

ORDINANCE NO. 2011-01

AN ORDINANCE GRANTING A FRANCHISE TO CHEROKEE VILLAGE WATER WORKS FOR THE PROVISION OF WATER SERVICES WITHIN THE CITY, IMPOSING A FRANCHISE FEE, AND FOR OTHER PURPOSES

WHEREAS, Cherokee Village Water Works provides water services within the corporate limits of the City of Cherokee Village, Arkansas; and

WHEREAS, Cherokee Village Water Works makes use of certain city rights-of-way for the location of its infrastructure; and

WHEREAS, state law permits the City to impose a franchise fee on any public utility that operates within the City and makes use of City rights-of-way.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHEROKEE VILLAGE, ARKANSAS:

Section 1: Cherokee Village Water Works, its successors and assigns, is hereby granted a nonexclusive franchise within the City to make use of city-owned rights-of-way for the provision of said services. Cherokee Village Water Works shall have the authority to place, remove, construct, extend and maintain its said plant and appurtenances thereto, along, over, across, on, through, above and under all public streets, alleys avenues, and the public grounds within the corporate limits of the City of Cherokee Village, Arkansas, as said corporate limits are now located or as may hereafter be located.

Section 2: An amount equal to four and one-quarter percent (4.25%) of the water charges collected from each customer within the City of Cherokee Village shall be paid by Cherokee Village Water Works to the City of Cherokee Village as a franchise fee, under the authority of Ark. Code Ann. §14-200-101 et seq. beginning with the first billing made after July 31, 2011. Said amount may be collected from each customer pursuant to state law.

Section 3: Franchise fees shall be remitted to the City on a monthly basis. Cherokee Village Water Works shall have thirty (30) days from the end of each month to compute and make payments provided for herein. The City reserves the right to request a review of Cherokee Village Water Works computations and payments made to the City of Cherokee Village to determine if appropriate amounts are being paid in franchise fees.

Section 4: The franchise granted by this ordinance is unlimited as to time and shall only terminate in accordance with state law.

Section 5: Monthly payments herein required shall be in lieu of all other charges, licenses, fees, or imposition other than the usual general or special ad valorem taxes which may be imposed by the City of Cherokee Village under authority conferred by state law,

Section 6: Nothing herein contained shall be construed as giving to Cherokee Village Water Works any exclusive privileges, nor shall it affect any prior or existing rights of Cherokee Village Water Works to maintain a water system within the City of Cherokee Village.

Section 7: If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared to be severable.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF
CHEROKEE VILLAGE, ARKANSAS

DATED: 4-21-2001

APPROVED: Lloyd W. Hefley
Lloyd W. Hefley, Mayor

ATTEST: Lana S. Hamilton
Lana S. Hamilton, Clerk/Treasurer

GILL ELROD RAGON OWEN & SHERMAN, P.A.
ATTORNEYS

STEPHEN K. CUFFMAN, P.A.
MATTHEW B. FINCH
ROGER H. FITZGIBBON, JR.
JOHN P. GILL, P.A.
T. DANIEL GOODWIN
DRAKE MANN
KELLY W. McNULTY
KELLY M. McQUEEN, P.A.
CHARLES C. OWEN, P.A.
DYLAN H. POTTS
HEARTSILL RAGON III, P.A.
W. BRADFORD SHERMAN
CHRISTOPHER L. TRAVIS, P.A.

METROPOLITAN TOWER
425 WEST CAPITOL AVENUE, SUITE 3801
LITTLE ROCK, ARKANSAS 72201
(501) 376-3800 FAX (501) 372-3359
www.gill-law.com

JUDY P. McNEIL
JENNY HOLT TEETER
CHAD L. CUMMING, JR.
KATIE A. MIDDLETON
DANIELLE M. WHITEHOUSE
CHAD L. WOOD

BETH ECHOLS, COUNSEL

JOHN A. FOGLEMAN
OF COUNSEL (1911-2004)

W. W. ELROD II (1950-2005)

May 5, 2011

Mr. Steve A. Rose, Manager
Cherokee Village Waterworks
P.O. Box 600
Cherokee Village, AR 72525-0600

Dear Steve:

At your request, I have reviewed the validity of Ordinance No. 2011-01 (the "Ordinance") adopted by the City of Cherokee Village, Arkansas. The Ordinance purports to levy a franchise fee on the Cherokee Village Waterworks.

In Section 2 of the Ordinance the City cites Ark. Code Ann. § 14-200-101, *et seq.* as its authority for levying the franchise fee. Section 14-200-101 states in part:

As used in this section, "public utility" means any electric, gas, sewer, or telephone company, and any company providing similar services, except a company excluded from the definition of "public utility" under § 23-1-101(9)(B)(ii),

....

(b)(1) Acting by ordinance or resolution of its council, board of directors, or commission, every city and town shall have jurisdiction to:

(A)(i) Except as provided in § 23-4-201, determine the terms and conditions upon which the public utility may be permitted to occupy the streets, highways, or other public paces within the municipality, including without limitation:

(a) The rates, quality, and character of each kind of product or service to be furnished or rendered by a public utility; and

(b) A reasonable franchise fee.

As stated in the Ordinance, the franchise fee is based upon the right to use city owned rights-of-way. I am informed that the developer of Cherokee Village retained title to the streets at the time the City was incorporated, therefore a preliminary issue is whether or not the streets within the city limits are public property of the City of Cherokee Village. I have been given no information to enable me to give an opinion regarding that issue; however, the validity of the Ordinance can be decided on another basis.

Cherokee Village Waterworks is a public facilities board organized under the provisions of Ark. Code Ann § 14-137-101, *et seq.* by Sharp County, Arkansas. The Waterworks is specifically authorized in Ark. Code Ann § 14-137-111(a)(5) "To fix, charge, and collect rents, fees, and charges for the use of any public facilities project", and when setting rates, it is not required to obtain approval of the Arkansas Public Service Commission. See Ark. Code Ann § 14-137-111(a)(11)(B).

The definition of "public utility" in Ark. Code Ann. § 14-200-101, under which the city purports to act, does not specifically include waterworks systems, and the phrase "any company providing similar services" is not applicable since the Cherokee Village Waterworks is not a company. Notably absent from the public utility definition is a public facilities board.

The franchise fee concept for use of public property by public utilities is part of the general public utility law framework in Arkansas. The central definition of "public utility" is found in Ark. Code Ann. § 23-1-101(9)(A) as follows:

"Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:

- (i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to or for the public for compensation;
- (ii) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation.

The terms "persons" and "corporations" referred to above are further defined as follows:

"Person" includes a natural person, a trustee, lessee, receiver, holder of beneficial or equitable interest, a partnership or two (2) or more person sharing a joint or common interest, and a corporation as defined in subdivision (4) of this section;

"Corporation" includes, but is not limited to, a private corporation, an association, a joint-stock association, a business trust, and an electric cooperative corporation providing service for charge or compensation in any area or from any facility for which the commission has granted a certificate of convenience and necessity;

Cherokee Village Waterworks fits none of the foregoing definitions, therefore it is my opinion that Cherokee Village Waterworks is not a public utility subject to payment of a franchise fee by the City of Cherokee Village. Therefore, the Ordinance is unenforceable.

Very truly yours,

A handwritten signature in black ink, appearing to read "John P. Gill". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

John P. Gill

JPG/ddg

CHEROKEE VILLAGE
WATERWORKS FACILITIES BOARD
OF SHARP COUNTY, AR

Date: July 18, 2011

To: Cherokee Village City Council Members & Mayor,

Regarding: Franchise Fee

The members of the Board of Cherokee Village Waterwork has reviewed Ordinance No. 2011-01 for the levy of a franchise fee and are unable to collect this fee the way the ordinance is currently written. Cherokee Village Waterworks is a public facilities board organized under the provisions of Ark. Code Ann. 14-137-101, et seq. by Sharp County, Arkansas. The Waterworks is specifically authorized in Ark. Code Ann 14-137-111(a)(5) "To fix, charge, and collect rents, fees and charges for the use of any public facilities project", and when setting rates, it is not required to obtain approval of the Arkansas Public Service Commission. The franchise fee concept for use of "public utility" in Ark. Code Ann. 14-200-101, under which the city purports the act, does not specifically include waterworks systems, and the phrase "any company providing similar services" is not applicable since Cherokee Village Waterworks is not a company. Notably absent from the public utility definition is a public facilities board. "Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:

- (1) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to the public for compensation;
- (2) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation.

Cherokee Village Waterworks fits none of the forgoing definitions, thus, not being a public utility subject to payment of a franchise fee by the City of Cherokee Village. Therefore, the Ordinance is unenforceable.

By the advice of our attorney in regards to the liability of this franchise fee, we are unable to collect this fee.



Cordially,

Steve A. Rose
Manager
Cherokee Village Waterworks Facility Board

July 26, 2011

The Honorable Linda Collins-Smith
P.O. Box 90
Pocahontas, AR 72455

Re: request for Attorney General's Opinion

Dear Representative Collins-Smith,

The City of Cherokee Village passed and published the enclosed ordinance to impose a franchise tax on provision of water by the Cherokee Village Waterworks in the City. The Waterworks board has taken the position that they are not obligated to pay the franchise tax imposed because they are organized as a Public Facilities Board authorized by Sharp County. (Letter dated July 18, 2011, from Manager of Cherokee Village Water Works enclosed.) I have also enclosed a copy of the authorizing county ordinance that created the Cherokee Village Waterworks Facility Board.

I am requesting, on behalf of the City of Cherokee Village, that you request an opinion from the Attorney General as to whether the Cherokee Village Waterworks is exempt from the imposition of a franchise tax by the city based on their status as a Public Facilities Board.

Thank you for your assistance in this matter. If I, or anyone else in the City, can provide any additional information, please do not hesitate to contact us.

Sincerely yours,

Lloyd Hefley, Mayor

enclosures: ordinances, letter