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Guy M. Hicks
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January 20, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth Telecommunications, Inc.'s Entry into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*
Docket No. 97-00309

Dear Mr. Waddell:

On July 2, 1998, in response to a request from the Authority, BellSouth submitted copies of the two Memoranda and Orders issued by the U.S. District Court in the litigation relating to the City of Chattanooga's proposed telecommunications franchise ordinance. In the cover letter accompanying those orders, BellSouth notified the Authority that the franchise litigation was currently pending before the Circuit Court of Hamilton County. By Order dated January 4, 1999, the Circuit Court granted the motions for summary judgment filed by BellSouth, MCI, TCG and ACSI (now e.spire), finding that the City's proposed ordinance was invalid under state law.

I have enclosed fourteen copies of the Circuit Court's Order.

Copies of the enclosed are also being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

147259

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

CITY OF CHATTANOOGA, TENNESSEE,	:	
	:	
Plaintiff,	:	**DOCKET NO. 96-CV-1155**
	:	
vs.	:	
	:	**DIVISION IV**
BELLSOUTH TELECOMMUNICATIONS, INC., MCI METRO ACCESS TRANSMISSION SERVICES, INC., AMERICAN COMMUNICATIONS SERVICES, INC. And TCG MIDSOUTH, INC.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION, ORDER AND JUDGMENT

This matter is before the Court upon cross-motions of the City of Chattanooga (hereinafter the "City"), BellSouth Telecommunications, Inc. (hereinafter "BellSouth"), American Communications Services of Chattanooga, Inc. (hereinafter "ACS"), MCI Metro Access Transmission Services, Inc. (hereinafter "MCI"), and TCG MidSouth, Inc. (hereinafter "TCG") for summary judgment pursuant to Rule 56, Tennessee Rules of Civil Procedure, upon the grounds that there are no genuine issues of material fact and that each movant is entitled to judgment as a matter of law.

The History of The Litigation

The Complaint for Declaratory Judgment in this action was originally filed in this Court on June 5, 1996, and was removed to Federal Court on July 10, 1996. By an Order, entered January 26, 1998, this action was remanded to this Court from Federal Court. The issue presented here and in Federal Court is and was whether City Ordinance #10377, which imposes a five (5%) percent fee on providers of telecommunications services, such as the defendants herein, is valid. The issue was first presented by way of cross-motions for summary judgment in Federal Court. By an Order, entered October 24, 1997, Judge Edgar granted the motions for summary judgment filed by BellSouth, ACS, MCI and TCG and denied the motion for summary judgment filed by the City. In a Memorandum, entered the same date, Judge Edgar held as follows:

> 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.

After the entry of the Order with respect to the foregoing Memorandum, the City moved to alter or amend pursuant to Rule 59(e), Fed. R. Civ. Proc., contending that the Court lacked subject matter jurisdiction under the Tax Injunction Act, 28 U.S.C. §1341. That motion was granted in an Order entered January 26, 1998, and the matter was remanded to Circuit Court[1].

In support of its motion the City submitted the deposition of James Boney, the deposition of Jack Wilkinson, the City's Amendment to BellSouth's Interrogatory No. 8 and a certified copy of Ordinance #3037 from the City of Memphis, Tennessee. In support of its motion BellSouth submitted the affidavits of Pamela Cook, Patricia Hazlewood and Lynn Jones, excerpts of the depositions of James Boney, Jack Marcellis and Jack Wilkerson, the October 24, 1997, and January 26, 1998 Memoranda and Orders from Federal Court, its May 5, 1997 Memorandum of Law in support of its motion for summary judgment in Federal Court, the 1885 State Franchise law and City Ordinance #5659. In support of its motion ACS submitted City Ordinances ##10377 and 10395, the October 24, 1997, and January 26, 1998 Federal Court Memoranda, the ACS application to the City, the affidavit of Alfred E. Smith, Jr., memorandum from Richard Lance to City Council, dated January 30, 1996, minutes of the City's Economic Development Committee, stipulation between the City and ACS and excerpts of the depositions of Jack Marcellis, James Boney and Jack Wilkinson. In support of its motion TCG submitted City Ordinance #10377, the affidavits of John W. Thomson and Mark Cazee, excerpts from the depositions of James Boney and Jack Marcellis, City Ordinances ##337 and 329, and the Opinion and Order of Federal Court, entered October 24, 1997. In support of its motion MCI submitted the declaration of Jerry Murphy, City Ordinance #10377, the City's responses to MCI's First Set of Interrogatories, City Code Article III, the City's Specification for Street Restoration, the January 20, 1996, minutes of the Economic Development Committee, excerpts of the depositions of James Boney, Jack Marcellis and Jack Wilkinson, Western Union Board

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[1] Although the only pleading which is formally part of the record in this Court is the City's Complaint, the Court has been provided with copies of the answers and counterclaims filed by the defendants in Federal Court, and the Court has considered them. Accordingly, the Clerk is directed to make those responses part of the record in this Court.

Minutes in 1881 and the Memoranda of October 24, 1997, and January 26, 1998 from Federal Court, Selected Abstract Tables and City Ordinance # 329.

The Pleadings

In its declaratory judgment complaint the City sought 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, 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 and other 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?

All defendants submitted answers, generally denying the allegations of the Complaint. In addition, MCI counterclaimed, seeking to declare City Ordinance #10377 invalid as violative of (1) the Federal Telecommunications Act of 1996, 47 U.S.C. §253, (2) Title 65 of the Tennessee Code, (3) the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, (4) the Commerce Clause of the Constitution of the United States, (5) Article XI, Paragraph 8 of the Constitution of the State of Tennessee and (6) the statutory and common law powers of municipal governments. ACS counterclaimed, seeking a declaration of the invalidity of the Ordinance as violative of the Telecommunications Act of 1996 and the Equal Protection clause of the 14th Amendment to the Constitution of the United States.

All parties submitted statements of facts as to which there is no genuine dispute and responses thereto, and for the purposes of these motions the following facts may be taken as undisputed. In 1880 the City granted to East Tennessee Telephone Company a franchise and privilege to use the rights-of-way of the City to erect poles for telephone and telegraph communications. BellSouth is the legal successor to the rights of East Tennessee Telephone Company. In 1880 the City granted to American Union Telegraph Company and its successors, assigns and lessees the right to maintain and the priviledge to use the rights-of-way of the City's

telegraph and telephone poles and wires for telephone and telegraph communication. In 1885, the State of Tennessee granted a state franchise to telephone companies, including East Tennessee Telephone Company and American Union Telegraph Company, authorizing them to construct, operate and maintain telephone lines over all public and private lands and waters. The 1885 State franchise law did not require East Tennessee Telephone Company or American Union Telegraph Company to make payments for the use of public rights-of-way to either the State of Tennessee are any city therein. City Ordinance #337, the ordinance granted to East Tennessee Telephone Company, did not require payment of any franchise fees and was unlimited in duration.

On November 2, 1994, ACS submitted an application to the City for authorization to use the City's rights-of-way so that it might install fiber optic cable to provide telecommunications services within the City. In response, on and about November 9, 1994, the City sent ACS a purposed ordinance granting authority to use the public rights-of-way. Subsequently, the City Council placed a moratorium on grants of authority to use public rights-of-way and appointed a committee "to develop a recommendation to deal with the new telecommunications environment." After completing its study of the issues, on January 30, 1996, the committee recommended that the City Council enact ordinance #10377.

On Feburary 6, 1996, the City enacted ordinance #10377, in part requiring any franchisee occupying any right-of-way of the City for the purpose of providing telecommunications services to pay to the City on a quarterly basis, begining January 1, 1997, a franchise fee for the use of the City's right-of-way. The City estimated the total revenue for ordinance #10377 to be $725,000 per year. In that ordinance a percentage fee of five (5%) was selected, and the City Council had discretion to choose a percentage fee other than that. In canvassesing other cities with respect to the fee, the City found franchise fees ranging from 3% to as high as 10% of all gross revenues as opposed to City's choice of 5% for long distant access charges. Under ordinance #3037, enacted by the city of Memphis, South Central Bell Telephone Company, the predecessor of BellSouth, pays franchise fees to the City of Memphis in the amount of 5% of gross revenues and has done so since 1980.

In enacting Ordinance #10377 the City did not know and made no attempt to

determ ne the percentage of any street improvements or repaving that would be attributable to telecor imunication construction, as opposed to other utilities. The City also did not know and made r o attempt to determine what portion of street maintenance relates to street cuts. At the time of the enactment of the Ordinance the City had detailed ordinances and specifications to preven damage to streets, including those requiring the utility to repave entire sections of streets, requiri g the utility to bore under main streets whenever possible, and to pay a permit fee based on eac linear foot of street cut. The ordinance itself requires telecommunications providers to compl with City ordinances related to the excavation of streets and to restore streets to their origina condition whenever providers excavate or otherwise preform work on the streets. Article 3 of the City code sets forth regulations concerning excavations by utility companies, includi g telecommunications providers, and specifies the fees that a utility must pay to obtain an exc vation permit. The fees are determined by the type and extent of the excavation. The City's engineer has also established specifications for the restoration of streets by utility companies.

After Ordinance #10377 became effective on February 6, 1996, ACS promptly resubmitted its application along with the necessary $750.00 fee, and on April 2, 1996, the City enacted Ordinance #10395, granting ACS authority to use the public rights-of-way pursuant to ordinance #10377.

Following enactment of ordinance #10377, telecommunications providers BellSouth and MCI announced that they were not subject to the 5% gross revenue fee required by the ordinance because each held prior grants of authority superseding the fee requirements of the ordinance.

TCG is a provider of telecommunications services as those terms are defined in ordinance #10377. TCG provides telecommunications services in the Chattanooga area and is subject to the ordinance, should the ordinance be valid. Chattanooga Cable presently holds a franchise from the city for the provision of cable television services within the City. Following enactment of the ordinance TCG publicly announced that it intended to provide telecommunications service in the Chattanooga area using the right-of-way of one of its owners, ComCast/Chattanooga Cable TV Company and that the ordinance did not apply to it because it

would be using the rights-of-way granted to ComCast. TCG is providing telecommunications services to Chattanooga customers as evidenced by the fact that it is presently advertising in the Chattanooga area, that it has purchased a DMS switch and a tellabs DACS frame for use in its fiber optic telecommunications work, that it has already leased real estate in Chattanooga and hired a sales and marketing representative, that it has actively begun recruiting, and that it has has hired switch technicians to maintain the network.

MCI is a subsidiary of MCI Telecommunications, Inc., the second largest provider of long distance services in the United States. MCI has been preparing to enter local telephone service markets across the country, including Chattanooga. MCI has a certificate of convenience and necessity to provide telecommunications services in the State of Tennessee from the Tennessee Regulatory Authority. MCI is a provider of telecommunications services as those terms are defined in Ordinance #10377. In order to compete, using its own facilities, MCI must use public rights-of-way to lay fiber optic cable. Most of MCI's existing fiber optic cable traverses public rights-of-way. MCI may install fiber optic cable underground or string it on poles over rights-of-way. The cost of laying cable underground varies depending upon whether MCI must dig a trench in the street or whether it can simply pull fiber optic cable into an existing conduit. Where there is existing conduit, the cost to MCI of laying fiber optic cable is approximately $8.00 per liner foot. MCI also spends approximately thirty-five (35) cents per foot per year on relocation of cable when cities determine existing cable must be moved to accommodate some city objective. MCI obtained its franchise when it purchased certain assets of Western Union in 1990. Western Union, in turn, obtained its franchise when it acquired the assets of American Union Telegraph Company in 1881. MCI has existing facilities, including fiber optic cable, that use public rights-of-way in the city of Chattanooga.

Ordinance #10377 imposes financial burdens on telecommunications providers, including a $750.00 application fee and franchise fees equal to 5% of the provider's gross revenue. The ordinance also includes an alternative franchise fee that would apply in the event that it is determined that the City is not permitted by law or otherwise to assess or collect a franchise fee based upon a provider's gross revenue. In 1997 that fee is one dollar per linear foot, with annual increases specified in the Ordinance. The Ordinance also requires

telecommunications providers to construct and reserve facilities for the City. Providers must make available to the city (1) one duct of equal size to that of the provider's for the City's exclusive use in every place that the provider installs its network and underground duct and (2) space on poles for the City to install its own line every place that the provider installs it own poles. The Ordinance also requires providers to make available four dark fiber optic fibers and access thereto (including ladder connections) on the provider's system at no cost to City for the City's unrestricted exclusive use in every place that the provider installs fiber optic cable. In addition, the provider is required to provide coordination and engineering assistance to the City for providing such fiber optic access for initial hookup as the City may desire at no cost to the City. Dark fiber is unused transmission media-fiber optic telephone line that can be combined with electronic equipment to provide telephone, data, and other services. The Tennessee Regulatory Authority has determined the cost of dark fiber and, therefore, the price that MCI must pay to BellSouth to lease dark fiber in BellSouth's network. The Tennessee Regulatory Authority has valued dark fiber at $241.00 per mile per month. Using this price, the cost of four dark fibers is $2.19 per foot, per year. The City, however, has not calulated the value of dark fiber, ladder connections, duct space, and pole space, that the Ordinance requires of franchisees. The Ordinance's requirement that providers build ladder connections will force providers to construct facilities for no purpose other that the City's use. Because the Ordinance requires that providers pay for all costs related to lateral connections in the City's access to its dark fiber, the cost of such lateral connections is substantial. The City has not calulated the amount of revenue that the Ordinance would generate if the alternative fee per linear foot were applicable. Revenues generated by the Ordinance would be placed in the City's general fund and could be used for projects other than maintenance of the City's rights-of-way.

A. Argument of the City

Preliminarily, the City argues that this Court is not bound by the prior decisions of the United States District Judge who held that the Ordinance imposed a tax and was, therefore, invalid, citing Ladd by Ladd v. Honda Motor Company, Ltd., 939 S.W. 2d 83 (Tenn. App.1996), and the decision of the United States Court of Appeals for the Sixth Circuit in dismissing its appeal from the decision of the United States District Judge in this case.

The City then addresses the arguments advanced by Bell South and MCI that their predecessors have long ago been granted franchises to use the City's rights-of-way, and, therefore, the Ordinance is not valid as to them since it would alter the prior franchise. The City argues that since there is a distinction between the police powers of a municipality and the proprietary powers of a municipality, that since a municipality's police powers can always override the proprietary powers, and that since the city in this instance was only exercising its police powers, the Ordinance is valid as to them, citing Bristol Tennessee Housing Authority v. Bristol Gas Corp., 219 Tenn.194, 407 S. W. 2d 681 (Tenn.1966). Indeed, it argues, the exercise of police powers may not be inhibited in any way by the exercise of the proprietary powers, citing City of Paris v Paris-Henry County Public Unity District, 207 Tenn. 388, 340 S.W. 2d 885 (Tenn.1960). Under this proposition, therefore, the City contends that it is capable of charging rentals for the use of rights-of-way under the exercise of its police powers even though it had previously granted franchises to the predecessors of BellSouth and MCI under its proprietary powers.

The City then turns to the issue of whether the fee imposed by Ordinance 13077 is a permissible exercise of its governmental powers (a fee) or an impermissible exercise of its governmental powers (a tax). In commencing this prong of its argument, the City asserts that under its police, or governmental, powers it is permitted by T.C.A. §65-21-103 to charge a rental fee for the use of the City's rights-of-way. The City then argues, in "me to" fashion, that it may charge a rental or a franchise fee in the form of a percent of gross revenue because other cities in Tennessee do it and because the Tennessee Public Service Commission has approved a five percent (5%) franchise fee. At this juncture, this Court would note that this argument begs the question. Simply because others do it and because the Public Service Commission approves it does not make it legal. The City also argues that a charge for the use of a public right-of-way is permitted under the Telecommunications Act of 1996 as set forth at 47 U.S.C.§ 253 (c). The City then urges that there is a distinction between reimbursement to the City for damage to the public right-of-way by the telecommunications provider, which is clearly permitted as an exercise of governmental powers, as opposed to a fee for the use of the City's large investment in that right-of-way. The City makes the collateral argument that because Congress has permitted cable

television franchisees to be charged up to 5% of gross revenue as a reasonable fee to local governments, that rationale also applies to the telecommunications industry. That legislation, however, covers a different industry, and, indeed, an argument could be made that if Congress intended to apply it to the telecommunications industry as it did to the cable industry it would have done so.

The City then turns to the difficult question of whether the fees imposed by the ordinance are (1) related to the City's cost of regulation and (2) whether they are required to be under T.C.A. §65-21-103. As to the former issue, the City urges that there was such evidence. In approaching this argument, the City correctly argues that governmental entities are not required, when imposing fees, to calculate precisely the amount of expenses incurred as result of a particular activity. The City then points to the expenditure of more than twenty million dollars from 1991 to 1996 for street paving, street improvements, equipment for street paving, and general improvements. The City then attempts to show the degradation in the life of a street through cuts made by utilities in the streets[2].

After attempting to show that there was data to support the figure used in the Ordinance, the City continues with its argument that rental fees for the use of public property are appropriate and are not considered taxes. The City cites City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 13 S. Ct. 485, 37 L. Ed. 380 (1893); The City of Dallas, Texas v. Federal Communications Commission, 118 F 3d 393 (5th Cir. 1997); Porter v. City of Paris, 184 Tenn. 555, 201 S. W. 2d 688 (Tenn. 1947); and Patterson v. City of Chattanooga, 241 S. W. 2d 291 (Tenn. 1951) in support of this proposition. These cases, it says, make available a third type of income to a municipality in addition to taxes (where authorized) and fees for reimbursement of a city's costs, and that third category is rent. As an example the City points to the rental fee charged by the City for the use of the Tivoli Theater and Memorial Auditorium by private entities. In addition, the City urges, the rent may be based upon the amount of usage of the public property, citing Patterson, supra.

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[2] These facts are disputed by the defendants and are urged by the defendants not to be relevant. In any event, the undisputed facts, set forth above, based upon the City's responses, show that the City made no attempt to calculate the cost of regulation attributable to the Ordinance and did not know the cost of paving work which would be attributable to telecommunications providers.

Next, the City argues that the word "rentals" contained in TCA § 65-21-103, the chapter of the Code governing telegraphs and telephones, does not limit the revenue to be derived from telecommunications providers to the cost or expense of the maintenance of the right-of-way. The City argues that the only limitation on the word "rental" in that statute is that it be "reasonable and imposed upon all telephone and telegraph companies without discrimination." The companion argument which the City advances in the statutory construction of that provision is that the legislature could have limited rentals to the cost directly associated with the administration of the right-of-way, but it chose not to do so. In further support of this argument, the City points to the 1961 enactment of T.C.A. §65-4-105(e), contained in the chapter of the Code which permits the regulation of public utilities. In that section, the City argues, the legislature recognizes that franchise fees have been made by utilities to municipalities. This same section, the city continues, shows that the legislature clearly distinguishes between franchise fees and privilege taxes. That the legislature may recognize the difference between excise taxes and franchise payments, however, still begs the question as to the nomenclature to be given to this Ordinance. Finally, the City correctly argues, citing Hermitage Laundry Company v. The City of Nashville, 209 S.W. 2d 5 (Tenn. 1948), that if a statute or ordinance is capable of two interpretations, one of which will make the legislation valid and one of which will make the legislation invalid, the interpretation in favor of validity is to be adopted. Construing the ordinance as imposing a tax would obviously invalidate the ordiance, but, the City urges, if the ordinance were construed as imposing a fee or rent, then it would not be invalid. The City then cites two authorities, one sentence from each of which squarley posits one of the issues in this case. In City of Tullahoma v. Bedford County, 938 S. W. 2d 408 (Tenn.1997), the Supreme Court held at 412: "Whether the charge for depositing waste in a landfill is a tax or a fee, even though denominated in a tax, is determined by its purpose." Likewise, 16 Eugene McQuillin. *The Law of Municipal Corporations,* § 44.02, states: "As aptly remarked what a tax really is, is determined from its nature and not its name."

The City then addresses one of its problems, namely, that if revenue generated from an ordinance is much greater than the cost of regulation, it is likely that the ordinance has imposed tax. The City argues that an ordinance may generate revenue in excess of the cost of

regulation and still not be a tax and cites to Memphis Retail Liquor Dealer's Ass'n. v. The City of Memphis, 547 S. W. 2d 244 (Tenn. 1977).

The City again then addresses the issue of whether it can exact a fee from BellSouth and MCI, having granted their predecessors a general franchise for the use of the City's rights-of-way in the late 1800's. As an alternative to its prior argument on this point the City argues that the fee is not imposed upon BellSouth and MCI but rather upon its customers. The City argues that under TCA§ 65-4-105(e), any franchise fee imposed by it under the Ordinance would be payable by the customers of the utility and are not to be taken into account in the setting the rates and charges of telephone companies. It is difficult to determine the economic reality of this position, except to state that under the statute any localized expense is to be passed through to the customer on a dollar for dollar basis and added to the rate determined by the Tennessee Regulatory Commission. It is, nevertheless, a cost imposed upon the utility and paid by the customers. Economically, it is no different from a tax imposed upon a corporation and, depending upon the nature of the market place and the amount of competition, passed on to the customers of that corporation.

Finally, in discussing the argument that T.C.A.§ 65-21-103 prohibits rentals without discrimination, the City concedes that if it is unable to exact a fee from BellSouth and MCI, it could not exact a fee from the remaining defendants. The City contends, however, that because it is able to exact the fee from BellSouth and MCI, then all defendants are subject to the Ordinance.

In discussing the arguments of various defendants in response to the position of the City, the Court will consider those arguments as having been made as arguments in support of their motions for summary judgment as well as in opposition to the motion of the city for summary judgment..

B. BellSouth

Initially, BellSouth argues that this Court can adopt Judge Edgar's decision of January 26,1998, under the doctrine of law of the case, citing Ladd by Ladd v. Honda Motor Co., Ltd., supra. As stated by the Court of Appeals in Ladd exercise of the doctrine is discretionary,

and this Court believes that it would be more appropriate to have a separate state determination in the event of further appeals. Furthermore, law of the case assumes a prior existing decision, and when Judge Edgar determined that he had no subject matter jurisdiction there is a substantial question as to whether there is any prior decision with which to invoke the doctrine. Finally, even though Judge Edgar found that he lacked subject matter jurisdiction under the Tax Injunction Act, that decision was necessary only for the purpose of determining jurisdiction and not for the determination of the validity of Ordinance #10377..

The general position of BellSouth is that in regulating a telecommunication provider's use of a municipality's rights-of-way, the revenue derived from the regulation, under a proper exercise of police power, must in some manner match the cost of regulation. BellSouth argues that because the City made no attempt to determine its cost of regulation and because all amounts collected under the Ordinance will go into the general revenue fund to be used for general purposes, the Ordinance imposes an impermissible tax.

BellSouth then turns to the issue of whether or not passage of the Ordinance constitutes an unlawful exercise of municipal power. Citing The City of Paris v. Paris-Henry County Public Utility District, supra, BellSouth argues that the amount of any fee imposed by a municipality may not exceed the cost of regulating the activity associated with the fee. BellSouth goes on to argue that T.C.A.§ 65-21-103 is a reaffirmation by the legislature that in the exercise of a city's police power over public rights-of-way the municipality is limited to "reasonable police powers" in connection with the exaction of rentals. See, Shelby County v. Cumberland Tel.& Tel., 203 S.W. 2d 342 (Tenn.1918).

Finally, BellSouth argues that the Ordinance impairs its perpetual contract, granted in 1880, "to erect and maintain telegraphic and telephonic poles and wires on city rights-of-way." BellSouth argues that since the franchise was perpetual the City may not now impose an additional fee, citing City of Chattanooga v. Tennessee Electric Power, Co., 112 S.W. 2d 385 (Tenn.1938).

As a subsidiary argument, BellSouth argues that the ordinance in question constitutes an unconstitutional taking under the 14th Amendment to the Constitution of the United States.

C. MCI

MCI advances many of the same arguments advanced by BellSouth, but it also includes an argument that the Ordinance violates the letter and spirit of the Telecommunications Act of 1996. The foundation for that argument is similar to the arguments advanced for the proposition that the Ordinance imposes a tax, namely, that the Ordinance is a revenue raising measure which constitutes a barrier to the entry of new competitors into the market for local telephone service in Chattanooga in violation of §253(a) of the Act.

Citing 9 McQuillin, *The Law of Municipal Corporations* at § 26.15, MCI argues that a licence fee may only "legitimately assist in regulation and will not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business or other subject that it covers." In further support of this proposition MCI cites the case of Porter v. The City of Paris, 184 Tenn. 555, 201 S.W. 2d 688 (1947).

In response to the City's "rentals" argument, MCI argues that the use of the word "rentals" in T.C.A.§ 65-21-103 does not constitute an expansion of the City's police powers, but is rather a part of City's police powers. MCI further cites Shelby County v. Cumberland Telephone and Telegraph Co., supra, for the proposition that a rental may not include a profit but rather is restricted to the cost to the city of the regulation of the activity.

MCI further argues that a fee based upon a percentage of revenue cannot possibly be related to the cost of regulation for two reasons. First, because revenues vary, a percentage based upon revenue cannot have a direct relationship to the cost of regulation. Second, because some providers may use city streets and because other providers may use a combination of private land and city streets, there is no correlation between such providers and the latter provider will pay a fee based upon revenue generated from sources other than the use of city streets.

MCI further argues that because other ordinances already exist that require utilities to repair any excavation of city streets which they might make, imposition of a 5% fee under this ordinance cannot be justified upon the grounds that it is necessary to provide for repaving of the city streets. Finally, in connection with its arguments that the Ordinance imposes a tax, MCI argues that some members of the City Council viewed the Ordinance as a source of revenue for projects wholly unrelated to the regulation of the telecommunications industry and

the industry's use of the city's rights-of-way.

In connection with its arguments under the Telecommunications Act of 1996, MCI argues that the Ordinance is preempted by federal law because it erects barriers to entry into the Chattanooga telecommunications market. Whether the Ordinance constitutes a barrier to entry under a valid exercise of police power, of course, is the issue. A barrier to entry may also be a legitimate exercise of a municipality's police power and still not be subject to the Supremacy Clause, because it would impose the same cost on all competitors. MCI argues that the Ordinance is barrier to entry because it requires that a provider (1) obtain a franchise from the City, (2) pay fees and cost in the amount of 5% of gross revenue and a donate dark fiber and duct space, (3) potentially face the City as a further competitor through the use of fiber optic systems constructed for free by the franchisee, and (4) face thousands of other possible ordinances across the country if the Court approves of the fee as a fee and not a tax. Finally, under the Act, MCI argues that the Ordinance does not fall within the savings provision of §253(c) because the authority of that section to permit municipalities to manage the public rights-of-way does not confer the right to impose a fee unrelated to the cost of managing the right-of-way.

D. TCG

In addition to the arguments advanced by BellSouth and MCI, TCG also argued that it cannot be charged a fee because (1) TCG is an affiliate of a cable television provider already being assessed the maximum fee allowable under the Telecommunications Act and (2) because TCG's operations impose no further burdens on the City's rights-of-way.[3]

TCG also cites the case of S& P Enterprises, Inc., v. The City of Memphis, 672 S.W. 2d 213 (Tenn. App.1993) for the proposition that taxes are distinguished from fees based upon objective standards. Under that case taxes raise revenues, and fees defray the cost of regulation.

E. ACS

ACS advances many of the arguments advanced by BellSouth, MCI, and TCG, but also argues that construction of T.C.A.§ 65-21-103 requires that the word "rentals" modify

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[3] TCG has abandoned the argument that ordinance may not impose any fee on it because of its affiliation with a cable television provider.

the phrase "police powers". ACS argues that term "rentals" when used in conjunction with the phrase "police powers" is totally different from the meaning of the term "rentals" when used in conjunction with the City proprietorship powers exercised as a landlord in connection with the rental of the Tivoli Theater or Memorial Authoritarian.

In addition to its arguments under the Telecommunications Act, ACS argues that when the Ordinance treats some telecommunications providers differently from others, it violates the Equal Protection Clause of the 14th Amendment to the Constitution of the United States and the Class Legislation Clause of the Constitution of the State of Tennessee.

The Standard of Rule 56

In considering a motion for summary judgment under Rule 56, this Court must determine whether a genuine issue of material fact exists for resolution by trial. As the Supreme Court has noted, Rule 56 "was implemented to enable courts to pierce the pleadings and determine whether the case justifies the time and expense of a trial." Byrd v. Hall, 847 S.W. 2d 208, 210 (Tenn. 1993). The analysis to be utilized in considering a motion for summary judgment was described by the Supreme Court in Byrd as follows:

> Thus, the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a *factual* dispute exists; (2) whether the disputed fact is *material* to the outcome of the case; and (3) whether the disputed fact creates a *genuine* issue for trial. 847 S.W. 2d at 214.

When the party seeking summary judgment makes a properly supported motion, then it becomes incumbent upon the nonmoving party to "set forth specific facts, not legal conclusions" by affidavit or other discovery material to establish that, indeed, there are properly disputed material facts. The nonmoving party may not rely upon the allegations or denials of the pleadings to establish such facts. Byrd, supra, at 215. Once proper materials, those admissible at trial, are submitted by the nonmoving party, they must be taken as factually true. Finally, in considering a motion for summary judgment, when a materially disputed fact is created, the Court may not weigh the evidence or test the credibility of the materials submitted; in such a case a trial is necessary. Byrd, supra, at 216.

Burden of Proof

Initially, the Court would note that the Ordinance at issue in this lawsuit is

presumed to be valid, and the burden is upon the defendants to show its invalidity. City of Paris v. Paris-Henry County Public Util. Dist., supra, 340 S.W. 2d at 888.

Discussion

Any discussion of the issues presented in this case must begin with an analysis of the two basic ways in which a municipality may function. The distinction between these two functions, coupled with an analysis of the type of charge imposed by Ordinance 10377, necessarily determines the outcome herein. Generally speaking, a municipality acts either in its proprietary capacity or in its governmental capacity. Bristol Tennessee Housing Auth. v. Bristol Gas Corp., supra; City of Paris v. Paris-Henry County Public Util. Dist, supra. 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 right-of-way, but in its governmental capacity it may only act through an exercise of its police power to regulate a specific activity or defray the cost of providing a service or benefit to the party paying the fee. City of Tullahoma v. Bedford County, supra; Bristol Tennessee Housing Auth., supra; City of Paris, supra. When acting in its proprietary capacity a municipality may not revoke or impair a right previously given by it to a third party by a subsequent enactment. Bristol Tennessee Housing Auth., supra; Shelby County v. Cumberland Telephone & T. Co., 203 S.W. 342 (Tenn. 1918).When acting in its governmental capacity and exercising its police powers, a charge exacted by the municipality must bear a reasonable relation to the thing being accomplished, and the amounts collected should not be disproportionate to the expenses involved. Porter v. City of Paris, 201 S.W. 2d 688 (Tenn. 1947).

Based on the foregoing, therefore, the City is faced with a dilemma. It can try to justify[4] the 5% charge as a fee or rent for the use of the rights-of-way in its proprietary capacity, where the charge is not necessarily tied to the cost of administration or it can try to justify the charge as a regulatory charge in its governmental capacity, where the charge must bear a reasonable relation to the thing being accomplished. The City seems to have chosen the latter course, since under the former it would have been faced with the problem created by the prior franchises granted to the predecessors of BellSouth and MCI, its inability to modify those

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[4] In the course of this opinion when the word "justify" is used in connection with the City's argument, the Court is not shifting the burden of proof with respect to the ordinance to it; rather, the word is used in the context of the City's basis for, or explanation of, the Ordinance.

franchises and the requirements of T.C.A.§65-21-103. City Mem., p. 24[5] Under the requirements of that statute, the City would not be able to exact a charge from any provider if it could not exact one from BellSouth and MCI. Under Bristol Tennessee Housing Auth. the City is prohibited in its proprietary capacity from modifying the franchises previously given to BellSouth and MCI. In that case the Supreme Court held that the City of Bristol was able to justify forcing the gas company to move its lines in a street at the expense of the gas company only through an exercise of its police powers, since the right to use the street had already been given to the gas company, and that right "cannot be revoked or impaired by the city." 407 S.W. 2d at p. 683. See also, City of Paris v. Paris-Henry County Public Util. Dist., supra, 340 S.W. 2d at 888.

The issue then becomes whether the City can justify the charges imposed under Ordinance 10377 as a proper exercise of police powers in its governmental capacity. To do so, it must show that the purpose and intent of the Ordinance is the regulation of some activity for the benefit of the public or is for a public purpose. Bristol Tennessee Housing Auth, supra; S&P Enterprises, Inc. v. City of Memphis, 672 S.W. 2d 213 (Tenn. App. 1983). After establishing the intent and purpose just mentioned, it must then be shown that the "charge made . . . must bear a reasonable relation to the thing being accomplished. Porter v. City of Paris, supra, 201 S.W. 2d at 691. Although the City argues that it is no objection to an ordinance that it produces more income than is required for its administration and enforcement by citing Memphis Retail Liquor Dealers' Ass'n, Inc. v City of Memphis, supra, and City of Chattanooga v. Veatch, 304 S.W. 2d 326 (Tenn. 1957), those cases are inapposite. The Memphis Retail Liquor Dealers' Ass'n case involved an inspection fee of 5% of the wholesale price of liquor. The Supreme Court was faced with whether the 5% "fee" was a tax or a fee. The Court, in making that analysis, held at 245-246:

> In Tennessee, taxes are distinguished 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.

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[5] References in the form "City Mem." are to the Brief in Support of Defendant City of Chattanooga's Motion for Summary Judgement.

Although the Court held that the charge was a fee, rejecting the argument that the income generated was totally disproportionate to the cost of administration[6], it specifically held at 246: "This argument might be valid if the activity regulated was anything other than the liquor business." Citing an Illinois Supreme Court decision, the Court went on to state 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." 547 S.W. 2d at 246. The Supreme Court, therefore, held that the fees imposed were part of the regulation of the alcoholic beverage industry, citing a decision of the United States Supreme Court, Phillips v. The City of Mobile, 208 U.S. 472, 28 S. Ct. 370, 52 L.Ed. 578 (1908), which held that: "Taxation is frequently the very best and most practical means of regulation this kind of business." 208 U.S. at 480. It would hardly seem that the telecommunications industry needs the type of regulation identified by the Tennessee and United States Supreme Courts. Thus, this Court does not find the City's argument on this point to be persuasive. Finally, it should be noted that the fee imposed by the City of Memphis had its genesis in enabling state legislation.

Nor is the Veatch case helpful, since that case, although it contains language supportive of the City's position on this point, does not say how much more the annual city car licence generated than was spent on its administration. Finally, although the Court in City of Memphis cited to Veatch for the proposition that the income generated by an ordinance may be more than the expense of regulation, there was no authority cited for that proposition in Veatch. The genesis of this proposition, however, may well have been contained in the Supreme Court's decision in Porter v. City of Paris, supra, where the Court, citing a decision of the Supreme Court of Idaho, held:

> 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)

See also, S&P Enterprises, Inc. v City of Memphis, supra, 672 S.W. 2d at 216.

At this juncture the Ordinance itself must be examined. Sec. 32-232 prohibits any

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

person or entity from using the public rights-of-way of the City for telecommunications services "without first having received a franchise from the governing body of the City for Telecommunications Services." Secs. 32-233 through 237 contain the permitting process for any installation. Sec. 32-238 requires that any City right-of-way which is disrupted be restored "to its original condition" as part the "acceptance of any franchise." Secs. 32-239 through 243 provide for the maintenance of the system, notification of execution of security agreements, indemnification, insurance and removal or relocation of systems. Sec. 32-244 restricts the assignment of any franchise. Secs. 32-245 through 247 provide for the removal of obsolete equipment at no cost to the City and a performance bond to insure the restoration of the streets to their original order. Sec. 32-248 provides for the payment of "a franchise fee of five percent (5%) of the gross revenue . . . of the Provider" and for an alternative fee. Sec. 32-249 provides for remedies in the event of the default of a Provider, and Secs. 32-250 through 253 contain certain standard contract clauses. At no place in the Ordinance was the Court able to find any statement regarding regulation for a public purpose or the cost of any such regulation. If protection of the City's right-of-way were the reason for the exercise of the police power, then that was accomplished by Sec. 32-238 which requires restoration of that right-of-way and Sec. 32-247 which insures that any such restoration will be performed through the posting of a performance bond.

The Court will now undertake a review of the pertinent decisions of the Supreme Court of Tennessee on the ability of municipalities to impose charges and whether those charges are or are not permissible under the exercise of governmental powers. In Shelby County v. Cumberland Telephone & T. Co., supra, the Supreme Court, in a 1918 decision, considered the imposition of a "pole rental of $1 per annum each for all the poles of the telephone company placed in the roads of Shelby County." 203 S.W. at p. 342. The County contended that it had the power to impose the rental "by way of compensation to the county for the cost of supervision and inspection of the company's poles and wires." 203 S.W. at 343. The Court agreed and assumed for the purpose of its decision that the county had that authority. The Court then, however, looked behind the county's contention with respect to the purpose of the resolution and examined the resolution itself. After making that examination, the Court held that it "was not a bona fide

effort on the part of the county court of Shelby county to collect fees with which to pay the expense of supervision and inspection in that county." 203 S.W. at 344. In short, the resolution was not what the county argued that it was. It was, in fact, "assessed as a penalty for bad service and high rates." 203 S.W. at 344. Thus, the county did not validly exercise its police power.

In 1947 the Supreme Court upheld an ordinance permitting the installation of parking meters over the objection that it constituted a municipal tax. The Court, again focusing on the intent of the ordinance, held that its purpose was to regulate traffic and it was not intended to raise revenue "for the general fund and use of the city, and that the amounts collected were not disproportionate to the expenses involved." 201 S.W. 2 at 691.

In 1951 the Supreme Court upheld the imposition of a sewer charge by the City of Chattanooga in Patterson v. City of Chattanooga, 241 S.W. 2d 291 (Tenn. 1951), holding that the revenue was devoted wholly to the maintenance and operation of the system and while the charges might look like a tax, they were "made for a different purpose," again focusing on intent.

In 1960 the Court upheld an ordinance which provided that no cut could be made in the streets of Paris without a permit and provided certain fees for that permit. The utility district argued that since it had been previously given a right to install its lines in the streets of Paris and that the original franchise was in lieu of all other fees, it was not subject to the ordinance. The Court disagreed, holding that the City was not acting in its proprietary capacity, but rather in its governmental capacity "to regulate and control its streets for the public health and safety." 340 S.W. 2d at 888. The Court rejected the District's argument that the franchise had been granted in lieu of all other fees, holding that the "all other fees" language pertained to the "rights and privileges" of use. Finally, the Court found that it did "not appear that the amount of such fees is unreasonable." 340 S.W. 2d at 889. Referring again to the burden of proof, the Court stated: "It is not shown that these fees will amount to more than the cost of enforcing this police regulation." 340 S.W. 2d at 889.

In 1966 the Court was presented with the issue, noted above in the discussion of Bristol Tennessee Housing Auth., as to whether a gas utility would be required to relocate, at the utility's expense, one of its lines in a street being closed by the City of Bristol through its housing authority. The Court reaffirmed that while the use of a right-of-way by a utility may not

be revoked or impaired, that right is subject to any subsequent enactments by the city in the exercise of its police power.

Finally, in 1997, the Court was presented with an issue, not entirely pertinent here, of whether a county may impose a "tax" for the privilege of solid waste disposal. The Court held that it could not because it was not consistent with the state's "comprehensive scheme for planning, managing, funding, and accounting found in the general law." 938 S.W. 2d 408. In reaching this conclusion, the Court was required to determine whether the charge was a tax imposed pursuant to a private act, or a fee. In concluding that the charge was a fee and, therefore, inconsistent with the state general scheme, the Court held at 412:

> A fee 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.

Under general principles of municipal law it would appear, for the reasons set forth below, that the fee imposed by Ordinance 10377 is either a tax or a charge not permitted in the exercise of the City's governmental powers. Before making that determination, however, the Court must consider the City's contention that under T.C.A.§65-21-103 it may exact a rental for the use of the right of way under its governmental, or police, powers. That section provides, in pertinent part, as follows:

> 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.

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. Thus, the construction of the term "rentals" becomes extremely important. The result of the City's construction of the term "rentals" would enable the City to exact the same charge in the exercise of its police powers as it could in the exercise of its proprietary powers, thereby rendering meaningless all of the Supreme Court decisions discussed above. Surely, the legislature could not have intended that result. Although the legislature chose not to define the term, "rentals," in the statute, it was stated to be one of a number of enumerated "police powers." Giving effect to all of the words of the statute, as well as the punctuation of the statute, this Court believes that the legislature was using

the term ion the restrictive sense. In addition not only will this Court assume that the legislature was using the term in the governmental, not proprietary sense, it will also assume that the legislature would not place it in conflict with T.C.A.§§ 67-4-401 and 67-4-406 which prohibits municipalities from taxing providers of telecommunication services for the privilege of doing business. Holder v. Tennessee Judicial Selection, 937 S.W. 2d 877 (Tenn. 1996). It is also noteworthy, as pointed out by Judge Edgar, that although §65-21-103 had been enacted in 1907, no reference was made to it in Shelby County v. Cumberland Telephone & T. Co, supra, when Shelby County's pole rental resolution was struck down.

The City also argues that the Telecommunications Act in §253(c) does not restrict and, therefore, permits a city to "manage the rights-of-way or to require fair and reasonable compensation . . . for use of public rights-of-way." Of course, this language could apply to a city exercising its proprietary powers and would not conflict with the Tennessee cases cited above. Although the City argues that the legislature is presumed to have meant what it said, it is also presumed to know the difference between proprietary hats and governmental hats and the restrictions applicable to each, and the reference in §253(c) could have been to the exercise of proprietary powers.

Applying the principles set forth above in the decisions of the Supreme Court, this Court can only conclude that the charge imposed in Ordinance 10377 is either a tax or a franchise fee imposed in its proprietary capacity. If it is the latter, it runs afoul of T.C.A.§64-21-103. If it is the former, it runs afoul of the cases cited above and T.C.A.§§67-4-401 and 67-4-406. Because the City has not argued that the charge was imposed in its proprietary capacity, the Court will consider the charge to be a tax. The Court believes that the charge is a tax for the following reasons:

1. There is no recitation in Ordinance 10377 that it is being enacted pursuant the City's governmental powers or for the purpose recovering the costs of regulating the telecommunications industry.

2. The revenue from the charge is deposited in the general fund of the City.

3. The defendants have shown that the City, at the time of the enactment of the Ordinance, did not know what the cost of regulating the use of its rights-of-way by telecommunications providers or the cost of regulation required by the Ordinance would be.

4. There are provisions in Ordinance 10377 and in other ordinances of the city for the repair and rehabilitation of its rights-of-way by utilities.

5. There is no rational basis for the charge which makes no distinction between and among providers depending upon their use of the City's rights-of-way.

6. The minutes of the City Council show that the revenue to be generated by Ordinance 10377 was to used for the general development needs of the City and not for the regulation of telecommunications providers.

7. Given other provisions of the City Code for requiring utilities to maintain the city's rights-of-way, the revenue generated by the Ordinance will substantially exceed the cost of regulation.

The foregoing analysis applies with equal strength to the alternative fee set forth in the Ordinance.

The Prior Franchises of BellSouth and MCI

Under the holding of this Court as set forth above, the arguments of BellSouth and MCI regarding impairment of contract are not reached. Were this an exercise by the City of its proprietary powers, those arguments would have had merit under Bristol Tennessee Housing Auth. v. Bristol Gas Corp., supra, and City of Paris v. Paris-Henry County Public Util. Dist., supra. If, however, the Ordinance had been held to be a valid exercise of governmental power, then those arguments would not have been persuasive. Id.

Remaining Issues Raised

Because of the holding of this Court as outlined above, the remaining arguments raised by the defendants with respect to the Ordinance are pretermitted, as is the City's argument with respect to whether the franchises granted to the predecessors of BellSouth and MCI have expired.

Answers to the Questions in the City's Complaint

The answers to the questions posed by the City's Complaint are: (1) Pretermitted; (2) No; and (3) Pretermitted.

CONCLUSION

For the foregoing reasons, the motion of the City for summary judgment will be **DENIED**, and the motions of BellSouth, MCI, TCG and ACS for summary judgment will be **GRANTED**. Accordingly, it is hereby

ORDERED that the motion of the City for summary judgment is hereby denied;

and it is further

ORDERED that the motions of BellSouth, MCI, TCG and ACS are hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that judgment herein be entered in favor of BellSouth, MCI, TCG and ACS; and it is further

ORDERED that the costs of this cause are hereby taxed to the City.

ENTERED this 4th day of January, 1999.

W. Neil Thomas, III, Judge
Division IV

CLERK CERTIFICATE

The undersigned hereby certifies that a copy of this order has been mailed to all parties or counsel to all parties in this cause.

This 4th day of Jan, 1999

JUDITH P. MEDEARIS, CLERK

By: _____, D.C.

cc:
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Robert G. Norred, Jr., Esquire
H. Frederick Hunbracht, Jr., Esquire
C. Crews Townsend, Esquire
Hugh J. Moore, Jr., Esquire

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 1999, a copy of the foregoing document was served on the parties of record, via hand delivery, facsimile, overnight or US Mail, addressed as follows:

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