No. 87400

In the
Supreme Court of Missouri

CITY OF ST. LOUIS,	)	
	)	On Appeal from the Circuit
Plaintiff-Appellant,	)	Court of St. Louis City
	)	
v.	)	No. 034-02912A
	)	
SPRINT SPECTRUM, L.P.,	)	
	)	Hon. David L. Dowd
Defendant-Respondent.	)	Judge Presiding

BRIEF OF THE MISSOURI CHAPTER OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST OF

AMICUS CURIAE

Amicus curiae, the Missouri Chapter of the National Association of Telecommunications Officers and Advisors ("MO-NATOA") submits this brief in support of Plaintiff-Appellant and others similarly situated (the "Cities") and urges that H.B. 209 be found unconstitutional under the Missouri Constitution. MO-NATOA is the local chapter of NATOA, a national association representing the needs and interests of local governments across the country on matters relating to telecommunications and cable television for over 25 years. We are a non-profit professional association made up of individuals and organizations responsible for -- or advising those responsible for -- telecommunications policies and services in local governments throughout the State. Mo-NATOA members include city attorneys, franchise administrators and other municipally employed telecom professionals and their advisors.

ARGUMENT

H.B. 209 is an unconstitutional exercise of legislative authority under the Missouri Constitution, and MO-NATOA hereby incorporates by reference the arguments made by the Cities in this regard in their Brief. However, H.B. 209 also violates several key facets of public policy paramount to the relationship between local municipalities and telecommunications providers.

As landlords and taxing authorities, local governments have had an essential longstanding relationship with telecommunications providers operating

in their markets dating back to the earliest days of the local telephone monopoly. While technology and other competitive developments have dramatically changed over time, the nature of this relationship has not changed and it remains an underpinning to a healthy local economy.

This relationship between municipal governments and the telecommunications industry is influenced by several factors. First, mechanisms must be in place to support the costs imposed upon local governments by the needs and demands of such businesses (e.g., law enforcement, fire protection, use of public infrastructure), primarily a local government's authority to tax. Second, it is imperative that actions by local governments seek to achieve, and not disrupt, competitive neutrality amongst telecommunications providers to promote genuine competition in the telecommunications marketplace, with the goal of yielding more and enhanced products and affordable rates and choices to its tax-paying citizens. And finally, a partnership of sorts is necessary between telecommunications providers and local governments to ensure the public and private infrastructures necessary for future economic development and business retention in the community.

Gross receipt taxes on telecommunications services have long been used by local governments to support and balance these needs. In the current proceeding, the Cities have long-standing ordinances that impose a business or occupational license tax upon entities engaged in supplying or furnishing "telephone service" or "exchange telephone service" or similar services within the Cities. These license

taxes are imposed in return for the privilege of engaging in the designated business within a city or municipality.

The providers in the current proceeding claim that the telecommunications services they provide, generally utilizing technologies introduced in the relatively recent past, should not be subject to the gross receipt taxes at issue. However, these same taxes are imposed and collected on nearly identical telephone services offered by other providers, albeit utilizing more traditional technologies.

The ability of regulatory language to keep up with ever-changing technology is not a new problem; however, the solution proposed by the lawmakers in Missouri critically undermines the ability of local governments to shape and secure the partnerships they must forge with telephone companies in their markets. New technologies will continue to challenge the existing regulatory paradigms, but heavy-handed solutions such as those proposed by H.B 209 are an unfair, anti-competitive and unconstitutional attempt to address such challenges.

I. THE ABILITY OF A LOCAL GOVERNMENT TO IMPOSE AND COLLECT TAXES TO FUND ITS OPERATIONS IS ESSENTIAL TO MAINTAIN PUBLIC SERVICES IN A COMMUNITY.

The long-established authority of localities to tax is critical in order to ensure that local governments have adequate resources to provide all of the vital public services their residents expect and demand. Local governments levy taxes to raise revenue that enables them to provide necessary services to their residents,

including public health, safety, education, infrastructure maintenance, economic development and social welfare.

The authority of municipalities and local governments to assess license taxes on telephone companies similar to those at issue here has long been recognized by the courts. See, e.g., City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc., 14 S.W. 3d 54 (Mo. App. E.D. 1999); mtn. for rehearing and/or to transfer to Supreme Court denied, application to transfer denied; City of Jefferson, et al. v. Cingular Wireless, LLC et al., Cause No. 04-4099-CV-C-NKL (W.D. Mo. 2005); AT&T Communications v. City of Eugene, 35 P.3d 1029 (Or. App. 2001); Sprint Spectrum, L.P. v. City of Eugene, 35 P.3d 327 (Or. App. 2001). In addition, the Mobile Telecommunications Sourcing Act,[1] enacted by Congress in 2000, specifically addresses the ability of local governments to tax wireless telephone services.[2]

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[1] 4. U.S.C. §§116-126 (2000).

[2] The purpose and summary of the Mobile Telecommunications Sourcing Act is, in part, to "provide[] a uniform method for fairly and simply determining how State and local jurisdictions may tax wireless telecommunications. Among its goals are to provide customers with simpler billing statements, reduce the chances of double taxation of wireless telecommunications services, and simplify and reduce the costs of tax administration for carriers and State and local

In Missouri, municipal authority to tax a telephone business can be found in Sections 71.610, 94.110, 94.270 and 94.360 RSMo. Pursuant to such authority, the Cities have adopted ordinances that impose a business or occupational license tax upon entities engaged in supplying or furnishing "telephone service" or "exchange telephone service" or similar services within the Cities. These license tax ordinances impose a tax on a person for the privilege of engaging in a designated business or occupation within the city limits.

In August 2005, H.B. 209 became effective. That statute provides, *inter alia*,

> "In the event any telecommunications company, prior to July 1, 2006, failed to pay any amount to a municipality based on a subjective good faith belief that either:
>
> (1) It was not a telephone company covered by the municipal business license tax ordinance, or the statute authorizing the enactment of such taxing ordinance, or did not provide telephone service as stated in the business license tax ordinance, and therefore owed no business license tax to the municipality; or
>
> (2) That certain categories of its revenues did not qualify under the definition or wording of the ordinance as gross receipts or revenues upon which business license taxes should be calculated;

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governments." H.R. Conf. Rep. No. 106-719, reprinted in U.S. Cong. Ad. News, 2000, at 508.

> such a telecommunications company is entitled to full immunity from, and shall not be liable to a municipality for, the payment of the disputed amounts of business license taxes, up to and including July 1, 2006.... If any municipality, prior to July 1, 2006, has brought litigation or caused an audit of back taxes for the nonpayment by a telecommunications company of municipal business license taxes, it shall immediately dismiss such lawsuit without prejudice and shall cease and desist from continuing any audit..." 92.089.2, RSMo.

If local governments are unable to collect the back taxes which H.B. 209 purports to forgive, it is troublesome how those governments will balance their budgets and continue to provide critical services to their constituents, all at a time that state and federal revenue sharing have been dramatically cut as well. H.B. 209 creates unprecedented tax benefits to the telecommunications industry in general, and indeed to select telephone companies in particular, without any concurrent benefit to the public, not to mention the obvious and immediate detriment of the operating budgets of the local governments.

One of the justifications provided by the Missouri legislature for the tax forgiveness and immunity provisions of H.B. 209 is "the resolution of [the parties'] uncertain litigation, the uniformity, and the administrative convenience and cost savings to municipalities from, and the revenues which will or may accrue to municipalities in the future as a result of the enactment of sections 92.074 to 92.098." 92.089.1, RSMo. The litigation to which H.B. 209 refers is

essentially a dispute by wireless companies as to whether they provide telephone service, and a dispute by other telephone companies as to what items are required to be included in the definition of "gross receipts" under the tax ordinances. These disputes, as are many today, are primarily driven by the rapid changes in technology and the strong competition factor in the telecommunications industry.

It is easy to see how tax administrators can have difficulty administering taxes in this ever-changing industry due to developments such as service bundling, new technologies, new names for old services and other changes in the marketplace. Likewise, phone companies can be faced with increased tax compliance costs because the companies may not know whether certain taxes apply or how to apply them. However, this does not warrant the proverbial solution of "throwing out the baby with the bathwater" – the approach taken by H.B. 209's provisions on back tax forgiveness and immunity. For example, clearly it is not the role of local governments to dictate the bundling practices or billing methods of these telephone companies. (Quite the contrary, local governments generally do not have the authority or the desire to do so.) However, this does not mean that, because a provider has chosen to offer a bundled service that does not "easily" fit within the existing framework of the tax statute that such entity is exempt from paying such taxes.

The Cities have reasonably relied upon certain expected levels of tax-generated revenues from telephone services in the budgeting, planning and spending processes over the past years. The solution proposed by H.B 209 will undoubtedly

result in cities being forced to eliminate basic public services or to reduce the level of police protection, fire protection and other services across-the-board, all to the detriment of the tax-paying public.

II. H.B. 209 CREATES A COMPETITIVE ADVANTAGE FOR SELECT TELEPHONE COMPANIES WHICH CHOSE NOT TO PAY TAXES PAID BY THEIR COMPETITORS DURING THE SAME PERIOD.

H.B. 209 provides a huge tax giveaway to select members of the telecommunications industry at the expense of local governments, local taxpayers, small businesses and working families and other telecommunications competitors which chose to pay their taxes. Such a costly move to reward a special interest by preempting local authority should not be allowed to stand and should be ruled unconstitutional under the equal protection clause of the U.S. Constitution and various sections of the Missouri Constitution.

Congress enacted the Federal Telecommunications Act of 1996 (the "FTA") "in an effort to foster rapid competition in the local telephone service market and to end the monopoly of local providers." See City of Sunset Hills, 14 S.W.3d at 57. Section 253 of the FTA was intended to prevent barriers to entry in the local exchange marketplace and to foster development of a competitive telephone industry. 47 U.S.C. §253. See, e.g., Cablevision of Boston v. Public Improvement Com'n, 184 F.3d 88, 97-98 (1st Cir. 1999) (Section 253 is aimed at those who might impede open competition.) As such, the FTA speaks to the

ability of states to impose certain types of legal requirements on the industry, requiring that any such requirements be "on a competitively neutral basis."[3]

As with any other legal obligation imposed on telecommunications providers, state and local tax policy (or, in this case, local tax policy as dictated by the state) should not influence or affect consumers' selection or use of one specific communications technology or service over another. Competing services that are equivalent or viewed as viable substitutes by consumers should be treated on a non-discriminatory tax basis by state and local governments regardless of the technologies used to deliver them. State and local taxation should be competitively neutral and should not advantage one provider over another of a functionally equivalent service just because a provider has refused to pay, in the past, taxes that Missouri courts have deemed legitimate.

The FTA does not prohibit gross receipts, utility taxes or franchise fees on local telephone providers, but its overarching policies of fair competition and open markets must dictate that such be applied on a competitively neutral and non-discriminatory basis. In any reference to state and local authority throughout Section 253, the FTA repeatedly uses phrases such as "competitively neutral" and "non-discriminatory", reinforcing the dictate that any allowed actions by state or local authorities treat similar providers similarly.

One can hardly imagine a more discriminatory tax scheme than the one which would ultimately result from the workings of H.B. 209. Under the provisions of

[3] See id. at §253(b).

H.B. 209, any cellular telephone service provider who, in its "subjective good faith," does not think it is a telephone company is now no longer subject to the applicable gross receipts tax – and, in fact, is forgiven several years of past taxes as well. Such selected carriers would therefore have costs below those of their competitors who did pay such taxes. As a result of such lower costs, these carriers would be in a position of being able to charge lower prices for their comparable services or, alternatively, being able to reap greater profits for their shareholders. H.B. 209's failure to provide a "level-playing field" for telephone companies is exactly the type of discriminatory effect that the FTA, and indeed most other state and federal telecommunications regulation, seeks to condemn.

The communications industry is not entitled to special tax relief. All businesses within the scope of a jurisdiction's general taxing power should be subject to that power, in accordance with the requirements of equal protection and other state and federal constitutional considerations. These principles are blatantly ignored in H.B. 209. Not only is the communications industry singled out for special treatment as compared to other industries subject to similar gross receipts taxes, but select companies within that industry are granted full and complete immunity from back taxes based on nothing more than a "subject good faith" belief. Again, one can hardly imagine a more discriminatory application of legislative fiat.

III. LOCAL GOVERNMENTS AND TELECOMMUNICATIONS PROVIDERS ACT AS "PARTNERS" IN ENSURING TECHNOLOGICAL AND ECONOMIC GROWTH IN A COMMUNITY.

While the ability to impose and collect taxes to fund its operations is an essential authority of any local or municipal government, that power is always balanced with other considerations. Of similar concern to local governments is the importance of telecommunications service to future economic development and business retention in their communities, including deployment of emerging communications technologies which foster economic opportunities needed by these communities. Local governments must have the ability to encourage the innovations and entrepreneurial spirit that drive technological change, while still ensuring that the citizens they serve continue to receive the services and benefits that they are entitled to both as consumers and as taxpayers. The deployment of the infrastructure used to deliver today's and tomorrow's communications services is of specific interest and concern to the local governments who are charged with the future economic health of their communities. If a city and its citizens wish to change the local government tax structure as a tool for balancing their varied needs and interests, they should be able to do so. And if they do not choose to do so, for budgetary or policy reasons, they should not be forced to do so.

So, while local governments need and want these telecommunications companies and providers in their communities, the providers must support the

infrastructure that allows them to operate. H.B. 209 eliminates that necessary support and attempts to dictate the uniquely local relationships between the Cities and telephone companies operating in their geographic limits, thereby ignoring a local government's prerogative, and indeed obligation, to determine the best balance for its citizens, economy and local community.

IV. CONCLUSION

For the foregoing reasons, in addition to the legal authorities and reasons citied by Plaintiff-Appellant, MO-NATOA urges that this Court rule in favor of Plaintiff-Appellant finding that H.B. 209 is an unconstitutional abuse of power by the Missouri legislature and that those portions purporting to amend chapters 71 and 92, RSMo, be declared unconstitutional and void in their entirety.

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RULE 84.06 (c) CERTIFICATION

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2002 and contains 2,888 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

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