

99-044

**PUBLIC SERVICE COMPANIES: TELEGRAPH AND TELEPHONE COMPANIES.**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.**

**COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.**

**City or town may satisfy constitutional requirements by advertising and receiving public bids before awarding franchise to certificated telecommunications providers to use its public rights-of-way for more than five years, notwithstanding fact that amount of bid is related to Public Rights-of-Way Use Fee collected from such providers. Requirement that locality accept highest bid from responsible bidder does not alter this conclusion.**

The Honorable Vincent F. Callahan Jr.  
Member, House of Delegates  
October 22, 1999

You ask whether §§ 56-458, 56-462, 56-468.1 and 56-468.2 of the *Code of Virginia* violate Article VII, § 9 of the Constitution of Virginia (1971).

Section 9 of Article VII places restrictions on the rights of a city or town to create franchises, leases, or other rights to use public property, including its streets and avenues.<sup>1</sup> In addition to limiting the term of such franchises,<sup>2</sup> § 9 imposes the following procedural requirement:

Before granting any such franchise or privilege for a term in excess of five years, except for a trunk railway, the city or town shall, after due advertisement, publicly receive bids therefor.

Section 15.2-2102 provides that, in connection with granting the franchise upon the receipt of public bids, the city council "shall accept the highest bid from a responsible bidder."<sup>3</sup>

Sections 56-458, 56-462, 56-468.1 and 56-468.2 relate to the Public Rights-of-Way Use Fee (the "Use Fee") collected from certificated providers of local exchange or interexchange telephone service, referred to in the statutes as "certificated providers of telecommunications services."<sup>4</sup> Section 56-458(B) prohibits the imposition of "any fee on a certificated provider of telecommunications service for the use of public rights-of-way except in the manner prescribed in § 56-468.1." Section 56-468.1(B) provides:

Notwithstanding any other provisions of law, there is hereby established a Public Rights-of-Way Use Fee to replace any and all fees of general application (except for zoning, subdivision, site plan and comprehensive plan fees of general application) otherwise chargeable to a certificated provider of telecommunications service by the Commonwealth Transportation Board in connection with a permit for such occupation and use granted in accordance with § 56-458 or § 56-462. Cities and towns whose public streets and roads are not maintained by the Virginia Department of Transportation, and any county that has withdrawn or elects to withdraw from the secondary system of state highways ... may impose the Public Rights-of-Way Use Fee only by local ordinance.

The amount of the Use Fee is measured by the number of highway and street miles in the Commonwealth, the number of feet of new installation and the number of access lines in the Commonwealth.<sup>5</sup>

You express concern that, because the Use Fee is a uniform state fee and preempts local franchise fees for use of the public rights-of-way, a city or town that has adopted the Use Fee and wishes to grant a franchise to a certificated provider of telephone services for a term exceeding five years would be unable to publicly receive bids as required by § 9 of Article VII.<sup>6</sup> You ask, therefore, whether the Use Fee is unconstitutional as applied to cities and towns.<sup>7</sup>

A presumption of constitutionality attaches to every legislative act of the General Assembly,<sup>8</sup> and the Supreme Court of Virginia applies a strict standard to constitutional challenges to state statutes. A statute will be upheld "[i]f any reasonable doubt exists as to its constitutionality."<sup>9</sup> The Court stated in *Dean v. Paolicelli*:

No act of the legislature should be held unconstitutional unless it is prohibited by the state or federal constitution *in express terms or by necessary implication*, nor should it be so construed as to bring it into conflict with constitutional provisions *unless such a construction is unavoidable*.<sup>[10]</sup>

It may be argued that, by mandating the receipt of public bids, the Constitution necessarily implies that the city or town must accept the highest bid. The history of adoption of the constitutional language indicates otherwise.

The language requiring advertisement and public bids was added as an amendment to the restrictions on the rights of cities and towns to sell or lease rights to public property in Article VIII, § 125 of the Constitution of 1902. Section 9 of Article VII is virtually unchanged from § 125 of the 1902 Constitution. The report of the proceedings and debates pertaining to adoption of the 1902 Constitution contains a full discussion of the intent and purpose of the provision.<sup>11</sup> The language was offered by C.V. Meredith, the delegate to the convention from the City of Richmond.<sup>12</sup> Mr. Meredith stated:

I desire to have this language added: "Before granting such franchise or privilege for a term of years, except as to a trunk railway, such municipality shall first, after due advertisement, receive bids therefor publicly in such manner as may be provided by law, and shall then act as may be required by law."

The whole object of that amendment, Mr. President, is simply to require publicity. These franchises are sometimes given away in a night, and the object is to require that publicity may be had about them and an effort made to ascertain what they are worth. That is the only restriction that is put upon the council; that before you give away this property, no matter whether you do it hurriedly or after due consideration, you shall let the public know what the franchises are worth, and then after that you shall do what the General Assembly may see fit. If the General Assembly shall require you to put it out to the highest bidder, you are compelled to do that, but it is left entirely to the Legislature....

I wish to call the attention of the Convention to the fact that in the Constitution of Kentucky they have a far more stringent rule. It provides: "Before granting such franchises or privilege for a term

of years, such municipality shall first, after due advertisement, receive bids therefor publicly and award the same to the highest and best bidder, but it shall have the right to reject any and all bids." That Constitution requires that the bid shall be given to the highest bidder.... [B]ut this amendment does not go to that extent. It does not require that it shall be given to any person, but simply that there shall be publicity about the matter. It says to the council: "You shall do this thing after due consideration, and you shall try to find out what the franchises are worth, so that the people can know how their property is being given away or sold, or whatever disposition is made of it"; then afterwards such proceedings may be taken as may be required by law.<sup>[13]</sup>

Although the 1971 Constitution omits from § 9 of Article VII the language "in such manner as may be provided by law, and shall then act as may be required by law," there is no indication that any substantive change from the 1902 Constitution was intended.<sup>14</sup> It follows that the purpose of the advertisement and bid provision in § 9 of Article VII is merely to require publicity and that the section does not require that the city or town accept the highest bid.<sup>15</sup> The General Assembly retains the authority to determine other matters related to a municipality's granting of a franchise for use of the public rights-of-way.

Accordingly, it is my opinion that a city or town may satisfy the requirements of § 9 by advertising and publicly receiving bids from certificated telecommunications providers prior to granting a franchise for a term exceeding five years, notwithstanding the fact that the amount of the bid related to the use of the public rights-of-way is controlled by § 56-468.1. The express requirement in § 15.2-2102 that a locality accept the highest bid does not alter this conclusion. Section 56-468.1(B) begins with the phrase "[n]otwithstanding any other provisions of law." This phrase indicates a legislative intent to override any potential conflicts with earlier legislation.<sup>16</sup>

<sup>1</sup>Section 9 also requires an affirmative vote of three fourths of the members elected to a city or town governing body before a city or town may sell any rights "in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works."

<sup>2</sup>The franchises, leases or rights may not exceed 40 years or, for air rights and easements for columns of support, 60 years. Art. VII, § 9.

<sup>3</sup>The council may accept a lower bid if, for some reason, the interest of the municipality "makes it advisable to do so." Section 15.2-2102.

<sup>4</sup>Section 56-468.1 defines "[c]ertificated provider of telecommunications service" as "a public service corporation holding a certificate issued by the State Corporation Commission to provide local exchange or interexchange telephone service."

<sup>5</sup>See § 56-468.1(C), (D). The Department of Transportation is to calculate the fee annually. Section 56-468.1(C). The telephone company collects the fee by adding it to the ultimate end user's monthly bill and remits the fee either to the Department of Transportation or to the locality that imposes the fee. Section 56-468.1(G), (H)(1)-(2).

<sup>6</sup>A locality with a franchise agreement or other consent in effect before July 1, 1998, or with an ordinance imposing a franchise fee in effect on February 1, 1997, may choose to continue enforcing the franchise, ordinance or consent for use of the public rights-of-way in lieu of imposing the Use Fee. See § 56-468.1(I). No other provision in the statutes permits a locality to

choose between imposing a franchise fee for use of the public rights-of-way or imposing the Use Fee.

<sup>7</sup>Because Article VII, § 9 applies only to cities and towns, no question is presented as to the constitutionality of the statutes in relation to counties.

<sup>8</sup>See *Coleman v. Pross*, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978).

<sup>9</sup>*City of Roanoke v. Elliott*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918).

<sup>10</sup>194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (emphasis added). In accordance with these dictates from the Supreme Court, it has been a long-standing practice of Attorneys General to refrain from opining that a statute is unconstitutional unless it is clear beyond a reasonable doubt that a reviewing court would strike down the statute. Op. Va. Att'y Gen.: 1995 at 164, 165; 1992 at 14, 18; 1985-1986 at 76, 77.

<sup>11</sup>See 2 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Held in the City of Richmond, June 12, 1901, to June 26, 1902, at 2033-40 (1906) [hereinafter *Debates Constitutional Convention*].

<sup>12</sup>*Id.* at 2033; see also 1 *Debates Constitutional Convention*, *supra*, at 3.

<sup>13</sup>2 *Debates Constitutional Convention*, *supra* note 11, at 2033.

<sup>14</sup>See *Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution* 310, 336-38 (Ex. Sess. 1969); *Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution* 510 (Ex. Sess. 1969).

<sup>15</sup>See *Town of Victoria v. Ice, Etc., Co.*, 134 Va. 124, 132, 114 S.E. 89, 91 (1922) (purpose of advertisement is to require publicity); see also 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 855 (1974) (advertisement provision is "to prevent hasty and clandestine moves" by city council).

<sup>16</sup>See 1998 Op. Va. Att'y Gen.: 1998 at 19, 21; 1996 at 197, 198; 1987-1988 at 1, 2.