable. *Steup*, 402 N.E.2d at 1220; *see also Sendak v. Trustees of Indiana Univ.*, 254 Ind. 390, 260 N.E.2d 601, 602–04 (1970) (Indiana University not considered "state"); *Thaanum*, 232 P. at 530 (irrigation district "is not the state"); citations listed in Ann., 143 Neb. 753, 10 N.W.2d 784, 152 A.L.R. at 505–08; *Coyner*, 150 S.E.2d at 94 (constitutional credit clause does not apply to industrial development authority since the Commonwealth is not liable for bonds issued by the authority); *Sprague v. Straub*, 252 Or. 507, 451 P.2d 49, 57–59 (1969) (constitutional prohibition of state ownership of corporate stock does not apply to investment of industrial accident commission fund and public employees' retirement fund, since the state has no proprietary interest in these funds); *but cf. Board of Trustees of the Public Employees' Retirement Fund of Indiana v. Pearson*, 459 N.E.2d 715, 717–18 (Ind.1984) (investment of state employees' retirement fund in stock of private companies violated constitutional provision since the state could suffer a loss if the stock value fell); *West Virginia Trust Fund, Inc. v. Bailey*, 199 W.Va. 463, 485 S.E.2d 407, 420–21 (1997) (state trust fund violated constitutional provision since it was an "alter ego" of the state);

5. The provision states:
Neither the State nor any city, county, town or other municipality in this State, shall ever lend its credit for any purpose whatever . . .
Ark. Const. art. XVI, § 1.

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State ex rel. Gainer v. West Virginia Bd. of Invs., 194 W.Va. 143, 459 S.E.2d 531, 534–37 (1995) (until public employees' pension funds actually withdrawn, the state has a beneficial ownership interest and, thus, the state has unconstitutionally become a stockholder).

In the case at bar, under a narrow interpretation of the term "State" in Section 31, the District clearly is not the State. The District's board of directors is not selected by the State, its operations are not supported by State revenue, and the State is under no obligation to cover any deficit that the District may incur.

The plaintiffs argue that the State may not delegate a power that it does not itself possess. Citing *State ex rel. Board of Dental Examiners v. Allen*, 192 Tenn. 396, 241 S.W.2d 505 (1951), the plaintiffs claim that since Section 31 prohibits the General Assembly from co-owning shares, it may not avoid this prohibition by creating hospital authorities and granting them authority to co-own shares. In *Allen*, a state statute authorized a county to permit an unlicensed person to practice dentistry, 192 Tenn. at 397, 241 S.W.2d at 505. Thus, the statute carved out an exception to the "general law applicable to the entire State," forbidding the unlicensed practice of dentistry. *Allen*, 192 Tenn. at 398, 241 S.W.2d at 506. The Court held that the statute violated Article XI, § 8, which prohibits suspending:

> any general law for the benefit of any particular individual, or to pass any law granting to any individual rights, privileges, or immunities not extended to any other member of the community who may be able to bring himself within the provisions of such law.

Id. (quoting *Lineberger v. State ex rel. Beeler*, 174 Tenn. 538, 541, 129 S.W.2d 198, 199 (1939)). The Court reasoned that the General Assembly may not "delegate to the Quarterly Court of a County the authority to do an act which the Constitution forbids the Legislature from doing." *Allen*, 192 Tenn. at 399, 241 S.W.2d at 506.

[6, 7] The plaintiffs' reliance on *Allen* is misplaced. *Allen* holds that municipal ordinances are subject to the same constitutional restraints as statutes. Since the General Assembly may not enact a statute suspending a general prohibition, it may not circumvent Article XI, § 8 by authorizing a county to suspend the general prohibition. *Allen* has no bearing on whether Section 31 forbids governmental entities other than the State from co-owning shares. The Tennessee Constitution is a limitation of powers, not a source of power. *Perry v. Lawrence County Election Comm'n*, 219 Tenn. 548, 551, 411 S.W.2d 538, 539 (1967). Thus, the General Assembly may enact any legislation that is not forbidden by the Tennessee or federal constitutions. *Fentress County Beer Bd. v. Cravens*, 209 Tenn. 679, 687, 356 S.W.2d 260, 263 (1962).

Therefore, the District's co-ownership of West Tennessee Alliance or similar entities, now or in the future, does not violate Article II, Section 31 of the Tennessee Constitution. The decision of the trial court on this issue is reversed.

ARTICLE I, SECTION 8

In its ruling, the trial court also enjoined the District from operating Sight Care, Health Partners, or any other PPO in the future, despite the fact that these entities are *solely* owned by the District. The trial court did not articulate its reasoning. The defendants assert that the Hospital Authorities Act authorizes their participation in the PPO business and that nothing in the Constitution prohibits such activity.

Presumably the trial court agreed with the plaintiffs' argument that Article I, § 8 of the Tennessee Constitution bars the governmental operation of PPOs. Article I, § 8, known as the "law of the land" provision, states:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

Tenn. Const. art. I, § 8. The plaintiffs' argument is three-fold: 1) that the notion of a governmental entity engaging in a business already served by a private enterprise is repugnant to this provision and the spirit of the constitution; 2) that the defendants de-

prived the plaintiffs of procedural due process of law; and 3) that the defendants deprived the plaintiffs of equal protection of the laws.

[8] The plaintiffs cite no authority for the proposition that Tennessee law forbids governmental entities from engaging in a proprietary capacity. In fact, governmental entities frequently act as market participants. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) (state owned and operated a cement plant). Under the plaintiffs' reasoning, state and local governments could not operate a hospital, since private hospitals exist. As noted above, the Tennessee Constitution is a limitation of powers, not a source of power. *Perry*, 219 Tenn. at 551, 411 S.W.2d at 539. Thus, the General Assembly may enact any legislation not forbidden by the Tennessee or federal constitutions. *Cravens*, 209 Tenn. at 687, 356 S.W.2d at 263. Under the Hospital Authorities Act, the General Assembly granted the District the right to participate in the PPO business. The District's ownership of PPOs, such as Sight Care or Health Partners, is authorized by the legislature and not forbidden by the Tennessee Constitution. This argument is without merit.

The plaintiffs also argue that the defendants deprived them of procedural due process of law. The plaintiffs assert that they were denied due process when they were denied membership in Sight Care and when their contracts with Health Partners were terminated, because they were not afforded a hearing or an explanation for the defendants' action or inaction.

[9, 10] The due process provision in Article I, § 8 is consonant with the due process clause in the Fourteenth Amendment of the United States Constitution. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn.1997). In *Rowe v. Board of Education of the City of Chattanooga*, 938 S.W.2d 351, 354 (Tenn.1996), the Tennessee Supreme Court held:

> In addressing a claim of an unconstitutional denial of procedural due process, we apply a two-step analysis. Initially we must determine whether [the plaintiffs'] interest rises to the level of a constitutionally protected property interest. If there is a constitutionally protected property interest, then the second step is to weigh the competing interests of the plaintiff and government to determine what process is due and whether deprivation has occurred.

With regard to the first step of the two-step analysis, the Court stated:

> To be entitled to procedural due process protection, a property interest must be more than a "unilateral expectation" or an "abstract need or desire." It must be a "legitimate claim of entitlement" to a specific benefit.

Id.(quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)). Thus, the claimant must have a "vested right" in order to assert this provision. *Kaylor v. Bradley*, 912 S.W.2d 728, 735 (Tenn.App. 1995).

[11, 12] Once an entitlement is shown, "the Due Process Clause simply does not mandate that all government decisionmaking comply with standards that assure perfect, error-free determinations." *State ex rel. McCormick v. Burson*, 894 S.W.2d 739, 743–44 (Tenn.App.1994) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979)). Instead, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *State v. Pearson*, 858 S.W.2d 879, 885 (Tenn. 1993) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)). Three factors should be considered when determining the procedural safeguards that should be utilized:

> (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional safeguards; and, (3) the government's interest.

Id.(quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903).

[13] The defendants do not dispute that the due process clause applies to them since they operate in a governmental capacity. *See Tennessee Cent. Ry. Co. v. Pharr*, 183 Tenn. 658, 664, 194 S.W.2d 486, 489 (1946) ("the requirements of due process of law

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tend to every case of the exercise of governmental power"); *Hinton v. Threet*, 280 Supp. 831, 840 (M.D.Tenn.1968). The question then becomes whether the individual plaintiffs have demonstrated a vested interest. A "plaintiff has no constitutional right to practice his profession at a public facility." *Meredith v. Allen County War Mem'l Hosp. Comm.*, 397 F.2d 33, 35 (6th Cir.1968) (citing *Hayman v. City of Galveston*, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927)). Thus, there is no merit in the proposition that the plaintiffs have an entitlement to become members of Sight Care or any other network arrangement. *Rowe*, 938 S.W.2d at 354. No contract, statute, regulation, or any other act of law entitles them to membership in Sight Care. Instead, the only interest articulated by the plaintiffs is a mere unilateral expectation or desire to be members. *Id.*

However, the individual plaintiffs were members of Health Partners. Their membership with Health Partners was governed by a preferred provider agreement. Outside of this agreement, there is no act of law, statutory or otherwise, that entitles the plaintiffs to be members of Health Partners. The agreement stated that either party may terminate the agreement "at any time, with or without cause, by giving at least 60 days prior written notice to the other party." The plaintiffs do not allege that the defendants failed to adhere to the terms of this contract and there is no allegation that Health Partners failed to follow its own procedures. The plaintiffs do not argue that their contracts could be terminated only for good cause. Under these circumstances, the plaintiffs simply had no property interest in an indefinite continuation of their contractual relationship with Health Partners. The membership in Health Partners is analogous to employment at will. *See Rowe*, 938 S.W.2d at 355 ("Substitute teachers are not tenured ... and have no 'legitimate claim of entitlement' to continued employment sufficient to give rise to a property interest."); *Gregory v. Hunt*, 24 F.3d 781, 785–87 (6th Cir.1994) (under Tennessee law, "an at-will employee does not have a property interest in continued employment unless it can be shown that the employee had a reasonable expectation that termination would be only for good cause." *Id.* at 785). The plaintiffs do not allege that they have been denied staff privileges at a public hospital. *Cf. Armstrong v. Board of Dirs.*, 553 S.W.2d 77 (Tenn.App. 1976). The nature of the parties' relationship does not entitle the plaintiffs to a hearing and an explanation for the termination of their contracts. Their only interest is a unilateral expectation or desire for the contractual relationship with Health Partners to continue. *Rowe*, 938 S.W.2d at 354.

Therefore, the denial of the individual plaintiffs' membership in Sight Care and the termination of their contracts with Health Partners without a hearing or an explanation does not violate the requirements of due process.

In addition, the plaintiffs argue that the defendants denied them equal protection of the law by treating "similarly situated citizens unequally."[6] The plaintiffs argue that the defendants discriminated against them by denying them membership into the network while inviting similarly situated doctors to join.

[14, 15] Equal protection analysis under the Tennessee Constitution is identical to equal protection analysis under the United States Constitution. *Riggs*, 941 S.W.2d at 52. The standard of scrutiny applied depends on the nature of the right asserted or

6. Equal protection is rooted in Article I, § 8 as well as Article XI, § 8. Article XI, § 8 declares: The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.

the class of persons affected. *Id.* Three standards of scrutiny exist:

> (1) strict scrutiny, (2) heightened scrutiny, and (3) reduced scrutiny, applying the rational basis test.

Brown v. Campbell Bd. of Educ., 915 S.W.2d 407, 413 (Tenn.1995). In this case, the plaintiffs do not claim that they are a suspect class or that the defendants have denied them a fundamental right. Therefore, we apply rational basis review. *Riggs*, 941 S.W.2d at 53. Under rational basis review:

> if some reasonable basis can be found for the classification . . . or if any state of facts may reasonably be conceived to justify it, the classification will be upheld.

Id. (quoting *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn.1993); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994)). This is a "lenient" standard under which a defendant may satisfy its burden merely by demonstrating "*any* possible reason or justification for [the statute's] passage." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195, 103 S.Ct. 2296, 2308, 76 L.Ed.2d 497 (1983); *Kelley v. J–M Co.*, 639 S.W.2d 437, 439 (Tenn.1982) (emphasis added).

[16] The policy underlying the General Assembly's decision to authorize the District to create PPOs is articulated in Tennessee Code Annotated § 7–57–501. The statute states that "the increasing competition and changing conditions forces hospitals and other health care providers to develop market strategies and strategic plans to effectively compete." *Id.* In order to compete in the health care market, provider networks must be exclusionary. The individual plaintiffs' provider agreements with Health Partners were terminated because Health Partners sought to "limit its provider network in Madison County to The Jackson Clinic, P.A., the West Tennessee Alliance for Healthcare, L.L.C., and physicians practicing in specialties or subspecialties not available through either of those organizations." A resolution adopted by the Health Partners' Board of Directors states that its provider network shall be limited so that it can enhance its ability to operate its managed care network. The resolution states that:

> this enhancement can be accomplished in the most cost-effective manner by contracting for physician services to the greatest extent possible with large multi-specialty entities which offer a structure for the development of internal medical management and utilization review programs and which effectively can enforce such programs with their member or employee physicians, thus limiting the cost to Health Partners, Inc., of such programs[.]

Soon thereafter, the Board of Governors of West Tennessee Alliance approved criteria for membership, which includes the following provision:

> As an expression of the commitment of the Company to integrity in the referral process, practitioners who have an Economic Conflict of Interest shall not be permitted to become or to remain Class P members of the Company.

Since the individual plaintiffs retain an interest in an outpatient ophthalmologic surgery center that competes with the District, Health Partners could reasonably have concluded that they had such an "Economic Conflict of Interest." Courts rarely "interfere with decisions which further the hospital's health care mission, even if they are at the expense of a doctor or group of doctors." *Alfredson v. Lewisburg Community Hosp.*, No. 88–311–II, 1989 WL 134739, *4 (Tenn. App. Nov.8, 1989), *reversed in part on other grounds*, 805 S.W.2d 756 (Tenn.1991). Consequently, we find a rational basis for the defendants' denial of membership in the PPOs to the individual plaintiffs. Accordingly, we hold that the defendants did not deprive the plaintiffs of the constitutional right of equal protection of law by denying them membership in the provider networks.

In sum, since the District is not a "county, city or town" within the meaning of Article II, Section 29 of the Tennessee Constitution, the defendants' actions do not violate Section 29. Likewise, the District is not within the meaning of "the State" under Article II, Section 31 of the Tennessee Constitution, and the defendants' actions do not violate Section 31. The Tennessee Constitution does not prohibit the District from operating a PPO simply because such entities are also operat-

*172647 SEE COURT OF APPEALS RULES 11 AND 12

CLEVELAND SURGERY CENTER L.P., and OCOEE PHYSICAL THERAPY, INC., Plaintiffs/Appellees,
v.
BRADLEY COUNTY MEMORIAL HOSPITAL, BRADLEY BUILDING LLC, and Ocoee Health Alliance, Defendants/Appellants

No. 03A01-9804-CH-00120.
Court of Appeals of Tennessee.
March 24, 1999.

Affirmed, as Modified, and Remanded.

Michael E. Callaway, Cleveland, for Appellant Bradley County Memorial Hospital.

Donald J. Cocke, Memphis, for Appellant Ocoee Health Alliance.

William H. West, Nashville, and Buddy B. Presley, Jr., Chattanooga, for Appellees Cleveland Surgery Center and Ocoee Physical Therapy, Inc.

William B. Hubbard and Jerry W. Taylor, Nashville, for Amici Curiae, Tennessee Hospital Association and Health Systems and Hospital Alliance of Tennessee, Inc.

OPINION

INMAN, Senior J.

**1 Two private health care providers sought a declaratory judgment that a county-owned hospital and its business partners had entered into business ventures which were ultra vires and in violation of the Tennessee Constitution. The trial court held that the county hospital had exceeded its authority by entering into unconstitutional business dealings with private entities, and issued an injunction permanently restraining the hospital from participating in these or any similar ventures. We affirm the judgment of the trial court as to the specific business ventures involving these defendants. We modify the judgment by narrowing the permanent injunction consistent with this opinion.

Plaintiffs Cleveland Surgery Center, hereinafter "Surgery Center," and Ocoee Physical Therapy, Inc., hereinafter "Physical Therapy," two businesses owned and operated by private physicians and physical therapists respectively, learned of plans by Bradley County Memorial Hospital, hereinafter "County Hospital," to acquire land and build a medical office building adjoining County Hospital. The plan provided that Ocoee Health Alliance, hereinafter the "Alliance," a partnership owned by County Hospital (50% interest) and local physicians (50% interest), would secure financing for the $8,500,000.00 building project, with no investment or personal liability for the loan on the part of the physicians, who would, however, have an ownership interest in the office building, with each physician owning an equal share of the Alliance's 50% interest. That building project is not the subject of appeal, since Sun Trust bank threatened to default the Hospital's loan after adverse publicity and the filing of this lawsuit, resulting in sale of the project to other parties. The appeal concerns whether the Hospital can lawfully engage in similar projects with Alliance.

Desiring to provide services for the patients of County Hospital, Physical Therapy sought membership in the Alliance which was denied on grounds that the Alliance already offered physical therapy services. Surgery Center, which operates a stand-alone surgical clinic, feared that the Alliance planned to establish a competing surgical clinic in the new building and joined with Physical Therapy in this suit against County Hospital, the Alliance, Bradley County Hospital Foundation and Bradley Builders, LLC, alleging unfair competition by the Alliance, ultra vires acts by County Hospital under its Private Acts and unconstitutional business ventures between partners County Hospital and the Alliance.

The trial court held that County Hospital, through its actions as an agent and arm of Bradley County, had exceeded its authority by lending the credit of the county and joining in ultra vires business ventures with private industry in violation of Article II, § 29 of the Tennessee Constitution.

Defendants County Hospital and the Alliance appeal and raise the following issues, verbatim:

1. The Chancellor erred when he determined

Bradley County Memorial Hospital is "... an agent and arm of Bradley County"; that is, is not an independent governmental entity or quasi-municipal corporation.

**2 2. The Chancellor erred when he found the Hospital's participation in the Ocoee Health Alliance, which is authorized by the Private Acts creating and governing the Hospital, as well as by T.C.A. sect. 7-57-601 et seq. [The Private Act Hospital Authority Act], was ultra vires and violated Article II, Section 29 of the Constitution of Tennessee.

3. The terms of the Order of Final Judgment and Permanent Injunction entered by the Chancellor are too broad and imprecise and unduly restrict and interfere with the Hospital's operation.

4. The Chancellor erred in finding the Plaintiffs had standing to bring this action.

I

Surgery Center and Physical Therapy have standing to bring this action by virtue of the special injuries which they allege are occasioned by unfair and illegal competition by the Alliance. *Morristown Rescue Squad v. Volunteer Development,* 793 S.W.2d 262 (Tenn.App.1990); *Parks v. Alexander,* 608 S.W.2d 881, 890 (Tenn.App.1980), cert. denied, 451 U.S. 939 (1981).

II

Appellants argue that the Chancellor erred:

when he determined Bradley County Memorial Hospital "... is an agent and arm of Bradley County"; that is, is not an independent governmental entity or quasi-municipal corporation.

Appellant's brief, page 1.

The Chancellor made no finding that County Hospital "is not an independent governmental entity or a quasi-municipal corporation." Rather, the court's opinion describes County Hospital as "an agent and arm of Bradley County" under the facts and circumstances of this particular case. Tennessee Private Act County Hospitals have, in some instances, properly been referred to as "governmental entities," "independent governmental entities," "public nonprofit corporations," "political subdivisions of Tennessee," "subdivisions of the state and county," or "public instrumentalities acting on behalf of the county," *Ketron v. Chattanooga-Hamilton County Hospital Authority,* 919 F.Supp. 280, 282 (E.D.Tenn., 1996), (for the purpose of determining whether former employees were entitled to bring suit under 42 U.S.C. § 1983 for alleged retaliatory discharge). Other appropriate descriptive terms have included "municipal corporation," *Finister v. Humboldt General Hospital, Inc.,* No. 02S01-9704-CH-00038 (Tenn. May 26, 1998), (for the purpose of determining whether a Private Act Hospital is exempt from the Tennessee Workers' Compensation Law), "quasi-municipal corporation," *Professional Home Health & Hospice, Inc. v. Jackson-Madison County General Hospital District,* 759 S.W.2d 416 (Tenn.App.1988), (for the purpose of determining whether a Hospital Authority could purchase and operate a home health care business outside the territorial jurisdiction specifically established by its Private Act), and "governmental hospital authority," *Moses v. Erlanger Medical Center,* 1995 WL 610243 (Tenn.App. Oct. 18, 1995), (for the purpose of determining whether plaintiff could maintain a tort action against a Private Act Hospital for mental anguish). No doubt other similar terms may be appropriate in other instances: the trial court did not exclude them. It merely considered (1) the provisions of Bradley County's Private Act, (2) the relevant statutes, (3) Article II, § 29 of the Tennessee Constitution, (3) the kinds of Hospital/Alliance and private/public ventures at issue in this case, and (4) the potential obligation of Bradley County funds. Based on that analysis, the trial court held that in this instance, County Hospital operates as an agent or arm of Bradley County and, as such, is subject to certain restrictions under both its Private Acts and Article II, § 29.

**3 Appellants argue that County Hospital is "not an agency of the county... but rather an independent governmental entity," because the Attorney General defined Erlanger Hospital as such in Tenn. Att'y. Gen. Op. No. U-95-040, (FN1) April 13, 1995:

"Thus, we think the prohibitions in Article 2, Section 29 would not apply to this authority or to any other private act hospital authority which is an

independent governmental entity. The prohibitions would apply to a private act hospital authority which is a department of a municipality or county. [Emphasis added]. (FN2)

The Attorney General recommended the following determinative analysis:

... an analysis of all the facts and circumstances of the transaction, especially the form of the ownership and whether the county would be incurring an additional liability, direct or contingent, by participating in such an organization.

The record demonstrates that the trial court in this case performed the recommended analysis, described in detail in its Memorandum Opinion. We find no fault with the conclusion drawn by the trial court that the County Hospital functions, in this instance, as an agent and arm of Bradley County. (FN3) The trial court's judgment on this issue is accordingly affirmed.

III

Appellants next complain of the trial court's finding that County Hospital's participation in the Ocoee Health Alliance was ultra vires and violated Article II, § 29 of the Tennessee Constitution. Appellants contend that the partnership is authorized by the Private Acts creating and governing County Hospital and by T.C.A. § 7-57-601 et seq. (1996).

In 1996 the Legislature passed The Private Act Hospital Authorities Act, T.C.A. § 7-57-601 et seq., which extends to all Tennessee Private Act hospitals the powers previously granted to Private Act Metropolitan Hospitals under T.C.A. § 7-57-501 et seq. (1995). These Acts provide, as pertinent:

(b) In addition to powers otherwise granted by this part or any other public or private act of this state, or by any state regulation or federal law or regulation, and to the extent at the time not prohibited by the Constitution of Tennessee [emphasis added], a private act metropolitan hospital authority has, together with all powers incidental thereto or necessary to discharge the powers granted specifically herein, the following powers:

(1) To participate as a shareholder in a corporation, as a joint venturer in a joint venture, as a general partner in a general partnership, as a limited partner in a limited partnership or a general partnership, as a member in a nonprofit corporation or as a member of any other lawful form of business organization, which provides hospital, medical or health care or is engaged in any activity supporting or related to the exercise of any power granted to a private act metropolitan hospital authority;

T.C.A. § 7-57-603 (incorporating T.C.A. § 7-57-502(b)(1)). Such hospitals may:

(10)(c) ... acquire, manage, lease, purchase, sell, contract for or otherwise participate solely or with others in the ownership or operation of hospital, medical or health program properties and facilities, and properties, facilities, and programs supporting or relating thereto of any kind and nature whatsoever and in any form of ownership whenever the board of trustees in its discretion shall determine it is consistent with the purposes and policies of this part or any private act applicable to it, and may exercise such powers regardless of the competitive consequences thereof.

**4 T.C.A. § 7-57-603 (incorporating T.C.A. § 7-57-502(c)).

By specific directive of the Legislature, both the 1995 and 1996 Private Act Hospital Authority Acts contain special rights which are to be provided to Private Act Hospitals to the extent at the time not prohibited by the Constitution of Tennessee. The trial court held that the ventures engaged in by County Hospital and the Alliance, which at first blush appear lawful, considering only sections (b)(1) and (10)(c) of the 1996 Private Act Hospital Act, are in fact unconstitutional, considering the constitutional limitation as recognized by the Legislature in section (b) of the Act.

The court opined that County Hospital/Alliance ventures violated Article II, § 29 of the Constitution, which provides:

The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and

> Corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation. But the credit of no County, City or Town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of the majority. [Emphasis added.]

Appellants contend that Article II, § 29 of the Constitution applies only to "counties, cities or towns" and therefore does not require an election and the assent of three-fourths or a majority of the voters before Private Act Hospitals engage in business involving credit or loans with private individuals, corporations or associations.

This issue was addressed recently by this court in a case to be published, *Eye Clinic, P.C. v. Jackson-Madison County General Hospital,* No. 02A01-9707-CH-00143 (Tenn.App. July 24, 1998, perm. app. denied January 11, 1999). Judge Holly Kirby Lillard, writing for the court, applied the analysis recommended by the Tennessee Attorney General. After describing the particular facts surrounding the challenged businesses of West Tennessee Alliance, (FN4) Judge Lillard considered those ventures in light of the Private Act Hospital Authority Acts of 1995 and 1996, the Private Act which enabled Jackson-Madison County General Hospital, and Article II, § 29.

Judge Lillard held that in the West Tennessee Alliance ventures, Article II, § 29 was not infringed because Jackson-Madison County General Hospital was not vested by its enabling Private Act with the "power to levy taxes;" "power to compel [the city of Jackson] to invoke its taxing power to make payments;" or power to "obligate Madison County" to appropriate funds "to commence [hospital] operations and pay operating deficits." The Private Act which enabled the hospital in that case merely provided that Madison County was "authorized to appropriate funds" for the hospital; the county was not obligated to do so. (Emphasis in original.) Therefore, private ventures between that hospital and West Tennessee Alliance could obligate only hospital-generated or physician-generated funds; no county taxes could be obligated by the private/public ventures in contravention of Article II, section 29.

**5 Applying the analysis ir *Eye Clinic v. Jackson-Madison County,* we compare the Private Acts authorizing Bradley County Memorial Hospital to Madison County's Private Acts as interpreted by Judge Lillard. Bradley County Hospital was established under Chapter 846 of the Private Acts of 1947:

> SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, that the County of Bradley ... upon the approval of a majority of the qualified voters of said County ... is hereby authorized to issue not to exceed $400,000.00 dollars coupon bonds ... for the purpose of acquiring a necessary site or location for a hospital, and ... necessary equipment ....
>
> SECTION 2. BE IT FURTHER ENACTED, ... Said bonds, when issued in conformity with this Act, shall be direct general obligations of Bradley County, for the payment of which, with interest, well and truly to be made the full faith and credit and all the taxing power of the County shall be irrevocably pledged .... (Emphasis added.)
>
> * * *
> * * *
>
> SECTION 8. BE IT FURTHER ENACTED, That it shall be the duty of the Quarterly County Court of Bradley County annually to levy and provide for the collection of a sufficient tax on all the taxable property in the County, over and above all other taxes authorized and limited by law, for the purpose of creating a sinking fund to pay the interest on said bonds as the same falls due and to retire said bonds as they mature.

Chapter 197 of Private Acts of 1953 provided for the operation of the hospital under the Board of Directors and gave to that Board:

> ... full, absolute and complete authority and responsibility for the operation, management, conduct and control of the business and affairs of

said hospital. Said authority and responsibility shall include, but shall not be limited to, the establishment, promulgation and enforcement of rules, regulations, and policies, the upkeep and maintenance of all property, the administration of all financial affairs, the maintenance of separate banking arrangements, the execution of all contracts, the purchase of supplies and equipment, and the employment, supervision, compensation and discharge of all personnel including a Hospital Administrator.

1953 Tenn. Priv. Acts 197, § 1. These Acts were amended in 1992:

WHEREAS, the complexities of providing health care services in the current environment necessitate a clarification and restatement of the power and authority of the board of directors;

BE IT ENACTED ...

SECTION 1. Section 13 of Chapter 846 of the Private Acts of 1947, is amended by adding the following additional language:

The Board of Directors shall have the authority to acquire or lease real property, equipment and other personal property related to the business and affairs of the hospital, including medical office buildings, parking structures, real property, buildings and other facilities determined by the board to be appropriate for the operation of the hospital and the provision of health care services. All property acquired by the board shall be acquired subject to the approval of the county legislative body and shall be held and owned in the same manner as the original property conveyed for establishment of the Bradley County Memorial Hospital under Chapter 846 of the Private Acts of 1947, as subsequently amended. (Emphasis added.)

* * *
* * *

**6 SECTION 2. Section 14 of Chapter 846 of the Private Acts of 1947, is amended by adding the following additional language:

Any revenues derived from operation of the hospital in excess of (1) operating expenses and (2) amounts required for the retirement of any bonds issued by Bradley County for the benefit of the hospital shall be used for future hospital capital projects and the provision of health care services to indigent persons. (Emphasis added.) (FN5)

* * *
* * *

SECTION 4. This act shall have no effect unless it is approved by a two-thirds (2/3) vote of the county legislative body of Bradley County ....

1992 Tenn. Priv. Acts 206 § 1, 4.

IV

Because plaintiffs argue that County Hospital could not enter into a partnership venture with the Alliance without the approval of Bradley County, whereas defendants assert the independence of County Hospital from County intervention, much evidence was introduced at trial with regard to the degree of financial independence from Bradley County the County Hospital actually maintained prior to and during the initiation of the soon-to-be-contested Alliance projects. Numerous course-of-business documents in evidence effectively describe the relationship:

Excerpt from Comprehensive Annual Financial Report, Bradley County, Tennessee, For The Year Ended June 30, 1996.

Individual Component Unit Disclosures ... Bradley County's Board of Commissioners must approve all long-term debt issues of the hospital. Bradley County would be responsible for this debt in case of default by the hospital.

Excerpt from Pershing & Yoakley Independent Auditors' Financial Statement for Bradley County Memorial Hospital, June 30, 1996.

Bradley County Memorial Hospital is a not-for-profit general short-term health care provider which serves Cleveland, Tennessee and surrounding areas. The Hospital is a component unit of Bradley County, Tennessee, which is considered the primary government unit .... The Hospital has a 51% membership in Ocoee Health Alliance (the Alliance), a Tennessee mutual benefit

corporation formed for the purpose of providing a comprehensive provider network and managed care system to businesses and others in the Hospital's service area. The remaining 49% membership interest is comprised of eligible physicians licensed to practice in the state of Tennessee and with active staff membership on the medical staff of the Hospital. (FN6) During 1996 and 1995, the Hospital paid membership dues of $51,946 and $54,392, respectively to the Alliance. In addition, during 1996 the Hospital paid for certain expenses related to the Alliance. Other current assets at June 30, 1996 include $156,296 from the Alliance for payment of such expenses.

Letter from Mike Callaway, Attorney for County Hospital, to Bradley County Executive, in response to her inquiry as to the Hospital obligating County funds, July 18, 1996.

... you will recall in 1995, in response to a request to the Attorney General for an opinion regarding the authority of the Hospital's Board of Directors to borrow funds from private sources, General Burson opined "... Bradley County [is not] liable for a debt incurred by the Bradley County Memorial Hospital Board of Directors without the consent of the County Commission or the County Executive." In any case, the Board and administration are convinced Bradley Memorial has the financial capacity and resources to perform its obligations under the Ground Lease Agreement, else the Hospital would not have executed it.

Minutes of Bradley County Hospital Board of Directors, Oct. 28, 1996.

**7 Jim Whitlock, Hospital Administrator, announced that his term as President of the Tennessee Hospital Association would end at its next meeting. He also reported that "originally Bradley Memorial Hospital was a 51% owner in the joint venture with Ocoee Health Alliance [April 1995]. Since the Private Act has been revised and no longer requires the hospital to be 51% owner in joint ventures, Mr. Whitlock requested that the Board authorize the Ocoee Health Alliance bylaws to be changed to allow a 50-50 joint venture ownership. Motion passed unanimously."

SunTrust Bank--In-House Loan Offering Memorandum from Recommending Loan Officer, for Loan of $8,500.00 to Bradley Building LLC. December 10, 1996.

The lease is structured so Bradley agrees to assume the debt or pay it off in case of default ... The strength of this deal is, obviously, the Bradley lease. Bradley's financial condition is very strong ... Among the strengths of the deal are: (1) Bradley's overall financial condition, Bradley County's A1 bond rating...

Letter from Jeffrey Ivey, Regional President, SunTrust Bank, to Michael Callaway, Attorney for County Hospital, January 31, 1997:

I have enclosed for your review the documents that we will be asking Bradley Memorial Hospital to execute in conjunction with the $8.5 million construction/permanent loan to Bradley Building, LLC ... The Credit Support Agreement was created because of the overall reliance on the Hospital for the debt repayment. Our underwriting of the loan request was based on the Hospital's ability to make the required lease payments.

Letter from Michael Callaway, Attorney for County Hospital, February 24, 1997, to David R. Evans, Attorney for SunTrust Bank: (in a different forum, taking a position opposite from that which he takes as counsel for the Hospital in this action)

... I have consulted with the Hospital and must advise [you that] Bradley Memorial cannot approve that portion of Section 3 of the document wherein it is required to accept possession of the building prior to completion, and further is constitutionally prohibited from executing and agreement that, in effect, guarantees repayment of credit extended to a private party as is required of the Hospital in Section 18 of the Agreement in the event of a default. (Emphasis added.)

Excerpt from Letter of Cameron Sorenson, Southeast Venture Corporation (purchaser of the project lease when SunTrust threatened to hold Hospital in default), to Craig Taylor, Assistant Administrator, Bradley County Memorial Hospital, March 6, 1997.

... after reviewing the potential reduction in rent if Galen (a private physician practice) were to elect not to accept an ownership interest in Bradley

Building, LLC ... as you and I discussed, it could create some issues with respect to Fraud and Abuse statutes if the Hospital were to redistribute Galen's forgone ownership to other physicians.

Affidavit of Jim Whitlock, August 27, 1997.

**8 The plaintiffs have alleged "... Bradley County Memorial Hospital has also unconstitutionally extended credit to Bradley Building, LLC, in violation of Section 29 of Article II of the Tennessee Constitution by *guaranteeing the financing* of Bradley Building's medical office building through entering into a Master Lease ..." As a result of that allegation, the lender for the medical office building, SunTrust Bank, has questioned the validity of the lease and, therefore, its prospects of being repaid on its loan with the result it has declined to fund the developer's most recent draw requests ... the Bank requested that the Hospital, in effect, "guarantee" the loan. That request was rejected by the Hospital. Affiant is informed and believes the same documents were also submitted to the County Executive for execution on behalf of Bradley County, but were likewise rejected.

Court-Ordered Trial Brief of Amicus Curiae James Webb, Attorney for Bradley County, filed October 27, 1997.

The Court is no doubt aware that considerable controversy regarding Bradley County Memorial Hospital and certain of its recent actions, as well as to what its future status should be, exists among Bradley County's officials and citizenry .... Bradley County Memorial Hospital, unlike similar institutions which are owned by "Authorities" or other independent corporate entities, has no separate existence from Bradley County itself. This is quite evident from the manner in which the Hospital's site was acquired in 1949 and the form in which its Board of Directors was established in 1947 .... "Bradley County Memorial Hospital" is without independent existence and is but ar *alter ego* of "Bradley County" itself--a fortunate circumstance, for otherwise the validity of some 22.5 million dollars of bonds issued by the County for the benefit of the Hospital, along with another 2.5 million dollar bond issue now in process, might well be called into question .... The "Master Office Lease Agreement" which was assigned by Bradley Building, LLC. to SunTrust Bank to secure the $8,000,000.00 loan for the office building to be leased entirely by Bradley County Memorial Hospital--in truth, as previously noted, Bradley County itself--is a "hell or high water lease" as described by the attorneys who prepared it for the lender ... it amounts to no more than a barely disguised absolute guaranty of repayment of SunTrust Bank's loan to Bradley Building, LLC. This conclusion is made inevitable by the content of certain documents indicating that the bank looked solely to the credit-worthiness of Bradley County in evaluating the prospects of repayment of the loan ... Before the credit of Bradley County (through its *alter ego*, "Bradley County Memorial Hospital") was loaned in aid of Bradley Building, LLC, the assent of three-fourths of the qualified voters of Bradley County should have been first secured through an election. Even Bradley County Commission, itself, which is directly elected by the voters of the County and directly answerable to all of its citizens, could not have entered into the arrangement concerned in this case without a referendum. (Emphasis added.)

Affidavit of Donna Hubbard, County Executive for Bradley County, October 29, 1997.

**9 The Documents attached hereto as Exhibit A to this affidavit are true and exact copies of excerpts from the official offering documents for the 1990 bond issue of Bradley County, Tennessee in which Bradley County issued $6,840,000.00 million in hospital revenue and tax improvements bonds, Series 1990. These bonds were bonds of Bradley County to which, insofar as they pertain to Bradley County Memorial Hospital, pledged the ad valorem taxing power of Bradley County to the repayment of said bonds should the revenues of Bradley County Memorial Hospital be insufficient to make the payments required by the bonds ... I have reviewed and directed the review of Bradley County's payment history of its bonds issued on behalf of Bradley County Memorial Hospital. My review of Bradley County's payments on those bonds establishes that, prior to 1993, Bradley County itself made the principal and interest payments on its bonds issued on behalf of Bradley County Memorial Hospital.

Excerpt from Bradley County, Tennessee Series 1990

Bond.

SECURITY: The Bonds, as to both principal and interest, shall be payable primarily from and secured by a pledge of the net revenues to be derived from the operation of the Hospital subject to any prior pledges of such revenues .... The Bonds will also be payable from unlimited ad valorem taxes to be levied in all taxable property within the corporate limits of the County. For the prompt payment of principal of, premium, if any, and interest on the Bonds, the full faith and credit of the County are irrevocably pledged. The Bonds will not be obligations of the State of Tennessee.

Considering the funding relationship between the county and the hospital as shown by the Bradley County Private Acts, along with the overwhelming evidence that the County has been fully obligated for the hospital's debts, we find that the partnership ventures engaged in by County Hospital and the private Alliance in this case amount to ultra vires acts under the Bradley County Private Acts and an unconstitutional application of the Private Act Hospital Act of 1996, under Art. II, § 29 of the Constitution of Tennessee. It is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution. *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520 (Tenn.1993), citing *State v. Sliger,* 846 S.W.2d 262, 263 (Tenn.1993); *State v. Lyons,* 802 S.W.2d 590, 592 (Tenn.1990); *Shelby County Election Comm'n v. Turner,* 755 S.W.2d 774, 777 (Tenn.1988); *Kirk v. State,* 126 Tenn. 7, 10, 150 S.W.2d 83, 84 (Tenn.1911) *See also, Smith v. Schneider,* No. 02A01-9608-CH-00193 (Tenn.App. December 11, 1996); *Barry v. Wilson County,* 610 S.W.2d 441 (Tenn.App.1980).

As stated, we find that the trial court correctly analyzed the facts and circumstances and correctly determined that under those facts and circumstances, County Hospital functions as an agent and arm of Bradley County. Further, applying the constitutional limitations set out in Art. II, § 29, the court properly enjoined County Hospital from participating in those or any other partnership ventures with the private Alliance which obligate County funds without first conducting a County referendum as constitutionally required. (FN7) We find that under these facts and circumstances, the constitutional requirement for prior approval of the county by vote of its citizens exists irrespective of any rights granted to Private Act Hospitals in general under T.C.A. § 7-57-601, et seq. That part of the trial court's judgment so ordering is affirmed.

V

**10. Finally, the appellants argue that the terms of the Order of Final Judgment and Permanent Injunction entered by the Chancellor are too broad and imprecise and unduly restrict and interfere with County Hospital's operation. Appellants point out that the injunction "prohibits the hospital from being a member of organizations such as the Tennessee Hospital Association, or the American Hospital Association, or even the local Chamber of Commerce, since all of them, though non-profit in nature, have members--probably even a majority of members--who are "non-governmental entities."

We must agree. We therefore narrow the injunction to provide that Bradley County Memorial Hospital is hereby enjoined from entering into any business transactions with private businesses or individuals which obligate County Funds unless authority is granted by vote of the citizens of Bradley County in a referendum, as required by law.

The judgment of the trial court is affirmed as modified. Costs are assessed to the parties evenly.

HOUSTON M. GODDARD, Presiding Judge and CHARLES D. SUSANO, Jr., Judge, concur.

FN1. Indeed, the Attorney General has been asked on several occasions to advise legislators as to the constitutional implications of physician-hospital-organizations (PHO's). Tenn. Att'y. Gen. Op. 95-056. May 23, 1995, involved an opinion as to "whether the General Assembly may constitutionally enact proposed legislation that would authorize a county-owned hospital to hold an 'ownership interest' in an organization owned in part by medical practitioners licensed in the State of Tennessee, without requiring approval by a local referendum." The Attorney General advised that the proposed law "is unconstitutional to the extent it authorizes a county to lend its credit in aid of a private individual or entity or to act as a

shareholder, with others, in any company, association or corporation without approval by referendum required by Article 2, Section 29 of the Tennessee Constitution. Whether any particular transaction would constitute an unconstitutional lending of credit or ownership interest could only be determined after an analysis of all the facts and circumstances of the transaction, especially the form of the ownership and whether the county would be incurring an additional liability, direct or contingent, by participating in such organization." By way of example, the Attorney General opined that "a loan guarantee or other pledge of assets by the county on behalf of a physicians hospital organization would also constitute such a lending of credit."

See also, Tenn. Att'y. Gen. Op. No. U97-037, July 28, 1997: "The extent to which the Board of Trustees [of Cookeville General Hospital] may exercise any of the powers accorded to the hospital under the Private Act Hospital Authority Act of 1996 depends upon its authority under the City Charter. The hospital is not a separate legal entity, rather it is a facility owned by city government... it should be noted, further, that Article II, Section 29 of the Tennessee Constitution prohibits a city, county or town from owning stock with others. It is not clear whether a court would conclude that acting as a member in a not-for-profit corporation, which issues no stock, would violate the provision."

See also, Tenn. Att'y. Gen. Op. No. 98-119, July 2, 1998: McNairy County Hospital Board of Trustees has no authority to sell the hospital without permission of the County Commission. Under the Private Acts governing the hospital, such authority rests with the McNairy County Commission, which can, however, sell the hospital without the permission of, or participation by, the hospital's Board of Trustees. (Hospital Trustees, without the involvement of the County Commission, had given a "Right of First Refusal" on the sale of the McNairy County Hospital to the Jackson-Madison County General Hospital District.)

FN2. The Private Act which created Chattanooga-Hamilton County Hospital Authority, [Erlanger Hospital] is quite different from the Bradley County Private Act, as will be shown. The Chattanooga Act provides that: "Neither the county nor the city shall in any event be liable for the payment of the principal of or interest on any bonds or notes of the [hospital] authority... or any pledge, mortgage, obligation or agreement of any kind whatsoever ... none of the ... obligations shall be construed to constitute an indebtedness of either the county or city within the meaning of any constitutional or statutory provision whatsoever."

FN3. *Finister v. Humboldt General Hopital, Inc.*, No. 02S01-9704-CH-00038 (Tenn. May 26, 1998), squarely holds hat a Private Act hospital is an agency of the County which owns it. While this case arose in the context of the Workers' Compensation Law, T.C .A. § 50-6-106(5), we do not believe that a workers' compensation setting. involves a definition of "State of Tennessee"," counties thereof" and" municipal corporations" that is different from the usual definition of these terms. The "City of Jackson" can only be defined in one manner, whether the underlying case involves workers' compensation, tort, contract, municipal corporation law, or whatever. For this reason, we are of the opinion that the holding of the Supreme Court in *Finister* is conclusive of the issue that a Private Act hospital is an agency of the County, unless it is designated and created as an independent entity.

**10_ FN4. A partnership similar or identical to the defendant Alliance in this case.

FN5. To emphasize the distinction between the respective Private Acts: In *Eye Clinic*, the Private Act merely *authorizea* Madison County to appropriate funds to commence operations and pay operating deficits; *it was not obligated to do so.* This factual and legal conclusion essentially controlled the disposition of the case. But in the case at Bar, the Private Act. unlike the Madison County Private Act, clearly onerates and obligates Bradley County, which pledges full faith and credit and its taxing power to the payment of the bonds. No discretion is allowed.

FN6. The Charter for the Alliance provides, in part: "Upon the dissolution of the Corporation, the Board of Directors, after making provision for the payment of all of the liabilities of the Corporation, shall distribute all of the assets of the Corporation to its members ...."

FN7. In so holding, we acknowledge the argument presented in the amicus brief of the Tennessee Hospital Association and Hospital Alliance of Tennessee, Inc.:

> The key then is not whether the taxing power *can* be used at all in support of the entity--as in the *Eve clinic* case [in which] the Western Section found that the possibility that the county or city could tax was insufficient--but whether taxing power *has* been used in support of a particular project at issue.

While we are not convinced of the soundness of this argument, we need not decide, since the proof is abundant that in this case, Bradley County Hospital and the private physicians' Alliance ignored the constitutional restrictions and obligated County funds in mixed private-public projects without vote of Bradley County citizens.

10-22-85
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Ord. No. 3509

AN ORDINANCE TO AMEND THE CODE OF ORDINANCES OF THE CITY OF MEMPHIS PERTAINING TO THE BUDGET, SALARIES AND CONTRACTS OF THE MEMPHIS LIGHT, GAS & WATER DIVISION

WHEREAS, the Charter of the City of Memphis was amended to provide that the Council of the City of Memphis may by ordinance raise the amount of any salaries or any contracts entailing an obligation or expenditure of funds for the Memphis Light, Gas & Water which requires City Council approval to such amount as the Council may deem appropriate;

WHEREAS, the Council has determined that an ordinance should be passed concerning the approval of salaries and contracts entailing obligations or involving expenditures and that the Council, in lieu of approval of individual contracts and salaries, should approve the budget established by the Board of Commissioners of the Memphis Light, Gas & Water Division.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS:

SECTION 1. Employees for the purpose of this ordinance means all regular full-time or part-time employees of the Memphis Light, Gas and Water Division but does not include members of the Board of Commissioners of the Memphis Light, Gas and Water Division. Any increase in the salaries or compensation of the President of the Memphis Light, Gas and Water Division shall be submitted to the City Council for approval. All other increases in the amounts of salaries or compensation for other employees may be approved by the Board of Commissioners of the Memphis Light, Gas and Water Division provided that no such increase shall result in annual compensation to such employee in excess of the President.

SECTION 2. The Board of Light, Gas and Water Commissioners shall have authority to make contracts entailing any obligations or involving any expenditure for any amount without the

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consent and approval of the City Council of the City of Memphis so long as said amount is within the budget established by the Board of Commissioners of the Memphis Light, Gas and Water Division and approved by the City Council.

SECTION 3. The Board of Commissioners of the Memphis Light, Gas and Water Division shall on or before December 1 of each year provide and forward to the City Council for distribution to Council members a copy of the preliminary budget adopted by the Board of Commissioners for the coming calendar year, and the Council shall schedule such review as it deems necessary by the Energy Committee on or before January 15 of said calendar year. The Board of Commissioners shall thereafter forward to the City Council on or before February 15 of the calendar year the final budget adopted by the Board of Light, Gas and Water Commissioners. The City Council shall by separate resolution adopt and/or amend and approve the budget for the Memphis Light, Gas and Water Division; provided, however, the Council shall approve in any such budget all amounts as are necessary to meet the requirements contained in the bond resolutions applicable to the Electric, Gas and Water Divisions, which bond resolutions have been approved by the Council.

SECTION 4. The budget of the Memphis Light, Gas and Water Division shall be submitted by the Memphis Light, Gas and Water Division in such form as to comply with the requirements of the Federal Energy Regulatory Commission, the accounting principles applicable to utilities, the regulations of any other applicable regulatory body, and in accordance with the provisons of the bond resolutions approved by the City Council for the Electric, Gas and Water Divisions.

SECTION 5. This Ordinance shall take effect from and after the date it shall have been passed by the Council of

the City of Memphis, signed by the Chairman of the Council, certified and delivered to the Office of the Mayor in writing by the Comptroller, and become effective as otherwise provided by law.

ATTEST:

CHAIRMAN OF THE COUNCIL

Robert J. Tamboli, Comptroller

THE FOREGOING ORDINANCE
3409 PASSED
1st Reading OCT 22 1985
2nd Reading OCT 29 1985
3rd Reading NOV 5 - 1985
Approved
Chairman of Council
Date Signed:

APPROVED:
Richard Hackett
Mayor, City of Memphis
Date Signed: 11-20-85

I hereby certify that the foregoing is a true copy and that it was adopted by the Council of the City of Memphis on the above date and approved by the Mayor.
Comptroller