COUNTIES -- FEES -- FRANCHISES -- IMPOSITION OF COMPENSATORY FRANCHISE FEE BY COUNTY

AGO 1977 No. 19 - Sep 27 1977

Attorney General Slade Gorton

COUNTIES -- FEES -- FRANCHISES -- IMPOSITION OF COMPENSATORY FRANCHISE FEE BY COUNTY

Impose a reasonable franchise fee in return for the granting of a franchise to cable television company, and likewise, may also impose similarly reasonable fees for the various other kinds of franchises which are authorized to be granted by RCW 36.55.010.

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September 27, 1977

Honorable Michael R. Tabler
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Douglas County
P.O. Box 338
Waterville, Washington 98858

Cite as: AGO 1977 No. 19

Dear Sir:

This is written in response to your recent letter in which you have requested our opinion on the following two questions:

"1. Is a county entitled to a franchise fee for franchises which are granted to a cable television company pursuant to RCW 36.55.010?

"2. If the franchise fee contemplated in the above question is properly chargeable by a county as against a cable television company, may a county impose similar fees for the various other franchises which are granted as per RCW 36.55.010?"

We answer your questions in the manner set forth in our analysis.

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ANALYSIS

RCW 36.55.010 provides that:

"Any board of county commissioners may grant franchises to persons or private or municipal corporations to use the right of way of county roads in their respective counties for the construction and maintenance of waterworks, gas pipes, telephone, telegraph and electric light lines, sewers and any other such facilities."

We would agree with you that this statute is broad enough to encompass a cable television franchise. It is further true, as you have pointed out, that nothing contained therein, nor in any other section of Chapter 36.55 RCW, expressly authorizes the imposition of a franchise fee. Nevertheless, it appears to be a generally recognized principle of law that:

"A municipal corporation, having entire control of its streets and the power to impose conditions on granting a franchise to use the streets, may require compensation for their use by public service companies, as a condition of the grant of the right to use them, unless forbidden by statute, or contrary to public policy. The grantee may be required to pay a certain portion of its receipts as compensation for the use of streets, or a certain percentage of its net earnings, or a certain percent of the dividends declared, or a license fee of a certain sum for each car to be paid annually to the city, or an annual tax on each mile of its tracks. Sometimes the payment of a percentage of gross receipts is in lieu of licenses and license taxes, as well as in lieu of property taxes."

See, 12 McQuillin, Municipal Corporations, § 34.37, and cases cited therein. Included among those cases, notably, are the following two Washington supreme court decisions: Seattle Gas Co. v. City of Seattle, 192 Wash. 456, 73 P.2d 1312 (1937), andSpokane v. Spokane Gas & Fuel Co., 182 Wash. 475, 47 P.2d 671 (1935).

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Also of interest is the matter of general practice. Although none of the various statutes authorizing cities, towns or counties to grant franchises (such as RCW 36.55.010, supra), appear to contain express authority to impose compensatory fees, it is our understanding that the practice of doing so is quite common. See, for example, Ordinance No. A-2682 of the City of Walla Walla, copy enclosed, which has been in effect now for nearly thirty years and specifically provides, in § 9, for a franchise fee equivalent to 3% of a grantee's gross operating revenue.

Further evidencing this same general acceptance of the validity of reasonable franchise fees are two publications by the Bureau of Governmental Research and Services of the University of Washington First, in Report No. 131, "Franchises in the State of Washington" (1956), the following discussion appears at page 29:

"XIX.CONSIDERATION FOR FRANCHISE AND TAXES. A franchise may provide that the consideration for granting a franchise may be (1) the payment of a certain flat sum of money, (2) an amount equal to a fixed percentage of the grantee's gross operating revenue within the city, or (3) certain free services (e.g. a certain number of free telephones, a certain amount of free water, or one or more of the foregoing items). Sometimes cities have been able to negotiate a franchise in which the city reserves the right to modify the amount of above items from time to time during the life of the franchise and to alter them as financial needs may require. However, unless a ceiling is fixed on the amount of such modification or increase, they may be difficult to negotiate because of the unknown financial commitment involved. In addition, where the franchise fee is small, cities require the grantee to pay a business and occupation tax to the city; this, in turn, may be on a flat fee or gross revenue basis. Payments based upon a certain per cent of the gross revenue of a telephone company made to a city under a telephone franchise are considered as 'general operating expense' and may not be passed on to the telephone ratepayers within the respective cities within which the telephone company is operating pursuant to franchises as a separate item on [[Orig. Op. Page 4]] the telephone bill of the ratepayers, but becomes an obligation of the entire system of the company within the state, whereas payments made for municipal business and occupation taxes pursuant to municipal taxing ordinances may be passed on entirely to the telephone ratepayers within the city imposing such a tax and included as separate items on their telephone bills. In other words, in each city that imposes such taxes, the tax of that particular city will be reflected in the telephone bills within that city only."

Secondly, in the bureau's Information Bulletin No. 181, "Natural Gas--Regulation by Washington Cities" (1956), a

similar indication of existing practice will be found at page 9, as follows:

"In consideration for the valuable rights and privileges granted to private utilities in franchises to use streets, alleys, and other public properties, a number of cities and towns, by negotiation, have required the franchise holder to pay a fixed sum of money and/or a certain percentage of its gross revenue. . . ."

It would seem to us that the foregoing principles are equally applicable to a franchise granted by a county under RCW 36.55.010, supra. Accordingly, we would conclude that a county may impose a reasonable franchise fee in return for the granting of a franchise to a cable television company pursuant to the provisions of that statute. And, likewise, a county may similarly impose reasonable fees for the various other kinds of franchises which are authorized to be granted by RCW 36.55.010.

We trust that the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Deputy Attorney General