

## **Legal Q&A**

**By Bennett Sandlin, TML General Counsel**

### **May cities charge for the use of rights-of-way by electric utilities?**

Yes. Prior to 1999, electric franchise fees were calculated much the same way that water and gas franchise fees were calculated (based on gross receipts). In 1999, the electric restructuring bill, S.B. 7, altered the franchise fee methodology for electric providers. Under S.B. 7, cities retain the right to manage public rights-of-way and to collect compensation for use of rights-of-way and public property for the delivery of electric service, albeit under a different compensation methodology.

### **How are electric franchise fees calculated?**

Compensation for use of rights-of-way and city land by electric providers is based on kilowatt hours of electricity delivered within the city. The rate per kilowatt hour is based on the amount of compensation that the city received in calendar year 1998 under its already-existing electric franchise fee, divided by the number of kilowatt hours delivered to retail customers in the city during 1998. In other words, 1998 is a “baseline” year from which cities calculate future fees based on usage. As electric consumption grows within the city, so will the total amount of compensation. Tex. Util. Code Sec. 33.008(b).

### **Are per kilowatt franchise fees automatically due the city?**

No, the statute provides that a city is “entitled to collect” the fees, but does not provide for automatic payment by the electric utility. Tex. Util. Code Sec. 33.008(b). A city should adopt an electric franchise ordinance providing for collection of the fees to which it is entitled. Copies of sample electric franchise fee ordinances can be obtained by calling the TML Legal Department at 512- 231-7400.

### **What about franchise agreements providing for different fees that are already in effect?**

The per kilowatt hour methodology of franchise fees replaces any franchise agreement fee provision in effect prior to January 1, 2002. Tex. Util. Code Sec. 33.008(d).

### **What about existing franchise agreement provisions relating to matters other than fees?**

Provisions in franchise agreements in existence as of January 1, 2002, that are not related to fees, continue in effect after the new per kilowatt hour methodology of S.B. 7. Tex. Util. Code Sec. 33.008(d).

### **What about cities that are newly incorporated since the 1998 base year?**

Cities that are recently incorporated, or cities that have not previously collected electric franchise fees, may adopt a franchise ordinance that collects fees at the same per kilowatt hour rate that is

collected by any other city in the same county that is served by the same electric utility. Tex. Util. Code Sec. 33.008(g).

**May cities collect franchise fees by any methodology other than per kilowatt hour?**

If a city had a franchise agreement in effect as of September 1, 1999, at the expiration of that agreement the city and the electric utility could agree to a different franchise fee methodology. Tex. Util. Code Sec. 33.008(f). If such a rate methodology is not negotiated at that time, the per kilowatt hour methodology goes into effect.

**How can a city make sure it is receiving all the electric franchise fees it is entitled to?**

A city collecting per kilowatt hour franchise fees may audit an electric utility concerning any payment made within the two years prior to the start of the audit. Tex. Util. Code Sec. 33.008(e).

**May cities charge for the use of rights-of-way by gas and water utilities?**

Yes, Section 182.025(a) and (b) of the Texas Tax Code provide that:

(a) An incorporated city or town may make a reasonable lawful charge for the use of a city street, alley, or public way by a public utility in the course of its business.

(b) The total charges, however designated or measured, may not exceed two percent of the gross receipts of the public utility for the sale of gas or water within the city.

These sections are the original franchise fee statutes that applied to more than just gas and water franchises. Since these sections were adopted, other franchises—electric, telecommunications, and so on—have adopted more specialized rate methodologies. The result is that by default the Tax Code provisions now apply just to water and gas.

**So, the maximum that can be charged for gas or water franchise fees is two percent of gross receipts, right?**

Not necessarily. While Section 182.025(b) of the Tax Code seems to limit the total amount of a unilaterally-imposed gas or water franchise fee to two percent, the next section of the Tax Code provides as follows:

Section 182.026(b)(2):

b) This subchapter does not...

(2) impair or alter a provision of a contract, agreement, or franchise made between a city and a public utility company relating to a payment made to the city.

These provisions taken together are normally interpreted to mean that while a city may unilaterally impose a two-percent franchise fee on a gas or water provider, the fee may be at a greater rate if the parties agree in writing.

**Assuming the gas or water utility is willing to pay franchise fees, does the utility have an absolute right to use the rights-of-way?**

No. Cities may choose to grant franchises as they see fit. Tex. Nat. Res. Code Sec. 111.022; Tex. Util. Code Sec. 103.002. Gas companies do have a right to cross under city streets, however, subject to direction by the city. Tex. Util. Code Sec. 181.005, 181.006.