
IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC94208

CITY OF AURORA, MISSOURI, et al.,

Plaintiffs/Respondents/Cross-Appellants,

v.

SPECTRA COMMUNICATIONS GROUP,
LLC, D/B/A CENTURYLINK, et al.,

Defendants/Appellants/Cross-Respondents.

Appeal from the Circuit Court of St. Louis County
State of Missouri

The Honorable David Lee Vincent, III

OPENING BRIEF OF APPELLANTS/CROSS-RESPONDENTS

Respectfully submitted by:

CLARK & SAUER, LLC
Stephen Robert Clark, #41417
D. John Sauer, #58721
7733 Forsyth Blvd., Suite 625
St. Louis, MO 63105
314-814-8880
314-332-2973 (facsimile)

BRYAN CAVE LLP
Mark B. Leadlove, #33205
One Metropolitan Square,
Suite 3600
211 North Broadway
St. Louis, Missouri 63102
314-259-2000
314-259-2020 (facsimile)

*Attorneys for Defendants/Appellants/Cross-Respondents
Spectra Communications Group, LLC, d/b/a CenturyLink, et al.*

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JURISDICTIONAL STATEMENT

This action involves the constitutional validity of a state statutory provision and the validity of new taxes and regulations Respondents seek to impose. Among other issues, Plaintiff-Respondent City of Cameron seeks to impose linear foot fees, which RSMo. § 67.1842 generally prohibits, by relying on a special exemption for grandfathered political subdivision[s] in RSMo. § 67.1846. Appellants oppose the imposition of such linear foot fees on the ground that the exemption for grandfathered political subdivisions is an unconstitutional “special law” under Article III, § 40(30) of the Missouri Constitution. Because this suit “involv[es] the validity . . . of a statute . . . of this state,” the Supreme Court of Missouri has “exclusive appellate jurisdiction.” MO. CONST. art. V, § 3, Appendix to Appellant’s Brief (“Appx.”), p. A28. That “jurisdiction extends to all issues in the case.” *State ex rel. Union Electric Co. v. Public Serv. Comm.*, 687 S.W.2d 162, 165 (Mo. banc 1985).

INTRODUCTION

Appellants generally are local telephone companies that for decades have provided local telephone service in small communities throughout the state. Over the years, Appellants have paid these Missouri communities millions of dollars in business license taxes under decades-old tax ordinances. In particular, Appellants have paid the five Respondent municipalities hundreds of thousands of dollars in business license taxes under ordinances dating back in some cases to the 1950s. Respondents have not amended those ordinances or gone to their voters to seek approval for higher taxes. Yet, in this case, Respondents claim that Appellants should pay significantly more in taxes.

More specifically, this appeal arises from a recent attempt by five Missouri municipalities (õRespondentsö or õCitiesö) to depart from decades of settled practice and impose a battery of new taxesö and taxes under the guise of fee-laden regulationsö on the telecommunication service provider affiliates of CenturyLink, Inc. (collectively, õAppellantsö or õCenturyLinkö). The Citiesö actions constitute a transparent ploy to circumvent constitutional and statutory restrictions on the imposition of such municipal taxes. They are illegal and void.

The Citiesö challenged actions have two major components: First, certain Cities (Cameron and Wentzville) seek to impose taxes ó that would be otherwise illegal ó under the guise of insisting that the telecommunications companies enter into contracts of adhesion styled õright-of-way user agreements.ö Cameron and Wentzville impose these contracts of adhesion on CenturyLink as a precondition of continuing to conduct business as they have for many decades. These õright-of-way agreementsö are laden with fees,

such as linear foot fees and other conditions, as Cameron and Wentzville seek to extract revenues from CenturyLink that they cannot lawfully extract through other means.

Second, around 2010, the Cities, without any votes of the people, and apparently without even a vote of their respective city councils, attempted to impose on CenturyLink a sweeping new construction of their business license tax ordinances that vastly broadened the base of existing taxes without any reduction in the levy. For decades, all parties uniformly understood these ordinances as applying only to revenues derived from the provision of local, or exchange, telephone services. The Cities now argue that the Ordinances purport to be much more far-reaching. The Cities' novel constructions would dramatically increase the tax burden on each CenturyLink entity that provides any kind of telephone service in each of the Cities.

This brief addresses these two main topics in multiple parts. The first two Points Relied On address the illegal attempts by Cameron and Wentzville to impose purported right-of-way user agreements on CenturyLink:

Point I demonstrates that the statutory exemption for grandfathered political subdivisions, on which Cameron relies to impose linear foot fees on CenturyLink, is an unconstitutional special law that grants a special privilege to a historically limited class of political subdivisions without substantial justification.

Point II demonstrates that, even if that exemption were valid, both Cameron and Wentzville's attempts to extract right-of-way user agreements from CenturyLink constitute illegal attempts to impose mandatory franchises on CenturyLink in violation of RSMo. § 67.1842.1(4).

The next two Points Relied On address the attempts by all five Cities to unconstitutionally broaden the scope of their business license tax ordinances as applied to CenturyLink:

Point III demonstrates that the Cities' new interpretation of their taxing ordinances violates the text and original intent of their own ordinances, and that a host of legal and factual authorities confirm the correctness of the previously-settled understanding.

Point IV demonstrates how the trial court's order on these municipal taxing issues also violated the applicable statutes of limitations.

The last two points on appeal address issues relevant both to the "right-of-way user agreements" and to the taxing ordinances:

Point V addresses the trial court's erroneous reliance on an inapposite statutory section, RSMo. § 392.350, to impose an unsupportable award of costs and legal fees on CenturyLink. This ruling was in error because the Cities are not proper parties to bring suit under those provisions, the Cities failed to establish that Appellants engaged in any "unlawful" acts, and the Cities failed to present any plausible evidence of "willfulness" as required under those statutes.

Point VI addresses the trial court's erroneous entry of judgment against three entities that were not properly named as defendants to any of the Cities' claims.

In sum, though this appeal addresses two broad topics—the illegal imposition of "right-of-way user agreements" and "linear foot fees" by Cameron and Wentzville, and the improper expansion of the Cities' interpretation of their taxing ordinances—it has a single unifying theme: the aggressive action by all five Cities to evade all statutory and

constitutional restrictions in an effort to impose a dramatic new tax burden on CenturyLink. As set forth in detail below, these attempts are illegal and void. The trial court's grant of partial summary judgment to the Cities was in error, and it must be reversed.

STATEMENT OF FACTS

This appeal arises from a cursory order of the trial court granting summary judgment to Respondents on complex and factually disputed claims, entered before Appellants had even answered the Respondents' Petition. The trial court's order was bereft of analysis or reasoning, and it summarily disposed of numerous disputed constitutional, factual, statutory, and regulatory questions. *See* Appx. pp. A1-A4 (LF, pp. 1671-74). The order short-circuited the proceedings by depriving Appellants the opportunity to file their Answer and Affirmative Defenses to the Respondents' lengthy Petition, which were not due to be filed until after the order was entered.

A. The parties, the history of their relationship, and relevant city code provisions.

Respondents are five Missouri municipalities of the third or fourth class. Legal File (LF), pp. 176-177, ¶¶ 1-5. Appellants are telecommunication service providers affiliated with and including CenturyLink, Inc., some of whom provide "local exchange telephone service," also known as "exchange telephone service," in one or more Respondent Cities. LF, p. 1217, ¶¶ 5-12, p. 1078, ¶ 31. "Local exchange telephone service" is basic service that permits callers located within a given telephone "exchange," or local area, to place a telephone call within the geographic confines of that exchange. LF, p. 1216.

Appellants Spectra Communications Group, LLC, d/b/a CenturyLink ("Spectra"), Embarq Missouri, Inc., d/b/a CenturyLink ("Embarq"), and CenturyTel of Missouri, LLC, d/b/a CenturyLink ("CenturyTel") are each telecommunication companies that

provide exchange telephone and other services in one or more of the Respondent Cities. LF, pp. 1216-1217, ¶¶ 1-12. Appellants CenturyTel Long Distance, LLC (öCenturyTel Long Distanceö) and Embarq Communications, Inc. (öEmbarq Communicationsö) provide long-distance service, but do not provide local exchange telephone service in any Respondent City. LF, pp. 1216-1217, ¶¶ 3, 10-11. Appellant CenturyLink, Inc. is the ultimate parent company of the other Appellants and does not provide telephone service. LF, p. 1078, ¶ 31; p. 1217, ¶ 12.

1. The Cities' business license tax ordinances.

Each Respondent has a business license tax ordinance that applies to telephone companies under specified circumstances. First, § 615.010 of the Aurora Code states, in relevant part, that any corporation öfurnishing exchange telephone service in the City of Auroraö shall pay a license tax on ögross receipts derived from the furnishing of such service within said City.ö Appx. p. A5 (LF, p. 220). The operative language of the Cameron Code is identical to that of Aurora's, except the tax rate is different. Appx. p. A7 (LF, p. 223). Section 665.010 of the Harrisonville Code states, in relevant part, that a license tax applies to öthe taxable gross receipts of any telephone company rendering telephone service and operating within the City of Harrisonvilleí .ö Appx. p. A9 (LF, p. 226). Both the Oak Grove and Wentzville ordinances state, in relevant part, that every person öengaged in the business of supplying í telephone service í in the City í shall pay to the City a license taxö based on öthe gross receipts from such businessí .ö Appx. p. A11 (LF, p. 231); Appx. p. A13 (LF, p. 234).

One of the services CenturyLink provides is local exchange telephone service, a term long defined by statute, federal and state regulation, and tariffs approved by the Missouri Public Service Commission (MPSC). *See, e.g.*, LF, pp. 1113-1117; LF, p. 1216; *infra*, Point III.B. As a long-standing practice, Appellants interpreted these ordinances in accord with the generally recognized definition to apply only to local exchange telephone service, LF, p. 1216, ¶ 3. For the many decades these ordinances have been in effect, including one dating back to 1948, Appx. p. A11 (LF, p. 231), no Respondent City had disputed the Appellants' calculation and remission of these taxes on only gross receipts derived from local exchange telephone service. *See* LF, p. 1668; LF, p. 1032. The Cities' own evidence showed that Appellants regularly and consistently submitted tax payments that went unquestioned by any of the Cities. LF, pp. 571-575, 583-585, 601-602, 604-606. These tax payments were calculated on the understanding that the taxing ordinances applied only to local exchange telephone service. LF, pp. 1216-1218. Appellants also filed public tariffs setting forth in detail the services offered to subscribers in the Cities and the charges for them. LF, pp. 1475-1625.

While Appellants have paid taxes under the Cities' ordinances for decades, there is no evidence that the Cities imposed any tax assessment, conducted any audit, or disputed Appellants' interpretation of the ordinances, at any time before 2010. LF, pp. 623-627, 1063, 1666. The Cities now claim that the taxing ordinances apply to several other categories of revenue, including four revenue streams at issue in this appeal. LF, pp. 180-182.

2. Cameron and Wentzville's right-of-way ordinances.

Cameron and Wentzville also have enacted right-of-way codes which purport to require Appellants to enter into a right-of-way agreement and pay user fees as a condition of using the right-of-way. LF, pp. 890-921, Cameron Code; LF, pp. 922-965, Wentzville Code. To evade the constitutional and statutory restrictions on the enactment of new municipal taxes on telecommunications, both Cities would impose a fee-laden contract of adhesion on the telecommunications companies as a vehicle for imposing novel taxes under the guise of "right-of-way user fees." Cameron Code § 10.5-151, Appx. p. A18 (LF, pp. 904); Wentzville Code §§ 655.100 ó 655.160, Appx. pp. A20-A22, (LF, pp. 931-933). *See also*, LF, pp. 904-913 (Divisions 5 through 7 of the Cameron ROW Code).

For years, while Spectra operated in Cameron and CenturyTel operated in Wentzville, the Cities never claimed that the companies must enter into an agreement to use the right-of-way and pay fees. LF, pp. 1320-1322, ¶ 59; LF, pp. 1132-1139. This included several years of uninterrupted operation under the current versions of each Cities' right-of-way code. The Cameron right-of-way code was enacted on December 5, 2000. *See* LF, p. 891 (editor's note noting day of enactment). The Wentzville right-of-way code was enacted on Feb. 18, 2004. *See* LF, p. 923. In or about 2010, Wentzville for the first time asserted that CenturyTel must enter into an agreement to use the right-of-way and pay fees. LF, pp. 1776-1777. In or about 2012, Cameron for the first time asserted that Spectra must enter into an agreement to use the right-of-way and pay fees. LF, pp. 1320-1322, ¶ 59; LF, pp. 1132, 1139.

B. The history of this litigation.

1. The Cities' Claims.

Because of the unusual timing of the order that is subject to this appeal, a review of the sequence of procedural events in the trial court is necessary for a clear view of the posture of this case and the rights of the respective parties. On July 27, 2012, Respondents filed their original Petition. LF, pp. 12-73. On August 23, 2012, Respondents filed a First Amended Petition. LF, pp. 74-155. On November 5, 2012, Appellants filed a Motion to Dismiss the First Amended Petition. LF, pp. 156-167. On November 12, 2013, before the trial court had ruled on that Motion to Dismiss, Respondents filed a Motion for Leave to file a Second Amended Petition, together with their proposed Second Amended Petition. LF, pp. 168-323. On November 19, 2013, the court granted leave. LF, pp. 175. On December 11, 2013, Appellants filed a Motion to Dismiss Plaintiffs' Second Amended Petition.¹ LF, pp. 324-339.

Respondents' Second Amended Petition alleges 24 separate counts. The first 15 counts pertain to the Respondent Cities' license tax ordinances. In Counts I-V, each city seeks a declaratory judgment and injunctive relief regarding the applicability of the tax ordinances to numerous broad categories of revenue. LF, pp. 180-182, ¶ 24, and pp. 185-190, ¶¶ 35-59. In Counts VI-X, each city seeks an accounting of CenturyLink's revenues, for the same purposes. LF, pp. 190-198, ¶¶ 60-94. In Counts XI-XV, each city

¹ Appellants' Motion to Dismiss Plaintiffs' Second Amended Petition was incorrectly titled "Motion to Dismiss Plaintiffs' First Amended Petition." The remainder of the Motion and the Memorandum in Support correctly identified the motion as a Motion to Dismiss Plaintiffs' Second Amended Petition. LF, pp. 324-339.

seeks delinquent taxes, interest, and penalties for the allegedly unpaid license taxes referenced in Counts I-V. LF, pp.198-201, ¶¶ 95-114.

Count XVI alleges a unique breach of contract action by Respondent Harrisonville against Appellant Embarq Missouri for payment of the license taxes that are the subject of Counts I-XV. LF, pp. 201-203, ¶¶ 115-124.

Counts XVII-XIX seek declaratory judgments and recovery of allegedly delinquent fees regarding the use of the rights-of-way of Respondents Cameron and Wentzville. LF, pp. 203-209, ¶¶ 125-159.

In Counts XX-XXIV, each City alleges a claim arising under RSMo. § 392.350, to recover damages in the form of attorneys' fees, alleging the Appellants violated RSMo. § 392.200.3, by failing to pay license taxes. Respondents Cameron and Wentzville further allege that Appellants violated RSMo. § 392.080 by failing to obtain these cities' consent to use the rights-of-way. LF, pp. 210-213, ¶¶ 160-180.

2. Respondents move for partial summary judgment, the trial court enters its partial summary judgment order, and Appellants timely file their answer and affirmative defenses

In December 2013, Respondents filed a Motion for Partial Summary Judgment on Counts I-V with respect to four categories of allegedly taxable revenue or "revenue streams," and on Counts XVI-XXIV. LF, pp. 340-361. The four revenue categories subject to Respondents' Motion for Partial Summary Judgment are: the end user common line charge ("Common Line Charge"); the Federal and Missouri Universal Service Fund fees ("USF Fees"); charges for optional services ("Optional Charges"); and license tax

fees charged to the customer to cover the cost of the municipal taxes (öLicense Tax Feesö). LF, p. 342, ¶ 9.

In February 2014, Appellants timely filed their Opposition to Respondentsö Motion for Partial Summary Judgment. LF, pp. 1028-1221. On March 4, 2014, Respondents filed their Reply. LF, pp. 1246-1463. On March 24, 2014, Appellants filed their Surreply to Respondentsö Reply Statement of Additional Facts. LF, pp. 1464-1625.

On March 26, 2014, Respondents filed their Response in Opposition to Appellantsö Motion to Dismiss the Second Amended Petition. LF, pp. 1626-1644.

On April 1, 2014, the trial court heard argument on Appellantsö Motion to Dismiss. LF, p. 1645. On April 10, 2014, the trial court heard argument on Respondentsö Motion for Partial Summary Judgment. LF, p. 1655. Also on April 10, 2014, the trial court denied Appellantsö Motion to Dismiss and granted Appellants until May 12, 2014, to respond to Respondentsö Second Amended Petition. *Id.* The trial court also permitted each party to submit supplemental briefs on the issue of öwillfulnessö under RSMo. § 392.350, which the parties filed on April 14, 2014. LF, pp. 1656-1670.

On April 17, 2014, before Appellants had filed their Answer and Affirmative Defenses, the trial court granted Respondentsö Motion for Partial Summary Judgment on Counts I-V and XVII-XXIV, and denied Respondentsö Motion for Partial Summary Judgment on Count XVI. Appx. pp. A1-A4 (LF, pp. 1671-1674). On Counts I-V, the trial court granted judgment in favor of Respondents for alleged delinquent tax amounts as to four disputed revenue streams dating back to January 1, 2007, as to four of the five Respondents (Aurora, Cameron, Wentzville, and Oak Grove) and amounts dating back to

August 1, 2008, as to the other Respondent (Harrisonville). Appx. p. A2 (LF, p. 1672). On Counts XVII-XVIII, the trial court granted judgment in favor of Cameron for alleged delinquent right-of-way fee amounts dating back to January 1, 2007, and ordered Spectra to enter into a right-of-way franchise agreement with Cameron. Appx. p. A3 (LF, p. 1673); *see also* LF, p. 1002. On Count XIX, the trial court ordered CenturyTel to obtain a right-of-way use agreement from Wentzville. Appx. p. A4 (LF, p. 1674). On Counts XX-XIV, the trial court held that Appellants' conduct violated applicable law and Defendants' unlawful actions were willful under § 392.350, Appx. p. A4 (LF, p. 1674); the trial court thus ordered Appellants to pay Respondents' damages and costs, including attorneys' fees. *Id.*

In its April 17, 2014 order, the trial court, *sua sponte*, stayed execution of the judgment and certified the judgment as final for purposes of appeal. Appx. p. A4 (LF, p. 1674). On April 25, 2014, Appellants filed a Notice of Appeal as to Counts I-V and XVII-XXIV. LF, pp. 1675-1689. On May 5, 2014, Respondents filed a Notice of Cross-Appeal as to Count XVI. LF, pp. 1690-1696. On May 12, 2014, Appellants filed their Answer, Affirmative Defenses, and Counterclaims. LF, pp. 1697-1979.

POINTS RELIED ON

- I. The trial court erred in granting summary judgment in favor of Respondent Cameron on Counts XVII-XVIII (Cameron’s right-of-way claims), because RSMo. § 67.1846.1’s “grandfathered political subdivision” exemption, on which Respondent Cameron relies to impose linear foot fees on Appellant Spectra, is an unconstitutional “special law” in violation of Article III, § 40(30) of the Missouri Constitution, in that the exemption creates a fixed, closed class based on an immutable historical fact, without substantial justification, and the exemption is severable from the rest of the statute.**

Primary Authorities:

- MISSOURI CONSTITUTION, art. III, § 40(30)
- RSMo. § 67.1846
- *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006)
- *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo. banc 2013)

- II. The trial court erred in granting summary judgment in favor of Respondents Cameron and Wentzville on Counts XVII-XIX (Cameron and Wentzville’s right-of-way claims), because Cameron and Wentzville’s coercive imposition of their respective right-of-way agreements is illegal and void, in that they constitute mandatory “franchises” prohibited by RSMo. § 67.1842.1(4), and Cameron failed to present any evidence that the costs that it seeks to impose**

are based on the actual, substantiated costs reasonably incurred by Cameron in managing its right-of-way.

Primary Authorities:

- RSMo. § 67.1842
- RSMo. § 67.1846
- *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006)
- *State ex rel. McKittrick v. Murphy*, 347 Mo. 484 (Mo. 1941)

III. The trial court erred in granting summary judgment in favor of Respondents on Counts I-V (Respondents' claims for declaratory judgment and injunction as to alleged delinquent taxes), because Respondents failed to establish the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law that their tax ordinances apply to the four disputed revenue streams, in that the plain language of the five tax ordinances, legal and factual authorities, and Respondents' own longstanding course of conduct all stand as solid evidence that the tax ordinances do not apply to the four disputed revenue streams.

Primary Authorities:

- Mo. Sup. Ct. R. 74.04
- *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708 (Mo. banc 2011)
- *May Department Stores Co. v. University City*, 458 S.W.2d 260 (Mo. banc

1970)

- *Southern Pacific Communications Co. v. AT&T.*, 740 F.2d 980 (D.C. Cir. 1984)

IV. The trial court erred in ordering Respondents to pay over five years' worth of allegedly delinquent taxes on Counts I-V, because such recovery is partially barred by statute of limitations, in that the three-year limitations period set forth in RSMo. § 71.625.2, and in other Missouri statutes, applies to Respondents' claims for delinquent taxes; and genuine issues of material fact exist that preclude summary judgment in Respondents' favor.

Primary Authorities:

- RSMo. § 71.625.2
- RSMo. § 94.150
- RSMo. § 94.310
- *State ex rel. Res. Med. Cntr. v. Peters*, 631 S.W.2d 938 (Mo. App. W.D. 1982)

V. The trial court erred in granting summary judgment on Counts XX-XXIV, because Respondents failed to establish any valid basis for liability against Appellants under RSMo. § 392.350, in that the defined terms "persons" or "corporations" that are authorized to bring suit under § 392.350 exclude municipalities such as Respondents, Respondents failed to establish that Appellants engaged in any substantively "unlawful" behavior as required

under § 392.350, and Respondents failed to establish that there was no genuine dispute of material fact on the issue of “willfulness.”

Primary Authorities:

- RSMo. § 392.350
- RSMo. § 386.020
- *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118 (Mo. banc 2014)
- *De Paul Hosp. School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542 (Mo. App. 1976)

VI. The trial court erred in granting summary judgment in Respondents’ favor on Counts I-V and XX-XXIV as to Appellants CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications, Inc., because these three entities were not proper defendants to those Counts, in that Respondents submitted no evidence that these Appellants provided exchange telephone service in any of the Respondent cities or failed to pay any applicable taxes, and genuine issues of material fact exist that preclude summary judgment in Respondents’ favor.

Primary Authorities:

- *Hefner v. Dausmann*, 996 S.W.2d 660 (Mo. App. S.D. 1999)
- *Grease Monkey Intern., Inc. v. Godat*, 916 S.W.2d 257 (Mo. App. E.D. 1995)
- *Mitchell v. Home Ins. Co.*, 865 S.W.2d 779 (Mo. App. W.D. 1993)

STANDARD OF REVIEW

“The right to summary judgment is solely an issue of law that does not require any deference to the trial court.” *City of St. Louis v. State*, 382 S.W.3d 905, 910 (Mo. banc 2012) (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). Accordingly, this Court’s review of a grant of summary judgment is essentially *de novo*. *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010), *superseded on other grounds sub nom. Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816 (Mo. banc 2013). In reviewing an order granting summary judgment, this Court views the record in the light most favorable to the party against whom judgment was entered and affords that party the benefit of all reasonable inferences. *Id.* “This Court also reviews *de novo* questions about the constitutional validity of a statute....” *Brehm v. Bacon Twp.*, 426 S.W.3d 1, 4 (Mo. banc 2014). Likewise, “[i]nterpretation of a municipal ordinance is also reviewed *de novo*.” *City of University City v. AT&T Wireless Servs.*, 371 S.W.3d 14, 17 (Mo. App. E.D. 2012). In this case, therefore, review of all issues is *de novo*.

“Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law.” *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. banc 2011). “The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment.” *Bob DeGeorge Assocs. v. Hawthorn Bank*, 377 S.W.3d 592, 596 (Mo. banc 2012) (citing *ITT*, 854 S.W.2d at 378).

Where, as here, a claimant moves for summary judgment, that party bears the burden of establishing not only “that there is no genuine dispute as to those material facts upon which the claimant would have had the burden of persuasion at trial,” but also that any affirmative defense asserted by the defending party “fails as a matter of law.” *ITT*, 854 S.W.2d at 381. “[A] claimant’s right to judgment depends just as much on the non-viability of that affirmative defense as it does on the viability of the claimant’s claim.” *Id.*; see also *Moore Auto. Group, Inc. v. Lewis*, 362 S.W.3d 462, 467 (Mo. Ct. App. 2012). Therefore, “the claimant must also show, beyond any genuine dispute, the nonexistence of some fact essential to the affirmative defense put forward by the non-moving party or that the defense is legally insufficient.” *ITT*, 854 S.W.2d at 383; see also *Napus Fed. Credit Union v. Campbell*, 356 S.W.3d 885, 887 (Mo. Ct. App. 2012).

If the moving party establishes a *prima facie* case for summary judgment, the burden shifts to the non-moving party to present evidence demonstrating “specific facts showing that there is a genuine issue for trial.” Mo. Sup. Ct. R. 74.04(c)(2), Appx. p. A109; see also *Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 563 (Mo. Ct. App. 2008) (“*GRHA*”). This can be accomplished by a showing there is, in fact, a genuine dispute about any issue of material fact that the movant contends is undisputed. *ITT*, 854 S.W.2d at 381. The non-movant may also defeat a motion for summary judgment by demonstrating “that the moving party is not entitled to judgment as a matter of law.” *GRHA*, 246 S.W.3d at 563.

When reviewing an order granting summary judgment, appellate courts view the trial court record “in the light most favorable to the party against whom summary

judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.ö *Goerlitz*, 333 S.W.3d at 452-53. In practical terms, these öwell-worn phrasesö mean that ö*any evidence in the record that presents a genuine dispute as to the material facts* defeats the movant's prima facie showing . . . [and] if the movant requires an inference to establish his right to judgment as a matter of law, and *the evidence reasonably supports any inference other than (or in addition to) the movant's inference*, a genuine dispute exists and the movant's prima facie showing fails.ö *ITT*, 854 S.W.2d at 382 (emphases added).

ARGUMENT

- I. The trial court erred in granting summary judgment in favor of Respondent Cameron on Counts XVII-XVIII (Cameron’s right-of-way claims), because RSMo. § 67.1846.1’s “grandfathered political subdivision” exemption, on which Respondent Cameron relies to impose linear foot fees on Appellant Spectra, is an unconstitutional “special law” in violation of Article III, § 40(30) of the Missouri Constitution, in that the exemption creates a fixed, closed class based on an immutable historical fact, without substantial justification, and the exemption is severable from the rest of the statute.**

Counts XVII and XVIII of Respondents’ Second Amended Complaint allege that Appellant Spectra is obligated to pay the City of Cameron a right-of-way user fee based on the total linear feet of [Appellants’] facilities occupying Cameron’s right-of-way. LF, p. 204, ¶ 131. Missouri law generally prohibits such linear foot fees, but Cameron claims the authority to impose such a fee based on an exemption for a select group of grandfathered political subdivisions under RSMo. § 67.1846.1, Appx. p. A41. See LF, pp. 204-05, ¶ 132.

The special exemption for select grandfathered political subdivisions under RSMo. § 67.1846.1 violates the Missouri Constitution’s prohibition on special laws by creating a fixed, closed class without substantial justification. That unconstitutional exemption is severable from the rest of the Missouri right-of-way (ROW) laws. See LF, pp. 1050-55 (citing MO. CONST. Art. III, § 40(30)). Yet in its Order and Judgment, the trial court did not discuss Appellants’ constitutional argument. The court held simply

that Cameron's linear foot user fee was invalid and lawful, under § 67.1846 RSMo., and any other law, and ordered Spectra to pay \$138,914.04 plus interest in purportedly unpaid user fees. Appx. p. A3 (LF., p. 1673). That conclusion was erroneous and should be reversed.

This Court reviews *de novo* the question of the constitutional validity of a state statutory provision. *Brehm v. Bacon Twp.*, 426 S.W.3d 1, 4 (Mo. banc 2014).

A. RSMo. § 67.1846.1's exemption for select "grandfathered political subdivision[s]" creates a fixed, closed classification, and is thus a facially special law.

Article III, § 40(30) of the Missouri Constitution provides that "[t]he general assembly shall not pass any local or special law in which a general law can be made applicable." MO. CONST. art. III, § 40(30), Appx. pp. A25-A26; *see also id.* § 40(28), Appx. pp. A25-A26 (prohibiting local or special laws "granting to any corporation, association or individual any special or exclusive right, privilege or immunity").

Missouri's right-of-way laws generally prohibit the imposition of linear foot fees by political subdivisions. Section 67.1840 provides that political subdivisions may only impose right-of-way permit fees to recover "right-of-way management costs," and that such fees must be "based on the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right of way." RSMo. § 67.1840.1, 67.1840.2(1), Appx. p. A37. Section 67.1830(5), moreover, defines "right-of-way management costs" in a manner that does not include linear foot fees. RSMo. § 67.1830(5), Appx. pp. A34-A35. But § 67.1846.1, entitled "Exceptions to applicability

of right-of-way laws,ö purports to create a special exemption permitting ögrandfathered political subdivision[s]ö to öenact[] new ordinances, including amendments to existing ordinances, charging a public utility right-of-way user a fair and reasonable linear foot fee,ö and to enforce such existing ordinances. RSMo. § 67.1846.1, Appx. p. A41.

Section 67.1846.1 defines ögrandfathered political subdivisionö as öany political subdivision which has, ***prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user. . . .***ö RSMo. § 67.1846.1, Appx. p. A41 (emphasis added).

This exemption for ögrandfathered political subdivision[s]ö creates a fixed, closed classification based on an immutable historical factö whether a city enacted a certain kind of ordinance before May 1, 2001. Under this Courtö's clear precedents, such an exemption is a öfacially special law.ö *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006). ö[C]lassifications based on historical facts ... focus on immutable characteristics and are therefore *facially special laws*.ö *Id.* (emphasis in original) (quoting *Harris v. Missouri Gaming Comm 'n*, 869 S.W.2d 58, 65 (Mo. banc 1994)); *see also Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997).

In *Springfield*, this Court reviewed a statute with the same defect as § 67.1846.1 and held the law to be a facially special law because öthe class of cities that could come within [the] exemption was fixed, based on an immutable, historical fact: whether an ordinance meeting [certain] specifications . . . had or had not already been passed and enforced by the city prior to [a fixed date].ö *Springfield*, 203 S.W.3d at 184-85.

Section 67.1846.1's "grandfathered political subdivision" classification is likewise "fixed, based on an immutable, historical fact," *id.* at 185 *i.e.*, whether a political subdivision "has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user, including ordinances which were specific to particular public right-of-way users." RSMo. § 67.1846.1, Appx. p. A41. After May 1, 2001, no city could join the specially privileged class of "grandfathered" subdivisions, thus making the class "fixed" and "immutable" within the meaning of the *Springfield* holding.

Moreover, like the statute at issue in *Springfield*, § 67.1846.1 did not take effect until *after* the deadline for entering the privileged class. *See* S.B. 369 (Mo. 2001), Appx. pp. A65-A72 (effective August 28, 2001); *Springfield*, 203 S.W.3d at 186 (observing that "[i]t is impossible for the status of the excluded cities to change because the excluded cities did not take the specified actions prior to the necessary date"). In *Springfield*, it made no difference whether the class was defined by the past *enactment* of an ordinance, or the past *enforcement* of an ordinance, or both. *See Springfield*, 203 S.W.3d at 184. What mattered was that the classification was based on the performance of a specified action by a past date, prior to the Act's enactment:

What was constitutionally fatal in [this Court's precedents], and what is constitutionally fatal here, is the fact that the statute's classifications are, and were, based on ***immutable characteristics***. The nature of the factors, or characteristics, is set, solid, and fixed. Just as one cannot change a geographical location, or the number of people who lived in an area as of the date of a past census, there is no

changing *actions completed or left incomplete at a date set in the past, prior to the current Act's enactment*. It is impossible for the status of the excluded cities to change because the excluded cities did not take the specified actions prior to the necessary day, a date prior to the Act's passage. Thus, none of the excluded cities may join the class of exempt cities.

Springfield, 203 S.W.3d at 186 (emphases added). Exactly like the statute invalidated in *Springfield*, the "grandfathered political subdivision" exemption defines a closed class of cities based on an "action[] completed or left incomplete at a date set in the past, prior to the current Act's enactment." *Id.* It is therefore a "facially special law." *Id.* at 184.

B. As a facially special law, RSMo. § 67.1846.1 is presumptively unconstitutional and requires "substantial justification," which Respondents do not and cannot provide.

"Facially special laws are presumed unconstitutional. The party defending a facially special law must demonstrate a substantial justification for the closed-ended classification." *Bd. of Educ. of St. Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1, 10 (Mo. banc 2008) (internal citations omitted); *see also Springfield*, 203 S.W.3d at 186. Demonstrating a "substantial justification" involves more than showing that a statute has a rational basis. *See O'Reilly v. Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) (holding that "[b]ecause the [statute] is not open-ended, the respondents must do more [than show a rational basis]: they must demonstrate a substantial justification to exclude other counties"); *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 871-72 (Mo. banc 2006) (rejecting several rationales for a classification that included only

one county because they did not adequately explain how the included county was “significantly different” from other counties); *compare Bd. of Educ. of St. Louis*, 271 S.W.3d at 10 (finding “substantial justification” in the statute’s role in a hard-fought settlement agreement to dispose of federal desegregation litigation).

Respondents have failed to demonstrate “substantial justification” for the exemption. According to Respondents, the legislature’s intent was “not to impact and reduce an immediate . . . source of funding that some cities may have relied upon,” which they argue was “not irrational.” LF, p. 1271. Even if that purported rationale made sense (which it does not, *see infra*), a showing that the exemption’s justification is merely “not irrational” does not suffice. Demonstrating “substantial justification” requires more. *See O’Reilly*, 850 S.W.2d at 99.

Moreover, Respondents’ post-hoc rationale does not accord with the plain terms of § 67.1846.1. In the trial court, Respondents speculated that § 67.1846.1’s “grandfathered political subdivision” exemption serves to “preserve existing revenue sources for local governments and simply prohibit new reliance on such linear foot fees in the future.” LF, p. 1271. But this is contradicted by the terms of the statute. The “grandfathered political subdivision” exemption does more than preserve already-ongoing taxation. It permits the fixed group of “grandfathered political subdivisions” to enforce, renew, and extend linear foot fee ordinances, and *to enact an unlimited number of new linear foot fee ordinances in the future*. *See RSMo. § 67.1846.1, Appx. p. A41*. Permitting a privileged class of cities to enact new linear foot fee ordinances was not necessary to avoid upsetting the

cities' reliance on "existing revenue sources." LF, p. 1271. Therefore, protecting existing revenue streams does not even afford a rational basis for the exemption.

Respondents also failed to identify any case law that would support the law's constitutionality. In the trial court, Respondents relied on *Level 3 Communications, LLC v. City of St. Louis*, 405 F. Supp. 2d 1047, 1063 (E.D. Mo. 2005), but their reliance is misplaced. The *Level 3* opinion gives no indication that the plaintiff ever challenged the constitutionality of the exemption, so the court did not address its constitutionality. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Further, Respondents failed to submit or cite any factual evidence that might support any theory as to why the grandfathering provision was included or its "substantial justification." *See* LF, p. 1271.

Because no substantial justification exists for granting special privileges to a closed class of select political subdivisions, RSMo. § 67.1846.1's "grandfathered political subdivisions" exemption is unconstitutional under Article III, § 40(30) of the Missouri Constitution.

C. The special exemption for "grandfathered political subdivisions" is severable from the other provisions of § 67.1846.1.

After determining that a statutory provision is unconstitutional, a court must consider whether that provision is severable from the rest of the statute in which it resides. *See, e.g., Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353 (Mo. banc 2013); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. banc 1994). Because

§ 67.1846.1ø exemption for õgrandfathered political subdivisionsö violates a substantive (rather than procedural) provision of the Missouri Constitution, severability is governed by RSMo. § 1.140. *Mo. Roundtable for Life*, 396 S.W.3d at 353; *Hammerschmidt*, 877 S.W.2d at 103. RSMo. § 1.140 *requires* courts to sever unconstitutional provisions of any Missouri statute, unless those provisions are

so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

RSMo. § 1.140, Appx. p. A33; *see also Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 742 (Mo. banc 2007) (õ[A]ll statutes should be upheld to the fullest extent possible.ö). There is a strong presumption in favor of preserving the rest of S.B. 369.

The exemption for õgrandfathered political subdivisionsö is severable under § 1.140 because the statutory scheme is perfectly õcomplete and workableö without it. *SSM Cardinal Glennon Children's Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. banc 2002). Nothing else in the bill in which it was enacted, S.B. 369, authorizes õlinear foot feesö or pertains to õgrandfathered political subdivisionsö; thus, the exemption does not õaffect the viability or workabilityö of any other provision. *Id.*; *see* S.B. 369 (Mo. 2001), Appx. pp. A65-A72.

To be sure, § 67.1842.1(4) implicitly cross-references the exemption when it states that “no political subdivision shall . . . require a public utility right-of-way user to pay for the use of the public right-of-way, *except as provided in sections 67.1830 to 67.1846.*” RSMo. § 67.1842.1(4) (emphasis added). But the mere existence of a generic cross-reference “to all sections in the bill” does not demonstrate that the statute is incomplete or unworkable without the special exemption. Indeed, eliminating what is currently the only exception to § 67.1842.1(4)’s prohibition on user fees would not render that provision meaningless or incapable of any operation. It would merely eliminate an exception for a privileged subset, leaving the general prohibition meaningful and capable of operation as to *all* political subdivisions.

The few instances in which the Missouri Supreme Court has found provisions *not* severable have involved invalid provisions that were much more tightly bound up with valid ones than here. *See, e.g., Weinschenk v. State*, 203 S.W.3d 201, 220 (Mo. banc 2006) (holding that transitional voter identification provisions were ineffective after the corresponding permanent provisions were invalidated, because “[a] transition is inherently a step towards an end, not an end in itself.”); *Conseco Fin. Servicing Corp. v. Mo. Dep’t of Revenue*, 98 S.W.3d 540, 546 (Mo. banc 2003) (“[I]f the homeowner provisions are struck down, then there will be no transfer of title, and so the provisions of [the statute] as to secured parties will never come into play.”).

The “grandfathered political subdivision” exemption is wholly unrelated to the other provisions of S.B. 369. “[S]everance of [the exemption] from the remainder of the bill would not impact its other provisions.” *Mo. Ass’n of Club Execs., Inc. v. State*, 208

S.W.3d 885, 889 (Mo. banc 2006). Therefore, RSMo. § 1.140 requires this Court to sever the unconstitutional exemption for “grandfathered political subdivisions” from the rest of the statute.

In sum, the “grandfathered political subdivision” exception reflects just the sort of political favoritism and special treatment that Article III, § 40 of the Missouri Constitution was designed to prohibit. The trial court erred by failing to acknowledge (or even discuss) that the exception constitutes a “fixed” and “immutable” special class in violation of *City of Springfield*, and failing to address any possible substantial justification for this act of legislative favoritism. The exception should be excised from the remainder of the statute.

II. The trial court erred in granting summary judgment in favor of Respondents Cameron and Wentzville on Counts XVII-XIX (Cameron and Wentzville’s right-of-way claims), because Cameron and Wentzville’s coercive imposition of their respective right-of-way agreements is illegal and void, in that they constitute mandatory “franchises” prohibited by RSMo. § 67.1842.1(4), and Cameron failed to present any evidence that the costs that it seeks to impose are based on the actual, substantiated costs reasonably incurred by Cameron in managing its right-of-way.

Missouri’s Right-of-Way Laws provide that “no political subdivision shall [r]equire a telecommunications company to obtain a franchise.” RSMo. § 67.1842.1(4), Appx. p. A39. Notwithstanding that prohibition, in Counts XVII-XIX, Respondents Cameron and Wentzville sought a declaration that Appellants violated their respective ROW Codes by failing to “obtain an agreement from the City granting authorization to use and occupy the rights-of-way.” LF, p. 1000 (citing Cameron ROW Code § 10.5-151; Wentzville ROW Code, §§ 655.100 & 655.285(A)(2)); *see also* LF, pp. 203-209, ¶¶ 125-45, 148-59. Under the factual circumstances of each of these two cities’ actions, such coercively-imposed agreements constitute mandatory “franchises” forbidden by RSMo. § 67.1842.1(4). Appx. p. A39.

Further, Cameron presented no evidence that the costs that it seeks to impose are based on the actual, substantiated costs it reasonably incurred in managing its public right-of-way, as required by RSMo. § 67.1840.2. Appx. p. A37. By contrast, Cameron’s ordinances make clear that the costs are not so limited.

At a minimum, genuine issues of material fact exist as to whether the Cities' attempts to enforce these requirements are therefore illegal and void. The trial court erred in entering summary judgment for Cameron and Wentzville on those Counts. Appx. pp. A3-A4 (LF, pp. 1673-74).

The trial court's determination that the evidence raised no genuine dispute of material fact is reviewed *de novo*, drawing every reasonable factual inference in favor of Appellants. *Turner*, 318 S.W.3d at 664. The trial court's interpretation of municipal ordinances is also reviewed *de novo*. *City of University City*, 371 S.W.3d at 17.

A. Cameron's "Public Ways Use Permit Agreement" and Wentzville's "Rights-of-Way Use Agreement" are illegal mandatory franchises because they are coercively imposed.

The City of Cameron's ROW Code requires telecommunications companies to enter into a franchise agreement, disguised as a "Public Ways Use Permit Agreement," as a mandatory condition to gaining access to the City's rights-of-way. *See* Cameron ROW Code § 10.5-151, Appx. p. A18 ("A public ways use permit granting consent to use the public rights-of-way . . . shall be required of any person who desires to occupy or use specific public ways of the city for facilities including but not limited to communication facilities located within a public way, including all communication carriers and communication providers. . . . A public ways use permit shall be obtained in the form of a public ways use permit agreement. . . .") (emphases added). Likewise, the City of Wentzville requires telecommunications companies to sign a franchise agreement, misleadingly labeled a "Rights-of-Way Use Agreement," before using the public rights-

of-way. Wentzville ROW Code § 655.100, Appx. p. A20 (‘‘Except as otherwise provided by law, it shall be unlawful for any person to construct, operate, own or maintain communications facilities or to provide communications services by use of facilities in the rights-of-way in the City without a valid, unexpired rights-of-way use agreement from the City . . .’’); *see also* Wentzville ROW Code § 655.285(A)(2), Appx. pp. A23-A24 (‘‘A ROW agreement shall be required for all other ROW-users . . .’’).

Indeed, both cities require these mandatory contracts even for facilities that have been in the rights-of-way for decades. Cameron ROW Code § 10.5-151, Appx. p. A18; Wentzville ROW Code § 655.100, Appx. p. A20. The Missouri legislature recognizes that telephone companies need access to the public rights-of-way to provide telephone service to their customers. RSMo. § 67.1832.1 (‘‘a political subdivision shall grant its consent to [telecommunications companies and other utilities] to construct, maintain and operate all equipment, facilities, devices, materials, apparatuses, or media in the public right-of-way.’’) In short, these ordinances prohibit CenturyLink from providing any telecommunications services whatsoever in either city unless and until CenturyLink enters into the cities’ mandatory contracts.

As noted above, Missouri law provides that ‘‘no political subdivision shall [r]equire a telecommunications company to obtain a franchise.’’ RSMo. § 67.1842.1(4), Appx. p. A39. And under Missouri law, ‘‘franchise’’ is a broad term, encompassing all transactions in which the government grants a privilege or authorization to an individual entity that is not common to the citizens generally. *See, e.g., State ex rel. McKittrick v. Murphy*, 148 S.W.2d 527, 530 (Mo. 1941) (defining ‘‘franchise’’ broadly as ‘‘[a] special

privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right); *see also Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo. App. S.D. 1963) (“The common definition of a franchise is that it is a special privilege conferred by the sovereign upon a citizen or citizens, which privilege is not common to the citizens generally.”).

This definition of “franchise” includes the agreements under which public utilities arrange to provide services in municipalities. *See Empire Dist. Elec. Co. v. Southwest Elec. Coop.*, 863 S.W.2d 892, 893 (Mo. App. S.D. 1993) (“The Empire District Electric Company í operates electrical transmission and distribution lines and holds a non-exclusive *franchise* from the city of Bolivar to provide electric service in that city.”) (emphasis added). Other authorities also confirm this understanding of “franchise.” *See, e.g., BLACK’S LAW DICTIONARY* 683 (8th ed. 2004) (defining “franchise” as “[t]he right conferred by the government to engage in a specific business or to exercise corporate powers”). According to Black’s Law Dictionary, “the rights necessary for public utility companies to carry on their operations are generally designated as franchise rights.” *Id.* (quoting 1 *Eckstrom’s Licensing in Foreign and Domestic Operations* § 1.02[3], at 1-10 to 1-11 (David M. Epstein ed., 1998)).

Because CenturyLink cannot provide telephone service in either city without these mandatory contracts, Cameron’s “public ways use permit agreement” and Wentzville’s “rights-of-way use agreement” are “franchises” under Missouri law. Thus, RSMo. § 67.1842.1(4) prohibits Respondent cities from requiring CenturyLink to obtain them.

B. A mandatory agreement need not be exclusive or discriminatory to constitute a prohibited “franchise.”

An agreement need not be exclusive or discriminatory to constitute a “franchise” prohibited by § 67.1842.1(4). RSMo. § 67.1842.1 prohibits requiring a telecommunications company to obtain a franchise in one discrete subsection. Then, in a separate subsection, it forbids entering into a contract or any other agreement for [sic] providing for an exclusive use, occupancy or access to any public right-of-way. See RSMo. § 67.1842.1(4) & (5), Appx. p. A39. If the “franchise” forbidden by paragraph (4) was limited to a contract ... providing for an exclusive use of the right-of-way, paragraph (5)’s prohibition on agreement[s] providing for an exclusive use of the right-of way would be unnecessary and superfluous. *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. banc 2006) (“[T]his Court presumes that the General Assembly does not enact meaningless provisions.”).

Likewise, the statute makes clear that a nondiscriminatory agreement may constitute a “franchise.” See RSMo. § 67.1846.1, Appx. p. A41 (stating that a political subdivision or public utility right-of-way user may renew or enter into a new or existing franchise, *as long as all other public utility right-of-way users have use of the public right-of-way on a nondiscriminatory basis*) (emphasis added). See also, e.g., *State ex rel. Chaney v. West Missouri Power Co.*, 281 S.W. 709, 712-713 (Mo. 1926) (“The franchise granted by the city of Warrensburg, though perpetual, being non-exclusive, was not a ‘special privilege or immunity’...”); *Empire Dist. Elec. Co.*, 863 S.W.2d at 893 (discussing a company’s “non-exclusive franchise from the city of Bolivar

to provide electric service in that city.ö); *State ex rel. Peach v. Melhar Corp.*, 650 S.W.2d 633, 634 & 636 (Mo. App. 1983) (recognizing ñnon-exclusiveö agreement as franchise).

C. Cameron Failed to Demonstrate that the Costs It Seeks to Impose Are Based on the Actual, Substantiated Costs Reasonably Incurred by the Cities in Managing Their Public Rights-of-Way.

Missouri law limits the right-of-way fees a city may lawfully charge to only those fees satisfying four conditions: the fees must be ñbased on the [1] actual, [2] substantiated costs [3] reasonably incurred by the political subdivision [4] in managing the public right-of-way.ö RSMo. § 67.1840.2(1), Appx. p. A37. Cameron failed to submit any evidence that its fees satisfied any of these conditions. In granting summary judgment to Cameron on its right-of-way fee claims, the trial court committed two errors: One, because Cameron failed to submit any evidence of compliance with the statute, the trial court lacked any basis to determine that Cameron was entitled to judgment as a matter of law. Two, because the only evidence ó the very text of Cameron's own ordinance ó was that Cameron did not comply with the statute, the trial court could not have determined the absence of a genuine dispute of material fact.

Cameron's own ordinance demonstrates Cameron's non-compliance with the statute: the purpose of the fees is ñto provide for the payment and recovery of all direct **and indirect** costs and expenses of the city related to the enforcement and administration of this article **as well as fair and reasonable compensation** for the use of public ways.ö Cameron ROW Code, § 10.5-201, Appx. p. A19 (emphasis added) (LF., p. 911). *See also* Cameron Code, § 10.5-52, Appx. pp. A16-A17 (stating that a purpose of the

Cameron right-of-way code is to "secure fair and reasonable *compensation*" (emphasis added) (LF, pp. 891-892).

Cameron's Code thus contemplates that its fees include "compensation" above the actual, substantiated costs reasonably incurred. RSMo. § 67.1840.2(1), Appx. p. A37. Missouri law prohibits the imposition of fees that include such additional compensation. *Id.* Accordingly, for this additional reason, the mandatory contracts to use the rights-of-way that Cameron seeks to impose are illegal and void. RSMo. § 67.1840.2(1), Appx. p. A37. At very least, the Cameron ordinance's authorization of costs above and beyond the actual and substantiated costs reasonably incurred in managing the right-of-way raises a genuine dispute of material fact as to whether the costs the trial court awarded Cameron are so based.

For the reasons stated, the trial court's entry of judgment in favor of Respondents Cameron and Wentzville on Counts XVII-XIX was erroneous and should be reversed.

III. The trial court erred in granting summary judgment in favor of Respondents on Counts I-V (Respondents' claims for declaratory judgment and injunction as to alleged delinquent taxes), because Respondents failed to establish the absence of a genuine dispute of material fact and entitlement to judgment as a matter of law that their tax ordinances apply to the four disputed revenue streams, in that the plain language of the five tax ordinances, legal and factual authorities, and Respondents' own longstanding course of conduct all stand as solid evidence that the tax ordinances do not apply to the four disputed revenue streams.

Over the last many decades, CenturyLink has paid Appellants, under the ordinances at issue here, hundreds of thousands of dollars in business license taxes. Decades after the enactment of the ordinances, the five Cities now attempt to impose via litigation a new and dramatically more expansive interpretation of their license tax ordinances to swell the tax burden on CenturyLink.

At the heart of this lawsuit is a disagreement about the construction and application of the five municipal tax ordinances. By their terms, the tax ordinances apply to revenues derived from the provision of local telephone service, or "exchange" telephone service, within the Respondent Cities. But the Cities contend that the courts should expand their tax ordinances to encompass four revenue streams that are not local exchange telephone service within the Cities—namely, (1) an end user common line charge that relates to long-distance service ("Common Line Charge"); (2) federal and

state “Universal Service Fund” fees that are also tied to the provision of long distance services (“USF Fees”); (3) charges for optional services separate from local exchange service, such as caller ID and call waiting (“Optional Charges”); and (4) revenue collected from subscribers on a pass-through basis to cover the cost of the City’s license taxes (“License Tax Fees”).

Here, in granting summary judgment to Respondents, the trial court again committed two errors: First, by interpreting the ordinances contrary to their terms, the trial court erroneously determined that Respondents were entitled to judgment as a matter of law. Second, by ignoring Appellants’ uncontroverted evidence, and by crediting Respondents’ controverted evidence, the trial court ignored genuine issues of material fact about the application of Respondents’ ordinances to the disputed revenue streams. The trial court’s grant of partial summary judgment as to Plaintiff’s Counts I through V should be reversed.

The trial court’s interpretation of municipal ordinances is reviewed *de novo*. *City of University City*, 371 S.W.3d at 17. The trial court’s determination that the evidence raised no genuine dispute of material fact also is reviewed *de novo*, drawing every reasonable factual inference in favor of Appellants. *Turner*, 318 S.W.3d at 664.

A. The Five Municipal Tax Ordinances Must Be Strictly Construed in Favor of the Taxpayers.

In addition to overlooking multiple disputed issues of material fact, the trial court’s judgment also committed legal errors by impliedly misinterpreting and misapplying the five tax ordinances. “An ordinance is interpreted using the same rules as

apply when interpreting a state statute.ö *City of University City v. AT&T Wireless Services*, 371 S.W.3d 14, 18 (Mo. App. E.D. 2012). öWhen construing a statute, the primary rule is to give effect to legislative intent as reflected in the plain language of the statute.ö *Id.* (citing *Brinker Missouri, Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 437-38 (Mo. banc 2010)); *see also Util. Serv. Co. v. Dep't of Labor & Indus. Rels.*, 331 S.W.3d 654, 658 (Mo. 2011). If the legislative intent is not discernible from the plain language of the statute, courts then resort to other rules of statutory construction. *State v. Liberty*, 370 S.W.3d 537, 549 (Mo. 2012); *Util. Serv. Co.*, 331 S.W.3d at 658. Courts can also look to historical context and the circumstances surrounding the enactment of a statute to discern legislative intent. *See S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 668 (Mo. 2009) (considering statutesøhistorical context after rules of statutory construction were inconclusive); *see also Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. 1983) (öFurther insight into the legislature's object can be gained by identifying the problems sought to be remedied and the circumstances and conditions existing at the time of enactment.ö).

Tax laws must be strictly construed in favor of the taxpayer. ö[W]here any real doubt exists in the construction of a taxing statute, the law requires that it be strictly construed in favor of the taxpayer. . . . ***Tax laws must be strictly construed and, if the right to tax is not plainly conferred by statute, it will not be extended by implication.***ö *United Airlines v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. 1964) (citations omitted) (emphasis added). Because of this presumption, ö[i]n a taxing statute there must be ***specific authority***, or authority necessarily implied, for the impositionö of the tax. *Id.*

(emphasis added); *see also St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (citation omitted) (õ[T]axing statutes must be construed strictly, and taxes are not to be assessed unless they are expressly authorized by law.ö).

The relevant text of each ordinance is as follows:

- Section 615.010 of the Aurora Code states:

Every person, firm, company or corporation now or hereafter engaged in the business of furnishing *exchange telephone service* in the City of Aurora, Missouri, shall pay the said City as an annual license tax, six percent (6%) of the gross receipts *derived from the furnishing of such service within said City*, as hereinafter set forth.

Appx. p. A5 (LF, p. 220) (emphases added).

- Cameron Ord. No. 2878 § 1 states:

SECTION 1. Every person, firm, company or corporation now or hereafter engaged in the business of furnishing *exchange telephone service* in the City of Cameron, Missouri, shall pay the said City as an annual license tax, five percent (5%) of the gross receipts *derived from the furnishing of such service within said City*, as hereafter set forth.

Appx. p. A7 (LF, p. 223) (emphases added).

- Section 665.010 of the Harrisonville Code states:

A license tax of five percent (5%) of the taxable gross receipts of any telephone company *rendering telephone service and operating within the City of Harrisonville*, Missouri, is hereby imposed. For purposes of this Chapter, a

telephone company rendering telephone service and operating within the City of Harrisonville, Missouri, shall include every person or entity ***providing any telephone, telegraph and other telecommunications services within the City*** as are permitted by law to be subject to this gross receipts tax.

Appx. p. A9 (LF, p. 226) (emphases added).

- Section 615.020 of the Oak Grove Code states:

Every person now or hereafter engaged in the business of ***supplying*** gas, ***telephone service*** or water for compensation for any purpose ***in the City of Oak Grove*** and every manufacturing corporation now or hereafter engaged in the manufacture of gas for compensation for any purpose in the City of Oak Grove shall pay to the City of Oak Grove as a license tax a sum equal to five percent (5%) of the gross receipts ***from such business***.

Appx. p. A11 (LF, p. 231) (emphases added).

- Section 640.020 of the Wentzville Code states:

Every person engaged in the business of ***supplying*** electricity, ***telephone service***, natural or manufactured gas by and through a central distribution system, or water for compensation ***in the City*** shall pay to the City a license tax of five percent (5%) of the gross receipts ***from such business***, except as otherwise provided.

Appx. p. A13 (LF, p. 234) (emphases added).

The trial court's summary order disposing of Counts I-V erroneously failed to identify any "specific authority," *United Airlines*, 377 S.W.2d at 448, or any "express[]

authoriz[ation], *Prestige Travel*, 344 S.W.3d at 712, in the five municipal tax ordinances for the new taxes that they seek to impose. The trial court offered no explanation for its conclusion that the specific ordinances applies to the disputed categories of revenue. By their plain terms, the ordinances do not apply to all *gross receipts* of any telecommunications-related business having any contact with the Cities. As discussed below, though there is some immaterial variation in their phrasing, each ordinance is instead limited to revenues derived from the provision of local exchange telephone service provided within the particular city. *See infra*, Point III.B-D.

**B. The Aurora and Cameron Ordinances Apply Only to Revenues
Derived Directly From the Furnishing of Exchange Service Within
Each City.**

The Aurora ordinance expressly limits its reach to: (i) *gross receipts derived from* (ii) *exchange telephone service* (iii) provided *“within said City* [of Aurora]. *Appx. p. A5, § 615.010 (LF, p. 220) (emphasis added). Cameron’s ordinance is virtually identical, except for the tax rate. Appx. p. A7, § 1 (LF, p. 223).*

By their terms, these ordinances do *not* apply to all *gross receipts* related to any kind of telecommunications service. They are limited by their plain terms to gross receipts specifically *derived from the furnishing of exchange telephone service* that is provided *within said City*. Therefore, interpreting the Aurora and Cameron ordinances requires a court to determine what *exchange telephone service* means, and what it means to *furnish* such service *within* a city. In such interpretation, the

ordinances must be strictly construed with doubts resolved in favor of the taxpayer.

Prestige Travel, 344 S.W.3d at 712.

**1. “Exchange telephone service” is an industry term of art
that encompasses only purely local telephone service.**

Both legal and factual authorities demonstrate that the phrase “exchange telephone service” is an industry term of art that refers solely to local telephone exchanges, in contrast to long-distance, cost-recovery surcharges, and optional services. In well-established telephone parlance, an “exchange” is a limited geographic area in which local calls are made, and “exchange service” refers to geographically limited local service within that area. This understanding is confirmed by well-established case law, industry manuals, Missouri statutes, and evidence from persons with expertise in the field.

First, numerous courts have reviewed the meaning of “exchange telephone service” and have determined that it refers to the basic service that permits callers located within a given telephone exchange to place a telephone call within the geographic confines of that exchange.²

For example, in *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984), the court noted that “[l]ocal exchange telephone service is the ordinary service used in nearly all homes and businesses. From a technical standpoint, it involves

² For a map of the hundreds of geographical “exchanges” in the State of Missouri, see http://mtia.org/wp-content/uploads/2014/01/missouri_map_2010.pdf (last visited August 1, 2014).

a wire connection from the telephone set to a switching system in a nearby telephone company switching center that is in turn connected by transmission trunks to switching systems in other switching centers within the exchange area.ö *Id.* at 985 n.4. Similarly, in *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), the court contrasted “telephone exchange service” with long-distance service, noting that “[t]he term ‘telephone exchange service’ is a statutory term of art, and means service within a discrete local exchange system.ö *Id.* at 1045. *See also, e.g., Pacific Tel. & Tel. Co. v. Hill*, 365 P.2d 1021, 1023 (Or. 1961) (defining “exchange telephone service” [to] mean local calls, that is, calls that can be made without the payment of long distance charge); *GTE Sprint Comm’s Corp. v. Dep’t of Treasury*, 445 N.W.2d 476, 478-79 (Mich. Ct. App. 1989) (“[T]elephone exchange service is what a residential or commercial customer utilizes when he picks up the telephone receiver, hears a dial tone and places a toll-free call to a local telephone number; it is nothing more and, more importantly, it is nothing less.ö). Under these legal authorities, none of the four revenue streams at issue constitutes “exchange telephone service.ö

Likewise, Newton’s Telecom Dictionary, a well-respected industry authority, defines an “exchange” as “[a] geographic area established by a common communications carrier for the administration and pricing of telecommunications services in a specific area that usually includes a city, town or village.ö NEWTON’S TELECOM DICTIONARY 377 (23rd ed. 2007).

This interpretation of “exchange telephone service” to refer to the provision of local phone service within an “exchange” also derives support from the usage of similar

terms in Missouri's telecommunications statutes.³ These statutes draw a basic distinction between "exchange" services, which are geographically limited to the "exchange," and "interexchange services," which are not so limited. The Missouri statute defines "exchange" as a specific, geographically limited area: "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service." RSMo. § 386.020(16), Appx. p. A53. The Missouri statute defines the term "local exchange telecommunications service" as "telecommunications service between points within an exchange." RSMo. § 386.020(32), Appx. p. A54. Under these definitions, an "exchange" is a limited "geographical area for the administration of telecommunications services," and "local exchange telephone service" is specifically defined as service "between points within an exchange." *Id.*

By contrast, § 386.020 consistently uses the term "interexchange service" to refer to non-local service, thus drawing a distinction between "exchange" service (geographically limited, local service within an exchange), and "interexchange" service (geographically unlimited, non-local service between exchanges). Paragraph (25) explicitly defines "interexchange telecommunications service" as "service between points in two or more exchanges." RSMo. § 386.020(25), Appx. p. A53. Paragraph (3) defines

³ While the Missouri statutory definitions are not dispositive of the interpretation of the Cities' ordinances, they nonetheless demonstrate the relevant differences here between "exchange" service and other types of telephone service.

“basic interexchange telecommunications service” to refer to service “between points in different local calling scopes.” RSMo. § 386.020(3), Appx. p. A51. Paragraph (17) defines “exchange access service” in a way that explicitly contrasts the “local exchange telecommunications network” from the “interexchange telecommunications service.” RSMo. § 386.020(17), Appx. p. A53. In short, the definitions in § 386.020 confirm that a telephone “exchange” refers to a geographically defined local area, and “exchange service” refers to local service in contrast to “interexchange service,” which refers to non-local service between telephone exchanges.

In addition, the Missouri statutes support the limited, geographically focused interpretation of the phrase “exchange telephone service” by defining “local exchange telephone service” more narrowly than “basic local telecommunications service.” As noted above, “local exchange telephone service” is defined as service “between points within an exchange.” RSMo. § 386.020(32), Appx. p. A54. By contrast, the same section defines “basic local telecommunications service” more broadly as “two-way switched voice service within a local calling scope” that comprises any of eight listed services. RSMo. § 386.020(4), Appx. p. A51. The contrast between these two definitions again emphasizes the narrow, geographically based definition of “exchange” telephone services.

All these authorities serve to corroborate the factual evidence of experienced industry professionals submitted by Appellants to the trial court, discussed further below. *See* Deposition Testimony of Doug Galloway, LF, p. 1221 (referring to LF, pp. 1113-1117) (testifying that “telephone exchange service would be local telephone services”);

Affidavit of Kiran Seshagiri (Seshagiri Aff.) ¶ 3, LF, p. 1216 (attesting that telephone services in all five ordinances refer to “basic local exchange telephone service”).

Respondents submitted no factual evidence to rebut this testimony, or to negate the genuine dispute of material fact on this issue.

2. The Aurora and Cameron ordinances confirm their narrow scope by restricting their coverage to revenues “derived from the furnishing of such services within” each City.

While limiting their coverage to “exchange telephone service,” both the Aurora and Cameron ordinances explicitly restrict their coverage to revenues “derived from the furnishing of such services *within*” each City. Appx. pp. A5, A7 (LF, pp. 220, 223) (emphasis added). This language provides an independent basis to conclude that each ordinance extends only to basic local telephony.

When a statutory term is not defined, the ordinary and natural meaning found in the dictionary should be used. *See Missouri Gaming Comm’n v. Missouri Veterans’ Comm’n*, 951 S.W.2d 611, 612 (Mo. banc 1997). The ordinary and natural meaning of the phrase “within” each city refers to activities that occur *entirely* within—not *partly* within but mostly outside—each City. *See, e.g.,* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2627 (2002) (defining the preposition “within” to mean “in the inner or interior part of: inside of”). In fact, the principal meaning of “within” is to connote that something is *entirely* inside of something else. *See id.* (stating that the preposition “within” is “used as a function word to indicate enclosure or containment”).

Thus, it is contrary to the plain meaning of the English language to claim, as Respondents do, that an activity that occurs largely outside the city limits—such as a long-distance call—is one that occurs “within” the city. See, e.g., *May Department Stores Co. v. University City*, 458 S.W.2d 260, 262-263 (Mo. banc 1970). In *May Department Stores*, the City of University City imposed a license tax on merchandise sold “within” the City. *Id.* at 262. The City attempted to impose the tax on all sales occurring at a shopping complex that straddled the border between University City and the abutting municipality of Clayton. *Id.* This Court held that University City could tax only those sales that occurred in the portions of the shopping complex that lay on University City’s side of the border, as only those occurred “within” the City. *Id.* This Court expressly rejected “any claim of University City that it is entitled to compute the amount of the license tax on the basis of the sale of goods, wares, merchandise or personal property made *outside* the City.” *Id.* (emphasis added).

Just as in *May Department Stores*, the Cities here cannot lawfully apply their ordinances to telephone services that do not occur wholly “within” each City. Indeed, it is the hallmark of exchange telephone services that they occur within the confined geographic area of the local exchange, and it is the hallmark of interexchange telephone services that they do not occur “within” the local geographic exchange. The taxing ordinances’ explicit limitation of coverage to telephone services furnished “within” each city, therefore, confirms and reinforces their limitation of coverage only to “exchange telephone service.”

In addition, both statutes include further narrowing language by specifying that the tax only applies to the gross receipts “derived from the furnishing of such [exchange telephone] services,” rather than imposed on all revenues. Appx. pp. A5, A7 (LF, pp. 220, 223). This language distinguishes this Court’s cases holding that certain taxes on “gross receipts” applied to all income of the taxed entity without differentiation. Most notably, in *Ludwigs v. Kansas City*, this Court held that a municipal tax ordinance on a company’s “gross receipts” encompassed all of the company’s receipts, not just those that were collected in payment for the company’s services. *Ludwigs v. Kansas City*, 487 S.W.2d 519 (Mo. 1972). But the ordinance at issue in *Ludwigs* differed from the ordinances at issue here in that it taxed “the company’s gross receipts *collected from its customers in the city*,” *id.* at 520 (emphasis added), whereas the ordinances at issue here tax “gross receipts *derived from the furnishing of such [exchange telephone] service within said City*,” *e.g.*, Aurora Code § 615.010, Appx. p. A5. Unlike the statute in *Ludwigs*, these ordinances do not apply to all gross receipts received from customers for any reason; rather, the ordinances explicitly apply only to the narrow category of gross receipts derived from the furnishing of local exchange services within the city.

3. The original import and historical understanding of the tax ordinances limited their application to local exchange service.

Even if there were any doubt that the Cameron and Aurora ordinances apply only to local exchange service, two additional powerful factors confirm this understanding:

(i) the historical context of each ordinance's enactment, and (ii) the decades-long enforcement practices of the Cities.

It is well established that a longstanding historical understanding and enforcement practice under a regulation or ordinance is entitled to great weight. *See, e.g., Davis v. United States*, 495 U.S. 472, 484 (1990) (We give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.); *Atchinson, I. & S.F. Ry. v. Pena*, 44 F.3d 437, 445 (7th Cir. banc 1994) (Easterbrook, J., concurring) (We pay attention to whether [an agency] has longstanding, consistent views, for a legal interpretation adopted soon after the statute's enactment may be the best evidence of the meaning the words carried in the legal profession at the time.); *Racine Harley-Davidson v. State Div. of Hearings & Appeals*, 717 N.W.2d 184, 191-92 (Wis. 2006) (noting that a reviewing court defers to an agency's interpretation when the agency interpretation is one of long standing, and will not defer when the agency's position on the issue has been so inconsistent as to provide no real guidance).

Here, the Cities acknowledge that the operative language of all five ordinances dates back many decades. In particular, according to Respondents, the Cameron ordinance was first enacted in 1962, LF, pp. 392-394; and the Aurora ordinance was first enacted in 1952, LF pp. 390-391. Both ordinances were thus enacted at a time before the proliferation of technologically complex telephony, when the distinction between *exchange* (local) and *interexchange* (long-distance) telephony was fundamental. The authorities construing telecommunications ordinances enacted during that time period

emphasize this core distinction. See *Southern Pacific*, 740 F.2d at 985 & n.4 (observing that “ordinary switched telephone services” prior to 1969 included two basic services, “local exchange telephone service” and “long distance service”); *North Carolina Utilities Comm’n*, 552 F.2d at 1045 (4th Cir. 1977) (defining “telephone exchange service” as “service within a discrete local exchange system,” as distinguished from “toll, or long distance, service”); *Pacific Telephone & Telegraph*, 365 P.2d at 1023 (Or. 1961) (drawing the basic distinction between “exchange telephone service, by which we mean local calls, that is, calls that can be made without the payment of a long distance charge, and toll service” meaning long distance calls that require the payment of a sum in addition to the monthly charge which all subscribers pay); *GTE Sprint*, 445 N.W.2d at 479 (Mich. Ct. App. 1989) (noting that “the term ‘telephone exchange service’ is a term of art and refers to service within a local exchange system as contrasted with long-distance service”).

Thus, at the time the ordinances were enacted, it was well understood that telephone service had two fundamental components: local exchange service and long-distance service. By referring to telephone service “within” each City, therefore, the Aurora and Cameron ordinances naturally referred to the former, more basic component of then-existent telephone service, *i.e.* local exchange service.

Finally, Respondents’ recent interpretation of these ordinances departs from decades of settled understanding and enforcement practice. As noted, each Respondent City contends that its ordinance has been in effect for many decades. But, as a long-standing practice, Appellants interpreted these ordinances to apply only to local exchange

telephone service. LF, p. 1216. For the decades these ordinances have been in effect, no Respondent City had disputed the Appellants' calculation and remission of these taxes. LF, p. 1032. It was not until in or around 2010 that the Respondents, for the first time, took the position with Appellants that their ordinances applied to revenue received from other services. LF, pp. 623-627.

This longstanding mutual understanding and enforcement practice provides strong support for Appellants' interpretation of these ordinances. Much like a contract, "[w]here the parties themselves have placed a knowledgeable, uniform, consistent, and long-time construction on the ordinances in question, such a construction is persuasive and ordinarily will be accepted by the courts." *Mansur v. Trustees of Hickory Hill*, 895 S.W.2d 611, 613 (Mo. App. E.D. 1995); *see also Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 852 (Mo. banc 1960).

C. Multiple Genuine Disputes of Material Fact Precluded Summary

Judgment on the Interpretation of the Municipal Tax Ordinances.

The trial court also erred by failing to recognize that multiple disputed issues of material fact precluded entry of summary judgment on the Cities' claims based on the municipal tax ordinances. As Appellants demonstrated in the trial court, disputed issues of material fact regarding the meaning and application of these ordinances precluded entry of summary judgment. These disputed issues include at least the following:

- 1. The meaning of the technical term "exchange telephone service" is a matter of expert opinion and Respondents**

failed to offer any expert testimony in support of their interpretation.

As quoted above, two of the ordinances expressly refer to “exchange telephone service.” Appx. p. A5 (LF, p. 220); Appx. p. A7 (LF, p. 223). For the reasons discussed below, moreover, the reference in the other ordinances to “telephone service” should be interpreted to refer to “exchange telephone service” as well. *See infra*, Point III.D. The interpretation of the industry term of art, “exchange telephone service,” raises factual questions on which Appellants submitted uncontroverted evidence, and on which Respondents submitted no evidence at all. For these reasons, as well, the trial court erred in granting summary judgment.

When a statute, or ordinance, uses a term of art, courts must assume that the drafters “intended it to have the meaning ascribed to it by the industry under regulation.” *City of Dallas v. FCC*, 118 F.3d 393, 395 (5th Cir. 1997) (citing *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 342, 111 S. Ct. 807, 810, 112 L. Ed. 2d 866 (1991)). A Missouri statute explicitly prescribes that “technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.” RSMo. § 1.090; *see also BASF Corp. v. Dir. of Revenue*, 392 S.W.3d 438, 444 (Mo. 2012).

In such cases, expert testimony is appropriate (and often *necessary*) to ascertain the meaning and usage of the phrase. *See, e.g., Strong v. Am. Cyanamid Co.*, 261 S.W.3d 493, 514 n.5 (Mo. Ct. App. 2007) (noting that “the plaintiff should present expert testimony concerning the interpretation of highly technical statutes and regulations”);

UMB Bank, N.A. v. City of Kan. City, 238 S.W.3d 228, 233 (Mo. App. 2007) (holding that “the phrase “necessary expenses of operation” is an accounting term of art,“ such that “its meaning and usage is a proper subject for expert testimony”); *City of Sullivan v. Truckstop Rest., Inc.*, 142 S.W.3d 181, 188-89 (Mo. App. 2004) (describing expert testimony submitted to expound the meaning of terms left undefined by electricity ordinance, such as “load factor” and “connected load”).

In the trial court, Appellants submitted evidence of experienced industry professionals attesting that “exchange telephone service” is a term of art that refers exclusively to local service. First, Mr. Kiran Seshagiri, the Director of Tax Systems and Billing for CenturyLink, Inc., attested that telephone service in all five tax ordinances refers to “basic local exchange telephone service.” *See Seshagiri Aff.*, ¶ 3, LF, p. 1216. Similarly, Appellants submitted deposition testimony of Mr. Doug Galloway, attesting that “telephone exchange service would be local telephone services.” LF, p. 1221 (referring to LF, pp. 1113-1117). Appellants also cited numerous industry authorities attesting to this meaning of “exchange telephone service.” LF, pp. 1036-1037; *see also supra*, Point III.B.

Respondents submitted no factual evidence to rebut this testimony, or to negate the expert testimony Appellants submitted on this issue. The fact that Respondents failed to provide any evidence on this disputed issue raises, at least, a critical dispute of material fact that should have foreclosed the entry of summary judgment on the tax ordinance claims.

2. Respondents failed to offer any relevant factual evidence on the issue whether the disputed charges constitute “exchange telephone service.”

Similarly, the trial court’s ruling overlooked disputed issues of fact as to whether the four disputed revenue streams constitute funds derived from the provision of local telephone service within each City. Just as the terms of art in the statute are technical and call for expert testimony, *Strong*, 261 S.W.3d at 514 n.5, the classification of the services are technical classifications that likewise call for expert testimony. Respondents have, to this point, failed to offer any evidence of the substance of the services that are included in the four revenue streams subject to this summary judgment. LF, p. 981. In Respondents’ briefing, they only offered evidence that Appellants have not paid taxes on these revenue streams. *Id.* As such, the Respondents have failed to meet their burden of proving the revenue streams are subject to the ordinance. Respondents must show that the substance of the services allows them to be classified as “telephone exchange services” or “telephone services.”

3. Respondents failed to offer any factual evidence demonstrating that the customer charges at issue were incurred “within” or “in” each of the Cities.

As quoted above, each of the municipal ordinances at issue limits the geographic scope of the ordinance to services “in the City” or “within the City.” Appx. pp. A5, A7, A9, A11, A13 (LF, pp. 220, 223, 226, 231, 234). Again, this express limitation on the Respondent Cities’ ability to collect tax revenue creates a factual inquiry to determine

whether the revenue streams at issue here are provided “in the City” or “within the City.” See LF, pp. 1036-1037. Appellants at summary judgment did not offer any evidence as to which, if any, of the four revenue streams was incurred in or within the Respondent Cities. LF, pp. 977-1012. Indeed, the Respondents’ Memorandum in Support of their Motion for Partial Summary Judgment focused only on the term “gross receipts” and ignored all other relevant limitations found within the ordinances, such as the geographic limitation. Without proving that the revenue streams were created in or within the Respondent Cities, Respondents have failed to show that the tax ordinance covers the four revenue streams at issue.

D. The Harrisonville, Oak Grove, and Wentzville Ordinances Likewise Apply Only to Revenues from Supplying Local Service in Each City.

For similar reasons, the Wentzville, Oak Grove, and Harrisonville taxing ordinances apply only to revenues derived from the “rendering” or “supplying” of local exchange services “within” each city. The Harrisonville ordinance imposes a license tax on the revenues “of any telephone company rendering telephone service and operating *within* the City.” Appx. p. A9 (LF, p. 226) (emphasis added). The Oak Grove ordinance applies revenues from the business of “supplying [] telephone service [] *in the City* of Oak Grove.” Appx. p. A11 (LF, p. 231) (emphasis added). And the Wentzville ordinance likewise imposes a license tax on the revenues from “the business of supplying [] telephone service [] *in the City*.” Appx. p. A13 (LF, p. 234) (emphases added).

These three ordinances do not use the same term of art, “exchange telephone service,” as the Aurora and Cameron ordinances. But the relevant text of each ordinance

is similar to the Aurora and Cameron ordinances, the ordinances were enacted under similar historical circumstances, and each ordinance is limited in coverage to local telephone services.

Each ordinance limits its coverage to telephone service “within” or “in” each city. As discussed above, this language provides an independent basis to conclude that these ordinances apply exclusively to local telephone service, because the ordinary and natural meaning of “within” and “in” refers to activities that occur entirely inside the cities— not partly inside but mostly outside each city, as Respondents contend. *See supra*, Point III.B.2.

Each statute includes limiting language that refers to revenues derived from “supplying” or “rendering” of telephone service in each city. This language distinguishes these ordinances from the ordinance in this Court’s “gross receipts” cases that do not include comparable limiting language. *See supra*, Point III.B.2 (discussing *Ludwigs*, 487 S.W.2d 519).

Each ordinance is equally subject to the rule that taxing ordinances are to be strictly construed in favor of the taxpayer. Thus, even if the ordinances were ambiguous as to whether they encompass services furnished “inside,” or “partly inside but mostly outside,” the cities, they must be construed in Appellants’ favor to refer to purely local telephone services. *See supra*, Point III.A.

Further, like the Cameron and Aurora ordinances, each ordinance was enacted under historical circumstances strongly indicating that the original meaning of the ordinance was limited to local exchange service, as opposed to long-distance or other

services; and each ordinance was subject to a decades-long uniform enforcement practice from which the Cities did not depart until 2010. *See supra*, Point III.B.3. In particular, according to Respondents, the Harrisonville ordinance was first enacted in 1958, LF, pp. 395-397; the Oak Grove ordinance was first enacted in 1948, LF, p. 401-402; and the Wentzville ordinance was enacted in 1967, LF, p. 1386 (codified at LF, p. 404). Just as for the Aurora and Cameron ordinances, no evidence suggests that Harrisonville, Oak Grove, or Wentzville ever disputed Appellants' reliance on local exchange service as the appropriate tax base under the ordinances.

In sum, this Court should give the same construction to the Harrisonville, Oak Grove, and Wentzville ordinances as to the Aurora and Cameron ordinances: all five tax ordinances apply only to revenues derived from the provision of local exchange telephone service within each city.

E. Because They Apply Strictly to Local Telephone Service, the Five Taxing Ordinances Do Not Apply to the Disputed Revenue Streams.

Because the taxing ordinances apply only to revenues derived from supplying local exchange telephone service, they do not include the four revenue streams in dispute in this case: (1) the Common Line Charge, (2) the USF Fees, (3) the Optional Charges, and (4) the License Tax Fees. Each of these revenue streams derives from activities that are wholly separate and distinct from the provision of local exchange service.

- 1. The Common Line Charge is a long-distance-related charge that is not derived from the furnishing of local exchange service within each City.**

First, the Common Line Charge is fundamentally a non-local charge, specifically imposed for *interstate* connections. It is thus the antithesis of “exchange telephone service” or service “within” a municipality. As multiple authorities confirm, the Common Line Charge is a charge for a customer’s “connection into the *interstate* network,” not part of local exchange service. *National Ass’n of Reg. Util. Comm’n’rs v. FCC*, 737 F.2d 1095, 1113 (D.C. Cir. 1984) (holding that Common Line Charges are designed to compensate for connection to the long-distance network); *see also Qwest Corp. v. Wyoming Dep’t of Rev.*, 130 P.3d 507, 515 (Wyo. 2006). For example, in *Qwest v. Wyoming*, the court considered whether the Common Line Charge was subject to a Wyoming excise tax on “the sales price paid for intrastate telephone and telegraph services.” 130 P.3d at 513. The state argued that because Qwest was providing a telephone service “access to long distance services” to its customers in Wyoming, and because all of the equipment used was located completely within Wyoming, the Common Line Charge should be subject to the Wyoming tax. *Id.* The court disagreed, holding that the Common Line Charge is compensation for “providing interstate long distance access,” not “intrastate telephone service,” which makes clear that it neither arises out of “exchange telephone service” nor arises from service “within” or “in” a city. *Id.* at 515-17. Similarly, in *City of Dallas v. GTE Southwest*, 980 S.W.2d 928 (Tex. App. 1988), the court affirmed the jury’s conclusion that the Common Line Charge was not taxable under an ordinance taxing “telecommunication service within the City of Dallas.” *See id.* at 938-939 (holding that “revenues from long distance network access fees and [Common

Line Charge] are excluded from the payment base of telecommunications service within the city, for purposes of city tax).

Factual evidence from an industry professional supports this indisputable understanding of the Common Line Charge. For example, Appellants submitted to the trial court the Seshagiri Affidavit, which attested that “[t]he end user common line charge (Common Line Charge) is a charge for a customer’s connection to the *interstate* network” LF, p. 1217, ¶ 13 (emphasis in original). Respondents provided no relevant evidence on this point and the trial court erred in granting summary judgment in light of this disputed material fact.

Lacking any authority to show that the Common Line Charge is “exchange telephone service,” Respondents submitted to the trial court portions of five customer bills that included the Common Line Charge in a list of charges under the subheading “Local Exchange Service.” See LF, pp. 1344-1347, 1350-1355, 1363-1366, 1369-1372, and 1377-1382. According to Respondents, these five bills provide “the best evidence that revenues collected from the Common Line Charge are taxable gross receipts derived from exchange telephone service.” LF, p. 1256.

On the contrary, the characterization of the Common Line Charge on customer bills designed for review by lay persons has little import. A company may associate a charge like the Common Line Charge with Local Exchange Service on a bill even though it does not qualify as a *part* of Local Exchange Service. Indeed, one doubts that Respondents would concede that the fact that the other three disputed charges are located

outside of the category “Local Exchange Service” on the customer bills is definitive proof that they do *not* belong in that category.

In fact, the question whether the Common Charge Line charge is covered by the ordinances should be determined by what that Charge *actually is*, not determined by where Appellants situate it on their bills. *See City of Dallas v. FCC*, 118 F.3d 393, 398 (5th Cir. 1997) (holding that the location of a charge on a customer bill does not “transform” the charge into something other than what the law says it is). No rule of statutory construction would authorize a court to consult Appellants’ billing practices when interpreting Respondents’ ordinances.

2. The Universal Service Fund (USF) Fees are long-distance charges that are not derived from the furnishing of local exchange service within the Cities.

Respondents likewise failed to show that they were entitled to judgment as a matter of law on the application of the Cities’ ordinances to USF Fees. USF Fees are required by law to be paid into a fund used to subsidize telecommunications services in rural areas and for income-eligible consumers, rural health care facilities, and schools and libraries. *See, e.g.*, <http://www.fcc.gov/guides/understanding-your-telephone-bill>; <https://www.missouriusf.com/>. Mandatory contributions to the federal fund are based *only on interstate and international telecommunications*, not on local or intrastate communications. *See* 47 C.F.R. § 54.706(b) (providing that “every entity required to contribute to the federal universal service support mechanisms í shall contribute on the basis of its projected collected *interstate and international* end-user telecommunications

revenues); 47 C.F.R. § 54.709(a)(1) (providing that “the subject revenues for the federal fund are *interstate and international* revenues derived from domestic end users”) (emphases added). Such charges are therefore wholly unrelated to the furnishing of exchange telephone service and do not relate to any revenue arising “within” or “in” any of the cities.

In the trial court, Respondents offered neither legal nor factual authority in support of their claim that USF Fees “arise out of Defendants’ business of furnishing exchange telephone service.” LF, p. 1258. They simply asserted, without evidence, that the proposition is “indisputable, because Defendants collect such amounts from identifiable customers specifically within each of the Cities.” *Id.* Apart from that bare assertion, Respondents’ whole argument as to USF fees was to reiterate the definition of “gross receipts.” LF, p. 1258. USF fees unquestionably derive solely from non-local, interstate or international communications. Thus, they fall outside the ambit of the taxing ordinances.

**3. The Optional Charges are distinct from local telephony
and are not derived from the furnishing of exchange
telephone service within each City.**

Like the other charges at issue, Respondents failed to make any proper showing that various Optional Charges, such as voicemail and call waiting, constitute revenues derived from the provision of local exchange services within each city. For example, among the evidence adduced by Respondents are redacted versions of Appellants’ tariffs for “General **and** Local Exchange Tariff,” which Respondents cite as proof that these

optional charges are “undeniably gross receipts derived from furnishing “exchange telephone service.” LF, p. 1259. But the redacted tariffs submitted by Respondents conveniently excluded the provisions that address “Local Exchange Service” as a distinct category of service, quite apart from the “Custom Calling Charges” section that includes the optional charges at issue here. Compare Respondents’ Exhibits at LF, pp. 639-673, Spectra tariff; LF, pp. 674-711, Embarq tariff; LF, pp. 712-782, CenturyTel tariff to Appellants’ Exhibits at LF, pp. 1475-1531, Spectra tariff; LF, pp. 1532-1573, Embarq tariff; LF, pp. 1574-1625, CenturyTel tariff.

In fact, CenturyLink’s tariffs demonstrate that the Optional Charges are not taxable local exchange services. The tariffs, which are filed with and approved by the Missouri Public Service Commission, provide definitive, legally authoritative definitions of CenturyLink’s services. See *Allstates Transworld Vanlines v. Southwestern Bell Co.*, 937 S.W.2d 314, 317 (Mo. Ct. App. 1996) (“[A] tariff that has been approved by the Commission becomes Missouri law. As a result, the tariffs have the same force and effect as a statute directly prescribed from the legislature.”) (citation omitted). According to those tariffs, “Exchange Service” is

[t]he furnishing of facilities for the telephone communication within an exchange area, in accordance with the regulations and charges specified in the Local or General Exchange Tariffs.

LF, p. 1582; see also LF, p. 1480. The tariffs separately classify and list charges for “Local Exchange Service” and for “Custom Calling Services,” such as call waiting and caller ID. See, e.g., *id.*, LF, pp. 1592, 1594-1625. For example, residents of the City of

Wentzville can get Local Exchange Service on a one-party residential line for \$16.30 per month. *Id.*, LF, p. 1592. Then those local exchange subscribers can opt to purchase vertical and optional services (individually or in various bundles) at rates outlined in Section 6 of the tariff. LF, pp. 1594-1625. As another example, Embarq Missouri customers can choose to purchase packages that include “Local Exchange Service *plus* features and services,” LF, p. 1559, such as call waiting, call forwarding, caller ID, and three-way calling. In every instance, “Local Exchange Service” is listed as a distinct component of the package, separate from optional services. LF, pp. 1561-1565, 1567-1573. *See generally* LF, pp. 1559-1573.

4. The License Tax Fees are not covered by the taxing ordinances because they do not arise from the furnishing of local exchange telephone service within each City.

For similar reasons, Respondents failed to make any proper showing that the License Tax Fees constitute local exchange service provided within each of the cities. As noted above, the License Tax Fees are fees that the Appellants use to pass through the cost of the Cities’ license taxes to the customer. Thus, by seeking to tax Appellants’ receipts of the License Tax Fees, the Cities attempt to impose a tax upon their own tax. This “tax on the tax” theory has no “specific authority” or “express authorization” in any of the taxing ordinances. *United Airlines*, 377 S.W.2d at 448; *Prestige Travel*, 344 S.W.3d at 712. It should be rejected.

For each taxing ordinance, the text of the ordinance fails to provide any support for the tax on the tax. First, as quoted above, the Aurora and Cameron ordinances apply

to revenues derived from the furnishing of [exchange telephone] service within [each] City. Appx. pp. A5, A7 (LF, pp. 220, 223). The License Tax Fees are not derived from the furnishing of exchange telephone service; they are derived from Appellants' attempt to comply with the taxing ordinances themselves. To derive means to take or receive esp. from a source. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 608 (2002). Simply put, the source of taxable funds in the tax ordinances is exchange telephone service, not compliance with municipal taxing ordinances. Further, if there were any doubt or ambiguity about this question, the ambiguity must be resolved in favor of the taxpayer. *United Airlines*, 377 S.W.2d at 448; *Prestige Travel*, 344 S.W.3d at 712.

Likewise, the Harrisonville, Oak Grove, and Wentzville ordinances fail to provide any specific authorization for Respondents' tax on the tax theory. Under the Harrisonville ordinance, taxable revenues are those arising from rendering telephone service within the City, not from complying with the City's taxation ordinances. Under the Oak Grove and Wentzville ordinances, the taxable revenues are those arising from supplying telephone service in the City, not from complying with the City's taxation ordinances. In each case, to adopt Respondents' interpretation that the ordinances cover License Tax Fees would require, at very least, a stretch of the plain language of each ordinance to the point of distortion. Respondents' aggressive and unreasonable interpretation constitutes the exact opposite of strict construal in Appellants' favor. See *Prestige Travel*, 344 S.W.3d at 712.

Moreover, on the issue of License Tax Fees, the language of each of the five ordinances contrasts sharply with the ordinance at issue in *Ludwigs v. Kansas City*, 487

S.W.2d 519 (Mo. 1972). As noted above, in *Ludwigs*, the ordinance at issue levied an annual occupation license tax upon each utility company in an amount equal to a certain percentage of the company's *gross receipts collected from its customers in the city.* *Id.* at 520 (emphasis added). In other words, the license tax at issue in *Ludwigs* applied to all "receipts collected from its customers in the city," without differentiation. The ordinances in this case, by contrast, are expressly limited in application to revenues "derived from the furnishing of exchange telephone service within" Cameron and Aurora, derived from "rendering telephone service its within the City" in Harrisonville, and derived from "supplying its telephone service its in the City" in Oak Grove and Wentzville. Appx. pp. A5, A7, A9, A11, A13 (LF, pp. 220, 223, 226, 231, 234). While the *Ludwigs* ordinance contained an authorization to "tax the taxes" as undifferentiated "gross receipts collected from customers its in the city," *id.*, the ordinances at issue in this case do not.

In sum, the trial court erred by overlooking multiple issues of disputed material fact that should have precluded the entry of summary judgment on Counts I-V. The trial court's cursory order misinterprets and misapplies the tax ordinances to the four disputed revenues streams. For these reasons, the trial court's order granting summary judgment to the Cities on Counts I-V was in error, and it should be reversed.

IV. The trial court erred in ordering Respondents to pay over five years' worth of allegedly delinquent taxes on Counts I-V, because such recovery is partially barred by statute of limitations, in that the three-year limitations period set forth in RSMo. § 71.625.2, and in other Missouri statutes, applies to Respondents' claims for delinquent taxes; and genuine issues of material fact exist that preclude summary judgment in Respondents' favor.

If the Court were to deny Appellants' other Point as to Counts I-V, the applicable statute of limitations bars at least a portion of Respondents' claims.

The question of which statute of limitations applies to a given cause of action is a question of law, reviewed de novo. *D.A.N. J.V., III v. Clark*, 218 S.W.3d 455, 457 (Mo. App. W.D. 2006).

A. Respondents' tax claims are subject to a three-year limitation under RSMo. § 71.625.2.

Respondents' claims for delinquent business license taxes (Count I-V) are barred to the extent they seek relief for more than three years of alleged back taxes prior to the filing of the Petition. Under Missouri law, as amended in 2012, a claim for delinquent business license taxes is generally limited to three years:

The limitation for bringing suit for the collection of the delinquent tax and penalty shall be *the same as that provided in sections 144.010 to 144.510*.

RSMo. § 71.625.2, Appx. p. A43 (emphasis added). Section 144.220.1, in turn, provides:

In the case of a *fraudulent return or of neglect or refusal to make a return* with respect to any tax under this chapter, there is no limitation on the period of time

the director has to assessí . In *other cases*, every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within *three years* after the return was filed or required to be filed.

RSMo. § 144.220.1, .3, Appx. p. A49 (emphases added).

In their summary judgment filings, Respondents provided no evidence that this is a case of a fraudulent return or of neglect or refusal to make a return under RSMo. § 144.220. LF, pp. 340-1012, 1246-1575. Indeed, Respondents concede that Appellants submitted returns. LF, pp. 571-575, 583-585, 601-602, 604-606. Appellants have provided ample evidence that their returns were *correct*, and, in any event, were not fraudulently submitted. LF, pp. 1216-1218, 1475-1625; *see also supra*, Point III. Therefore this is one of the "other cases" referred to in § 144.220, and the three-year statute of limitations bars Respondents' claim for amounts allegedly due before **July 27, 2009**, because Respondents filed their Petition on July 27, 2012. LF, pp. 11-12.

The trial court, however, erroneously granted judgment for alleged delinquent amounts dating back to January 1, 2007 as to four of the five Respondents (Aurora, Cameron, Wentzville, and Oak Grove) – more than five years and six months before the Petition was filed – and amounts dating back to August 1, 2008 as to the other Respondent (Harrisonville) – four years before the Petition was filed. Appx. p. A2 (LF, p. 1672). Moreover, to the extent there is any disputed fact regarding whether Appellants "fraudulently" submitted returns, such a disputed fact precludes summary judgment. *Kansas City v. W.R. Grace & Co.*, 778 S.W.2d 264, 268 (Mo. App. 1989) ("When issues of fact are present, statute of limitations issues must be submitted to the jury.").

B. The three-year limitation period under RSMo. § 71.625.2 applies retrospectively.

In their summary judgment reply brief, Respondents contended that their claims are subject to a five-year limitation period, § 516.120, because the three-year period under § 71.625.2 was enacted after their initial Petition was filed, and § 71.625.2 does not apply retrospectively. LF, p. 1274. Respondents are incorrect.

A statute of limitations is a matter of procedural law, not substantive law, and therefore is presumed to apply retrospectively to all active cases at the time of enactment, unless the statute expressly manifests a contrary intent. *See State ex rel. Res. Med. Cntr. v. Peters*, 631 S.W.2d 938, 946-48 (Mo. App. W.D. 1982). As the court stated in *Peters*, “[a] general statute of limitations reposes the remedy only and not the right. It is procedural and not substantive. A statute which affects only procedure or remedy applies to all actions which fall within its terms, ***whether commenced before or after the enactment***, unless the statute expresses a contrary intention.” *Id.* at 946 (emphasis added); *see also State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. 1974) (“There are two recognized exceptions to the rule that a statute shall not be applied retrospectively: (1) where the legislature manifests a clear intent that it do so, and (2) where the statute is procedural only and does not affect any substantive right of the parties.”) (emphasis added). Section 71.625.2 does not express any intention that the amendment to the statute of limitations should apply only prospectively to not-yet-filed actions.

Further, municipal corporations, such as Respondents, are “creatures of the legislature” and have no vested or substantial rights immune to retrospective application of the law. *Savannah R-III Sch. Dist. v. Public Sch. Retirement Sys.*, 950 S.W.2d 854, 858 (Mo. 1997). The legislature may waive or impair the rights of creatures of the legislature, such as municipalities and other political subdivisions, at will. *See id.* (“As creatures of the legislature, the rights and responsibilities of school districts are created and governed by the legislature.”). Hence, the legislature may waive or impair the vested rights of school districts without violating the retrospective law prohibition.); *Graham Paper Co. v. Gehner*, 59 S.W.2d 49, 51-52 (Mo. 1933) (“The state may constitutionally pass retrospective laws impairing its own rights, and may impose new liabilities with respect to transactions already past on the state itself or on the governmental subdivisions thereof.”) (quoting *New Orleans v. Clark*, 95 U.S. 644 (1877)).

C. Even if RSMo. § 71.625.2 did not apply retrospectively, Missouri statutes otherwise impose a three-year limitation.

Even if § 71.625.2 did not apply retrospectively, a three-year limitation would nevertheless apply. Respondents are all cities of the third or fourth class, LF, pp. 176-177, and a three-year statute of limitation applies to tax claims of third and fourth class cities. *See* RSMo. § 94.150, Appx. p. A44 (tax collection statute applicable to third-class cities, incorporating provisions regarding state and county taxes); RSMo. § 94.310, Appx. p. A45 (tax collection statute applicable to fourth-class cities, incorporating provisions regarding state and county taxes); RSMo. § 144.220, Appx. pp. A49-A50 (imposing a three-year limitation on state and county tax assessments); *see also* RSMo. § 140.160,

Appx. p. A46 (imposing a three-year limitation on state and county collection of real estate taxes); RSMo. § 140.730, Appx. p. A47 (imposing a three-year limitation on state and county suits on personal tax bills); RSMo. § 141.080, Appx. p. A48 (imposing a three-year limitation on state and county suits for real estate taxes). Accordingly, Respondents' claims are subject to a three-year limitation.

D. The three-year limitation period governs, not the five-year statute of limitation under § 516.120.

Respondents advanced in the trial court the default five-year limitation period of § 516.120. That generic statute applies only if a different limitation is not otherwise provided under Missouri statutes. *See* § 516.120(1) (establishing a five-year limitation for actions upon obligations or liabilities, express or implied, except where a different time is herein limited). For the reasons stated above, multiple Missouri statutes provide a different, three-year limitation.

E. Even if the five-year limitation period applied, the trial court erroneously awarded damages for a period beginning more than five years before Respondents filed their Petition.

Even if a five-year period somehow applied, as Respondents contend, the trial court awarded damages for a period greater than five years, going back to January 1, 2007, as to four of the five Respondents (Aurora, Cameron, Wentzville, and Oak Grove). Appx. p. A2 (LF, p. 1672). Indeed, Respondents only claimed damages dating back to no earlier than July 28, 2007: "Any of Defendants' unpaid taxes in calendar years 2007-2012 which were due after July 28, 2007 are properly at issue in this case." LF, pp. 1275-

1276. Even under Respondents' theory, therefore, the trial court erred in awarding damages dating back to January 1, 2007.⁴

⁴ The trial court made the same error in its judgment under Cameron and Wentzville's right-of-way codes, awarding damages dating back to January 1, 2007, more than five years and six months after the case was filed. *See* Appx. p. A3 (LF, p. 1673); LF, p. 1002. The three-year limitations period described above applies to bar a significant portion of this recovery as well, as does (at the very least) the default five-year limitations period of RSMo. § 516.120.

- V. **The trial court erred in granting summary judgment on Counts XX-XXIV, because Respondents failed to establish any valid basis for liability against Appellants under RSMo. § 392.350, in that the defined terms “persons” or “corporations” that are authorized to bring suit under § 392.350 exclude municipalities such as Respondents, Respondents failed to establish that Appellants engaged in any substantively “unlawful” behavior as required under § 392.350, and Respondents failed to establish that there was no genuine dispute of material fact on the issue of “willfulness.”**

Counts XX-XXIV of the Second Amended Petition alleged that Appellants were liable under RSMo. § 392.350 for engaging in willful violations of the law, and were thus liable for attorneys' fees. LF, pp. 210-213, ¶¶ 160-180. Chapter 392 protects telecommunications subscribers from rate discrimination but does not apply to tax collectors seeking alleged underpayment of business license taxes. But without any discernible analysis, the trial court granted summary judgment to the Cities on those Counts. Appx. p. A4 (LF, p. 1674). The trial court erred and should be reversed for at least three reasons: (1) the Cities are not persons or corporations authorized to bring suit under RSMo. § 392.350; (2) the Cities failed to establish that the Appellants engaged in any unlawful acts or omissions, as required by § 392.350; and (3) even if the evidence suggested any unlawful behavior, the Cities failed to make any plausible showing of willful misconduct necessary for liability under the statute.

The trial court's determination that the evidence raised no genuine dispute of material fact is reviewed *de novo*, drawing every reasonable factual inference in favor of

Appellants. *Turner*, 318 S.W.3d at 664. The trial court's interpretation of state statutes is also reviewed *de novo*. *City of University City*, 371 S.W.3d at 17.

**A. The Cities Are Not “Persons” or “Corporations” Under RSMo.
§ 392.350 and Therefore Cannot Bring Suit under that Section.**

In relevant part, § 392.350 provides: “In case any telecommunications company shall do any act, matter or thing prohibited, forbidden, or declared to be unlawful by such telecommunications company shall be liable to the *person or corporation* affected thereby for all loss, damage or injury caused thereby. . . . An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any such *person or corporation*.” RSMo. § 392.350, Appx. p. A64 (emphasis added). Thus, only “persons” and “corporations” are authorized to bring suit under § 392.350. *Id.*

The Cities are not “persons” or “corporations” within the meaning of § 392.350. Section 392.180 states that “[t]he provisions of section 386.020, defining words, phrases and terms, shall apply to and determine the meaning of all such words, phrases and terms as used in sections 392.190 to 392.530.” RSMo. § 392.180, Appx. p. A59. The definitions of “person” and “corporation” set forth in RSMo. § 386.020 do *not* include municipalities or other government entities: “Corporation” includes a corporation, company, association and joint stock association or company. RSMo. § 386.020(11), Appx. p. A52. “Person” includes an individual, and a firm or copartnership. RSMo. § 386.020(40), Appx. p. A55.

Moreover, § 386.020 provides a separate definition of “municipality,” which states: “Municipality” includes a city, village or town. RSMo. § 386.020(34), Appx. p.

A54. Thus, § 386.020 defines “municipality” separately from both “person” and “corporation,” and it does not define “person” and “corporation” to include “municipalities.” “Persons” and “corporations” are thus distinct categories from “municipalities” under § 386.020.

In light of these definitions, § 392.350’s inclusion of two terms defined in § 386.020 (“person” and “corporation”) as entities authorized to sue, and its exclusion of another separately-defined term (“municipality”), demonstrate that § 392.350 authorizes only “persons” and “corporations” — but not “municipalities” — to sue. RSMo. § 392.350, Appx. p. A64.

Respondents urge that the definition of “person” is sufficiently broad to include “municipality” notwithstanding that “municipality” is defined separately from “person” in the same definitions section. LF, pp. 1003-1004. They seize upon the definition’s use of the word “include” to argue that the definition is broader than the items explicitly listed. *Id.* This argument has no merit. “In determining the meaning of a word in a statute, the Court will not look at any one portion of the statute in isolation. Rather, it will look at the word’s usage in the context of the entire statute to determine its plain meaning.” *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014). Here, the entire statutory context expressly provides separate definitions of “municipality,” “person,” and “corporation” in the same definitions section. RSMo. § 386.020, Appx. pp. A52, A54-A55.

Further, each definition of “person” and “corporation” comprises a list of words providing examples of what is included in each definition. *See* RSMo. § 386.020(11),

Appx. p. A52 (providing that “corporation” includes a corporation, company, association and joint stock association or company); *id.* § 386.020(40), Appx. p. A55 (providing that “person” includes an individual, and a firm or copartnership). When confronted with such a “list of words” in a statute, this Court “will apply the principle of statutory construction known as *noscitur a sociis* ó a word is known by the company it keeps.” *Union Elec. Co.*, 425 S.W.3d at 122. “Under this principle, a court looks to the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended.” *Id.* This principle forecloses Respondents’ argument that “person” and “corporation” in § 386.020 include governmental creatures such as municipalities. In each case, the items listed in each definition are not relevantly similar to municipalities.

The definition of “corporation” lists only *privately owned* entities that are all common forms of private business organization— “corporation, company, association and joint stock association or company.” RSMo. § 386.020(11), Appx. p. A52. No municipal entities are included. Likewise, the definition of “person” includes only private individuals or groups of private individuals— “individual,” “firm,” and “copartnership.” RSMo. § 386.020(40), Appx. p. A55. Again, no municipal entities are included. Thus, under the principle *noscitur a sociis*, the definitions of “person” and “corporation” include only entities that are relevantly similar to the listed entities— private business organizations, and private individuals or groups of individuals. They do not include municipalities, which fit squarely within the separate definition of

“municipality.” RSMo. § 386.020(34), Appx. p. A54 (defining “municipality” to include “a city, village or town”).

Moreover, under the Cities’ strained interpretation, the separate definition of “municipality” would be meaningless because municipalities would already be included in the definitions of “person” and “corporation.” The Cities’ interpretation thus runs afoul of the principle that a statute should not be interpreted to render any of its terms meaningless or without effect. *See, e.g., State ex rel. Nothum v. Walsh*, 380 S.W.3d 557 (Mo. banc 2012) (“When interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision.”).

Moreover, as noted above, in *Union Electric*, this Court emphasized that “[i]n determining the meaning of a word in a statute, the Court will not look at any one portion of the statute in isolation. Rather, it will look at the word’s usage in the context of the entire statute to determine its plain meaning.” *Union Elec. Co.*, 425 S.W.3d at 122. Other statutory sections that rely on the definitions in § 386.020 confirm that the legislature understood that municipalities constitute a separate class from “persons” and “corporations” under those definitions. The definitions in § 386.020 apply to all sections in Chapter 386. *See* RSMo. § 386.020 (providing that the definitions apply to terms “[a]s used in this chapter,” *i.e.* Chapter 386). Chapter 386 includes several instances where the legislature made clear that “municipalities” are distinct from “persons” or “corporations,” by listing municipalities separately from persons and corporations on the same lists. For example, § 386.390.1 refers to complaints by “any **corporation or person**, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or

manufacturing association or organization, *or any body politic or municipal corporation*” ö RSMo. § 386.390.1 (emphasis added). Again, § 386.572.1 refers to “*corporation, person*, public utility, or *municipality*.” RSMo. § 386.572.1 (emphasis added). The very same paragraph, moreover, grants a partial exemption to a “municipality” that does not apply to “persons” or “corporations.” *Id.*

Similarly, § 386.572.3 refers to violations of natural gas safety standards by “any *corporation, person*, public utility, or *municipality*.” RSMo. § 386.572.3 (emphasis added). Likewise, § 386.572.4 provides for vicarious liability for violations committed by employees and officers of “any *corporation, person*, public utility, or *municipality*.” RSMo. 386.572.4 (emphasis added). In sum, in sections governed by the definitions in § 386.020, the legislature repeatedly and consistently listed “municipality” separately from “person” and “corporation.” Thus, looking at “the word’s usage in the context of the entire statute,” *Union Elec. Co.*, 425 S.W.3d at 122, confirms that a “municipality” is not a “person” or “corporation” under § 386.020, but is treated as a distinct entity.

In the trial court, Respondents relied on the broader definition of “person” set forth among the generic definitions in RSMo. § 1.020(12), which states that “person” “may extend and be applied to bodies politic and corporate.” RSMo. § 1.020(12). For multiple reasons, however, this generic definition of “person,” does not apply to § 392.350.

First, § 1.020 specifically provides that its generic definitions apply “unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof.” RSMo. § 1.020. The use of the definition of “person” in § 1.020 would violate all three of these criteria. As noted above, the statute “specially

provide[s], *id.*, that the definitions of § 386.020 apply in § 392.350, not the generic definitions in § 1.020. *See* RSMo. § 392.180, Appx. p. A59 (‘‘The provisions of section 386.020, defining words, phrases and terms, shall apply to and determine the meaning of all such words, phrases and terms as used in sections 392.190 to 392.530.’’).

Second, for the reasons discussed, reading ‘‘person’’ to include ‘‘municipality’’ would violate the statutory context and purpose, so using the generic definition would be both ‘‘repugnant to the intent of the legislature’’ and ‘‘to the context thereof.’’ RSMo. § 1.020. Indeed, the use of the generic definition of ‘‘person’’ in RSMo. § 1.020 is permissive and not mandatory, and it should not be imposed in a context that would contradict the specific definition of ‘‘person’’ provided. *See J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 643 (Mo. App. 1984) (declining to use the permissive definition of ‘‘person’’ in RSMo. § 1.020(12) in a context in which the definition did not fit).

In sum, the Cities are neither ‘‘persons’’ nor ‘‘corporations’’ under § 386.020, and therefore the legislature did not authorize them to sue under § 392.350. Summary judgment should have been denied on Counts XX-XXIV for this reason alone.

B. The Cities Failed to Establish Any Substantive Violation of Law to Support a Claim Under § 392.350.

Even if the Cities were authorized to sue under § 392.350, the trial court’s judgment in their favor was in error because the Cities failed to establish that CenturyLink engaged in any substantive violation of the law. A telecommunications company violates § 392.350 only if it ‘‘shall do or cause to be done or permit to be done

any act or thing prohibited, forbidden or declared to be *unlawful*. RSMo. § 392.350, Appx. p. A64 (emphasis added). The Cities alleged two categories of supposedly “unlawful” acts: (1) in Counts XX-XXIV, they alleged that CenturyLink’s putative underpayment of licensing taxes subjected the Cities to “undue or unreasonable prejudice or disadvantage” in violation of RSMo. § 392.200.3; and (2) in Counts XXI and XXIV, they alleged that CenturyLink failed to enter into illegal franchise agreements with Cameron and Wentzville and thus did not “first obtain consent” from the Cities to use their public rights-of-way, as set forth in RSMo. § 392.080. LF, pp. 210-213, ¶¶ 160-180. These claims have no merit.

1. CenturyLink’s putative underpayment of municipal license taxes did not violate RSMo. §§ 392.200.3 or 392.350.

First, CenturyLink’s putative underpayment of municipal license taxes did not violate RSMo. §§ 392.200.3 or 392.350 for at least two reasons. First, § 392.350 requires that the challenged action be “unlawful.” RSMo. § 392.350, Appx. p. A64. For the reasons stated above, CenturyLink has paid its municipal license taxes in accord with the governing ordinances for many decades, its actions have been consistent and unquestioned, and its payments have not been “unlawful.” *See supra*, Point III. Because the Cities’ various arguments under the tax ordinances lack merit— or at very least raise numerous issues of disputed fact— summary judgment under § 392.350 based on the same alleged conduct was inappropriate as well. *Id.*

Second, the text and statutory context of § 392.200 indicate that the statute protects *customers* from “undue or unreasonable prejudice or disadvantage” arising from rate discrimination, not governmental entities from the supposed underpayment of taxes. RSMo. § 392.200.3, Appx. p. A60. The title of § 392.200 indicates that it concerns “adequate service,” “just and reasonable charges,” “unjust discrimination,” “unreasonable preference,” and similar matters. RSMo. § 392.200, Appx. p. A60. “Municipal license taxes” are conspicuously absent from the list. Further, § 392.200.3 includes an exception within its text that confirms that the legislature intended to address rate discrimination: “except that telecommunications messages may be classified into such classes as are just and reasonable, and different rates may be charged for the different classes of messages.” RSMo. § 392.200.3, Appx. p. A60.

Additional language in § 392.200 confirms that the purpose of the section is to prevent rate discrimination, and that the statute’s intended beneficiaries are “customers,” not taxing entities: “It is the intent of this act to bring the benefits of competition to all *customers* and to ensure that incumbent and alternative local exchange telecommunications companies have the opportunity to price and market telecommunications services to all prospective *customers* in any geographic area in which they compete.” RSMo. § 392.200.4(2), Appx. pp. A60-A61 (emphasis added). *See also State ex rel. De Paul Hospital School of Nursing v. Public Service Com.*, 464 S.W.2d 737, 738 (Mo. App. 1970) (“Section 392.200 forbids discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions.”).

Moreover, § 392.200 is part of a single statutory scheme within Chapter 392, comprising sections 392.180 to 392.530. This single statutory scheme regulates telecommunications companies for the benefit of customers, not for the benefit of taxing authorities. Section 392.185 sets forth the purposes of Chapter 392; all pertain to the protection of customers, and none pertains to the protection of taxing authorities. *See* RSMo. § 392.185 (listing the nine customer-oriented purposes of Chapter 392). Section 392.190, entitled “application of sections 392.190 to 392.530,” indicates that sections 392.190 to 392.530 are to be viewed as a unified whole. RSMo. § 392.190. Other sections of RSMo. §§ 392.190-392.530 contain numerous references to “sections 392.190 to 392.530” together, demonstrating that these statutory sections form a unified scheme. These sections include over 100 references to telecommunication companies’ rates and/or charges. *See, e.g.*, RSMo. § 392.200 (just and reasonable charges); § 392.205 (reduced rates for public schools); § 392.220 (filing of rate schedules); §§ 392.230, 392.240 (regulation of rates for certain services). Numerous other provisions relate to the specific services for which telecommunications companies charge— including “telecommunications services” generally, and specific services such as “internet protocol services,” “mobile services,” “local voice service” and “exchange access service.” *See* RSMo. §§ 392.180 ó 392.530.

Only two provisions in RSMo. §§ 392.180 ó 392.530 reference taxes in any way, and neither relates to the reporting, remission, or delinquency of municipal taxation. Those two provisions pertain to disclosures for transfers of franchises between telecommunication companies (section 392.300.1) and limits to capitalization of

franchises (section 392.310.6). Not a single statutory provision within RSMo.

§§ 392.180 ó 392.530 authorizes or regulates municipal taxation, let alone addresses the alleged failure of a telecommunication company to pay those taxes in full.

Moreover, the legislature provided municipalities with remedies, in other chapters, for the collection of allegedly due taxes. Indeed, the Cities brought their tax collection counts under RSMo. § 94.150. The cities therefore have a separate statutory scheme for the collection of taxes allegedly due.

In sum, when confronted with the vague phrase “undue or unreasonable prejudice or disadvantage” in § 392.200.3, this Court “will not look at any one portion of the statute in isolation,” but “will look at the [phrase’s] usage in the context of the entire statute to determine its plain meaning.” *Union Elec. Co.*, 425 S.W.3d at 122. Both the plain meaning and the statutory context of § 392.200.3 confirm that the statute is designed to cover claims by customers aggrieved by rate discrimination, not claims by tax-collectors, who have tax-collection remedies in other statutory schemes.

2. CenturyLink’s refusal to enter into illegal franchise agreements with Cameron or Wentzville did not violate RSMo. §§ 392.080 and 392.350.

The Cities’ contention that CenturyLink violated § 392.080 and § 392.350 by refusing to agree to Cameron and Wentzville’s illegal franchise agreements is equally meritless. Section 392.080 provides, in relevant part, that “any telegraph or telephone company desiring to place their wires, poles, and other fixtures in any city í shall first obtain consent from said city through the municipal authorities thereofí .” RSMo.

§ 392.080, Appx. p. A58. It is undisputed that CenturyLink had consent to install poles, wires, and fixtures in Wentzville and Cameron dating back many decades. Cameron and Wentzville contend that CenturyLink's recent refusal to succumb to their newfound demands for illegal mandatory franchise agreements, however, constitutes a failure to "first obtain consent" of those Cities before installing fixtures in violation of § 392.080, and that this failure constitutes an "unlawful" act under § 392.350. These contentions have no merit for at least two reasons.

First, for the reasons discussed above, Cameron and Wentzville's attempts to impose franchise agreements on CenturyLink are illegal as a matter of law. Both Cities' attempts to extract franchise agreements from CenturyLink violate the prohibition on mandatory franchises in RSMo. § 67.1842.1(4). *See supra*, Point II. Because the Cities' attempts to extract such novel forms of "consent" are illegal and void, CenturyLink is in full compliance with all requirements of RSMo. § 392.080.

Second, CenturyLink's facilities have been in place in Cameron and Wentzville for decades with their full knowledge and approval. Only recently did the two Cities attempt to revoke that consent retroactively unless CenturyLink agreed to new demands. Nothing in § 392.080 authorizes a claim under such circumstances.

As quoted above, that section provides that "any telegraph or telephone company desiring to *place* their wires, poles, and other fixtures in any city í shall *first* obtain consent from said cityí .ö RSMo. § 392.080, Appx. p. A58 (emphasis added). This language requires the companies to seek consent *prior to* "placing" of poles, wires, and other fixtures. *Id.* Since "place" is not defined in the statute, the ordinary and natural

meaning of the word as found in the dictionary applies. *Missouri Gaming Comm'n v. Missouri Veterans' Comm'n*, 951 S.W.2d 611, 612 (Mo. banc 1997). To "place" telephone poles, wires, and other fixtures involves the positive action of installing them in the first place, not the passive action of continuing to maintain them there. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1727 (2002) (defining the transitive verb "place" as "to put into or as if into a particular position: cause to rest or lie: set, fix"). But Cameron and Wentzville do not allege, and have presented no evidence, that CenturyLink has "placed" or installed any new fixtures in their rights-of-way since those Cities purported to impose their new illegal requirements for occupying the right-of-way. Rather, they contend only that CenturyLink has failed to obtain "consent" for poles and fixtures that *were already validly installed in their rights-of-way, and had been there for decades*. LF, pp. 1280-1281. For this reason, they cannot state a claim under § 392.080, which only requires the Cities' "consent" *prior to* the installation of new fixtures.

C. Respondents Made No Plausible Showing of "Willfulness," and the Trial Court Erred in Granting Summary Judgment on this Fact-Bound Issue.

Finally, contrary to the trial court's judgment, the Cities made no plausible showing that CenturyLink engaged in any "willful" violations of the law within the meaning of RSMo. § 392.350. Section 392.350 provides that "if the court shall find that such an [unlawful] act or omission was *willful*, it may, in its discretion, fix a reasonable counsel or attorney's fee" RSMo. § 392.350, Appx. p. A64 (emphasis added). The

trial court held that CenturyLink's actions were "willful" and ordered payment of the Cities' attorneys' fees. Appx. p. A4 (LF, p. 1674). This holding was erroneous and should be reversed.

For the reasons stated above, *supra*, Point V.B, the Cities failed to show that CenturyLink engaged in any "unlawful" acts or omissions, much less any *willful* unlawful acts. Even assuming that the Cities could establish an "unlawful" act by any Appellant, they made no plausible showing of "willfulness."

In *De Paul Hosp. School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542, 549 (Mo. App. 1976), the Missouri Court of Appeals addressed the meaning of "willful" in § 392.350 in the specific context of rate discrimination. When it comes to rate discrimination among customers, "willful" in § 392.350 "means either intentionally charging an incorrect rate knowing it was incorrect, or charging a rate when the utility has no reasonable basis for placing the individual consumer within the classification calling for that rate." *De Paul Hosp.*, 539 S.W.2d at 549. For the reasons discussed above, this portion of Chapter 392 exclusively protects consumers, not tax-collectors. *See supra* Point V.B.1. But even assuming that Chapter 392 applies here, the Cities cannot and did not show that CenturyLink either acted unlawfully knowing that their actions were unlawful, or acted with "no reasonable basis" for any challenged action. *De Paul Hosp.*, 539 S.W.2d at 549. Respondents cannot make any such showing either for their tax claims or for their right-of-way claims.

1. Regarding the tax claims, no evidence suggests that Appellants acted in “willful” violation of the law because Appellants’ legal position is persuasive and correct.

In the trial court, Respondents’ principal argument regarding “willfulness” was that Respondents’ interpretation of the taxing ordinances was clearly established by settled law. *See* LF, p. 1009 (relying on putatively “unequivocal law”). For the reasons discussed above, Respondents are gravely mistaken on this point—the law clearly favors Appellants’ interpretation of the taxing ordinances, as do decades of well-established practice. *See supra*, Point III. Because the law strongly favors CenturyLink’s position, the Cities cannot plausibly claim that CenturyLink knew it was behaving incorrectly or had no reasonable basis for its interpretation of the taxing ordinances. *De Paul Hosp.*, 539 S.W.2d at 549.

In addition to their reliance on “unequivocal law,” Respondents urged that one Appellant entity entered into a settlement agreement with the City of Jefferson regarding similar taxation issues. LF, p. 1009 (citing LF, pp. 873-888). Respondents appear to assert that because a single Appellant settled a prior lawsuit, involving an audit, a different ordinance, a franchise agreement, and different facts, Appellants were aware that their legal position regarding the scope of the ordinances was incorrect. *Id.* This argument contradicts clearly settled law. A settlement is not a judgment by a court on the merits of the case. *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 428 (Mo. App. 1997) (“The danger of admitting evidence of settlements is that the trier of fact may

believe that the fact that a settlement was attempted is some indication of the merits of the case.ö). Settlement agreements are not admissions of liability. *Id.* at 427.

Indeed, in that agreement, Appellant Embarq Missouri clearly stated it continued to dispute Jefferson City's interpretation of its ordinance, and Jefferson City took no position on the validity or invalidity of Embarq Missouri's position. LF, pp. 873-875, Recital G and § 2. No court entered any judgment on the underlying liability.

Respondents now try to use the settlement for the very purpose settlement agreements are inadmissible as a matter of public policy: the concern they might be interpreted as an indication of the merits of a case. *Malan*, 942 S.W.2d at 428.

In any event, "willfulness" is a controverted issue of material fact. In the trial court, Appellants submitted the Seshagiri Affidavit, which testified to his familiarity with CenturyLink's municipal tax payment process, his understanding of the scope of the ordinances at issue, and CenturyLink's history of tax payments consistent therewith. LF, p. 1216, ¶¶ 1-3. This testimony is clear evidence of Appellants' proper intent, and thus lack of "willfulness." Appellants also presented relevant tariffs; Appellants made their tax payments consistent with these tariffs, which have the force of law. LF. 1467, 1475-1625. *See Allstates Transworld Vanlines v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. 1996) (noting that "a tariff that has been approved by the Commission [has] the same force and effect as a statute directly prescribed from the legislature").

While Respondents may disagree with Appellants' and Mr. Seshagiri's interpretation of the ordinances and the relevant tariffs, they cannot deny that a central question of material fact—Appellants' purported knowledge that they supposedly violated the law or

had no reasonable basis for their actions is controverted. *De Paul Hosp.*, 539 S.W.2d at 549. As such, Respondents are not entitled to summary judgment.

2. Regarding the right-of-way claims, Respondents offered no evidence supporting any purported “willfulness.”

The supposed evidence of willful misconduct submitted by Respondents, discussed above, relates only to the alleged failure to pay *license taxes*. In Counts XXI and XXIV, Respondents Cameron and Wentzville additionally alleged willful violations of RSMo. § 392.080 for failing to enter into *right-of-way agreements*. LF, pp. 210-211, ¶¶ 163-168; *id.*, pp. 212-213, ¶¶ 175-180. In the trial court, Respondents simply stated in conclusory fashion that Wentzville, Cameron, and Harrisonville have “similar ordinance requirement[s].” LF, p. 1010. This bare conclusion cannot demonstrate that Appellants knowingly violated the law or had no reasonable basis for their refusal to enter into an agreement. *De Paul Hosp.*, 539 S.W.2d at 549. On the contrary, for the reasons discussed above, Appellants’ legal position on the issue of these illegal franchise agreements is correct and persuasive. *See supra* Points I, II. Respondents do not, because they cannot, demonstrate “willfulness” under § 392.350.

VI. The trial court erred in granting summary judgment in Respondents' favor on Counts I-V and XX-XXIV as to Appellants CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications, Inc., because these three entities were not proper defendants to those Counts, in that Respondents submitted no evidence that these Appellants provided exchange telephone service in any of the Respondent cities or failed to pay any applicable taxes, and genuine issues of material fact exist that preclude summary judgment in Respondents' favor.

Respondents submitted no evidence that Appellants CenturyLink, Inc., CenturyTel Long Distance, or Embarq Communications provided exchange telephone service in any of the Respondent cities. Therefore, these three Appellants cannot be liable for any unpaid taxes or fees related to providing exchange telephone service, and summary judgment against them was inappropriate.

The trial court's determination that the evidence raised no genuine dispute of material fact is reviewed *de novo*, drawing every reasonable factual inference in favor of Appellants. *Turner*, 318 S.W.3d at 664. Questions of law are also reviewed *de novo*. *City of University City*, 371 S.W.3d at 17.

It is uncontroverted that CenturyLink, Inc. does not provide telephone service of any kind to or in any Respondent City. LF, pp. 1075-1078, ¶¶ 19, 23, 25, 27, 30, 31; pp. 1216-1217, ¶¶ 1-12. Nevertheless, Respondents argued below that judgment against CenturyLink, Inc. was "appropriate" to the extent that "judgment against CenturyLink, Inc., as [alleged] payor of the License Taxes, is necessary to effectuate" a judgment

against its subsidiaries. LF, p. 1283. This argument ignores established precedent limiting the liability of a parent corporation for the obligations of its subsidiaries.

As a parent company, CenturyLink, Inc. is a different legal person that is not responsible for the acts of its subsidiar[ies].ö *Grease Monkey Intern., Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. App. E.D. 1995). The only exception to this ruleö inapplicable hereö is öwhere the wronged party pierces the corporate veil,ö establishing by evidence both (1) ösuch dominion and control that the controlled corporation has no separate mind, will or existence of its own,ö *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo. App. S.D. 1999); and (2) that öthe corporate cloak was used as a subterfugeö for some öimproper purpose,ö *Mitchell v. Home Ins. Co.*, 865 S.W.2d 779, 784 (Mo. App. W.D. 1993). Respondents here did not even argue for piercing the corporate veil, much less offer evidence (let alone uncontroverted evidence) on either of these prongs. Therefore CenturyLink, Inc. cannot be held liable.

Respondents instead argued that CenturyLink, Inc. had öundertaken to pay the License Taxö on behalf of the other Respondents simply because it had paid such taxes on their behalf in the past. LF, p. 1283. Missouri courts have previously rejected just such a önew exception to the general rule of nonliability of a separate parent corporation.ö *Mitchell*, 865 S.W.2d at 784. In *Mitchell*, plaintiffs similarly argued that they did not have to establish a case for piercing the corporate veil to hold a parent company liable for a subsidiary's lease where the parent had övoluntarily assumed the liabilityö by having öpaid rent, paid taxes, and bought insurance on the building, thereby acting as the lessee.ö *Mitchell*, 865 S.W.2d at 783-84.

The court rejected this novel theory of liability and found, instead, that to hold the parent liable for the obligations of the subsidiary, the plaintiffs must demonstrate both that “the corporation must be controlled and influenced by persons or by another corporation,” and that “the corporate cloak was used as a subterfuge to defeat public convenience, to justify a wrong, or to perpetrate a fraud.” *Id.* at 784. It further held that evidence that the parent company made payments on behalf of the subsidiary fell far short of the requirements for piercing the veil. *Id.* Neither do CenturyLink, Inc.’s alleged payments on behalf of its subsidiaries render it subject to suit for their liabilities. Here, as in *Mitchell*, Respondents did not even argue for piercing the corporate veil, let alone submit evidence on the *Mitchell* elements, and this court should reject their attempt to circumvent that doctrine.

Likewise, no evidence in the record establishes that CenturyTel Long Distance or Embarq Communications, both long-distance providers, provided local exchange telephone service in any of the Respondent cities. LF, pp. 1216-1217, ¶¶ 1-3, 10-11. Nor did Respondents submit any evidence that these two Appellants or their parent, CenturyLink, Inc., used any rights-of-way, provided communications services, or set any poles, wires, or facilities in Cameron or Wentzville. As such, no basis existed for summary judgment on any count against these three Appellants.

By way of support for their motion for summary judgment seeking to hold these three non-provider defendants liable for taxes and fees in five cities, Respondents offered evidence putatively showing that one Appellant ó CenturyTel Long Distance ó had previously paid license tax in two Respondent Cities. LF, pp. 1348-1355, 1375-1382.

This evidence does not and cannot support the court's entry of summary judgment for several reasons. Among other reasons, the evidence is in dispute. Respondents pointed to two bills issued under the name "CenturyLink" a trade name utilized by multiple Defendant entities that included multiple charges, including charges for both long-distance service and the license tax. *See* LF, pp. 1350, 1377. The bills denominate charges for long distance services under the heading "CenturyLink Long Distance." LF, pp. 1355, 1381. The bills state: "Long distance service provided by CenturyTel Long Distance, LLC d/b/a CenturyLink Long Distance, using the trade name CenturyLink." *Id.* These bills provide no evidence that CenturyTel Long Distance ever provided local exchange service in any Respondent City or paid a license tax. *See id.* In any event, these bills have no relation to CenturyLink, Inc. or Embarq Communications. The Court should reverse the trial court's summary judgment in all respects as to Appellants CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications.

CONCLUSION

For the reasons stated, this Court should reverse the trial court's judgment granting partial summary judgment in favor of Plaintiffs-Respondents/Cross-Appellants.

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Respectfully submitted,

CLARK & SAUER, LLC

By: /s/ Stephen Robert Clark
Stephen Robert Clark, #41417
D. John Sauer, #58721
7733 Forsyth Boulevard, Suite 625
Saint Louis, Missouri 63105
(314) 814-8880 (office)
(314) 332-2973 (fax)
sclark@clarksauer.com
jsauer@clarksauer.com

and

BRYAN CAVE LLP

Mark B. Leadlove, #33205
One Metropolitan Square, Suite 3600
211 North Broadway
St. Louis, MO 63102
Tel. (314) 259-2000
Fax: (314) 259-2020
mbleadlove@bryancave.com

*Attorneys for Defendants-Appellants Spectra
Communications Group, LLC d/b/a
CenturyLink, Embarq Missouri, Inc. d/b/a
CenturyLink, CenturyTel of Missouri, LLC
d/b/a CenturyLink, CenturyTel Long Distance,
LLC d/b/a CenturyLink Long Distance, Embarq
Communications, Inc. d/b/a CenturyLink
Communications and CenturyLink, Inc. f/k/a
CenturyTel, Inc.*

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Opening Brief on Appeal of Appellants/Cross-Respondents Spectra Communications Group, LLC d/b/a CenturyLink, Embarq Missouri, Inc. d/b/a CenturyLink, CenturyTel of Missouri, LLC d/b/a CenturyLink, CenturyTel Long Distance, LLC d/b/a CenturyLink Long Distance, Embarq Communications, Inc. d/b/a CenturyLink Communications and CenturyLink, Inc. f/k/a CenturyTel, Inc., filed on August 1, 2014, complies with the requirements of Rule 84.06(c), and that:

- (1) The signature block contains the information required by Rule 55.03;
- (2) The brief complies with the limitations contained in Rule 84.06(b); and
- (3) The brief contains 25,978 words, excluding those portions that are excluded from the word count by Rule 84.06(b), as determined by the word count feature of Microsoft Word 2010.

Dated: August 1, 2014

/s/ Stephen Robert Clark
Stephen Robert Clark

CERTIFICATE OF SERVICE

This certifies that on the 1st day of August, 2014, the foregoing brief and accompanying Appendix were served via e-mail to the following counsel of record:

Daniel G. Vogel
David A. Streubel
Ryan A. Moehlman
Cunningham, Vogel & Rost, P.C.
333 S. Kirkwood Road, Suite 300
St. Louis, MO 63122
dan@municipalfirm.com
dave@municipalfirm.com
ryan@municipalfirm.com

Attorneys for Plaintiffs-Respondents

/s/ Stephen Robert Clark