



**Ralph Karpinos**

**From:** Ellis Hankins [ehankins@nclm.org]  
**Sent:** Monday, August 05, 2002 5:02 PM  
**To:** Cal Horton; Ralph Karpinos  
**Subject:** CP&L Declaratory Judgment Complaint Challenging Munic. Utility Tax Ordinances

**Follow Up Flag:** Follow up  
**Due By:** Thursday, August 08, 2002 12:00 AM  
**Flag Status:** Flagged

To:

League Board of Directors  
City Managers  
City Attorneys  
Other Key Municipal Officers

Steve Smith, the Yanceyville Town Manager, posted a message to the city-county managers listserve this morning about the above. I want to provide more information, particularly since we know other city councils are considering adopting the ordinance.

Since this is a municipal issue (counties do not receive revenues from the utility franchise tax), I am not posting this to the city-county managers listserve.

A number of our city councils have adopted ordinances or resolutions levying municipal electric utility taxes, under the apparent authority of G.S. 105-116(e) and other statutory provisions. That section contains what we have referred to as a "conditional prohibition." It says, in part, that "[s]o long as there is a distribution to cities from the tax imposed by this section [the statewide utility franchise tax levied by the General Assembly and collected by the Department of Revenue], no city shall impose or collect any greater franchise, privilege or license taxes, in the aggregate, on the businesses taxed under this section...." That certainly can be read to provide authority for a local levy in circumstances where the Governor is withholding the quarterly distributions provided for by statute.

The League has not encouraged or discouraged the adoption of these ordinances. We have simply provided our best information and advice, including the admonition that cities whose councils adopted the ordinance probably could expect to be sued. On the other hand, the utility franchise tax is an essential municipal revenue source, and some city councils concluded that in light of this apparent statutory authority, they had no choice but to seek this revenue by means of a locally levied tax.

As Steve said, CP&L filed a complaint on Friday seeking a declaratory judgment that the named municipalities do not have adequate statutory authority to levy and enforce a municipal utility franchise tax, or that the tax levies are unconstitutional, along with injunctive relief. The named defendants are: the Town of Yanceyville, City of Rockingham, Town of Smithfield, City of Hamlet, Town of Troy, City of Fayetteville and Town of Elizabethtown. Apparently, these are all of the municipalities in the CP&L service area whose councils have adopted the electric utility tax ordinance. For whatever reason, the suit was filed in Caswell County Superior Court, the county where the Town of Yanceyville is located.

As far as we know, no similar lawsuit has yet been filed by Duke Power or any of the affected electric membership co-ops. or other providers, although that could happen later. Duke Power previously filed a request for a hearing before the Secretary. We understand from Secretary Tolson's Office that he has denied that request, based on advice from the Attorney General's Office that the Secretary has no jurisdiction or authority to rule on the validity of a local tax levy. Apparently the municipalities in the Duke Power service area who received copies of the hearing request have not received written notice that the Secretary has denied the hearing.

Apparently the Secretary did request an opinion from the Attorney General's Office about

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the validity of the local ordinances. Unfortunately the written opinion adds some words that do not appear in the statute, and on that basis says that the local levies are without authority. The opinion says that since two quarterly distributions were made last fiscal year, "there has been a distribution to them during the fiscal year within the meaning of the statute." Those words "during the fiscal year" do not appear in the statute. A copy of the AG opinion is attached to the CP&L complaint. Undoubtedly it will be taken into consideration by the court, but it is the opinion of two lawyers in the Attorney General's Office. We disagree with the opinion.

We plan to convene a meeting of city attorneys and others who are interested in this issue, and particularly in this pending lawsuit, probably at the League offices. We will notify you when and where, and we plan to do it very soon. We understand that some of the defendant cities and towns in this lawsuit have retained counsel to defend them. The other named defendants might want to consider retaining the same law firm, or a limited number of other firms, to assure high quality representation at reasonable cost.

We've told several reporters that our city councils do not want to have to adopt these local utility taxes, and shouldn't have to. We've said that we need the General Assembly to fix the current utility franchise tax structure that has worked well for 50 years, until Governor Easley withheld two quarterly distributions. We've also said that we will welcome the help of CP&L and Duke Power in getting the legislation enacted. Frankly, we've received no such help.

The purpose of our "secure local revenue" legislation is to restrict the authority of the current and future governors to withhold this and other local revenues, to improve our legal position in case Governor Easley withholds more local revenue this year and leaves us with no reasonable choice but to seek judicial relief, and to fix the statewide utility franchise tax structure, as stated above. The secure local revenue provisions are contained in two separate bills that have passed at least one house. One of those, HB 1490 - Secure Local Revenues, has passed the House and is awaiting action in the Senate. Different versions of the other bill, SB 1292 - Budget Revenue Act of 2002, have passed both houses and is in a House-Senate conference committee for resolution of the differences. That is the bill that includes our earlier local sales tax to replace the local reimbursements. The secure local revenue provisions are in the House and Senate versions of SB 1292, in slightly different forms.

We believe that these secure local revenue provisions will be enacted eventually, and that the Governor will sign the legislation, although unforeseen difficulties still could prevent that from happening. If those provisions are enacted, we would consider recommending that these municipal utility tax ordinances be repealed, which should make this lawsuit moot.

Please note that the primary contact in the League office on this issue, and this lawsuit, is:

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Please call John if you have questions.

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