BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: *Petition of Memphis Networx, LLC for Approval of a Telecommunications Franchise with the City of Memphis*
Docket No. 01-00091

COMMENTS OF SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION ON THE MEMPHIS FRANCHISE

The Southeastern Competitive Carriers Association ("SECCA") submits the following comments concerning the franchise agreement between the City of Memphis and Memphis Networx, LLC.

Pursuant to T.C.A. § 65-4-107, the Authority must determine whether the franchise agreement at issue "is necessary and proper for the public convenience and properly conserves the public interest." Although SECCA takes no position as to whether the franchise is in the best interests of the parties to the agreement, SECCA submits that Section 21.1 of the agreement, which requires Memphis Networx to pay a franchise fee "equal to 5% of Gross Revenue," and Section 20, which requires that Memphis Networx give the city four optical fibers, are illegal under state law. Striking down a similar requirement in Chattanooga, the Tennessee Court of Appeals ruled last year that "such fees must bear a reasonable relationship to the cost to the City" of providing access to the city's right-of-way. *City of Chattanooga v. BellSouth, et al.*. A copy of the Court's decision is attached. The United States District Court in Chattanooga reached the same conclusion. *City of Chattanooga, Tennessee v. BellSouth Telecommunications, Inc., et al.*. Copy attached.

Clearly, a franchise fee based on a carrier's gross revenue or which includes a certain number of optical fibers has no relation to the city's costs. The Memphis ordinance, like the

Chattanooga Ordinance, is illegal and unenforceable. Therefore, the Memphis franchise agreement does not "conserve the public interest."

Although SECCA members are free to negotiate their own franchise agreements or to challenge existing agreements in court, SECCA submits that TRA approval of the Memphis Networx agreement may indicate to the City of Memphis that its ordinance is, in fact, valid under state law and that the city will attempt to impose similar, illegal agreements on other CLECs.

SECCA therefore, asks that the TRA decline to approve the Memphis Networx franchise agreement on the grounds that the agreement is illegal under state law. In the alternative, SECCA requests that, if the TRA approves the franchise, such approval should be accompanied by a disclaimer that the TRA's decision is based solely on the fact that both parties to the agreement have requested TRA approval and that such approval does not indicate whether a similar agreement, if challenged by one party, would be upheld.

Respectfully submitted,

By: _____

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IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

CITY OF CHATTANOOGA, TENNESSEE,	) C/A NO. 03A01-9902-CV-00056
Plaintiff-Appellant,	) E1999-01573-COA-R3-CV
	) HAMILTON CIRCUIT
	)
	) HON. W. NEIL THOMAS, III,
vs.	) JUDGE
	)
BELLSOUTH TELECOMMUNICATIONS, INC., MCI METRO ACCESS TRANSMISSION SERVICES, INC., AMERICAN COMMUNICATIONS SERVICES, INC., and TCG MIDSOUTH, INC.,	)
	) AFFIRMED
	) AND
Defendant-Appellee.	) REMANDED

RANDALL I. NELSON and LAWRENCE W. KELLY, Chattanooga, for Plaintiff-Appellant.

DAVID A. HANDZO, JANIS C. KESTENBAUM, JENNER & BLOCK, Washington, and H. FREDERICK HUMBRACHT, JR., BOULT, CUMMINGS, CONNERS & BERRY, PLC, Nashville, for MCI Metro Access Transmission Services, Inc.

C. CREWS TOWNSEND and LEAH M. GERBITZ, MILLER & MARTIN, LLP., Chattanooga, for American Communication Services of Chattanooga, Inc.

J. HENRY WALKER, and FRED A. WALTERS, Atlanta, and ROBERT G. NORRED, JR., SPEARS, MOORE, REBMAN & WILLIAMS, INC., Chattanooga, for Bellsouth Telecommunications, Inc.

OPINION

Franks, J.

In this declaratory judgment action brought by the City of Chattanooga ("City"), the Trial Judge held the disputed ordinance invalid, and the City has appealed.

In 1996, the City enacted Ordinance No. 10377 entitled "An Ordinance to Amend Chattanooga City Code, Part II, Chapter 32, by adding a new Article XI Relative to Telecommunications Services within the City of Chattanooga." The Ordinance requires those wishing to provide telecommunications services within the City to obtain a franchise from the City. It requires that any franchise occupying any right-of-way of the City to pay a franchise fee of "five percent of its 'gross revenue'[1] to the City each year." The Ordinance also requires franchisees to furnish the City for its exclusive use, an underground duct (with underground installations); pole space (with aboveground installations); four dark fiber optic fibers; and engineering assistance for initial hookup by the City.

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[1] "Gross revenue" is defined by the Ordinance as: "all revenue of any kind collected by Provider from any source whatsoever for customer access to a long distance carrier or provider using a Telecommunications Services system within the City of Chattanooga. For the purposes of this section, 'gross revenue' shall not include (1) any taxes which are collected by Provider from its customers, (2) lease or rental fees received from a lessee or sublessee or Provider's System for which a five percent (5%) franchise fee on the lessee's or sublessee's gross revenue is paid to the City pursuant to this Article, or (3) revenues from sale of capacity in Provider's System for which a franchise fee on the purchaser's gross revenue is paid to the City pursuant to this Article."

After this action was brought, defendants had it removed to Federal District Court where a trial was had, but the action was ultimately dismissed for lack of jurisdiction, with remand to the State Court.

Upon remand, the parties filed motions for summary judgment and after oral argument, the Trial Judge entered a Memorandum of Opinion and Order denying the City's summary judgment, and granting defendants' summary judgment.

The dispositive issue on appeal is does the franchise fee imposed by the Ordinance violate State law, as either an impermissible tax or as an ultra vires act of police powers?[2]

A municipality has authority to act in either its proprietary capacity or its governmental capacity. *See Bristol Tennessee Housing Auth. V. Bristol Gas Corp.*, 407 S.W.2d 681 (Tenn. 1966). Acting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining the rights-of-way, but in its governmental capacity, it may only act through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee. *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997); *Bristol Tenn. Housing Auth.*; *City of Paris v. Paris-Henry*

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[2] The issue of whether the franchise fee violates the Federal Telecommunications Act of 1996, is pretermitted.

County Public Unity District, 340 S.W.2d 885 (Tenn. 1960).

The franchise fees imposed by the Ordinance under consideration must necessarily come under the City's governmental function and not its proprietary function. Acting in its proprietary capacity, a municipality may not revoke or impair rights previously given by it to a third party by a subsequent enactment. *Bristol Tenn. Housing Auth.; Shelby County v. Cumberland Telephone & T. Co.*, 203 S.W.342 (Tenn. 1918). Because two of the defendants hold prior franchises granted to their predecessors, the City may not modify the franchise by imposing a fee under the City's proprietary functions. T.C.A. §65-21-103 requires such fees to be imposed without discrimination. Moreover, T.C.A. §67-4-401 and 67-4-406 prohibit a city from taxing providers of telecommunications services for the privilege of doing business within the city. *See Holder v. Tennessee Judicial Selection*, 937 S.W.2d 877 (Tenn. 1996).

Accordingly, to be valid, the fee imposed by Ordinance 10377 must be enacted under an exercise of the City's police powers, and cannot constitute a tax. In exercising these powers, the charge exacted by the municipality must bear a reasonable relation to the objective to be accomplished. *Porter v. City of Paris*, 201 S.W.2d 688 (Tenn. 1947). T.C.A. §65-21-103 permits a city to exact a rental for the use of the right-of-way under its governmental, or police, powers. This section

provides, in pertinent part:

> While any . . . city within which such line may be constructed shall have *all reasonable police powers to regulate the construction, maintenance, or operation* of such line within its limits, *including the right to exact rentals* for the use of its streets and to limit the rates to be charged; provided, that such rentals and limitations as to rates are reasonable and imposed upon all telephone and telegraph companies without discrimination. (Emphasis added).

The City argues that under this statute, in the exercise of its police powers, it may charge a telecommunications provider a rental unrelated to the cost of regulation. The City argues that the term "rental" is not limited to the cost of regulation, but allows generation of revenue in excess of regulation without constituting a tax, and cites to *Memphis Retail Liquor Dealer's Ass'n v. City of Memphis*, 547 S.W.2d 244 (Tenn. 1977) in support of its argument.

The Trial Court found that "rental" derived from the City's police power and must therefore bear a reasonable relationship to the thing being accomplished, and that the amounts collected could not be disproportionate to the expenses involved. The *City of Memphis* case involved an inspection fee of 5% of the wholesale price of liquor, and the Supreme Court was faced with whether this constituted a fee or a tax. The Court made this distinction:

> In Tennessee, taxes are distinguishable from fees by the objectives for which they are imposed. If the imposition is primarily for the purpose of raising revenue, it is a tax; if its purpose is for the regulation of some activity under the police power of the governing authority, it is a fee.

547, S.W.2. at 246.

While the Court held that the income generated was not totally disproportionate to the cost of administration,[3] it specifically held that "this argument might be valid if the activity regulated was anything other than the liquor business." The Court went on to say that "the amount of the license fee may itself have a permissible regulatory effect" where the occupation regulated "while they are tolerated, are recognized as being hurtful to the public morals, productive of disorder, or injurious to the public, such as the liquor traffic." *Id.* The Trial Court in this case observed that "it would hardly seem that the telecommunications industry needs the type of regulation identified," by the Court in *City of Memphis.*

An important characteristic and distinguishing feature of a tax is that it is designed and imposed for the purpose of raising revenue. *City of Tullahoma*, 938 S.W.2d at 412; *Memphis Retail Liquor*, 547 S.W.2d at 245-6. If the revenue raised by the government assessment provides a general benefit to the public of a sort typically financed by a general tax, then the assessment will usually be deemed a tax rather than a fee. *Id.* If the franchise fee would generate income to the City beyond that necessary to regulate and manage the telecommunications industry, such "fee" would

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[3] In that case, the income was approximately two hundred times the cost of regulation.

be generally considered to be a tax rather than a fee. To counter, the City argues that it should be able to collect revenue generating rent on defendant's use of its public right-of-way, similar to the rent charged by the City for the private use of its publicly-owned theater. However, this comparison supports the argument that the City's ordinance was meant to be revenue generating instead of simply a fee to defray the cost of regulation.

The City's urged construction of the term "rental" to allow for revenue above mere "compensation", would enable the City to exact the same charge in its exercise of its police powers as it can in the exercise of its proprietary powers, thereby rendering meaningless our Supreme Court's decisions making the distinction. *In Porter v. City of Paris*, the Supreme Court held under the City's police powers, the fee imposed must "bear a reasonable relation to the thing being accomplished." 201 S.W.2d at 691. Recently, the Court defined "fee" as that which is "imposed for the purpose of regulating specific activity or defraying the cost of providing a service or benefit to the party paying the fee." *City of Tullahoma v. Bedford County*, 938 S.W.2d 408 (Tenn. 1997).

The record reveals that the 5% fee does not necessarily bear any relation to the cost to the City of the franchisees' use of the City's rights-of-way. The fee varies based upon the provider's gross revenue, and is therefore measured by the

provider's earnings and not to the burdens assumed by the city in regulating the particular provider. This is particularly true because a telecommunications provider must pay 5% of its gross receipts, regardless of the extent to which the provider uses the City's rights-of-way. *Cf. Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland,* 49 F.Supp.2d 805, 818 (D. Md. 1999), appeal docketed, 99-1784 (4th Cir. June 14, 1999) (holding that under §253(c) of the FTA, fees for access to public rights-of-way must be directly related to the "cost of the [local government] of maintaining and [using] the public rights-of-way . . . . These costs must be apportions to [a telecommunication provider] based on its degree of use, not its overall level of profitability.")

The City cites us to the fact that it spent more than twenty million dollars from 1991 to 1996 for street paving and improvements, and offered evidence that the street cuts made by utility companies damaged the integrity of the street and necessitated repaving more frequently than otherwise necessary. The City estimated the total revenue from the Ordinance would be about $725,000 per year, but it did not know, and had not determined, the percentage of any street improvements or repaving that would be attributed to telecommunications construction, as opposed to other utilities. Likewise, there was no evidence presented as to what portion of street maintenance relates to street cuts.

The City chose a fee of 5% of gross revenue, based upon what some other cities charge telecommunication providers for the use of rights-of-way, which the Trial Judge referred to as a "me too" rationale. The mere fact that other cities charge similar rates, is not conclusive as to the reasonableness of the fee. *See AT&T Communications of the Southwest, Inc. v. City of Dallas,* 8 F.Supp. 2d 582, 593 (N.D. Tex. 1998). But the Trial Judge incorrectly reasoned that the provisions requiring the telecommunications providers to repair the cuts they make and to post bonds before construction, adequately reimburse the City. The City does have the right to be reimbursed for the added cost of repaving more frequently. *In Porter*, the Court said:

> The fact, that the fees charged produce more than the actual cost and expense of enforcement and supervision, is not an adequate objection to the exaction of the fees. *The charge made, however, must bear a reasonable relation to the thing being accomplished.* (Emphasis supplied).

201 S.W.2d 688, 691. Thus, while the City may charge a fee beyond the mere repair of its rights-of-way, such fees must bear a reasonable relation to the cost to the City. There is no evidence to support the proposition that the 5% fee will "bear a reasonable relation" to the use of the rights-of-way.

Finally, the City raised in oral argument the case of *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 1999 WL 1037 160 (S.C. November 8, 1999), where the South Carolina Supreme Court upheld a franchise fee in the

amount of 5% of gross revenue imposed by the City of Orangburg on BellSouth.

The Trial Court in the City of Orangeburg found the fee to be fair and reasonable in part because "the only other telecommunications franchise, a cable television company, paid the same fees". The Court in *City of Orangeburg*, reasoned that South Carolina had delegated to municipalities the power to enact ordinances "necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it." This power included the ability to ensure that the grant of franchise privileges operates to benefit the public.

The City of Chattanooga has been given a limited range of police powers in regulating telecommunications providers. It has not been given the full range of powers found in *City of Orangeburg*. The proper measure for a franchise fee under our cases is not the "franchise's value as a business asset", but rather the cost to the City of allowing the franchise to use its public rights-of-way.

The Trial Judge found the franchise fee to constitute a tax. Regardless of whether the franchise fee in the ordinance is characterized as a fee or a tax, the record fails to establish the fees created by the ordinance come within the statutory authority granted to the plaintiff. The same holds true for the savings provision of the ordinance that provides for a per foot fee if the percentage based fee is struck down.

A fee calculated based upon the amount of the City's rights-of-way actually used, could be a type of fee that would be proper and reasonably related to the regulation of the industry. However, there is no evidence that the per foot charge does, in fact, bear a reasonable relation to such cost. Accordingly, we hold that neither the fees based upon the gross percentage of revenue nor the per foot charge is a reasonable exercise of the City's police powers. We affirm the judgment of the Trial Court, holding the ordinance invalid.

We remand with the cost of the appeal assessed to plaintiff.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

D. Michael Swiney, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

CITY OF CHATTANOOGA, TENNESSEE, *Plaintiff*, v. BELLSOUTH TELECOMMUNICATIONS, INC.; MCI METRO ACCESS TRANSMISSION SERVICES, INC.; AMERICAN COMMUNICATION SERVICES OF CHATTANOOGA, INC.; and TCG MIDSOUTH, INC., *Defendants*.	)	1:96-cv-351 *Edgar*

Filed OCT 24 1997
Ent'd Order Bk. 71B, p. 58
R. MURRY HAWKINS, CLERK
By _____
Dep. Clerk

ORDER

For the reasons set forth in the memorandum filed herewith, the motion for summary judgment by The City of Chattanooga, Tennessee (Court File No. 46) is **DENIED** on the issue of whether under state law the City may impose the franchise fee and other charges specified by Chattanooga City Ordinance No. 10377. All other issues raised by the City's motion are **MOOT**. The motions for summary judgment filed by MCImetro Access Transmission Services, Inc. (Court File No. 39); BellSouth Telecommunications, Inc. (Court File No. 42); American Communication Services of Chattanooga, Inc. (Court File No. 48); and TCG Midsouth, Inc. (Court File No. 50) are **GRANTED** on the issue whether under state law the City may properly impose the

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franchise fee and other charges and conditions specified by Chattanooga City Ordinance No. 10377. All other issues raised thereby are **MOOT**. The parties will bear their own costs.

SO ORDERED.

ENTER:

R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT
OCT 24 1997
R. MURRY HAWKINS, CLERK
By
Dep. Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

CITY OF CHATTANOOGA, TENNESSEE, *Plaintiff*, v. BELLSOUTH TELECOMMUNICATIONS, INC.; MCI METRO ACCESS TRANSMISSION SERVICES, INC.; AMERICAN COMMUNICATION SERVICES OF CHATTANOOGA, INC.; and TCG MIDSOUTH, INC., *Defendants*.	)	1:96-cv-351 *Edgar*

MEMORANDUM

I.

The City of Chattanooga, Tennessee ("City") on February 6, 1996, enacted its Ordinance No. 10377. This Ordinance requires that providers of telecommunications services desiring to install cable and other equipment on City rights-of-way must obtain a franchise from the City by paying a $750.00 application fee and by paying a "franchise fee" of five percent of gross revenue from services provided within the City. The Ordinance also requires franchised providers to furnish the City for its exclusive use an underground duct (with underground installations); pole space (with aboveground installations); four dark fiber optic fibers; and engineering assistance for initial hookup by

the City. If a provider defaults in any one of several ways in carrying out the franchise, including failure to pay the franchise fee, the City may terminate the franchise.

The City filed a declaratory judgment action in State court naming as defendants various telecommunications providers and seeking a declaration of the rights of the parties with respect to Ordinance 10377. Specifically, the City sought the answers to the following questions:

> (1) Are defendants BellSouth and MCI properly occupying the rights-of-way of the plaintiff pursuant to the East Tennessee franchise and the American Union franchise, respectively, as the successors-in-interest to East Tennessee Telephone Company and American Union Telegraph Company, respectively?
>
> (2) Assuming that defendants BellSouth and MCI are properly occupying the rights-of-way of the plaintiff pursuant to the East Tennessee franchise and the American Union franchise, respectively, can the plaintiff properly charge a franchise fee to said defendants pursuant to the provisions of Ordinance 10377?
>
> (3) If the plaintiff cannot properly charge a franchise fee to defendants BellSouth and MCI, can the plaintiff properly charge a franchise fee to defendant ACSI and all others receiving telecommunications franchises pursuant to Ordinance #10377, or does TENNESSEE CODE ANNOTATED § 65-21-103 prohibit such a franchise fee?

The case was removed to this Court on the basis of diversity of citizenship. 28 U.S.C. § 1332. Before the Court are motions for summary judgment pursuant to FEDERAL RULES OF CIVIL PROCEDURE 56 filed by the City (Court File No. 46); MCImetro Access Transmission Services, Inc. ("MCI") (Court File No. 39); BellSouth Telecommunications, Inc. ("BellSouth") (Court File No. 42); American Communications Services of Chattanooga, Inc. ("ACSI") (Court File No. 48); and TCG Midsouth, Inc. ("TCG") (Court File No. 50). MCI has filed a counterclaim seeking, among other things, a declaration that Ordinance 10377's franchise fee and its other fees and conditions of doing business are violative of state law.

II.

This case has historical roots. Alexander Graham Bell obtained the basic patent for the telephone in 1876. By that time the telegraph had been in existence for some years. States and municipalities were eager to have this technology provided to their citizenry. In 1880, the City by separate ordinances granted non-exclusive franchises to the American Union Telegraph Company (Ordinance 329) and the East Tennessee Telephone Company (Ordinance 337) to erect and maintain telegraphic and telephonic poles and wires on City rights-of-way. Neither of these franchises requires any payment of franchise or other fees to the City, nor are the franchises limited in duration. The answer to the first question posed by the City is not in doubt. It is conceded that MCI is the successor-in-

interest to the American Union Telegraph Company franchise, while BellSouth is the successor-in-interest to the East Tennessee Telephone Company franchise.

III.

The resolution of the City's second and third questions requires further historical review. In 1885 the State of Tennessee, in recognition of the need to encourage and promote the investment of private capital for telegraph and telephone communications, enacted a State franchise law authorizing companies in that business to construct lines "along and over the public highways and streets of cities and towns, or across and under the waters, and over any lands or public works belonging to this state . . . ." This statute is now codified at TENN. CODE ANN. § 65-21-201. This statute applies to underground fiber optic cables. *American Tel. & Tel. Co. v. Proffit*, 903 S.W.2d 309, 312-13 (Tenn. App. 1995).

In 1907 the Tennessee Legislature enacted TENN. CODE ANN. § 65-21-103 which provides that a municipality in the exercise of its police powers may exact reasonable "rentals for the use of its streets" by telegraph and telephone companies. As will be seen, the City relies on the language in this statute as authority for charging the franchise fee specified by Ordinance 10377.

In 1937 the Tennessee Legislature enacted two statutes which are presently codified at TENN. CODE ANN. §§ 67-4-401 and 67-4-406. Section 67-4-401 provides:

"Engaging in the various businesses mentioned in this part is declared to be a privilege for state taxes and taxable by the state alone . . . . No county or municipality may impose any tax upon the privileges mentioned in this part . . . ." Among the businesses subject exclusively to state privilege taxation are public utilities. TENN. CODE ANN. § 67-4-406. Telephone, telegraph, and telecommunications service providers are public utilities. TENN. CODE ANN. § 65-4-101.

IV.

Prior to enacting Ordinance 10377 the City did not attempt to relate the five percent gross revenue fee to its costs or expense in maintaining the rights-of-way in which the telecommunications companies place their cable and equipment. The proceeds of the fee will be used to pay the City's general debts and liabilities. Thus, it must be concluded that the franchise fee is in fact a tax. *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997); *Memphis Retail Liquor Dealers' Ass'n, Inc. v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977). The Ordinance's revenue raising intent is made all the more clear by its requirement that providers furnish the City such items as dark fibers and hookups. These are clearly unrelated to the City's costs. [1] In effect the franchise fee and other Ordinance requirements is a tax sought to be imposed on

[1] Ordinance 10377 says that in the event that the five percent franchise fee is not permitted by law, it will charge a franchise fee based upon amounts per linear foot of public right-of-way used. This alternative fee calculation must also be categorized as a tax. There is no evidence that it is in any way related to the City's costs.

telecommunications providers for the privilege of doing business in the City. Engaging in the business of providing telecommunications services is a privilege taxable only by the State of Tennessee. As recited above, TENN. CODE ANN. §§ 67-4-401 and 67-4-406 make it clear that only the state, not municipalities, may tax the privilege of doing business in the State of Tennessee as a public utility such as a telecommunications provider. Moreover, a municipality can levy privilege taxes only when given specific authority by the state to do so. *Neuhoff Packing Co. v. City of Chattanooga*, 234 S.W.2d 824 (Tenn. 1950). The state has granted no such authority to the City.

V.

The City contends however, that it has the authority to enact the five percent franchise fee by virtue of its police power. Generally, the police power extends to the making of laws and ordinances necessary to secure the safety, health, good order, peace, comfort and convenience of the City. *Chattanooga v. Norman*, 20 S.W. 417, 419 (Tenn. 1892). The City, as a municipal corporation and an extension of the state, only possesses those police powers which are authorized and delegated to it by the state. *Holdredge v. City of Cleveland*, 402 S.W.2d 709, 712 (Tenn. 1966); *City of Chattanooga v. Tennessee Elec. Power Co.*, 112 S.W.2d 385, 388 (Tenn. 1938). The City says that the state granted it the police power to obtain revenue from telecommunications providers in TENN. CODE ANN. § 65-21-103. That statute reads in its entirety as follows:

> **Local regulation.**-- While any village or city within which such line may be constructed shall have all reasonable police powers to regulate the construction, maintenance, or operation of the line within its limits, including the right to exact rentals for the use of its streets and to limit the rates to be charged; provided, that such rentals and limitations as to rates are reasonable and imposed upon all telephone and telegraph companies without discrimination. No village, town, or city shall have the right to prevent the company from constructing, maintaining, and operating the line within the village, town, or city, so long as the line is being constructed, maintained, or operated within the village, town, or city, in accordance with the reasonable police regulations.

Should "rentals" in Section 65-21-103 be read as "revenue" or "taxes?" There are several reasons why the answer must be "no." First, the phrase "rentals for the use of its streets" is ambiguous. Rent is defined broadly as any fee or compensation paid for the use of real or personal property. *Galbraith v. Harris*, 779 S.W.2d 392, 394 (Tenn. App. 1989); *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975); BLACK'S LAW DICTIONARY 166 (5th ed. 1979). By itself, "rentals" could be broader or narrower than the term "revenue." However, the Tennessee Legislature could have used the word "taxes" but did not do so. It is well settled under Tennessee law that statutes of taxation are to be strictly construed against the taxing authority and liberally construed in favor of the taxpayer. Doubtful language as to the imposition of a tax should be resolved in favor of the taxpayer. *Young Sales Corp. v. Benson*, 450 S.W.2d 574, 577

(Tenn. 1970); *Carl Clear Coal Corp. v. Huddleston*, 850 S.W.2d 140, 147 (Tenn. App. 1992).

Second, if Section 65-21-103 were to be interpreted to mean "taxes," the statute would in direct conflict with TENN. CODE ANN. §§ 67-4-401 and 67-4-406 which expressly prohibit municipalities from taxing telecommunications providers for the privilege of doing business. Wherever possible courts must avoid constructions of ambiguous statutory language that place one statute in conflict with another. *Holder v. Tennessee Judicial Selection*, 937 S.W.2d 877, 883 (Tenn. 1996); *State ex rel. Metropolitan Govt. v. Spicewood Creek Watershed Dist.*, 848 S.W.2d 60, 62 (Tenn. 1993); *Parkridge Hospital, Inc. v. Woods*, 561 S.W.2d 754, 755 (Tenn. 1978).

Thirdly, Section 65-21-103 has been on the books since 1907. Since that time there is no indication in any published case or other legal authority that anyone ever thought that the statute was authority for municipalities to tax telecommunications companies. In fact, in 1918 the Tennessee Supreme Court, without mentioning the statute, held that Shelby County could not, without state legislative permission, collect a "poll rental" on telephone polls under the police power unless that rental was for the purpose of defraying the county's expenses in supervising and inspecting a planned reconstruction of telephone lines. *Shelby County v. Cumberland Tel. & Tel. Co.*, 203 S.W. 342 (Tenn. 1918). The substance of Section 65-21-103 had by that time been in existence for eleven years. Obviously, the Tennessee Supreme Court was unaware of any state legislative

authority, including Section 65-21-103, which it thought would warrant a municipality obtaining non-cost related revenue from telephone companies.

Finally, the police power does not include the power to raise revenue. *City of Chattanooga v. Veatch*, 304 S.W.2d 326 (Tenn. 1957); *Wright v. Town of Camden*, 259 S.W.2d 529 (Tenn. 1953). The police power "may not be resorted to as a shield or subterfuge, under which to enact and enforce a revenue raising ordinance or statute." *Porter v. City of Paris*, 201 S.W.2d 688, 691 (Tenn. 1947). Fees charged by a municipality must have some reasonable relation to costs incurred. *Id.; Lamar Advertising of Tennessee, Inc. v. Chancellor, City of Knoxville*, 1997 WL 170304, at *2 (Tenn. App. April 11, 1997); *S&P Enterprises, Inc. v. City of Memphis*, 672 S.W.2d 213, 216 (Tenn. App. 1983). There is no language in Section 65-21-103 evidencing any legislative intent to displace longstanding Tennessee municipal law limiting the scope of the police power. Instead, it is clear that Section 65-21-103 was intended to reaffirm the right of cities to exercise their traditional police powers to regulate, maintain and operate their streets and public rights-of-way, and to prevent them from abusing their police power by imposing unreasonable limitations and discriminatory fees on telephone companies which would unduly inhibit the construction of their lines of communication in public rights-of-way.

VI.

The City's second and third questions are, therefore, effectively answered by the conclusion reached here that the City may not properly impose upon MCI, BellSouth, or any of the other telecommunications providers the non-cost related application fee, franchise fee, and other requirements contained in Ordinance 10377. On the other hand, it is beyond question that the City does have police power to levy and collect from telecommunications providers reasonable fees to reimburse the City for its financial costs and expenses directly related to the maintenance and repair of the City's streets and public rights-of-way. *See City of Memphis v. Postal Telegraph Cable Co.*, 145 F. 602 (6th Cir. 1906).

This disposition of the case makes it unnecessary to decide other issues which have been raised. MCI and BellSouth contend that Ordinance 10337 violates Article I, Section 10, Clause 1 of the United States Constitution which provides that no state shall pass any law impairing the obligation of contracts (the "Contracts Clause"),[2] by effectively negating their non-exclusive franchises with the five percent franchise fee. While this question need not be resolved here, it should be said that the Contracts Clause would not prevent the City from exercising its police powers affecting MCI and BellSouth despite the existence of their franchises. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190 (1983);

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[2] Article I, Section 20 of the Tennessee Constitution contains a similar provision.

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 410 (1983); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 240-41 (1978). Thus, for example, the City could charge cost-related fees to MCI and BellSouth as well as other telecommunications providers without differentiation.

Likewise, the disposition of this case makes it unnecessary to determine whether Ordinance 10337 runs afoul of the Federal Telecommunications Act of 1996, and in particular, 47 U.S.C. § 253. It is evident that nothing in the federal statute grants states and municipalities any rights or powers beyond those which they already possess under state law.

In accordance with the terms of this opinion, Ordinance 10377 in its entirety is invalid under state law. The City's motion for summary judgment (Court File No. 46) will be **DENIED** and the motions for summary judgment of MCI (Court File No. 39), BellSouth (Court File No. 42), ACSI (Court File No. 48), and TCG (Court File No. 50) will be **GRANTED** to the extent that those parties seeking a declaration that Ordinance 10377 is invalid under state law. The answer to the City's first question is "yes." The answer to the City's second and third questions is that the City may not charge the franchise fee specified by its Ordinance 10377 to MCI, BellSouth or any of the other telecommunications providers. TENN. CODE ANN. § 65-21-103 does not authorize the City to charge this franchise fee. Likewise, the City may not require telecommunications

providers to give the City non-cost related application fees, underground ducts, pole space, fiber optic cables or engineering assistance.

An order will enter.

ENTER:

R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 16 day of March, 2001.

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