
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 CENTURLINK, et al.,
Defendants/Appellants/Cross-Respondents.

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

The Honorable David Lee Vincent, III

REPLY BRIEF AND CROSS-APPEAL RESPONDENTS' BRIEF OF APPELLANTS
SPECTRA COMMUNICATIONS GROUP, LLC, et al.

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.*

TABLE OF CONTENTS

TABLE OF AUTHORITIESvi

INTRODUCTION 1

STATEMENT OF FACTS.....2

ARGUMENT.....7

I. The “Grandfathered Political Subdivisions” Exemption of RSMo.

§ 67.1846 Is a Facially Special Law For Which the Cities Provide No Substantial Justification, and It Is Severable From the Remainder of the Statute (Reply in Support of Appellants’ Point D).....7

- A. This case squarely presents the constitutionality of RSMo. § 67.1846’s exemption for select “grandfathered political subdivision[s].”**7
- B. The legal authority cited by the Cities does not bar CenturyLink’s constitutional claim.**9
- C. The exemption for “grandfathered political subdivisions” is a facially special law and thus presumptively unconstitutional.** 10
- D. The Cities fail to provide the requisite “substantial justification” for the special exemption.** 14
- E. Severance of the “grandfathered political subdivision” exemption would do no harm to the statutory scheme.**.....20

II. Cameron and Wentzville’s Right-of-Way User Agreements Are Illegal Mandatory “Franchises” Under RSMo. § 67.1842.1(4), and Cameron

Made No Showing That Its Fees Are Based on the Actual, Substantiated Costs of Using the Right-of-Way (Reply in Support of Appellants’ Point

II).30

A. Cameron and Wentzville’s right-of-way agreements constitute illegal mandatory “franchises” under Missouri’s ROW laws.31

B. The fact that other entities have entered ROW user agreements does not bar Spectra and CenturyTel from objecting to Cameron and Wentzville’s illegal franchise requirement.....39

C. Section 67.1842.1(4)’s prohibition on mandatory franchises is not an unconstitutional special law because it does not include fixed limitations based on historical facts or similar immutable characteristics.....41

D. Cameron failed to show that its fees are based on the actual, substantiated costs reasonably incurred in managing its right-of-way.....45

III.The Trial Court’s Order Grant of Summary Judgment on Counts I-V

Must Be Reversed Because the Tax Ordinances Do Not Apply to the Four Disputed Revenue Streams, and Genuine Disputes of Material Fact Should Have Precluded the Entry of Summary Judgment (Reply in Support of Appellants’ Point III).....47

A. CenturyLink properly preserved its arguments on appeal.48

- B. The testimony of Seshagiri and Galloway is part of the record on appeal, and it establishes that genuine disputes of material fact should have prevented the entry of summary judgment..... 49
- C. The tax ordinances must be strictly construed in favor of the *taxpayer*, not in favor of the tax-collector. 54
- D. The tax ordinances do not apply to all “gross receipts,” but only those derived from providing local telephone service. 55
- E. “Exchange telephone service,” and telephone service that is provided “in” or “within” each city, are inherently local. 58
- F. All four disputed revenue streams fall outside the tax ordinances. 65

IV. The Three-Year Limitations Period Provided in RSMo. §§ 71.625.2 and 144.220.3 Applies to Bar Recovery on the Cities’ Tax Claims for Taxes Allegedly Incurred Prior to July 28, 2009 (Reply in Support of Appellants’ Point IV). 73

- A. CenturyLink preserved for appeal its statute of limitations defenses under RSMo. §§ 71.625.2 and 144.220.3. 73
- B. Section 71.625.2 applies retrospectively in this case, both because the Cities are creatures of the legislature and because they were afforded a reasonable opportunity to bring their tax claims..... 74
- C. It is undisputed that the three-year limitations period of RSMo. § 144.220.3 also applies. 76
- D. The default limitations period of RSMo. § 516.120 does not apply. 77

V. The Trial Court Erred in Finding of Liability Under RSMo. § 392.350

Because the Cities Are Not “Persons” Authorized to Sue Under That Statute, the Cities Failed to Prove Any “Unlawful” Behavior, and the Cities Submitted No Plausible Evidence of “Willfulness” (Reply in Support of Appellant’s Point V).80

A. CenturyLink properly preserved its arguments for appeal.....80

B. Respondents are not “persons” who may sue under RSMo. § 392.350.....81

C. Section 392.200.3 applies to claims by “persons,” not municipalities, and provides relief to consumers, not tax authorities.....83

D. CenturyLink had municipal consent prior to placing facilities in the rights-of-way under RSMo. § 392.080.....85

E. No plausible evidence even suggests CenturyLink committed any “willful” violation of the law.87

VI. The Judgment Against Appellants CenturyLink, Inc., CenturyTel Long

Distance, LLC, and Embarq Communications, Inc., Lacks Any Basis in

Fact or Law Because These Entities Do Not Provide Local Exchange

Service in Any City (Reply in Support of Appellants’ Point VI).....94

***CROSS-RESPONDENTS’ BRIEF*98**

I. The Trial Court Correctly Refused to Grant Summary Judgment on

Harrisonville’s Breach-of-Contract Claim, Because Embarq Did Not

Underpay Any License Taxes, and Because the Agreement Was Not

Supported by Consideration (Responds to Cross-Appellants’ Point I).98

A. There is no jurisdiction over the Cities’ cross-appeal from an order denying summary judgment.98

B. The Harrisonville Agreement is an illegal mandatory “franchise.” 101

C. Embarq has fully paid its tax liability to Harrisonville..... 102

D. Embarq’s alleged promise to perform its preexisting legal obligations is unenforceable as a matter of black-letter contract law. 102

CONCLUSION 110

CERTIFICATE OF COMPLIANCE 112

CERTIFICATE OF SERVICE 113

TABLE OF AUTHORITIES

Cases

<i>Am. Nat'l Prop. & Cas. Co. v. Ensz & Jester, P.C.</i> , 358 S.W.3d 75 (Mo. App. W.D 2011).....	36, 47, 61, 68
<i>Ashland Oil v. Tucker</i> , 768 S.W.2d 595 (Mo. App. E.D. 1989).....	105
<i>Bd. of Educ. of St. Louis v. Mo. State Bd. of Educ.</i> , 271 S.W.3d 1 (Mo. banc 2008).....	14, 16
<i>Belcher v. State</i> , 299 S.W.3d 294 (Mo. banc 2009)	33
<i>Blaske v. Smith & Entzeroth, Inc.</i> , 821 S.W.2d 822 (Mo. banc 1991)	43
<i>Bob DeGeorge Assocs. v. Hawthorn Bank</i> , 377 S.W.3d 592 (Mo. banc 2012)	99
<i>Bresnahan v. Bass</i> , 562 S.W.2d 385 (Mo. App.1978).....	40
<i>Canteen Corp. v. Goldberg</i> , 592 S.W.2d 754 (Mo. banc 1980).....	55
<i>Carlisle v. T&R Excavating</i> , 704 N.E.2d 39 (Ohio App. 1997).....	107, 108
<i>City Collector of Winchester v. Charter Communications Inc.</i> , Nos. 10SL-CC02719, 10SL-CC03687, Order and Judgment (St. Louis County Cir. Court, Feb. 11, 2014)	63, 64
<i>City of Dallas v. FCC</i> , 118 F.3d 393 (5th Cir. 1997)	72
<i>City of Jefferson City v. Cingular Wireless, LLC</i> , 531 F.3d 595 (8th Cir. 2008).....	63
<i>City of Springfield v. Sprint Spectrum, LP</i> , 203 S.W.3d 177 (Mo. banc 2006).....	<i>passim</i>
<i>City of Sullivan v. Sites</i> , 329 S.W.3d 691 (Mo. banc 2010)	18, 19

Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue, 98 S.W.3d 540
 (Mo. banc 2003).....25, 26

Cranor v. Sch. Dist. No. 2, 52 S.W. 232 (Mo. 1899) 75

Crow v. Crawford & Co., 259 S.W.3d 104 (Mo. App. E.D. 2008).....53

De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co., 539 S.W.2d 542
 (Mo. App. 1976) 84, 85, 88

Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454 (Mo. banc 2006)99, 100

Egan v. St. Anthony's Med. Ctr., 244 S.W.3d 169 (Mo. banc 2008) 102

Eiman Bros. Roofing Sys. v. CNS Int'l. Ministries, Inc., 158 S.W.3d 920
 (Mo. App. W.D. 2005)..... 106

Empire Dist. Elec. Co. v. Southwest Elec. Coop., 863 S.W.2d 892
 (Mo. App. S.D. 1993)32

First Nat'l Bank v. Griffith, 182 S.W. 805 (Mo. App. 1916).....51

Goodman v. St. Louis Children's Hospital, 687 S.W.2d 889 (Mo. banc 1985).....74, 75

Grable v. Atlantic Cas. Ins. Co., 280 S.W.3d 104 (Mo. App. 2009)..... 100

Great Rivers Habit Alliance v. City of St. Peters, 384 S.W.3d 279
 (Mo. App. W.D. 2012).....54

GTE Sprint Communications Corp. v. Dep't of Treasury, 445 N.W.2d 476
 (Mich. Ct. App. 1989).....58

Harris v. A.G. Edwards & Sons, Inc., 273 S.W.3d 540 (Mo. App. E.D. 2008)..... 105

Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58 (Mo. banc 1994)).....42

Harris v. The Epoch Group, L.C., 357 F.3d 822 (8th Cir. 2004)75

Holcomb v. United States, 622 F.2d 937 (7th Cir. 1980) 103, 104

In re Wood's Estate, 232 S.W. 671 (Mo. banc 1921)..... 103

Intermed Ins. Co. v. Hill, 367 S.W.3d 84 (Mo. App. 2012)99

J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp., 881 S.W.2d 638
 (Mo. App. E.D. 1994) 82

James v. Paul, 49 S.W.3d 678 (Mo. 2001)..... 100

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006)..... 16

Kansas City v. Graybar Elec. Co., Inc., 485 S.W.2d 38 (Mo. banc 1972).....95

Kansas City v. Standard Home Improvement Co., 512 S.W.2d 915 (Mo. App. 1974)..... 78

Kaufman v. Bormaster, 599 S.W.2d 35 (Mo. App. 1980).....99, 100

Laclede Gas Co. v. St. Louis, 253 S.W.2d 832 (Mo. banc 1953)57

Land Clearance for Redevelopment Authority of Kansas City v. Dunn, 416 S.W.2d 948
 (Mo. 1967) 40

Leiser v. City of Wildwood, 59 S.W.3d 597 (Mo. App. 2001) 100

Level 3 Communications, LLC v. City of St. Louis, 405 F.Supp.2d 1047
 (E.D. Mo. 2005)9

Ludwigs v. Kansas City, 487 S.W.2d 519 (Mo. 1972)53, 56

Manner v. Schiermeier, No. ED96143, 2011 Mo. App. LEXIS 1715
 (Mo. App. Dec. 27, 2011).....99

May Department Stores Co. v. University City, 458 S.W.2d 260
 (Mo. banc 1970).....47, 62, 63

Merlyn Vandervort Invs., LLC v. Essex Ins. Co., 309 S.W.3d 333 (Mo. App. 2010)..... 100

Miller v. Ernst & Young, 892 S.W.2d 387 (Mo. App. E.D. 1995).....91

Mitchell v. Home Ins. Co., 865 S.W.2d 779 (Mo. App. 1993).....96, 97

Nail v. Husch Blackwell Sanders, LLP, 436 S.W.3d 556 (Mo. 2014)..... 101

Nat’l Solid Waste Mgmt Ass’n v. Dir. of Dep’t of Nat’l Res., 964 S.W.2d 818
(Mo. banc 1998).....20

North Carolina Utilities Comm’n v. FCC, 552 F.2d 1036 (4th Cir. 1977)58

O’Reilly v. Hazelwood, 850 S.W.2d 96 (Mo. banc 1993) 16

Ogg v. Mediacom, L.L.C., 142 S.W.3d 801 (Mo. App. W.D. 2004).....36, 37, 38

Pacific Tel. & Tel. Co. v. Hill, 365 P.2d 1021 (Or. 1961).....58

Planned Industrial Expansion Authority v. Southwestern Bell Tel. Co., 612 S.W.2d 772
(Mo. banc 1981).....44

Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 220 S.W.3d 732
(Mo. banc 2007).....24, 28

Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc., 369 S.W.2d 764
(Mo. App. S.D. 1963)32, 33, 34

Qwest Corp. v. Colorado Pub. Utilities Comm’n, 656 F.3d 1093 (10th Cir. 2011).....59

Rizzo v. State, 189 S.W.3d 576 (Mo. 2006).....27

Savannah R-III Sch. Dist. v. Public Sch. Retirement Sys., 950 S.W.2d 854
(Mo. banc 1997).....73, 75, 76

School District of Riverview Gardens v. St. Louis County, 816 S.W.2d 219 (Mo. banc
1991),22, 23, 26

Southern Pacific Communications Co. v. AT&T, 740 F.2d 980 (D.C. Cir. 1984)58

Southwestern Bell Tel. Co. v. Combs, 270 S.W.3d 249 (Tex. Ct. App. 2008).....66

Sprint Spectrum, L.P. v. County of St. Charles, No. 4:04 CV 1144 RWS, 2005 U.S. Dist. LEXIS 43590 (E.D. Mo. July 6, 2005).....44

SSM Cardinal Glennon Children’s Hosp. v. State, 68 S.W.3d 412 (Mo. banc 2002)24

St. Louis Country Club v. Admin. Hearing Comm’n of Mo., 657 S.W.2d 614 (Mo. banc 1983).....55

St. Louis County v. Prestige Travel, Inc., 344 S.W.3d 708 (Mo. banc 2011)54, 55

Starhome GmbH v. AT&T Mobility LLC, 743 F.3d 849 (Fed. Cir. 2014).....59

State ex rel. Auto Owners Ins. Co. v. Messina, 331 S.W.3d 662 (Mo. banc 2011).....33

State ex rel. Ford Motor Co. v. Gehner, 27 S.W.2d 1 (Mo. banc 1930).....55

State ex rel. Hagerman v. St. Louis & E.S.L.E.R. Co., 216 S.W. 263 (Mo. 1919).....32, 33

State ex rel. Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960)57, 95

State ex rel. Malan v. Huesemann, 942 S.W.2d 424 (Mo. App. 1997).....67, 89

State ex rel. McKittrick v. Missouri Standard Tel. Co., 85 S.W.2d 613 (Mo. 1935) ..86, 87

State ex rel. McKittrick v. Murphy, 148 S.W.2d 527 (Mo. 1941)32, 33

State ex rel. McKittrick v. Springfield City Water Co., 131 S.W.2d 525 (Mo. 1939)38, 39

State ex rel. Peach v. Melhar Corp., 650 S.W.2d 633 (Mo. App. E.D. 1983).....38

State ex rel. Public Defender Com. v. County Court of Greene County, 667 S.W.2d 409 (Mo. banc 1984).....23

State ex rel. Res. Med. Cntr. v. Peters, 631 S.W.2d 938 (Mo. App. W.D. 1982)76

State ex rel. Safety Ambulance Serv., Inc. v. Kinder, 557 S.W.2d 242
 (Mo. banc 1977)..... 12, 13, 21

State ex rel. Schneider’s Credit Jewelers, Inc. v. Brackman, 272 S.W.2d 289
 (Mo. banc 1954)..... 32

State ex rel. Smith v. Atterbury, 270 S.W.2d 399 (Mo. 1954)..... 21

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409
 (Mo. banc 1974)..... 76

State ex rel. Vossbrink v. Carpenter, 388 S.W.2d 823 (Mo. 1965)..... 12

State v. Christopher, 2 S.W.2d 621 (Mo. 1927)..... 22

State v. Sager, 600 S.W.2d 541 (Mo. App. W.D. 1980) 13

Stoner v. Dir. of Revenue, 358 S.W.3d 514 (Mo. App. 2011)..... 78

Swartz v. Swartz, 887 S.W.2d 644 (Mo. App. 1994)..... 75

Taylor v. City of Pagedale, 746 S.W.2d 576 (Mo. App. 1987)..... 55

Thummel v. King, 570 S.W.2d 679 (Mo. banc 1978) 30

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. 1997)..... 14, 42

Union Elec. Co. v. Cuivre River Elec. Co-op., Inc., 726 S.W.2d 415
 (Mo. App. E.D. 1987)..... 12, 13

Union Elec. Co. v. Mexico Plastic Co., 973 S.W.2d 170 (Mo. App. E.D. 1998)..... 17

Union Electric Company v. Director of Revenue, 425 S.W.3d 118 (Mo. banc 2014) 81

United Air Lines v. State Tax Comm’n, 377 S.W.2d 444 (Mo. banc 1964) 55

United States v. Ziegler, 474 F.3d 1184 (9th Cir. 2007) 59

Vogel v. A.G. Edwards & Sons, Inc., 801 S.W.2d 746 (Mo. App. 1990)..... 59

Watkins v. Floyd, 492 S.W.2d 865 (Mo. App. S.D. 1973)40, 93

Webster v. Fall, 266 U.S. 507 (1925)9

Westover v. Bridgford, 144 P. 313 (Cal. App. 1914).....51

Wheeler v. Philadelphia, 77 Pa. 338 (Pa. 1875).....42

Whitworth v. McBride & Son Homes, Inc., 344 S.W.3d 730 (Mo. App. W.D. 2011) 102

Wilhoite v. Mo. Dep’t of Soc. Servs., No. 2:10-CV-03026-NKL, 2011 U.S. Dist. LEXIS
77150 (W.D. Mo. July 15, 2011)..... 102

Wilson v. Hungate, 434 S.W.2d 580 (Mo. 1968)98

Wise v. Crump, 978 S.W.2d 1 (Mo. App. E.D. 1998) 102, 103, 104

Wood v. Procter & Gamble Mfg. Co., 787 S.W.2d 816 (Mo. App. E.D. 1990).....52

Ziegler v. Dir. of Revenue, 150 S.W.3d 145 (Mo. App. S.D. 2004)49, 50

Statutes

4 U.S.C. §§ 116-12643

47 U.S.C. § 522(9).....37

RSMo. § 1.02082

RSMo. § 1.14024, 28

RSMo. § 67.1830*passim*

RSMo. § 67.1834.127

RSMo. § 67.18408, 21, 25

RSMo. § 67.1842.18, 21, 25, 30

RSMo. § 67.1842.1(4)*passim*

RSMo. § 67.1842.1(5)35

RSMo. § 67.1844.128

RSMo. § 67.1846.....*passim*

RSMo. § 67.1846.17, 10, 12, 25

RSMo. § 71.625.2*passim*

RSMo. § 94.15077

RSMo. § 94.31077

RSMo. § 140.16077

RSMo. § 140.73077

RSMo. § 141.08077

RSMo. § 144.22073, 76, 77, 78

RSMo. § 386.02060, 81, 82

RSMo. § 392.08085

RSMo. § 392.20083, 84, 85

RSMo. § 392.350*passim*

RSMo. §§ 392.010-392.61143

RSMo. § 512.110.213

RSMo. § 516.12077

Constitutional Provisions

Mo. Const. art. III, § 40(30).....7, 29

Ordinances

Aurora Code § 615.010.....96

Cameron Ord. No. 2878 § 1.....96

Cameron Code § 10.5-15131, 43

Harrisonville Code § 655.01096

Harrisonville Code § 530.025 101

Harrisonville Code § 665.020 78

Oak Grove Code § 615.02097

Oak Grove’s Code § 615.050 78

Wentzville Code §§ 655.100-655.16043

Wentzville Code § 655.100 31

Wentzville Code § 655.285(A)(2) 31

Wentzville Code § 640.02097

Regulations

4 C.S.R. § 240-32.100(2).....69

Rules

Mo. Sup. Ct. R. 74.04(e).....52

Mo. Sup. Ct. R. 81.12 13

Mo. Sup. Ct. R. 84.04(d).....30

Legislation

2001 S.B. 369.....*passim*

Enactment History of 2005 H.B. 5827, 28

2014 S.B. 650.....44

Other Authorities

3 WILLISTON ON CONTRACTS, § 7:42 (4th ed.) 103

17 Am. Jur. 2d CONTRACTS, § 119..... 104

BLACK’S LAW DICTIONARY 683 (8th ed. 2004)32

E. Allan Farnsworth, *Contracts* § 2.9 (3d ed.)..... 107, 108

NEWTON’S TELECOM DICTIONARY 377 (23rd ed. 2007).....59, 60

RESTATEMENT (SECOND) OF CONTRACTS § 71 107

RESTATEMENT, CONTRACTS § 76 104

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2627 (2002).....61, 62

INTRODUCTION

This is a case of municipal overreach. Respondents'/Cross-Appellants' Initial Brief ("Resp. Br.") fails to provide any convincing reason to affirm the trial court's order granting partial summary judgment to Respondents/Cross-Appellants City of Aurora, *et al.* (collectively, "the Cities") on Counts I-V and XVII-XXIV of their Second Amended Petition. Instead, the Cities' brief repeatedly mischaracterizes the factual record and misapprehends governing legal authority. The failure of the Cities' arguments matches the breadth of their overreach in seeking to tax and regulate Appellants/Cross-Respondents Spectra Communications Group, LLC, *et al.* (collectively, "CenturyLink") in ways far beyond what Missouri law authorizes.

The Cities' attempt to impose right-of-way permit agreements on CenturyLink runs afoul of the Missouri Constitution's ban on special laws and Missouri's statutory prohibition against imposing mandatory franchises on telecommunications companies. The Cities' attempt to impose a sweeping new construction on their tax ordinances contravenes plain English, this Court's cases, numerous telecommunications authorities, the sworn testimony of industry professionals, the original understanding of the ordinances, and decades of settled enforcement practice. The Cities' attempt to establish "willful" misconduct by CenturyLink contradicts the plain terms of the relevant statute and lacks any support in the factual record. This Court should rule against the Cities on all disputed issues and reverse the trial court's order granting partial summary judgment.

STATEMENT OF FACTS

Response to Respondents/Cross-Appellants' Statement of Facts

CenturyLink's Statement of Facts is set forth in the Opening Brief. *See* Opening Brief of Appellants/Cross-Respondents ("App. Br.") 6-13. CenturyLink addresses factual matters raised by the Cities' brief for purpose of clarification and correction of the record.

A. The Cities Make Allegations That Mischaracterize the Record.

The Cities make several allegations that mischaracterize the record. The Cities allege that CenturyLink has taken inconsistent positions regarding payment of license taxes and the right-of-way agreements. Resp. Br. 28-32. Regarding the right-of-way claims, the Cities allege that CenturyLink entities have voluntarily entered into similar agreements in the past. Resp. Br. 30-31. This allegation mischaracterizes the evidence. The trial court entered judgment solely against Appellant Spectra on Counts XVII and XVIII. LF 1673. The trial court entered judgment solely against Appellant CenturyTel on Count XIX. LF 1674. The Cities concede these are the only two relevant entities occupying the Cameron and Wentzville rights-of-way. Resp. Br. 15. These two companies are the only two entities whose actions are at issue with respect to the right-of-way claims. None of the agreements upon which the Cities rely involves either Appellants Spectra or CenturyTel. Resp. Br. 30-31; LF 1387, 1401-1411, 1412-1427, 1470-1472.

The Cities also allege that CenturyLink engaged in inconsistent action with respect to the license tax ordinances. Resp. Br. 15-16, 28-29. First, Respondents allege that Embarq's actions are inconsistent because Embarq is a party to a settlement agreement

with Jefferson City. Resp. Br. 16 (citing LF 1316) (arguing CenturyLink “does pay License Taxes on these four categories in another city”). But the Jefferson City settlement agreement does not involve any admission by Embarq that any taxes were due under Jefferson City’s ordinance, or any other tax ordinance. The settlement agreement specifically recites that CenturyLink “disputes the Assessment, the Assessed Amount, the methodology of the audit, the tax base on which the Audit was based, and otherwise disputes that it owes any amounts under [Jefferson City’s tax ordinance]....” LF 873 (Recital G). The settlement agreement further provides that “[t]his Safe Harbor Agreement and the Settlement Agreement represent the settlement of disputed claims, and are not an admission of liability or of indebtedness by any of the Parties.” LF 884.

The Cities contend that, because certain of CenturyLink’s customer bills include the Common Line Charge under a heading for “Local Exchange Services,” CenturyLink has effectively conceded that this charge constitutes a taxable local exchange service. Resp. Br. 28. This allegation mischaracterizes the bills. As CenturyLink informed the trial court, this designation on the bills merely indicates that these services are offered in connection with local exchange service, not that they themselves constitute local exchange service. LF 1467 (noting that “certain services or features are made available to or are associated with local exchange customers but do not constitute exchange telephone services”). The more authoritative evidence of the nature of services lies in the tariffs that CenturyLink submitted to the trial court. These tariffs draw a fundamental distinction between “local exchange service” and other services, including the optional services. *See* LF 1475-1625 (filed tariffs).

The Cities, moreover, badly mischaracterize CenturyLink’s tariffs. The Cities quote the Embarq tariff as if it defined “exchange service” broadly as “CenturyLink’s telecommunication services ‘specified in the Local or General Exchange Tariffs.’” Resp. Br. 29 (quoting LF 1480). This selective and misleading quotation of the tariff erroneously implies that any service listed in the tariff is a local exchange service, when the tariff indicates exactly the opposite. The full sentence from which the Cities quote is as follows: “Exchange Service – The 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 1480. The tariff has a three-part basic structure: introductory material and definitions, LF 1475-1481; services that qualify as local exchange service, LF 1482-1502; and additional services, “Custom Calling Services,” that are above and beyond those services that qualify as local exchange service, LF 1503-1531. Despite the Cities’ claims, the tariff does not define “exchange service” as any service listed in the tariffs, but instead defines “exchange service” as a specific service—i.e., the “furnishing of facilities for the telephone communication within an exchange area”—the charges for which are listed in the tariff. LF 1480.

The Cities assert that Appellants “individually or collectively provide telephone service to residents and businesses within the Cities.” Resp. Br. 14; *see also* Resp. Br. 27 (similar). Appellants, however, presented evidence at summary judgment that only Appellants Spectra, CenturyTel, and Embarq provide “telephone service” in the Respondent Cities, as that term is used in the Cities’ respective ordinances. LF 1294-1300, ¶ 17-31 (referring to the Galloway Deposition, LF 1113-1117, and the Seshagiri

Affidavit, LF 1216-1218.). The remaining three Appellants do not provide telephone service in the Respondent Cities. *Id.*

B. The Cities Allege New Facts Not Supported by the Record.

The Cities also seek to introduce new facts not supported in the trial court record. First, the Cities allege they did not learn until 2009 of CenturyLink's alleged underpayment of taxes, when they learned of "the apparent telecommunications industry practice of failing to pay taxes on certain amounts of revenue." Resp. Br. 15. They cite only a statement of "fact" submitted to the trial court, LF 1315-1316. That fact pertains to a 2009 settlement agreement between Southwestern Bell Telephone Co./AT&T Missouri and the cities of Wellston, Winchester, and University City, which may be found at LF 783-872. At no point, however, did the Cities submit any evidence that they were unaware of CenturyLink's position before 2009. LF 1315-1316; LF 783-872. Further, the Cities offered no evidence that the alleged underpayment of taxes was an "apparent telecommunication industry practice." *Id.* On the contrary, the evidence in the record indicates that CenturyLink paid taxes on the settled understanding of the tax ordinances for many years without complaint from the Cities. *See* LF 571-575, 583-585, 601-602, 604-606, 1216-1218, 1235.

Second, the Cities allege that "nothing in the [license tax] reports filed by CenturyLink shows how the taxes are calculated." Resp. Br. 15; *see also* Resp. Br. 24 (similar). There is no evidence in the record to support this allegation. In particular, the Cities did not submit any of CenturyLink's license tax reports to the trial court. The only relevant citation provided to support this allegation is a citation of the Cities' Second

Amended Petition, LF 184, which contains an unsupported allegation that CenturyLink failed to file sworn statements of their gross receipts. *See* Resp. Br. 15; LF 184, ¶ 30.

The record contains no evidence that the license tax reports failed to place the Cities on notice of the tax base CenturyLink used to calculate its tax liability under the ordinances.

The Cities allege that an audit of one CenturyLink entity was conducted by Wentzville. Resp. Br. 15 (citing LF 607-622). Respondents have made no prior arguments about the alleged Wentzville audit, nor did they rely on the alleged Wentzville audit in the court below. In the trial court, moreover, the affiant attesting to the authenticity of the “audit” document referred to it merely as a “copy of certain results of a certain report prepared by Defendants detailing revenues....” LF 604. The only indication that Wentzville conducted an “audit” comes from footers on pages 607-622 of the legal file, which state “Wentzville Audit” and “12/19/2013,” the date on which Respondents moved for summary judgment. LF 607-622. The record contains no evidence stating an audit was completed, stating the findings, results, or conclusions of that audit, or assessing any past due taxes.

ARGUMENT

REPLY BRIEF IN SUPPORT OF APPELLANTS' APPEAL

I. The “Grandfathered Political Subdivisions” Exemption of RSMo. § 67.1846 Is a Facially Special Law For Which the Cities Provide No Substantial Justification, and It Is Severable From the Remainder of the Statute (Reply in Support of Appellants’ Point I).

The Cities fail to satisfy either of the legal standards that could salvage § 67.1846.1’s exemption for a select group of “grandfathered political subdivision[s]” from the prohibition against special laws in Article III, § 40(30) of the Missouri Constitution. They fail to show that the exemption is not “facially special,” and they fail to show that the legislature had “substantial justification” for it. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184, 186 (Mo. banc 2006). The Cities also fail to offer any plausible theory of severability that would preserve Cameron’s authority to impose linear foot fees. This Court should declare the “grandfathered political subdivision” exemption unconstitutional and excise it from the remainder of S.B. 369, leaving intact a statutory scheme that is complete, constitutional, and consistent with legislative intent.

A. This case squarely presents the constitutionality of RSMo. § 67.1846’s exemption for select “grandfathered political subdivision[s].”

The Cities contend that this Court could resolve Cameron’s claim to linear foot fees without determining the constitutionality of RSMo. § 67.1846’s “grandfathered

political subdivision” exemption. Resp. Br. 40-41. This is clearly incorrect. As the Cities acknowledge, Cameron’s power to impose its user fee is entirely dependent on the “grandfathered political subdivision” exemption. *See* Resp. Br. 38-39. If the exemption is an unconstitutional special law and should be severed from the rest of S.B. 369, then Cameron has no authority to impose a linear foot fee. *See id.*

As the Cities concede, Resp. Br. 38, Missouri’s right-of-way laws prohibit political subdivisions from “requir[ing] 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), Appx. A39. Section 67.1840 provides that those political subdivisions may require right-of-way users to pay permit fees to cover “right-of-way management costs,” RSMo. § 67.1840.1, Appx. A37, which must be based on “the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right-of-way.” RSMo. § 67.1840.2(1), Appx. A37. Section 67.1830(5) reinforces that political subdivisions may not smuggle “payment ... for the use or rent of the public right-of-way” into their “right-of-way management costs.” RSMo. § 67.1830(5), Appx. A35.¹

¹ After partial summary judgment was granted in this case, legislative amendments to RSMo. §§ 67.1842.1 and 67.1830(5) became effective on August 28, 2014. The interpretation of the amended language is not currently before this Court, and the amendments did not affect the language quoted herein.

These provisions make clear that political subdivisions may not collect arbitrary, non-cost-based “user fees” or “linear foot fees” from right-of-way users. Rather, they may collect from right-of-way users *only those fees that are specifically authorized by the ROW Laws*, which include a permit fee based on the actual costs of managing the right-of-way. These provisions provide the context for § 67.1846’s special exemption for “grandfathered political subdivision[s],” which purports to allow a select group of cities to do exactly what the law otherwise forbids: to charge right-of-way users a fee based on nothing more than use of the right-of-way. Because Cameron’s linear foot fees are not authorized by the ROW laws—except as permitted by the unconstitutional exemption for grandfathered political subdivisions—this case squarely presents the validity of that exemption.

B. The legal authority cited by the Cities does not bar CenturyLink’s constitutional claim.

The Cities argue that a federal district court “specifically upheld the grandfathering provision under Missouri law” in *Level 3 Communications, LLC v. City of St. Louis*, 405 F.Supp.2d 1047, 1063 (E.D. Mo. 2005). But, as the Cities openly concede, *Level 3* did not even address this issue. Resp. Br. 42. In fact, the opinion contains no indication that the plaintiff challenged the validity of the exemption on any grounds. *See Level 3*, 405 F.Supp.2d at 1063. The court therefore had no occasion to “uphold” the exemption, and the case has no persuasive value here. *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.”).

C. The exemption for “grandfathered political subdivisions” is a facially special law and thus presumptively unconstitutional.

CenturyLink demonstrated that the “grandfathered political subdivision” exemption is a “facially special law” under this Court’s precedent in *Springfield*, 203 S.W.3d at 184, because it creates a closed classification by providing a special privilege to those political subdivisions that had “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. A41. *See* App. Br. 22-25. The Cities make several attempts to distinguish this case from *Springfield* and rely on other authorities instead; all these attempts are unavailing.

1. The Cities’ attempts to distinguish *Springfield* have no merit.

First, the Cities argue that the problem with the contested provision in *Springfield* was that it created a classification based on whether cities had *enforced* certain ordinances by a date in the past, whereas RSMo. § 67.1846.1 draws a line based on whether cities had *enacted* certain ordinances by a date in the past. *See* Resp. Br. 42-43. On the contrary, enactment or enforcement made no difference to the outcome in *Springfield*. *See* App. Br. 24. What made the contested provision a “facially special law” was that the “specified action,” whatever it was, was completed 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*.... [T]here 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.

Springfield, 203 S.W.3d at 186 (emphases added). Just like the contested provision 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” under *Springfield*. *Id.* at 184.

Second, the Cities attempt to distinguish *Springfield* on the ground that the “grandfathered political subdivision” exemption allegedly operates to “retain” a preexisting legal authority that would otherwise be restricted by a new statute, while the contested provision in *Springfield* “did much more than this common and well accepted statutory practice.” Resp. Br. 43-44. On this point, the Cities have the facts precisely backwards. The contested provision in *Springfield* operated simply to preserve certain cities’ preexisting business license tax ordinances, which would otherwise have been subject to a new statutory cap. *See Springfield*, 203 S.W.3d at 181 (“Such a municipality could continue to impose the tax previously approved without being limited by the [new] provisions...”). It did not purport to allow the privileged cities to amend their license tax

ordinances or enact new ones—yet it was still held unconstitutional. By contrast, the “grandfathered political subdivision” exemption purports not only to preserve a select group of cities’ preexisting linear foot fee ordinances, but also to empower those cities to amend those ordinances and enact new linear foot fee ordinances. *See* RSMo. 67.1846.1, Appx. A41 (“Nothing in sections 67.1830 to 67.1846 shall prevent a grandfathered political subdivision from enacting new ordinances, including amendments of existing ordinances, charging a public utility right-of-way user a fair and reasonable linear foot fee...”).

2. The Cities rely on cases that do not involve special-laws challenges and provide no support for their position.

The Cities cite a series of cases to argue that laws may be enacted that preserve preexisting legal authority, but these cases do not avail the Cities. Resp. Br. 43-44. First, none of these cases involved a special-laws challenge to the relevant law, so they provide no guidance on whether the exemption in this case is an unconstitutional special law. Second, none of these cases involved a provision that empowered the privileged class to enact additional new ordinances on the subject matter. *See State ex rel. Safety Ambulance Serv., Inc. v. Kinder*, 557 S.W.2d 242, 247 (Mo. banc 1977) (exempting existing ambulance services from a new, one-time hearing requirement); *State ex rel. Vossbrink v. Carpenter*, 388 S.W.2d 823, 829 (Mo. 1965) (exempting an existing school superintendent from new credentialing requirements); *Union Elec. Co. v. Cuivre River Elec. Co-op., Inc.*, 726 S.W.2d 415, 418 (Mo. App. E.D. 1987) (applying a clause that permitted an electric company to continue providing service in the manner it had been

providing it on the effective date of the statute). Further, each of those cases involved a clear justification for the special treatment, while the Cities in this case have failed to provide any plausible theory of justification for the exemption. *See, e.g., Safety Ambulance*, 557 S.W.2d at 246 (“If grandfather licenses had not been permitted, existing ambulance services would have been barred from operation.”); *Cuivre River*, 726 S.W.2d at 417 (observing that the clause at issue was necessary to “preclude customers from switching back and forth between electrical suppliers”).

3. The Cities’ argument that the exemption covers “too many political subdivisions” has no factual or legal support.

The Cities argue—for the first time on appeal—that the exemption cannot be an unconstitutional special law because it allegedly affects “too many political subdivisions.” Resp. Br. 44. This argument is wholly speculative as a matter of fact, and lacks any support as a matter of law. As to the lack of factual basis: The Cities admit that they have no idea how many political subdivisions the exemption does affect, and that they are “unaware of any effort to ever identify every ‘grandfathered political subdivision.’” Resp. Br. 45. Even if they did, the Cities submitted no evidence on this issue to the trial court. *State v. Sager*, 600 S.W.2d 541, 577 (Mo. App. W.D. 1980) (“This court cannot assume facts or evidence not found upon the record, and it cannot assume facts presented as mere allegations on appeal ...”); *see also* Mo. Sup. Ct. R. 81.12; RSMo. § 512.110.2. Further, the Cities speculate that the class of “grandfathered political subdivisions” includes only about “a dozen political subdivisions,” among the

many hundreds throughout the State, so the exemption covers only a small minority of cities even on their speculative account. Resp. Br. 45.

This argument lacks any legal support as well. The Cities cite no precedent applying a “numerosity” standard in a special-laws case, and no case so holds. On the contrary, in *Springfield*, this Court directly rejected this argument, holding that the size of the privileged class is irrelevant: “Sprint suggests that it is possible other, as yet unidentified, cities may fit within this special category also. This misses the point. ‘*The focus is not on the size of the class comprehended by the legislation . . . the issue is the nature of the factors used in arriving at that class.*’” *Springfield*, 203 S.W.3d at 186 (emphasis added) (quoting *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997)).

D. The Cities fail to provide the requisite “substantial justification” for the special exemption.

The Cities fail to bear their burden of demonstrating a “substantial justification” for upholding the facially special law. *See* App. Br. 25-27; *Bd. of Educ. of St. Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1, 10 (Mo. banc 2008) (“The party defending a facially special law must demonstrate a substantial justification for the closed-ended classification.”); *see also Springfield*, 203 S.W.3d at 186.

1. “Preservation of existing revenue sources” does not provide a substantial justification for the exemption.

The Cities’ principal argument is that the legislature had “substantial justification to preserve existing revenue sources for local governments and simply prohibit new

reliance on such linear foot fees in the future.” Resp. Br. 46. That argument fails for at least two reasons: (i) the exemption does not merely “preserve existing revenue sources”; and (ii) preserving existing revenue sources does not amount to “substantial justification” for a facially special law in any event.

First, the Cities mischaracterize the exemption. The “grandfathered political subdivision” exemption does not merely “preserve existing” linear foot fee ordinances while “prohibit[ing] new reliance” on such fees. *See* App. Br. 26-27. It grants a select group of municipalities unlimited authority to impose new linear foot fees in the future, *i.e.*, after S.B. 369 takes effect to prohibit all other political subdivisions from imposing the same fees. *See* RSMo. § 67.1846.1, Appx. A41. It creates a privileged class of cities that may enact new legislation in the future, as well as preserving their (and only their) preexisting linear foot fee ordinances.

The Cities attempt to gloss over this crucial distinction by suggesting that “[t]he ability to enforce, renew, and enact new linear foot fee ordinances is inherently necessary” to enable cities to “adjust” their existing fees “to keep up with inflation and increases in costs.” Resp. Br. 48. But the exemption does not merely grant cities the power to amend existing ordinances in response to external economic factors; it permits select cities to enact new linear foot fees without limitation to inflation, costs, or any other consideration: “Nothing in sections 67.1830 to 67.1846 shall prevent a grandfathered political subdivision from *enacting new ordinances*, including amendments of existing ordinances, *charging a public utility right-of-way user a fair*

and reasonable linear foot fee . . . for use of the right-of-way.” RSMo. § 67.1846
(emphases added).

In any event, even if the statute were limited to preexisting ordinances, “preserv[ing] existing revenue sources” does not rise to the level of “substantial justification” for a facially special law under this Court’s precedents. The “substantial justification” standard requires more than showing that the legislature had a rational basis for passing the provision. *See O’Reilly v. Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) (“Because 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 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).

In *Springfield*, the contested statute unquestionably had the effect of preserving existing streams of tax revenue, but this Court nonetheless found that there was no “substantial justification” for excluding the political subdivisions that had not established those streams of revenue by a certain date in the past. *See Springfield*, 203 S.W.3d at 181, 187. Likewise, the mere fact that the “grandfathered political subdivision[s]” had certain revenue streams established by a date prior to the enactment of S.B. 369 does not

afford “substantial justification” for granting *only them* an exemption to S.B. 369’s ban on linear foot fees, while applying the ban to all others. *See id.*

2. “Balancing municipal and business interests” does not provide a substantial justification for the exemption.

For the first time on appeal, the Cities claim that the legislature’s effort to preserve the cities’ linear foot fees is putatively justified by the interest in “[b]alancing the preservation of ‘sound municipal revenue’ with economic interests of businesses.” Resp. Br. 46 (citing *Union Elec. Co. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. App. E.D. 1998)). But *Mexico Plastic* is clearly distinguishable. In *Mexico Plastic*, the Court of Appeals found that the overall purpose of an ordinance would be undermined without the contested classification, and it made specific factual findings about the magnitude of the financial stakes to the municipality. *See Mexico Plastic*, 973 S.W.2d at 174 (“Revenue from the business license tax constituted nearly fifty percent of City’s general fund budget and about fourteen percent of City’s overall budget at the time the 1990 ordinance was passed. City had to make reasonable limitations like the one lifetime exemption rule to adequately serve the purposes of its ordinance.”). By contrast, the Cities provide no evidence that the “grandfathered political subdivision” exemption is necessary “to adequately serve the purposes” of S.B. 369, or that it is vital to the financial welfare of the State of Missouri or to any of its municipalities. *Id.* Indeed, Cameron itself certainly cannot make such a showing, because Cameron adopted its linear foot fee ordinance only six months before the statutory cut-off date of May 1, 2001. *See* LF 912-913 (indicating that Cameron Code § 10.5-207 was enacted on December 5, 2000).

Without such evidence, the bare allegation that the exemption attempts to balance the competing interests of municipalities and businesses provides no “substantial justification” for enactment of a facially special law. In fact, this Court rejected that very argument in *Springfield*: “Sprint also argues that adoption of the Act was an attempt by the legislature to achieve a balance between the needs of utilities and cities. Most legislation is an attempt to balance the needs of citizens or businesses. Such is not a basis to ignore constitutional requirements.” *Springfield*, 203 S.W.3d at 186 n.12.

3. “Satisfying an important government function” does not provide substantial justification for the exemption.

The Cities also contend that the “grandfathered political subdivision” exemption finds “substantial justification” on the putative ground that the linear foot fees “satisf[y] an important government function as an important component of the Cities’ existing revenue streams and ROW Code enforcement.” Resp. Br. 46. This argument is difficult to distinguish from the Cities’ claim that the exemption is justified to “preserve existing revenue streams,” which has no merit for the reasons state above. Further, it is difficult to see how charging linear foot fees constitutes such an “important government function” when the statute permits only a privileged subset of cities to exercise it. In any event, the case on which the Cities rely, *City of Sullivan v. Sites*, 329 S.W.3d 691, 694-95 (Mo. banc 2010), is clearly distinguishable from this case. In *Sullivan*, this Court upheld a city’s schedule of sewer-connection fees that imposed higher fees on properties with access to newer, updated portions of the city’s sewer system. *Id.* The record in *Sullivan*

provided clear evidence of a direct nexus between the special class and the benefits the city sought to provide:

The record in this case provides evidence that there was substantial justification for creating a class of new sewer connections that was required to pay higher connection fees before accessing new portions of the City’s sewer system. *The higher connection fees were imposed in a way that embraced all of the class to which the higher fees naturally related....*

Sullivan, 329 S.W.3d at 694 (emphases added).

Unlike *Sullivan*, the record in this case is devoid of any facts that would support a similar justification. The Cities have not shown, or attempted to show, that the class embraces all political subdivisions to which the privilege of imposing linear foot fees “naturally relate[s].” *Id.* (citing *Springfield*, 203 S.W.3d at 184). Lacking such facts, this Court should decline to adopt the blanket principle that any facially special law has “substantial justification” if it “satisfies an important government function.” Resp. Br. 46. To adopt that principle would effectively nullify the Constitution’s prohibition on special laws.

Finally, without citing any authority, the Cities propose that “even where a statute sets forth a closed class of political subdivisions, substantial justification for such closed class is found where the number ... in such a closed class is greater than ‘one or a few.’” Resp. Br. 47. This argument has no merit for the same reasons discussed above. The Cities have submitted no evidence that the “number” of political subdivisions is “greater than ‘one or a few,’” *id.* Even if they had, this Court squarely rejected this argument in

Springfield. See *Springfield*, 203 S.W.3d at 186 (“The focus is not on the size of the class comprehended by the legislation . . . the issue is the nature of the factors used in arriving at that class.”).

E. Severance of the “grandfathered political subdivision” exemption would do no harm to the statutory scheme.

In an effort to preserve Cameron’s ability to impose illegal linear foot fees, the Cities propose two alternative schemes for severing the unconstitutional exemption from the statute: (1) severing only the date of the exemption from the statute; and (2) invalidating the ROW laws, RSMo. §§ 67.1830-67.1848, in their entirety. See Resp. Br. 48-54. Both of these proposals are meritless.

1. Severing the date limitation from the “grandfathered political subdivision” exemption would effectively nullify the ROW Laws’ ban on linear foot fees, in clear contradiction of legislative intent.

First, the Cities argue that, if the exemption is unconstitutional, only the date limitation should be severed. Resp. Br. 49. Excising the date would cause the statute to read: “[A] ‘grandfathered political subdivision’ is any political subdivision which has [] enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user” The Cities contend that this solution would manifest “restraint” and honor the principle that “statutes . . . should be upheld to the fullest extent possible.” Resp. Br. 49 (quoting *Nat’l Solid Waste Mgmt Ass’n v. Dir. of Dep’t of Nat’l Res.*, 964 S.W.2d 818, 822 (Mo. banc 1998)). In fact, it would do the opposite.

Though modest in word count, the Cities’ proposed modification has unrestrained implications. As the Cities admit, the revised statute would authorize *any* city to enact a linear foot fee *at any time*—past, present, or future. *See* Resp. Br. 49. The proposed modification would completely turn the statute on its head—like striking the word “not” from a general prohibition. That is far from a minor alteration to the statutory scheme. It would eviscerate the statute’s ban on linear foot fees, and it would render part of the provision senseless and the rest misleading. *See Safety Ambulance*, 557 S.W.2d at 247 (“[I]n construing the Act ... we seek to ... avoid any strained and absurd meaning.”) (internal quotation marks and citations omitted)); *State ex rel. Smith v. Atterbury*, 270 S.W.2d 399, 404 (Mo. 1954) (holding that “in construing a statute, significance and effect should, if possible, be attributed to every word, every phrase, sentence and part thereof”).

Even more problematic, authorizing all political subdivisions to impose linear foot fees would reverse the statutory scheme’s ban on non-cost-based user fees. As discussed above, the ROW Laws prohibit cities from charging right-of-way users fees for use of the right-of-way “except as provided in sections 67.1830 to 67.1846.” RSMo.

§ 67.1842.1(4). Other than the exception for “grandfathered political subdivisions,” those sections allow for only a handful of narrow, targeted exceptions, such as (i) fees to recover the actual, substantiated costs of managing the right-of-way, RSMo. § 67.1840.1, 2(1), Appx. A37; and (ii) preexisting fees from “an existing franchise, franchise fees, license or other agreement or permit” that was already in effect at the time of the statute’s enactment, *id.* § 67.1846.1.

This statutory scheme reflects a clear policy against the imposition of arbitrary, non-cost-based municipal user fees as “rent” for use of the right-of-way, with only limited exceptions. *See* RSMo. §§ 67.1840.1, 67.1840.2(1), 67.1830(5); Appx. A35, A37. Deleting the date limitation, and thereby licensing all Missouri municipalities to impose non-cost-based user fees, would allow the narrow exception to swallow the rule. *State v. Christopher*, 2 S.W.2d 621, 629 (Mo. 1927) (rejecting a proposed statutory interpretation because it would make an exception broader than the rule).

Respondents contend that excising the date would leave intact other conditions on the “grandfathered political subdivision” exemption—e.g., the condition that public utility right-of-way users must receive “credit for any amounts paid as business license taxes or gross receipts taxes” against their linear foot user fee. Resp. Br. 49 (quoting RSMo. § 67.1846). This observation is beside the point. The drafters of S.B. 369 clearly did not intend to provide broad authorization for linear foot user fees, subject to only that limitation. Rather, they intended to prohibit almost all non-cost-based user fees, with only a handful of limited exceptions. That legislative intent would be turned on its head by extending “grandfathered political subdivision[s]” to include *all* political subdivisions, thus allowing all municipalities to impose non-cost-based linear foot fees as “rent” for the use of their rights-of-way.

Moreover, the only case the Cities cite in support of their proposal actually supports severing the entire “grandfathered political subdivision” exemption, as CenturyLink urges. In *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219 (Mo. banc 1991), after invalidating a special procedure for revising tax levies

for only St. Louis City and St. Louis County, the Court severed the offending provision, leaving the rest of the statutory scheme intact, and leaving the two formerly-special political subdivisions subject to the same provisions that applied to all other political subdivisions in the state. *Riverview Gardens*, 816 S.W.2d at 223 (“If the provisions of the statute dealing with St. Louis County and the City of St. Louis are excised from the statute, there remains a complete plan . . .”). The same course is appropriate here—to sever the unconstitutional “grandfathered political subdivision” exemption, leaving the rest of the statutory scheme intact, and subject the formerly exempt subdivisions to the same provisions that apply to all other political subdivisions in Missouri. *See also State ex rel. Public Defender Com. v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984) (invalidating a statutory exception for a single county and leaving the remainder of the statute intact).

2. Invalidating the entirety of the ROW laws is unnecessary and would contradict the legislature’s manifest intent.

The Cities contend that the only alternative to excising the date limitation on the exemption is to invalidate S.B. 369 in its entirety, because striking the exemption itself would leave the statutory scheme “incomplete and incapable of being executed in accordance with the legislative intent,” Resp. Br. 51, and because “it cannot be presumed the legislature would have enacted the valid provisions without the grandfathering provision,” Resp. Br. 53. This proposal contradicts the well-established statutory standard for severance, which adopts a default presumption in favor of severing substantively unconstitutional provisions while upholding valid provisions to the fullest

extent possible. *See* RSMo. § 1.140, Appx. A33 (“The provisions of every statute are severable.”); *see also* *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 742 (Mo. banc 2007) (“[A]ll statutes should be upheld to the fullest extent possible.”).

As CenturyLink has already shown, severance of the “grandfathered political subdivision” exemption would leave a statutory scheme that is perfectly “complete and workable,” and would not “‘affect the viability or workability’ of any other provision.” App. Br. 28 (quoting *SSM Cardinal Glennon Children’s Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. banc 2002)). The Cities insist, however, that § 67.1842.1(4), which states that “no political subdivision shall . . . [r]equire a telecommunications company to obtain a franchise or 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,” would be “meaningless” if the exemption were severed, because the “grandfathered political subdivision” exemption is supposedly the *only* provision of S.B. 369 that allows political subdivisions to “require a public utility right-of-way user to pay for the use of the public right-of-way....” Resp. Br. 52 (quoting RSMo. § 67.1842.1(4), Appx. A39).

That argument fails for several reasons. First, the “grandfathered political subdivision” exemption is *not* the only provision of the ROW Laws that authorizes municipalities to “require a public utility right-of-way user to pay for the use of the public right of way.” RSMo. § 67.1842.1(4), Appx. A39. As discussed above, sections 67.1830 to 67.1846 include multiple targeted exceptions that authorize municipalities to “require a public utility right-of-way user to pay for the use of the public right-of-way,”

id., other than the exemption for grandfathered subdivisions. These exceptions include (i) *cost-based* fees to recover right-of-way management costs, which 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, 2(1), Appx. A37, and which “shall not include payment by a public utility right-of-way user for the use or rent of the public right-of-way,” *id.* § 67.1830(5), Appx. A35; and (ii) fees associated with “the provisions of an existing franchise, franchise fees, license or other agreement or permit in effect on May 1, 2001,” RSMo. § 67.1846.1, Appx. A41.

Second, even if there were no other mechanism for cities to require utilities to pay for use of the public rights-of-way, nothing about the statutory scheme would become “incomplete” or “unworkable” by the invalidation of the “grandfathered political subdivision” exemption. The clear significance of § 67.1842.1(4) is to forbid municipalities from imposing fees on right-of-way users except as explicitly authorized by the Missouri state legislature. *See* RSMo. § 67.1842.1, Appx. A39. The severance of the exemption leaves this principle intact.

Third, the Cities have identified no case in which a court declined to sever an unconstitutional provision based solely on a generic cross-reference somewhere else in the bill. The Cities rely on *Conseco Financial Servicing Corporation v. Missouri Department of Revenue*, in which the Court found that one set of provisions would have to stand or fall with another, because it was “so essentially and inseparably connected with, and so dependent on” the other, that if the other were invalidated, they would literally “never come into play.” *Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue*,

98 S.W.3d 540, 546 (Mo. banc 2003). The *Conseco* Court was dealing with a complex statutory regime that would become practically moot if another statutory regime were invalidated. *Id.* Here, by contrast, if the contested exemption is severed, it will have no practical effect on the operation of any other statutory provision. It will simply put the “grandfathered political subdivision[s]” on the same footing under Missouri’s ROW Laws as all other municipalities—an outcome that this Court has deemed acceptable in other contexts. *See Riverview Gardens*, 816 S.W.2d at 221, 223.

Fourth, S.B. 369’s legislative history makes clear that the Missouri legislature did not regard § 67.1842.1(4)’s catch-all exception as “meaningless” without the “grandfathered political subdivision” exemption, because the “except as provided in sections 67.1830 to 67.1846” language appeared in all five draft versions of S.B. 369, whereas the “grandfathered political subdivision” exemption did not appear until the last. *See Enactment History of S.B. 369 (2001)*, Appx. A65-A72 (Introduced), A73-A80 (Senate Committee Substitute), A81-A89 (Perfected), A90-A98 (House Committee Substitute), A99-A107 (Truly Agreed To and Finally Passed), *available at* <http://www.senate.mo.gov/01info/billtext/SB369.htm>. It would be odd, to say the least, for the statute’s drafters to include, and for so many Missouri legislators to approve, language that was “meaningless and incapable of any operation.” Resp. Br. 52.

Lastly, the Cities allege that “it cannot be presumed the legislature would have enacted the valid provisions without the grandfathering provision.” Resp. Br. 53. In support of this claim, they offer the bare assertion that “[t]he fact that the grandfathering provision was adopted as part of a Conference Committee between the House and Senate

is proof that the legislature would *not* have enacted the valid provisions without the void one.” Resp. Br. 53. This argument is unconvincing for multiple reasons. Most fundamentally, the Cities’ theory would prohibit Missouri courts from severing any legislative provision that was added in Conference Committee. But this Court has previously done so. *Rizzo v. State*, 189 S.W.3d 576, 578 n.2, 581 (Mo. banc 2006). In *Rizzo*, this Court severed a provision that appeared for the first time in the “conference committee substitute” version of a bill because the valid provisions of the bill “are not so dependent upon [the invalid provision] that it cannot be presumed the legislature would have passed the bill without it.” *Id.* at 578 n.2, 581; *see also* Enactment History of H.B. 58 (2005) (demonstrating that the invalid provision appeared for the first time in the Truly Agreed to and Finally Passed version of H.B. 58 after Conference Committee), *available at* <http://www.house.mo.gov/content.aspx?info=/bills051/bills/HB58.HTM>.

In this case, the Conference Committee added the grandfathered-subdivisions exemption along with a host of other, minor alterations to the bill. These last-minute additions included—among others—a provision allowing franchise fees for cable television systems, RSMo. § 67.1830(5); an alteration that clarified the conditions under which right-of-way users must provide proof of insurance, RSMo. § 67.1830(6)(a); a provision explicitly allowing political subdivisions to impose permit conditions to protect the public safety, RSMo. § 67.1830(6)(h); a provision allowing political subdivisions to undertake their own street restoration work after excavations by public utilities, with reimbursement by the utilities, RSMo. § 67.1834.1; and a provision clarifying that SB 369 does not limit the authority of political subdivisions to enforce applicable zoning and

safety ordinances, RSMo. § 67.1844.1. Because the exemption was added along with several other minor amendments, as routinely happens in Conference, the exemption clearly did not serve as a necessary catalyst to secure the bill's passage, as the Cities contend. *See* Resp. Br. 53.

Further, the Cities presented no evidence supporting their theory that the exemption's insertion by the Conference Committee was a critical turning point for the legislation. Indeed, the Senate had passed a prior version of the legislation that did not include the exemption, giving rise to an inference that the special law was not particularly important. *See* Enactment History of S.B. 369 (2001), Appx. A65-A72 (Introduced), A73-A80 (Senate Committee Substitute), A81-A89 (Perfected), A90-A98 (House Committee Substitute), A99-A107 (Truly Agreed To and Finally Passed), *available at* <http://www.senate.mo.gov/01info/billtext/SB369.htm> (showing that a version of the bill that did not have the exemption was perfected by the Senate on April 23, 2001). Given that *both* legislative houses had passed earlier versions of the bill with no exemption, there is no reason to suspect that the bill would not have passed without it.

The Cities have provided no reason to doubt that the legislature would have passed S.B. 369 without the "grandfathered political subdivision" exemption. Nor have they shown that the other provisions of S.B. 369, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent. *See* RSMo. § 1.140, Appx. A33; *Planned Parenthood of Kan. & Mid-Mo.*, 220 S.W.3d at 742 ("[A]ll statutes should be upheld to the fullest extent possible."). In fact, the Cities have offered no reason to view the special exemption as anything other than a last-minute political favor inserted

into the bill before final passage for the benefit of a select group of privileged cities such as Cameron. *See* Resp. Br. 53 (suggesting that the grandfathered political subdivision exemption passed due to the lobbying of “several large and likely influential cities”). This is the precise ill that Article III, § 40(30) of the Missouri Constitution was designed to prohibit.

II. Cameron and Wentzville’s Right-of-Way User Agreements Are Illegal Mandatory “Franchises” Under RSMo. § 67.1842.1(4), and Cameron Made No Showing That Its Fees Are Based on the Actual, Substantiated Costs of Using the Right-of-Way (Reply in Support of Appellants’ Point II).

The Cities provide no basis to conclude that their right-of-way permit agreements are anything but illegal “franchises.” Cameron and Wentzville’s attempts to compel Spectra and CenturyTel to obtain franchises violate RSMo. § 67.1842.1(4).² *See* Appx., A39. The trial court’s entry of summary judgment in favor of Cameron and Wentzville on Counts XVII-XIX was erroneous and should be reversed.³

² After partial summary judgment was granted in this case, legislative amendments to RSMo. §§ 67.1842.1 became effective on August 28, 2014. The interpretation of the amended language is not currently before this Court, and the amendments did not affect the language quoted herein.

³ The Cities argue that Point II violates Rule 84.04(d) because it is putatively “multifarious” and “asserts ‘two errors’ of the trial court under one point.” Resp. Br. 55. They repeat this claim for Points III and V. *See* Resp. Br. 67, 98. For the reasons stated in CenturyLink’s Suggestions in Opposition to the Cities’ Motion to Dismiss, these arguments have no merit. All of CenturyLink’s Points Relied On correctly combine *related* legal reasons to review a single ruling of the trial court in a single point. *See Thummel v. King*, 570 S.W.2d 679, 688 (Mo. banc 1978).

A. Cameron and Wentzville’s right-of-way agreements constitute illegal mandatory “franchises” under Missouri’s ROW laws.

Missouri’s ROW Laws forbid cities from requiring the kind of agreement that Cameron and Wentzville seek to require of Spectra and CenturyTel: “[N]o political subdivision shall ... [r]equire a telecommunications company to obtain a franchise.” RSMo. § 67.1842.1(4), Appx. A39. Under Missouri law, the term “franchise” includes any transaction in which the government grants an individual entity a privilege or authorization that is not common to the citizens generally, including agreements under which public utilities arrange to provide services in municipalities. *See* App. Br. 33-34. Cameron and Wentzville seek to compel telecommunications companies to “obtain an agreement from the City granting authorization to use and occupy the rights-of-way.” LF 1000 (citing Cameron ROW Code § 10.5-151, Appx. A18; Wentzville ROW Code, §§ 655.100 & 655.285(A)(2), Appx. A20, A23-A24); *see also* LF 203-209, ¶¶ 125-45, 148-59. Thus, they “require a telecommunications company to obtain a franchise,” in violation of RSMo. § 67.1842.1(4), Appx. A39.

1. Missouri law defines “franchise” as a grant of privilege by the government that is not common to citizens generally.

The Cities incorrectly argue (1) that CenturyLink “essentially create[d]” its definition of “franchise,” and also (2) that the definition relies on non-Missouri case law. *See* Resp. Br. 57-58. On the contrary, Missouri courts have repeatedly defined the term “franchise” as a transaction in which the government grants a privilege or authorization to an individual entity that is not common to the citizens generally. *See* App. Br. 33-34

(citing *State ex rel. McKittrick v. Murphy*, 148 S.W.2d 527, 530 (Mo. 1941); *Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo. App. S.D. 1963)); see also *State ex rel. Schneider's Credit Jewelers, Inc. v. Brackman*, 272 S.W.2d 289, 292-93 (Mo. banc 1954) (quoting *McKittrick v. Murphy*'s definition of "franchise"); *State ex rel. Hagerman v. St. Louis & E.S.L.E.R. Co.*, 216 S.W. 263, 265 (Mo. 1919) (finding that "permission to operate [a] street railway on [a] public highway for fifty years" is a "franchise," under "the correct meaning of the term 'franchise,' which implies a privilege conferred by law to do that which 'does not belong to the citizens of the country generally as a common right'"). Further, Missouri courts have used the term specifically to refer to 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 ... 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). Not surprisingly, the definition of "franchise" that has been used for decades by the Missouri courts is also consistent with other legal sources. See App. Br. 34 (citing BLACK'S LAW DICTIONARY 683 (8th ed. 2004)).

The Cities would have this Court simply ignore the definition of "franchise" that comes from its own precedents, on the grounds that those precedents "do not analyze the term 'franchise' in light of S.B. 369." Resp. Br. 58. This objection is meritless. "Where a statute uses words that have a definite and well-known meaning at common law, it will be presumed that the terms are used in the sense in which they were understood at

common law, and the words will be construed unless it clearly appears that such a construction was not so intended.” *State ex rel. Auto Owners Ins. Co. v. Messina*, 331 S.W.3d 662, 665 (Mo. banc 2011) (quoting *Belcher v. State*, 299 S.W.3d 294, 296 (Mo. banc 2009)). The term “franchise” is not defined in the statute, and the Cities provide no argument that this Court’s oft-repeated definition of “franchise” does not fit in the statutory context. “By ... not enacting ... any provision defining [‘franchise’], the legislature has left the common law definition of [‘franchise’] in place....” *Messina*, 331 S.W.3d at 665.

Regarding this Court’s cases, the Cities seek to distinguish *McKittrick v. Murphy* on the ground that it analyzed the term “franchise” in the context of a writ of quo warranto. Resp. Br. 58. The Cities offer no argument why that should disqualify the definition, *id.* at 58, which Missouri courts have applied in many contexts. *See, e.g., Hagerman*, 216 S.W. at 265 (applying the same definition in the context of railroad tax assessment); *Poplar Bluff*, 369 S.W.2d at 766 (citing the same definition in the analysis of a municipal license tax).

The Cities also attempt to distinguish *Poplar Bluff*, but without success. *Poplar Bluff* arose in the closely analogous context of interpreting a municipal tax ordinance, and it provided the following analysis of the term “franchise”:

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. Generally, a franchise tax is said to be a tax upon the privilege of existing or the privilege of doing certain things.... ***The franchise often***

involves the use of public property; and, in such a case, the city tax upon the franchise holder can become what is really a rental charge.

Poplar Bluff, 369 S.W.2d at 766-67 (emphases added; footnotes omitted).

Poplar Bluff also refutes the Cities' argument that the Missouri courts' definition of "franchise" is overly broad and would "encompass any person or entity-specific transaction entered into with a government, potentially including leases, contracts, or business licenses." Resp. Br. 58. In *Poplar Bluff*, the Missouri Court of Appeals considered whether there was any meaningful distinction between an occupational license fee and a "franchise tax." 369 S.W.2d. at 766-67. Using the very definition to which the Cities object, the court had no trouble drawing the distinction between a "license" and a "franchise": "[T]he occupation license fee *on a business which does not use public facilities and which the city has no power to regulate* is in reality a tax, and the so-called 'privilege' which is common to anyone who can qualify as being within that class of persons *is not such a special privilege as to constitute a city franchise.*" *Poplar Bluff*, 369 S.W.2d at 767 (emphasis added) (footnote omitted).

2. The Cities' various interpretations of the statute have no merit.

In addition to misconstruing Missouri case law, the Cities also advance various erroneous interpretations of the statute.

First, contrary to the Cities' mischaracterization, CenturyLink does not argue that the fact that Cameron and Wentzville's ROW agreements are "coercively imposed" is what makes them "franchises." See Resp. Br. 57. Rather, the fact that the Cities *require* CenturyLink to obtain a franchise—*i.e.*, as a mandatory condition of providing

telecommunications services in each city—is what makes them illegal franchises under RSMo. § 67.1842.1(4). That statute does not ban “franchises” *per se*. Rather, it forbids a city to “*require* a telecommunications company to obtain a franchise.” RSMo. § 67.1842.1(4), Appx. A39; *compare* RSMo. 67.1846.1, Appx. A41 (permitting political subdivisions and public utilities to enter into franchises voluntarily).

Second, the Cities contend that the ROW Laws “draw a distinction between a ‘franchise’ and a ‘contract’ or ‘other agreement,’” and they argue that something that is a “contract” or “agreement” cannot also be a “franchise.” Resp. Br. 57, 62. This interpretation makes no sense, since every definition of “franchise” indicates that a franchise is one form of contract or agreement. *See supra* Part II.A.1. Under the Cities’ strained interpretation, therefore, “franchise” would mean nothing at all. Further, the statute provides no basis for the Cities’ distinction. By their plain terms, Sections 67.1842.1(4) and 67.1842.1(5) prohibit political subdivisions from (4) requiring a telecommunications companies to obtain a “franchise”; and (5) entering into “a contract or any other agreement for providing for an exclusive use, occupancy or access to any public right-of-way.” RSMo. § 67.1842.1(4), (5), Appx. A39. Nothing in the statute defines “franchise” in subsection (4) in contrast to “contract or any other agreement” in subsection (5).

Third, the Cities argue that “SB 369 only prohibits exclusive or discriminatory agreements.” Resp. Br. 62 (*italics in original*). This argument has no merit because it would deprive the prohibition on mandatory franchises of any effect. As noted above, section 67.1842.1(4) prohibits mandatory “franchises,” and section 67.1842.1(5)

prohibits “exclusive” agreements to use the right-of-way. Further, as the Cities concede, section 67.1846.1 prohibits “discriminatory” agreements to use the right-of-way. *See* RSMo. § 67.1846.1, Appx. A41 (requiring that “all other public utility right-of-way users have use of the public right-of-way on a nondiscriminatory basis”). Thus, § 67.1842.1(5) prohibits “exclusive” agreements, and § 67.1846.1 prohibits “discriminatory” agreements. If, as the Cities contend, “[a]ll that is prohibited in SB 369 are exclusive and discriminatory agreements,” Resp. Br. 63, the separate prohibition on “franchises” in § 67.1842.1(4) would be meaningless. This Court should not adopt such an interpretation. *See Am. Nat'l Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 85 (Mo. App. W.D 2011) (“[W]e will avoid a construction that renders statutory language meaningless”).

3. “Franchises” are not restricted to those agreements that directly authorize the provision of services.

The Cities argue that a “franchise” includes only “an agreement or license from a governing body that *authorizes the provision of services.*” Resp. Br. 59 (emphasis in original). For this point, the Cities rely principally on *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801 (Mo. App. W.D. 2004). *See* Resp. Br. 58-59. According to the Cities, in that case, the Missouri Court of Appeals “distinguished a franchise issued in neighboring municipalities ... from the mere license to use the right-of-way at issue in that case.” Resp. Br. 59. In actuality, *Ogg* did not involve any question about a public right-of-way. The case considered the placement of cable wires on a private family farm, for which the cable company claimed permission based on a license agreement with an electric

company that had an easement for the placement of electrical wires. *Ogg*, 142 S.W.3d at 805-06. Accordingly, *Ogg* drew no distinction between “a franchise that authorized a cable company to sell and provide its service” and a “license to use and occupy *public* rights-of-way,” as the Cities incorrectly suggest. Resp. Br. 59 (emphasis added).

Ogg did note in passing that, pursuant to the federal Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-559, “cable television companies such as Mediacom are generally permitted to sell their programming and other services only within localities in which they have been granted a franchise by the appropriate governmental authority.” *Ogg*, 142 S.W.3d at 805. In that context, the court explained that “[a] franchise is a statute or ordinance that specifically authorizes a company such as Mediacom to sell cable programming or other services to the residents of a particular area.” *Id.* at 805 n.4. But the court was simply describing cable television “franchises” under federal law and in the particular context of the case; it by no means suggested that it was the *only* kind of authorization that could qualify as a “franchise.” *See id.*

In fact, the statute cited in *Ogg* defines “franchise” as “an initial authorization, or renewal thereof . . . , issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, *which authorizes the construction or operation* of a cable system.” 47 U.S.C. § 522(9) (emphasis added). Thus, under the statute cited in *Ogg*, a “franchise” includes authorizations to do multiple things, including the “construction” of facilities in the right-of-way—not just the “provision of services,” as the Cities contend. Thus, *Ogg* lends no support to the Cities’ artificially cramped definition of “franchise.”

The Cities also rely on *State ex rel. Peach v. Melhar Corp.*, 650 S.W.2d 633, 636 (Mo. App. E.D. 1983), to argue that “[t]he primary function of a franchise is to provide authorization to do business.” Resp. Br. 58-59. According to the Cities, *Peach* held “that a franchise is an agreement that grants contractual rights to do business in a municipality, and a ‘franchise is contractual in nature.’” Resp. Br. 59. On the contrary, nothing in *Peach* suggests that a franchise’s primary or exclusive function is to “grant contractual rights to do business.” The franchise at issue in *Peach* was a “franchise for the construction and operation of a cable television system utilizing the streets and alleys of the City of St. Louis.” 650 S.W.2d at 634 (emphasis added). Like the definition of “franchise” in *Ogg*, *Peach*’s definition of “franchise” includes an agreement that authorizes access to the right-of-way for purposes other than provision of services, such as “construction” of facilities. *Id.*

Finally, the Cities’ reliance on *State ex rel. McKittrick v. Springfield City Water Co.*, 131 S.W.2d 525 (Mo. 1939), is equally meritless. Resp. Br. 59. *Springfield City Water* did distinguish between “the power of the municipality to grant its consent to the utility to use its streets for the purpose of laying mains, etc.” and “the right of the city to contract with the utility for [the provisions of services].” *Springfield City Water*, 131 S.W.2d at 531. But the Court referred to *both* contractual arrangements as “franchises.” *Id.* (“[T]he City of Springfield had power to grant a *franchise to use its streets for the location of water mains.*”) (emphasis added). In fact, the court held that a franchise is the only way that a municipality can confer the right to place equipment in the rights-of-way:

It is *unquestioned law* that neither an individual nor a corporation has any natural or inherent right to use public streets except for ordinary traffic; that *if a corporation possesses the right to make special uses of public streets for its equipment, that right must have been specially conferred upon it by the State in the form of a franchise.*

Id. at 530. Contrary to the Cities' characterization, the *Springfield City Water* decision in no way suggested that authorization to use the public streets was "not a franchise," or merely a "portion" of a franchise, because it did not require voter approval. Resp. Br. 59-60. Rather, the case directly indicates that an agreement "to make special uses of public streets" is a "franchise," regardless of whether it directly authorizes the provision of services. *Springfield City Water*, 131 S.W.2d at 530.

B. The fact that other entities have entered ROW user agreements does not bar Spectra and CenturyTel from objecting to Cameron and Wentzville's illegal franchise requirement.

The Cities argue that Spectra and CenturyTel should be barred from objecting to Cameron and Wentzville's illegal ROW user agreement requirements, because two other CenturyLink-affiliated entities—Appellant Embarq and non-Appellant Qwest

Communications⁴—have entered into ROW user agreements with the cities of Harrisonville and Wentzville. Resp. Br. 61. This argument fails for several reasons.

First, estoppel does not apply on the basis of illegal transactions, such as Wentzville or Harrisonville’s imposition of a franchise requirement in violation of § 67.1842.1(4). *See Watkins v. Floyd*, 492 S.W.2d 865, 872 (Mo. App. S.D. 1973) (“The rule is that estoppel by acceptance or ratification of an act or transaction does not apply if the act or transaction be void for violation of a mandate of the law.”). Because Cameron and Wentzville’s franchise agreements are illegal under RSMo. § 67.1842.1(4), the Cities have no basis to claim that CenturyLink has waived its right to protest them.

Second, estoppel could not apply unless Cameron and Wentzville had “been misled or deceived” by Embarq’s acquiescence to Harrisonville’s ROW agreement requirement. *Bresnahan v. Bass*, 562 S.W.2d 385, 390 (Mo. App. 1978) (“[N]o man can set up another’s act or conduct as the ground of an estoppel, unless he has himself been misled or deceived by such act or conduct.”) (quoting *Land Clearance for Redevelopment Authority of Kansas City v. Dunn*, 416 S.W.2d 948, 951 (Mo. 1967)). The Cities have not even alleged, much less proven, that Cameron or Wentzville was “misled or deceived” by Harrisonville’s user agreement with Embarq.

⁴ Elsewhere, the Cities characterize Qwest as “the same company as Appellants CenturyTel Long Distance and Embarq Communications,” Resp. Br. 42 n.4, but those entities had not merged at any time relevant to this appeal. *See* LF 1356, 1470.

Third, as noted in Point VI of Appellants' Opening Brief, the various CenturyLink-affiliated companies are distinct corporate entities and may not be treated as interchangeable. App. Br. 91-94. Embarq and Qwest Communications are not parties to Counts XVII-XIX of this lawsuit. See Resp. Br. 15 (conceding that only Spectra and CenturyTel use the rights-of-way in Cameron and Wentzville, respectively). The entities that are parties cannot be estopped on the basis of actions taken by non-parties.

Fourth, the Cities have provided no facts to support the analogy they seek to draw between Embarq and Qwest's user agreements and the two agreements in this case. They have presented no evidence of any circumstances surrounding other companies' acquiescence to other requirements of other cities. It is therefore impossible to draw the conclusion that the circumstances were relevantly similar to this case.

C. Section 67.1842.1(4)'s prohibition on mandatory franchises is not an unconstitutional special law because it does not include fixed limitations based on historical facts or similar immutable characteristics.

The Cities argue that, on CenturyLink's interpretation, RSMo. § 67.1842.1(4)'s prohibition on mandatory franchises is an unconstitutional special law because it supposedly "give[s] telecommunications companies special rights not provided to other similarly situated rights-of-way users." Resp. Br. 63. They contend that the statute must be interpreted narrowly to avoid this constitutional problem. *Id.* The purported constitutional issue raised by the Cities is chimerical.

In *Springfield* this Court stated that “a general law is a statute which relates to persons or things as a class,” while “a statute which relates to *particular persons or things* of a class is special.” 203 S.W.3d at 184 (emphasis in original) (citations and quotation marks omitted). “[W]hether a law is special or general can most easily be determined by looking to whether the categories created under the law are open-ended or fixed, based on some immutable characteristic.” *Id.* “[C]lassifications based on historical facts ... focus on immutable characteristics and are therefore facially special laws.” *Id.* (alteration and italics omitted) (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).

Section 67.1842.1(4)’s prohibition on franchises does not draw any distinctions or confer any special privileges based on “historical facts” or similar “immutable characteristics.” *Id.* Rather, it applies without limitation to any “political subdivision” and to any “telecommunications company.” RSMo. § 67.1842.1, Appx. A39. The statute naturally encompasses any new political subdivisions or new telecommunications companies that might be formed or choose to do business in Missouri. Thus, these are “open-ended” classes. *Springfield*, 203 S.W.3d at 184.

If the statute were an unconstitutional special law merely because it applies to “telecommunications compan[ies],” the restriction would prohibit the legislature from drawing virtually any classification in a statute, which would be absurd. The use of general classifications such as “telecommunications company” is inevitable in any legislative scheme. *See, e.g., Wheeler v. Philadelphia*, 77 Pa. 338, 349 (Pa. 1875) (cited

in *Springfield*, 203 S.W.3d at 184) (observing that drawing such general classifications is essential to legislation, and that “illustrations might be multiplied indefinitely” to show the necessity of such classifications). Federal law, state law, and the Cities’ own municipal codes impose numerous regulations on “telecommunications companies” as a general class. *See, e.g.*, 4 U.S.C. §§ 116-126 (imposing special rules for municipal taxation of wireless telecommunications companies); Cameron Code § 10.5-151, Appx. A18 (affecting “communication carriers and communication providers”); Wentzville Code §§ 655.100-655.160, Appx. A20-A22 (“Article II. Communications Services”). An entire Chapter of the Missouri Revised Statutes, Chapter 392—provisions of which were first enacted in 1909—is devoted to the regulation of “Telephone and Telegraph Companies.” *See* RSMo. §§ 392.010-392.611. By the Cities’ logic, that entire Chapter is an unconstitutional special law.

The Missouri Constitution is not so far-reaching. In the absence of a “close-ended” class defined by “immutable characteristics,” *Springfield*, 203 S.W.3d at 184, the provision on special laws requires only a “rational basis” to justify legislative distinctions among different types of businesses. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. banc 1991) (holding that only a “rational basis” was required to uphold a legislative distinction “between designers and builders on the one hand and materialmen on the other”). Such a rational basis is easy to discern here. Missouri’s prohibition on mandatory franchises for telecommunications companies reflects the same policies that are embodied in the Federal Telecommunications Act—“accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and

services to all Americans,” in part by “limiting local regulation” of telecommunications facilities. *Sprint Spectrum, L.P. v. County of St. Charles*, No. 4:04 CV 1144 RWS, 2005 U.S. Dist. LEXIS 43590, at *7 (E.D. Mo. July 6, 2005). The Missouri Legislature has recently reaffirmed these interests in prompt and uniform deployment of telecommunications technologies, by enacting legislation that “is intended to encourage and streamline the deployment of broadcast and broadband facilities and to help ensure that robust wireless radio based communication services are available throughout Missouri.” Senate Bill No. 650 (enacted March 20, 2014), at 1, *available at* <http://www.senate.mo.gov/14info/pdf-bill/tat/SB650.pdf>. Indeed, implementing such purposes provides more than a rational basis for the statute; it provides a “substantial justification,” even if one were required.

For these reasons, the lone case cited by the Cities is inapposite. *See* Resp. Br. 63-64. In *Planned Industrial Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772, 777 (Mo. banc 1981), this Court stated in dicta that there was “no reasonable constitutional basis for granting a permanent easement to a telecommunications company while not creating a similar vested easement for electric, water or other utility companies whose services might be provided through underground facilities.” *Id.* at 777. Here, by contrast, the statute’s “reasonable ... basis,” *id.*, is readily apparent. The statute serves “to encourage and streamline the deployment of broadcast and broadband facilities.” Senate Bill No. 650 (enacted March 20, 2014), at 1.

D. Cameron failed to show that its fees are based on the actual, substantiated costs reasonably incurred in managing its right-of-way.

The Cities contend that CenturyLink did not preserve its claim that Cameron failed to show that its fees are based on the actual, substantiated costs reasonably incurred in managing the right-of-way. Resp. Br. 55. On the contrary, CenturyLink contended in the trial court that the Cities' claims are "barred to the extent that they seek to collect fees for use of the right-of-way against [CenturyLink], in that ... such fees are not based upon the actual, substantiated costs reasonably incurred in managing the public right-of-way." LF 1772-73, ¶ 38.

The Missouri ROW laws authorize Cameron to impose only those right-of-way fees that are "[b]ased on the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right-of-way." RSMo. § 67.1840.2(1), Appx. A37; *see* App. Br. 36. Cameron failed to submit any evidence to the trial court that its fees satisfy these conditions. Therefore, the trial court lacked any evidence that Cameron was entitled to judgment as a matter of law. *See* App. Br. 36-37. Further, Cameron's own ordinance provides evidence that its fees do not comply with RSMo. § 67.1840.2(1). *See* App. Br. 36-37. At very least, therefore, a genuine dispute of material fact exists as to whether Cameron's right-of-way fees are based on actual and substantiated costs, because Cameron's ordinance demonstrates facially that they are not, and the Cities submitted no evidence to rebut the ordinance's plain import. *Id.*

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’s Order Grant of Summary Judgment on Counts I-V Must Be Reversed Because the Tax Ordinances Do Not Apply to the Four Disputed Revenue Streams, and Genuine Disputes of Material Fact Should Have Precluded the Entry of Summary Judgment (Reply in Support of Appellants’ Point III).

On the Cities’ interpretation, revenues from the provision of “exchange telephone service” occurring “within” the Cities include *every penny* received by CenturyLink from any customer located within the Cities, for any purpose, without any limitation. *See* Resp. Br. 72. The Cities focus myopically on the term “gross receipts,” while studiously ignoring the critical question posed by this Court—“gross receipts from what?” *May Department Stores Co. v. University City*, 458 S.W.2d 260, 262 (Mo. banc 1970). Contrary to plain English, the Cities would interpret “exchange telephone service” to mean “*all* telephone service,” and they would interpret “within” to mean “having any connection to.” Resp. Br. 72-73. On their unreasonable reading, each ordinance is an unqualified tax on all gross receipts from customers located in each city, and the additional limiting language in each ordinance has no meaning whatsoever. *Am. Nat’l Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 85 (Mo. App. W.D 2011) (“[W]e will avoid a construction that renders statutory language meaningless”).

It is not hard to discern the purpose behind the Cities’ tactics. In this appeal, the Cities push for an overbroad reading of the tax ordinances that would effectively encompass, not just the four disputed revenue streams before this Court, but all *twenty-five* revenue streams on which the Cities have sued CenturyLink in the trial court. *See* LF

180-182, ¶ 24(a)-(y). Thus, they seek to transform the trial court’s award of partial judgment into a complete judgment on issues never briefed or argued before the trial court or this Court. This Court should reject the Cities’ interpretive gambit, and rule that the tax ordinances are limited by their plain terms to revenues derived from the provision of local or “exchange” service “within” each City; and that, at very least, disputed issues of material fact prevented the entry of partial summary judgment.

A. CenturyLink properly preserved its arguments on appeal.

First, the Cities incorrectly argue that CenturyLink did not preserve for appeal the argument that “the ‘longstanding course of conduct’ and historical context demonstrate that the tax ordinances do not apply to the four disputed revenue streams.” Resp. Br. 67. CenturyLink repeatedly urged the trial court to consider the historical context and decades-long enforcement practice under the tax ordinances. *See, e.g.*, LF 1029 (arguing to the trial court that “[t]he Defendants have provided telecommunications services in [the Cities’] respective territories for many years ... and they have paid taxes to the Plaintiffs throughout that period”); LF 1032 (arguing that “[f]or decades, these defendants have remitted ... business license taxes to [the Cities] without complaint from [the Cities] regarding the tax base used to compute those taxes”); LF 1036-1037 (discussing the historical interpretation of the ordinances’ phrase “exchange telephone service,” based on authorities from 1961 through 1989); LF 1063 (arguing that “Defendants have paid license taxes for decades, and have done so without complaint from Plaintiffs”); LF 1063 (arguing that “Defendants used the current tax base for years without complaint”); LF 1768-1769, ¶ 18 (arguing that Plaintiffs should be barred from

adopting a novel interpretation of their tax ordinances in the face of longstanding enforcement practice). In fact, in the trial court, the Cities never disputed CenturyLink's characterization of the historical context of the ordinances and the Cities' enforcement practices.

B. The testimony of Seshagiri and Galloway is part of the record on appeal, and it establishes that genuine disputes of material fact should have prevented the entry of summary judgment.

Second, the Cities argue that CenturyLink's reliance on the testimony of Kiran Seshagiri and Douglas Galloway is improper because this testimony is putatively "not properly in the summary judgment record." Resp. Br. 67. But the Cities concede that they filed motions to strike the Seshagiri affidavit and the Galloway testimony, and the trial court never ruled on these motions. *See* Resp. Br. 21-22; *see also* LF 1222-1224 (Cities' Motion to Strike); LF 1225-1230 (Cities' Memorandum in Support of Motion to Strike); LF 1646-1654 (CenturyLink's Memorandum in Opposition of Motion to Strike). Because the testimony of Seshagiri and Galloway was not stricken from the trial record, it is part of the record on appeal. "[I]t is the objecting party's responsibility to insure that a trial judge has heard and ruled on an objection. If this is not done, nothing is preserved for review. Likewise, should the objecting party fail to insist on a ruling, the objection is deemed overruled and the evidence is in the record for consideration." *Ziegler v. Dir. of Revenue*, 150 S.W.3d 145, 147 (Mo. App. S.D. 2004) (internal citations omitted). As in *Ziegler*, "because the trial court entered its judgment without specifically ruling on [the]

objections,” the Cities’ objections to the Seshagiri and Galloway testimony “are deemed overruled and the records admitted.” *Id.*

Moreover, the Cities have not raised the trial court’s failure to strike those affidavits as a point of error in their cross-appeal. *See* Resp. Br. 117-23. Thus, they have not preserved the claim that the testimony of Seshagiri and Galloway should have been stricken. *See Ziegler*, 150 S.W.3d at 147 (“Any objection Driver may have had to the admission of such evidence is not preserved for appeal”).

In any event, even if the Cities had preserved their objections for appeal, their various challenges to the testimony of Seshagiri and Galloway lack merit. For instance, the Cities argue that the testimony was not “made ‘on personal knowledge’ as required by the Rule.” Resp. Br. 67. On the contrary, both Seshagiri and Galloway attested that the information was based on their first-hand knowledge. *See* LF 1216 (Seshagiri attesting that “[a]s part of my responsibilities at CenturyLink, I am familiar with issues related to the collection and payment of municipal taxes on behalf” of the Appellant entities); LF 1221 (Galloway attesting that his deposition testimony was “true and accurate,” and that he “would testify in accordance with the statements made” therein). The recital in each affidavit’s preamble that the affiant’s testimony is “true to the best of my information and belief,” LF 1216, 1221, is fully consistent with—and actually confirms—the conclusion that the testimony is based on each witness’s personal knowledge.

In addition, the Cities argue that the Galloway affidavit is “not even properly notarized and facially defective” because its caption lists Denver County, Colorado, but the notary seal (or “jurat”) indicates that it was subscribed and sworn in Cole County,

Missouri. Resp. Br. 67-68; *see also* LF 1221. But the Cities cite no authority indicating that the stray caption somehow renders defective the jurat's clear statement that the affidavit was properly executed under oath (and in Missouri). *See, e.g., First Nat'l Bank v. Griffith*, 182 S.W. 805, 809 (Mo. App. 1916) (holding that, where there is a discrepancy between the caption of the affidavit and the jurat of the officer taking the affidavit, the affidavit was made where the officer had jurisdiction to administer oaths); *see also Westover v. Bridgford*, 144 P. 313, 314 (Cal. App. 1914) ("Where there is a variance between the caption and the jurat of an affidavit, it will be presumed that the officer acted within his jurisdiction.").

In addition, the Cities argue the testimony of Seshagiri and Galloway is "devoid of any foundation or reasoning, wildly speculative, and inadmissible," and based on "conclusory speculation." Resp. Br. 68. This argument is itself conclusory and speculative, because the Cities do not identify which allegations in the affidavits, if any, are conclusory and speculative. *See id.* In any event, Seshagiri and Galloway's testimony is clearly based on direct, personal knowledge. *See* LF 1216, 1221. Seshagiri, for example, notes that he serves as the "Director of Tax Systems and Billing for CenturyLink," that he is "familiar with issues related to the collection and payment of municipal taxes," and that he has first-hand knowledge of tax data related to the disputed transactions. LF 1216. Further, the Cities do not appear to dispute Seshagiri's testimony as to which CenturyLink entities provide which forms of telephone service in which

cities (LF 1217, ¶¶ 5-12),⁵ and they do not seriously dispute Seshagiri's characterization of the Common Line Charge, the USF Fees, or the Optional Charges (LF 1217-1218).

Instead, the Cities appear to dispute Seshagiri's testimony that "I understand the term 'telephone service' as used in the Plaintiffs' ordinances to mean basic local exchange telephone service," LF 1216; and Galloway's testimony that "telephone exchange service" means "local telephone services" that do not include "any optional services" or "any services that go beyond the City of Cameron," LF 1235. Contrary to the Cities' contention, such testimony is admissible for several reasons. First, this testimony demonstrates that experienced telecommunications industry professionals share the same understanding of "exchange telephone service" offered "within" the Cities as the various other industry and legal sources cited by CenturyLink, and thus it further corroborates CenturyLink's longstanding interpretation of the tax ordinances. *See infra* Part III.E. Notably, the Cities did not provide any testimony, or evidence of any kind, of industry understanding of such terms of art.

⁵ The Cities argue that the Seshagiri affidavit violated Rule 74.04(e) by failing to attach the "tax data" to which Seshagiri refers in ¶ 4. Resp. Br. 68; *see* LF 1216 (attesting that Seshagiri's information is based on "certain tax data"). Because the Seshagiri affidavit is based on his personal knowledge of the facts, this argument fails. *See, e.g., Wood v. Procter & Gamble Mfg. Co.*, 787 S.W.2d 816, 821 (Mo. App. E.D. 1990) ("Since [the] affidavit was based upon person knowledge, sworn or certified copies of the records reviewed are unnecessary.").

Second, the testimony directly refutes the Cities' charge that CenturyLink's tax base constituted a "willful" violation of the law, by providing unrebutted evidence of the good-faith interpretation of the tax ordinances by the relevant CenturyLink professionals. *See* LF 1216; *see also, e.g., Crow v. Crawford & Co.*, 259 S.W.3d 104, 114 (Mo. App. E.D. 2008) ("What Appellants contend are 'legal conclusions' are statements of fact regarding motive and intent. We note that it frequently is difficult to make a statement of fact ... regarding a person's motive or intent that does not sound as if it were conclusory.").

Third, Seshagiri's testimony about the meaning of "telephone service," LF 1216, ¶ 3, explains Seshagiri's subsequent use of the phrase "telephone service" in the affidavit itself—for example, when he explains which CenturyLink entities provide which services in which cities. *See* LF 1217, ¶¶ 5-12.

For all these reasons, this testimony goes well beyond the mere conclusory assertion that the "ordinances involved are ambiguous," which this Court rejected as insufficient in *Ludwigs v. Kansas City*, 487 S.W.2d 519, 522 (Mo. 1972).

Therefore, in light of the testimony of Seshagiri and Galloway, at very least there existed substantial disputes of material fact that ought to have prevented the trial court from granting summary judgment on the interpretation of the tax ordinances. Among other issues, at very least, their testimony created a genuine dispute of fact about the industry understanding of critical terms such as "exchange telephone service" and "telephone service" in the decades-old ordinances. *See* LF 1216 (Seshagiri attesting that "telephone service" in the ordinances is understood to mean "basic local exchange

telephone service”); LF 1235 (Galloway testifying that “exchange service” in the ordinances refers to “local telephone services”). Their testimony also created, at very least, a genuine dispute of fact about what it means in the telecommunications industry for services to be offered “within” a city. *See* LF 1235 (Galloway testifying that the phrase “services within the City of Cameron” does not include “any services that go beyond the City of Cameron”). Their testimony created, at very least, a genuine dispute of material fact about which of the four disputed revenue streams actually constitute “exchange telephone service” and are offered “within” each city. *See* LF 1217-1218 (Seshagiri testifying, among other things, that “[t]he Common Line Charge is not payment for local exchange telephone service,” the “USF fees are not payment for local exchange telephone service,” and “Optional Charges are not payment for local exchange telephone service”).

C. The tax ordinances must be strictly construed in favor of the taxpayer, not in favor of the tax-collector.

The Cities argue that their tax ordinances are “presumed to be valid.” Resp. Br. 70 (quoting *Great Rivers Habit Alliance v. City of St. Peters*, 384 S.W.3d 279, 296 (Mo. App. W.D. 2012)). This argument is beside the point. In this Point, CenturyLink does not challenge the validity of the ordinances, but the Cities’ overbroad and unreasonable interpretation of them. When it comes to the interpretation of a tax ordinance, a different presumption applies—each ordinance must be “construed strictly” in favor of the taxpayer, and “taxes are not to be assessed unless they are expressly authorized by law.” *St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011). Though

the Cities describe this canon of interpretation as a “platitude,” it is better described as a well-established rule of construction frequently invoked by this Court in interpreting tax ordinances. *See, e.g., Prestige Travel*, 344 S.W.3d at 712 (holding that tax statutes and ordinances are to be strictly construed in favor of the taxpayer); *St. Louis Country Club v. Admin. Hearing Comm’n of Mo.*, 657 S.W.2d 614, 617 (Mo. banc 1983) (same); *Canteen Corp. v. Goldberg*, 592 S.W.2d 754, 756 (Mo. banc 1980) (same); *United Air Lines v. State Tax Comm’n*, 377 S.W.2d 444, 448 (Mo. banc 1964) (same); *State ex rel. Ford Motor Co. v. Gehner*, 27 S.W.2d 1, 3 (Mo. banc 1930) (same).

Instead of conceding that tax ordinances are strictly construed in favor of the taxpayer, the Cities argue that the tax-collector’s interpretation of a tax ordinance should be favored. Resp. Br. 73. But they cite no authority supporting this counterintuitive proposition, and it directly contradicts this Court’s case law. The only case cited by the Cities involves the interpretation of zoning ordinances, not tax statutes or ordinances. *Id.* (citing *Taylor v. City of Pagedale*, 746 S.W.2d 576, 578 (Mo. App. 1987)). In *Pagedale*, the Missouri Court of Appeals did not consider any tax statute, and it did not purport to overrule the eighty years of precedent from this Court holding that tax statutes are strictly construed in favor of the taxpayer. *Pagedale*, 746 S.W.2d at 578.

D. The tax ordinances do not apply to all “gross receipts,” but only those derived from providing local telephone service.

The Cities urge that the tax ordinances “require CenturyLink to pay the tax on all gross receipts.” Resp. Br. 71 (underline in original). The phrase “gross receipts” appears in each tax ordinance, but the Cities wrench that phrase from its context. Each tax

ordinance explicitly qualifies and restricts its application to those “gross receipts” derived from the provision of local service, *i.e.*, “exchange” telephone service. For example, the Aurora and Cameron ordinances specify that they apply only to the “gross receipts” that are “derived from the furnishing” of “exchange telephone service” “within” each City. Appx. A5 (LF 220); Appx. A7 (LF 223). Similarly, the Oak Grove and Wentzville ordinances apply only to the “gross receipts” derived “from such business” of “supplying ... telephone service” “in the City.” Appx. A11 (LF 231); Appx. A13 (LF 234). Likewise, the Harrisonville ordinance applies only to “gross receipts” derived from “rendering telephone service” “within the City.” Appx. A9 (LF 226).

This qualifying and limiting language in each ordinance serves to distinguish the three cases interpreting “gross receipts” on which the Cities so heavily rely—*Ludwigs*, *Hotel Continental*, and *Laclede Gas*. See Resp. Br. 71-72, 78-79, 82, 87-88, 90-94 (repeatedly relying on these three cases). None of these cases supports the Cities’ argument, because these cases address the meaning only of “gross receipts.” None even purports to address the interpretation of other language narrowing the class of “gross receipts,” such as is found in the tax ordinances.

First, the tax ordinance at issue in *Ludwigs* applied to *all* “gross receipts collected from ... customers in the city,” regardless of the source. *Ludwigs*, 487 S.W.2d at 520 (addressing “ordinances which 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*”) (emphasis added). In *Ludwigs*, this Court was not presented with, and did not discuss, any tax ordinance that applies only to a specified

portion of the company's business within the city. *Id.* Indeed, the Cities concede that *Ludwigs* did not address and provides no guidance on the interpretation of tax ordinance language that restricts the scope to receipts "derived from the furnishing of [exchange] service in the city": "[T]hat portion of the ordinance language was not analyzed in *Ludwigs*, and was irrelevant to the decision. The *Ludwigs* court solely focused on the term 'gross receipts'...." Resp. Br. 78; *see also id.* at 93 (conceding that, in *Ludwigs*, the "language of the ordinance in that case was never even analyzed").

Exactly the same is true of *Hotel Continental* and *Laclede Gas*. *Hotel Continental* considered only the propriety of the utility's policy of passing through the costs of the gross receipts tax to customers on its bills (which it approved). *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 77-85 (Mo. 1960). *Hotel Continental* did not quote the text of the tax ordinance in question, and it did not purport to interpret any language restricting the application of "gross receipts." *Id.* Likewise, the only issue of interpretation presented to the Court in *Laclede Gas* was whether the phrase "gross receipts" included funds that Laclede recovered in litigation and that the public utilities commission ordered Laclede to refund to its customers—an issue that has no application in this case. *See Laclede Gas Co. v. St. Louis*, 253 S.W.2d 832, 834 (Mo. banc 1953). *Laclede Gas* did not consider or discuss the interpretation of any limiting language in the ordinances that might have restricted the application of "gross receipts" to those received only from certain classes of business. As in *Ludwigs*, *Laclede Gas* was "solely focused on the term 'gross receipts'," and any other limiting language "was never even analyzed" in the case and thus "was irrelevant to the decision." Resp. Br. 78, 93.

E. “Exchange telephone service,” and telephone service that is provided “in” or “within” each city, are inherently local.

The Cities incorrectly contend that CenturyLink’s interpretation of the tax ordinances impermissibly grafts the word “local” onto the ordinances. Resp. Br. 24, 66, 72-80. By their terms, the ordinances apply only to “exchange telephone service” and telephone service that is provided “within” or “in” each city. Both “exchange telephone service,” and telephone service provided “in” or “within” a city, are *inherently* “local.” See App. Br. 43-53, 57-59.

1. “Exchange telephone service” refers specifically to local service provided within a geographic “exchange.”

As discussed in CenturyLink’s Opening Brief, a wide array of sources confirms that “exchange telephone service” refers exclusively to local service provided within a geographic “exchange.” App. Br. 44-48. The Cities attack the credibility of all of these sources, but in each case, they miss the mark.

First, federal and state appellate decisions from various jurisdictions, since at least 1961, have uniformly interpreted “exchange telephone service” or “exchange service” to refer exclusively to local phone service between points within a geographic exchange. See App. Br. 44-45 (discussing *Southern Pacific Communications Co. v. AT&T*, 740 F.2d 980, 985 n.4 (D.C. Cir. 1984); *North Carolina Utilities Comm’n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977); *GTE Sprint Communications Corp. v. Dep’t of Treasury*, 445 N.W.2d 476, 478-79 (Mich. Ct. App. 1989); and *Pacific Tel. & Tel. Co. v. Hill*, 365 P.2d 1021, 1023 (Or. 1961)). The Cities attempt to dismiss these authorities by

arguing that they are “cases outside Missouri.” Resp. Br. 74. But these cases provide overwhelming evidence of the longstanding, universally accepted import of the phrase “exchange telephone service” in the national telecommunications industry. *See, e.g., Vogel v. A.G. Edwards & Sons, Inc.*, 801 S.W.2d 746, 749-50 (Mo. App. 1990) (consulting federal appellate decisions, statutes, and case law to discern the meaning of a “term of art” used to describe illegal trading practices).

The Cities also attack the credibility of Newton’s Telecom Dictionary, an authoritative industry trade manual, but their argument fares no better. Newton’s Telecom Dictionary defines an “exchange” as a limited geographic region for local phone service, and thus corroborates the holdings of the appellate decisions cited above. NEWTON’S TELECOM DICTIONARY 377 (23rd ed. 2007) (emphasis added). The Cities dismiss this authoritative manual because it includes a small number of obviously humorous definitions among its many thousands of serious entries. *See* Resp. Br. 74 n.6 (arguing that “the definitions are clearly intended to be tongue-in-cheek”). But an electronic search of the Lexis Advance case database reveals that Newton’s has been cited as authoritative in over 90 cases, including at least seven federal Courts of Appeals and appellate courts of 10 states. *See, e.g., Starhome GmbH v. AT&T Mobility LLC*, 743 F.3d 849, 856 (Fed. Cir. 2014) (citing Newton’s as an authoritative “technical dictionar[y]” in a telecommunications-related patent case); *Qwest Corp. v. Colorado Pub. Utilities Comm’n*, 656 F.3d 1093, 1097 n.3 (10th Cir. 2011) (citing Newton’s in dispute over interpretation of federal telecommunications statutes and regulations); *United States v. Ziegler*, 474 F.3d 1184, 1186 n.2, n.3 (9th Cir. 2007) (citing Newton’s to expound

technical issues relating to a suppression order of seized electronic evidence). Further, there is nothing “tongue-in-cheek” about Newton’s definition of “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.*” NEWTON’S, at 377 (emphasis added).

The Cities also contend that Newton’s “lack of a definition for ‘exchange telephone service’ refutes CenturyLink’s argument that such is an ‘industry term of art’.” Resp. Br. 74. This argument misses the mark. Newton’s provides a definition of the industry term-of-art “exchange” as a limited geographic region, which suffices to confirm that “exchange telephone service” is *local* service, *i.e.*, within a limited geographic region that typically coincides with a municipality, or “city, town, or village.” NEWTON’S, at 377.

The Cities contend that provisions of Chapter 386 of the Missouri Revised Statutes support their interpretation of “exchange telephone service,” but the Definitions section of Chapter 386 recognizes a fundamental distinction between “exchange service,” which is explicitly identified as “local,” and “*interexchange* service,” which is non-local. *See* App. Br. 45-47 (discussing RSMo. § 386.020(3), (4), (16), (17), (25), (32)). Based on the same definitions, the Cities argue that the term “exchange” serves as an “umbrella” term that includes both “exchange” and “interexchange” services. Resp. Br. 75-76. But the Cities’ “umbrella” interpretation of “exchange” contradicts the Missouri statute’s definition of an “exchange” as “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. A53 (emphasis added).

Further, by arguing that “exchange” service includes “interexchange” service, Resp. Br. 75-76, the Cities’ “umbrella” interpretation does violence to the English language. It is comparable to arguing that a “national” championship is the same as an “international” championship. In addition, the Cities’ “umbrella” interpretation would render the term “exchange” completely nugatory and without effect, since the Cities’ interpretation of “exchange telephone service” is broad enough to cover *all* telephone services, depriving the qualifier “exchange” of any independent meaning. *See Ensz & Jester*, 358 S.W.3d at 85 (“[W]e will avoid a construction that renders statutory language meaningless”).

Finally, the testimony of experienced industry professionals, Kiran Seshagiri and Doug Galloway, further confirms CenturyLink’s interpretation of “exchange telephone service.” *See supra* Part III.B.

2. Service provided “within” or “in” a city does not include service occurring largely *outside* a city.

The Cities contend that the tax ordinances cover all services “that are provided within (but not necessarily *wholly* within)” each municipality. Resp. Br. 72. This argument stretches the terms “within” and “in” beyond what their natural meaning will bear. *See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 2627 (2002) (defining “within” to mean “in the inner or interior part of: inside of”). The Cities contend that *all* telephone services that involve any of their residents “are provided within an exchange

(and within each City).” Resp. Br. 73. On the Cities’ strained interpretation, a conference call between participants in Pakistan and Buenos Aires that happens to connect through a switching station in the city of Wentzville is a phone call that occurs “within” the city of Wentzville. This is comparable to saying that an international flight from London to Los Angeles to Tokyo occurs “within” the United States. This interpretation plainly misuses the English language. “Within” does not mean “having any connection to” a city. It means “inside of” a city, WEBSTER’S THIRD, at 2627, and in the case of telephony, it refers to local or “exchange” service.

The Cities attempt to distinguish *May Department Stores Co. v. University City*, 458 S.W.2d 260 (Mo. banc 1970), but their attempt fails. *May Department Stores* involved a department store complex that straddled the border between Clayton and University City, Missouri. Interpreting a tax ordinance on gross receipts of sales occurring “within” the city of University City, this Court held that one cannot simply focus on the phrase “gross receipts”—“[t]he question then is, gross receipts from what?” *Id.* at 262. In other words, this Court focused on the *limiting and restricting* language in the tax ordinance that narrowed its application to sales occurring “within” the city, and it held that only those sales that occurred on floor space located “entirely in” University City were covered by the ordinance. *Id.* at 263. This Court held that the qualifier “within” entailed that taxes on sales occurring in departments that straddled the border must be prorated by the proportion of square footage located on University City’s side of the border. *Id.* at 263. In other words, the ordinance’s word “within” meant “entirely in,” and the proration ensured that only those sales that occurred entirely within

University City could be taxed. *Id.* *May Department Stores*, therefore, directly contradicts the Cities’ theory that their ordinances apply to all “gross receipts,” without qualification. *See id.* at 262 (“[G]ross receipts from what?”).

3. The historical context and decades-long enforcement practice under the tax ordinances confirm that they are limited to local service.

When each tax ordinance was enacted, telephony had two fundamental components—local exchange service and long-distance service—and the limiting language in each ordinance demonstrates each city’s intent to impose taxes only on local or “exchange” service. *See App. Br.* 50-53. In fact, the Cities do not dispute that, when the tax ordinances were enacted, their original meaning was to apply only to local or “exchange” service. Instead, they argue that “Missouri law is clear that a City need not constantly change the wording of their [*sic*] ordinances to keep up with changes in technology.” *Resp. Br.* 79 (citing *City of Jefferson City v. Cingular Wireless, LLC*, 531 F.3d 595, 608 (8th Cir. 2008), and *City Collector of Winchester v. Charter Communications Inc.*, Nos. 10SL-CC02719, 10SL-CC03687, Order and Judgment, at *17 (St. Louis County Cir. Court, Feb. 11, 2014), LF 1430). This argument misses the mark. In *Cingular Wireless*, the court considered an ordinance that taxed all “telephonic services,” and concluded that the plain meaning of this term included cell phone services. *Cingular Wireless*, 531 F.3d at 607-08. Similarly, in the unpublished trial court opinion in *City Collector of Winchester*, the court ruled that voice over internet protocol (VOIP) was a form of “telephone service” within the meaning of a tax ordinance. *See LF* 1445-1447. In this case, the plain meaning of the tax ordinances draws a fundamental

distinction between local and non-local services. Updated technology in the provision of *local* services, therefore, might well be covered by the ordinances. But nothing in *Cingular Wireless* or *City Collector of Winchester* advises this Court to interpret ordinances that were originally and have always been understood to refer specifically local services, and apply them to non-local services, regardless of the stage of technological development.

The Cities also argue that the longstanding enforcement practice under the tax ordinances has little import because the “taxes are self-reporting” and “the Cities only recently learned that CenturyLink was not paying the appropriate amount of License Taxes.” Resp. Br. 79-80. But the Cities have submitted no evidence to demonstrate that they did not learn what tax base was being used to calculate the taxes until “only recently.” Resp. Br. 80. The Cities did not submit any of CenturyLink’s license tax reports to the trial court, or any other evidence to support this allegation. The only relevant citation provided to support this allegation is a citation of the Cities’ Second Amended Petition, LF 184, which contains an unsupported allegation that CenturyLink failed to file sworn statements of their gross receipts. *See* Resp. Br. 15; LF 184, ¶ 30. In any event, to the extent that the Cities wished to take issue with CenturyLink’s tax base after fifty years of tax compliance, it was incumbent on them, not CenturyLink, to take steps to ascertain that tax base, which each city easily could have done via its authority to audit.

F. All four disputed revenue streams fall outside the tax ordinances.

The Cities are mistaken in contending that the four disputed revenue streams are covered by the tax ordinances. All four revenue streams—the Common Line Charge, the USF Fees, the Optional Charges, and the License Tax Fees—fall outside the ordinances.

1. The Common Line Charge is not taxable as a form of local or “exchange” telephone service.

The Cities effectively concede that the Common Line Charge is a quintessential *long-distance* charge, not a local charge. *See* Resp. Br. 82 (conceding that the Common Line Charge is for “providing access to their customers to long-distance service providers”). *See also* App. Br. 60-61 (citing multiple authorities holding that the Common Line Charge is a charge for access to long-distance services).

Though it is fundamentally a charge for long-distance services, the Cities argue that the Common Line Charge must be deemed “local” because it appears in certain CenturyLink bills under a column of charges totaled as “Local Exchange Services.” Resp. Br. 81, 83-85. The Cities’ reliance on this informal designation in CenturyLink’s bills is self-contradictory and unconvincing. The Cities admit that the other three disputed charges—the USF Fees, the Optional Charges, and the License Tax Fees—are *not* designated in the column for “Local Exchange Services,” yet the Cities contend that these other three charges are also covered by the tax ordinances. Resp. Br. 85. The Cities, in effect, argue that the designation on CenturyLink’s bills is determinative only when it supports the Cities’ position; otherwise, it is irrelevant. *Id.* The designations on CenturyLink’s bills were not designed for tax compliance purposes, and no evidence

suggests, let alone demonstrates, that any City relied on that designation in any way in assessing taxes. Rather, as CenturyLink informed the trial court, this designation on the bills merely indicates that these services are offered in connection with local exchange service, not that they themselves constitute local exchange service. LF 1467 (noting that “certain services or features are made available to or are associated with local exchange customers but do not constitute exchange telephone services”).

Relying on *Ludwigs*, *Hotel Continental*, and *Laclede Gas*, the Cities argue that the Common Line Charge is taxable because it constitutes “gross receipts” of CenturyLink’s business. Resp. Br. 82-83. This argument has no merit for the reasons discussed above. *See supra* Point III.D. None of these cases discussing “gross receipts” purported to interpret the sort of limiting language present in each of the tax ordinances in this case. For similar reasons, the Cities’ reliance on *Southwestern Bell Tel. Co. v. Combs*, 270 S.W.3d 249 (Tex. Ct. App. 2008), is misplaced. The franchise tax at issue in *Combs* applied broadly to all gross receipts of all business done in Texas, without geographic limitation, and thus the question whether a common line charge constituted local exchange service never arose in *Combs*. *Combs* merely concluded that “the term ‘service’ includes providing access to a communications network for the purpose of completing long distance calls and/or operator assistance.” *Id.* at 262. Here, of course, the ordinances purport to tax “exchange telephone service,” and “telephone service within” a particular city, not any “service” without qualification.

The Cities argue that the taxability of the Common Line Charge is “further demonstrated by CenturyLink’s agreement with Jefferson City to include [the Common

Line Charge] in its gross receipts on Jefferson City’s tax.” Resp. Br. 85 (citing LF 873).

But that settlement agreement specifically recites that CenturyLink “disputes the Assessment, the Assessed Amount, the methodology of the audit, the tax base on which the Audit was based, and otherwise disputes that it owes any amounts under [Jefferson City’s tax ordinance]....” LF 873 (Recital G). The settlement agreement further provides that “[t]his Safe Harbor Agreement and the Settlement Agreement represent the settlement of disputed claims, and are not an admission of liability or of indebtedness by any of the Parties.” LF 884.⁶ See *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.”). Settlement agreements are not admissions of liability. *Id.* at 427.

⁶ The Cities also cite a settlement agreement with AT&T, to which no CenturyLink entity is a party. See Resp. Br. 73-74. Even if it were relevant, the AT&T settlement agreement likewise provides, among other things, that the AT&T defendants “have denied and continue to deny any and all liability with respect to the allegations raised against them” in the municipal tax litigation, LF 785, and that “[n]either this Agreement nor any of its terms shall be offered or received into evidence in any other action or proceeding,” LF 826.

2. The USF Fees are not taxable as local or “exchange” telephone service.

The Cities concede that the federal and state USF Fees have no direct relation to the provision of local or “exchange” telephone service. *See* Resp. Br. 86 (conceding that the federal USF Fees are levied on telecommunications carriers that “provide interstate and/or international services,” and that Missouri “lev[ies] a similar charge” to provide a fund to promote access for those with disabilities and in underserved areas). The Cities’ only argument that the USF Fees should be covered by the ordinance is their insistence that *all* receipts that relate in any way to telecommunications are taxable: “all revenues collected by CenturyLink for services rendered to pay for its costs of doing business within the Cities are subject to the License Taxes.” Resp. Br. 87. This argument rests entirely on *Ludwigs*, *Hotel Continental*, and *Laclede Gas*, *see id.*, and it has no merit for the reasons stated above. *See supra* Part III.D. Indeed, the Cities’ attempt to tax the USF Fees, which are collected from customers to create a fund for needy and underserved telecommunications consumers, make clear that the Cities recognize no limitations whatsoever on the scope of their tax ordinances, notwithstanding the restrictive language in each ordinance discussed above. On the Cities’ interpretation, each ordinance is an unqualified tax on all gross receipts from customers located in each city, and the additional language in each ordinance has no meaning whatsoever. *Am. Nat’l Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 85 (Mo. App. W.D 2011) (“[W]e will avoid a construction that renders statutory language meaningless”).

3. The Optional Charges are not taxable as local or “exchange” telephone services.

Similarly, the Cities fail to provide any convincing reason to conclude that the Optional Charges (such as call waiting, call forwarding, and caller ID) are taxable as local or “exchange” telephone services under the tax ordinances. The Cities rely on 4 C.S.R. § 240-32.100(2)(F), *see* Resp. Br. 89, but that regulation does not avail them. Section 240-32.100(2)(F) identifies “custom calling features” such as “call waiting, call forwarding, three (3)-way calling and speed dialing” as among the “minimum elements necessary” for *both* exchange *and* interexchange service. 4 C.S.R. § 240-32.100(2) (identifying “the minimum elements necessary for basic local *and* interexchange service”) (emphasis added). Section 240-32.100(2) thus presupposes both that “basic local” service is distinct from “interexchange service,” and that “custom calling features” are a separate, necessary precondition for the provision of both of those.

The Cities also argue that CenturyLink’s tariffs support their argument, but the tariffs show that Optional Charges are not “exchange service.” The Cities submitted to the trial court selectively redacted versions of CenturyLink’s tariffs that omitted key portions of the tariffs. *See* App. Br. 63-65. The Cities continue to rely on these selectively redacted tariffs in their responsive brief. *See* Resp. Br. 90. CenturyLink’s tariffs provide the classification of the companies’ services and service prices to the Missouri Public Service Commission. LF 1475-1531 (Spectra Tariff); LF 1532-1573 (Embarq Tariff); LF 1574-1625 (CenturyTel Tariff). The Spectra and CenturyTel Tariffs define “exchange service” as “[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 1480; LF 1582 (emphasis added). The Embarq Tariff defines “exchange service” as “a general term describing as a whole, the facilities including a Telephone Company provided communication, together with the right to send and receive a specified or an unlimited number of *local messages* at charges in accordance with the provisions of this tariff.” LF 1541 (emphasis in original omitted, emphasis here added). Each definition refers to the Tariffs for exchange service charges, but this does not mean that all services listed in the tariffs are exchange services. Instead, each definition explicitly limits “exchange service” to either “communication within an exchange area” or “local messages.” LF 1480, 1541, 1582. Exchange service is a specific service—i.e. the “furnishing of facilities for the telephone communication *within an exchange area*”—the charges for which are listed in the tariff. *Id.* (emphasis added).

Further, the basic structure of the tariffs reveals that they explicitly distinguish local exchange service from other services. First, each tariff begins with introductory material and definitions. LF 1475-1481 (Spectra), 1532-1545 (Embarq), 1574-1583 (CenturyTel). Then, each tariff describes the charges and services that qualify as local exchange service in sections titled “Local Exchange Service.” LF 1482-1502 (Spectra), 1546-1557 (Embarq) 1584-1593 (CenturyTel). Lastly, the tariffs describe the additional services that are above and beyond local exchange service. LF 1503-1531 (“Custom Calling Services” in the Spectra Tariff), 1558-1573 (“Special Packaged Offerings” in the Embarq Tariff), 1594-1625 (“CenturyTel Calling Services” in the CenturyTel Tariff).

The Cities also argue that their position is “perhaps best illustrated by the fact that CenturyLink included at least some revenues from [the Optional Charges] in its calculation of Wentzville’s License Tax for at least one tax-reporting period,” citing a statement that indicates that such taxes may have been accidentally overpaid for one six-month reporting period. Resp. Br. 91 (citing LF 1314). The fact that one entity may have erroneously paid partial taxes on the Optional Charges for one six-month period does not “illustrate” that the Optional Charges are taxable. Rather, at most, this is the exception that proves the rule—the fact that the Cities can only point to one entity and a single six-month period in which taxes were inadvertently paid on the Optional Charges demonstrates the longstanding course of conduct of not taxing such charges.

4. The License Tax Fees are not taxable as local or “exchange” telephone service.

In their Response, the Cities do not address or refute CenturyLink’s straightforward argument that the Cities’ tax ordinances do not encompass the revenues CenturyLink receives pursuant to its tariffs as reimbursement for the License Tax Fees, as those fees are not “derived from the furnishing” of local exchange service. *See* App. Br. 65-67. Rather, the Cities once again invoke *Ludwigs*, *Hotel Continental*, and *Laclede Gas* to argue that all “gross receipts” are taxable, without regard to the express limitations of their taxing ordinances. Resp. Br. 92-94. For the reasons discussed above, none of these cases purported to construe such limiting language as is present in the tax ordinances, and thus none has application in this case. *See supra* Part III.D. In fact, the Cities openly concede that these cases provide no guidance for the interpretation of the

specific language of the tax ordinances, stating of *Ludwigs* that “[t]he exact language of the ordinance in that case was never even analyzed.” Resp. Br. 93. The Cities evidently believe that the “exact language” of the ordinances in this case is irrelevant, so long as the term “gross receipts” appears in each ordinance, regardless of its context. *Id.* The term “gross receipts” is not such a talisman, and *Ludwigs*, *Hotel Continental*, and *Laclede Gas* never held it was.

In support of their argument, the Cities also invoke *City of Dallas v. FCC*, 118 F.3d 393 (5th Cir. 1997). *See* Resp. Br. 94-95. But *City of Dallas* did not even purport to interpret a tax ordinance. *City of Dallas* considered an FCC regulation that limited franchise fees to five percent of “gross revenue.” *City of Dallas*, 118 F.3d at 393. The court held that the *unqualified* phrase “gross revenue” included money collected from customers to cover the cost of the franchise fee itself. *Id.* at 398-99. The case did not consider or discuss whether such gross revenue was derived from the provision of local or exchange telephone service, and it did not purport to address any limiting language similar to that in the tax ordinances.

In sum, the Cities provide no convincing reason to conclude that the tax ordinances apply to the four disputed revenue streams. The trial court’s order granting summary judgment on Counts I-V should be reversed.

IV. The Three-Year Limitations Period Provided in RSMo. §§ 71.625.2 and 144.220.3 Applies to Bar Recovery on the Cities' Tax Claims for Taxes Allegedly Incurred Prior to July 28, 2009 (Reply in Support of Appellants' Point IV).

A three-year limitation period applies to the Cities' tax claims. RSMo. § 71.625.2 applies because limitation periods apply retrospectively to the Cities, since the legislature may freely "waive or impair the vested rights" of such "creatures of the legislature." *Savannah R-III Sch. Dist. v. Public Sch. Retirement Sys.*, 950 S.W.2d 854, 858 (Mo. banc 1997). Even if § 71.625.2 did not apply, the three-year limitation period of RSMo. § 144.220 that governs tax-enforcement actions by third- and fourth-class cities also applies.

A. CenturyLink preserved for appeal its statute of limitations defenses under RSMo. §§ 71.625.2 and 144.220.3.

As an initial matter, the Cities contend that "CenturyLink asserts for the first time on appeal that several statutes of limitation apply to bar the Cities' claims," and that "these arguments are not preserved." Resp. Br. 95. On the contrary, in the trial court, CenturyLink explicitly argued that "Plaintiffs' claims for allegedly delinquent business license taxes ... are time-barred to the extent they seek relief for more than three years of alleged back taxes." LF 1056. CenturyLink's trial-court brief block-quoted the language of both RSMo. § 71.625.2 and § 144.220.3, emphasizing in bold the operative language of each three-year limitations period. *Id.* CenturyLink's brief advised the trial court that § 71.625.2 had become effective shortly after the initial petition had been filed, and

explicitly argued that the three-year limitations period of § 71.625.2 applies retrospectively to the Cities. *Id.* n.7. Moreover, in its responsive pleading, CenturyLink again explicitly asserted the three-year statutes of limitations as affirmative defenses, explicitly citing the same statutory sections relied on in its Opening Brief. LF 1766, ¶ 8; LF 1770, ¶ 25.

B. Section 71.625.2 applies retrospectively in this case, both because the Cities are creatures of the legislature and because they were afforded a reasonable opportunity to bring their tax claims.

The Cities do not dispute that they are creatures of the legislature that have no vested rights to be adversely affected by retrospective application of the statute of limitations. *See* Resp. Br. 95-98. Rather, the Cities rely heavily on an inapposite case, *Goodman v. St. Louis Children's Hospital*, 687 S.W.2d 889 (Mo. banc 1985). Resp. Br. 96. *Goodman* involved a statutory enactment that shortened the ten-year limitations period for medical malpractice claims involving minor victims to two years. *Goodman*, 687 S.W.2d at 890. In considering the retrospective application of the statute, *Goodman* expressly reaffirmed that “statutes of limitations are procedural and that there is no vested right in the maintenance in force of the statute in effect when the claim accrued. It is possible to shorten the statute of limitations applicable to an existing claim.” *Id.* at 891; *see also id.* at 891 n.2.

Goodman declined to interpret the particular medical-malpractice statute of limitations as applying retrospectively, solely on the ground that minor persons “who have pending and unbarred claims at the time the new statute becomes effective must be

afforded a reasonable time within which to file suit,” to prevent extinction of their claims. *Id.* at 891. Because applying the statute retrospectively might effectively extinguish the claim of a minor person “if the alleged malpractice occurred one day short of two years before the effective date of the statute,” *id.* at 891-892, the court concluded that the statute was not intended to apply retrospectively.

Goodman provides no support for Respondents’ position. No plausible argument exists that the retrospective application of § 71.625.2 deprived the Cities of “a reasonable time within which to file suit.” *Goodman*, 687 S.W.2d at 891. On the contrary, the Cities had *already* filed suit at the time of the enactment, and shortening of the limitations period did not extinguish their claims but merely narrowed the period for which recovery was available.

Further, the Cities, as “creatures of the legislature” whose vested rights the legislature may freely “waive or impair,” bear no resemblance to the physically injured minors at issue in *Goodman*. *Savannah R-III Sch. Dist.*, 950 S.W.2d at 858. The other cases cited by the Cities, all of which rely on *Goodman*, are distinguishable on the same grounds as *Goodman*. Without exception, these cases involved individual, natural-person plaintiffs—not creatures of the legislature. *See Swartz v. Swartz*, 887 S.W.2d 644, 646 (Mo. App. 1994) (individual’s claims of abuse against two other individuals); *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 824 (8th Cir. 2004) (individual’s claims against health plan and its administrator); *Cranor v. Sch. Dist. No. 2*, 52 S.W. 232, 234 (Mo. 1899) (individual’s claims against school district).

For these reasons, § 71.625.2 is governed by the longstanding, general rule that amendments to statutes of limitations are procedural changes that apply retrospectively in pending cases, particularly where the plaintiff is a creature of the legislature with no vested or substantial rights. *See* App. Br. 70-71; *State ex rel. Res. Med. Cntr. v. Peters*, 631 S.W.2d 938, 946-48 (Mo. App. W.D. 1982) (holding that 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); *Savannah R-III Sch. Dist.*, 950 S.W.2d at 858 (holding that municipal corporations, unlike natural persons, are “creatures of the legislature” whose vested rights may be waived or impaired by the legislature at will); *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974) (noting that a statute applies in pending cases if “the statute is procedural only and does not affect any substantive right of the parties”).

C. It is undisputed that the three-year limitations period of RSMo. § 144.220.3 also applies.

The Cities fail to provide any substantive argument against the application of the three-year limitations period of RSMo. § 144.220.3, which governs tax-collection actions by third- and fourth-class cities, such as Respondents. As noted, RSMo. § 144.220.3 provides, for the collection of state and county taxes, that “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. § 144.220.3,

Appx. A49 (emphasis added).⁷ Sections 94.150 and 94.310 apply this same limitations period for state and county assessments to tax-collection actions by third- and fourth-class cities, respectively. *See* RSMo. § 94.150, Appx. A44 (requiring that “[t]he enforcement of all taxes” by third-class cities “shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes”); RSMo. § 94.310, Appx. A45 (requiring the same for fourth-class cities). The Cities’ only argument against the application of this three-year period of § 144.220.3 is to argue that the issue was not preserved for appeal, which is demonstrably incorrect. *See* LF 1056 (urging the trial court, in bold, that the three-year period of § 144.220.3 applies).

D. The default limitations period of RSMo. § 516.120 does not apply.

The Cities claim that the five-year period under RSMo. § 516.120 applies, but they ignore the text of that statute: RSMo. § 516.120 applies only if “a different” limitation is not otherwise provided under Missouri statutes. § 516.120(1). Both § 71.625.2 and

⁷ The same three-year limitations period applies to various other state and county tax-collection actions, further confirming that the period applicable to tax-collection actions by third- and fourth-class cities is three years. *See, e.g.*, RSMo. §§ 140.160, Appx. A46 (three-year limitation on state and county real estate tax collections); 140.730, Appx. A47 (three-year limitation on state and county personal tax collections); 141.080, Appx. A48 (three-year limitation on state and county suits for real estate taxes). *See also* App. Br. 71-72.

§ 144.220.3 establish a “different,” three-year limitation. The Cities cite cases in which the courts applied the five-year limitations period in tax-collection actions, but these cases are readily distinguishable. *See* Resp. Br. 97 (citing *Stoner v. Dir. of Revenue*, 358 S.W.3d 514, 518 n.6 (Mo. App. 2011), and *Kansas City v. Standard Home Improvement Co.*, 512 S.W.2d 915, 918 (Mo. App. 1974)). In particular, both cases were decided before the enactment of the three-year limitations period of RSMo. § 71.625.2, so they provide no guidance as to that statute. Further, neither case considered or discussed § 71.625.2, § 144.220.3, or any tax-collection action by a municipality. *See Stoner*, 358 S.W.3d at 518 n.6; *Standard Home*, 512 S.W.2d at 918.

Moreover, even if a five-year limitation did apply, the trial court awarded damages extending beyond five years, back to January 1, 2007. Without any citation of the record, the Cities assert that all taxes at issue were due *after* July 28, 2007 (the date five years before the filing date). Resp. Br. 97. The Cities are mistaken. For example, Harrisonville’s and Oak Grove’s ordinances required periodic payments, such that some of the alleged 2007 taxes would have come due *before* July 28, 2007. *See, e.g.*, Appx. A9 (LF 226) (Harrisonville’s Ordinance § 665.020) (“Every person... shall pay to the City Collector no later than the twenty-fifth (25th) day of each month an amount equal to five percent (5%) of the gross receipts from such business for the preceding calendar month”); Appx. A12 (LF 232) (Oak Grove’s Ordinance § 615.050) (“Every person... shall pay to the City Collector... on the first (1st) day of February... and on the first (1st) day of August... an amount equal to five percent (5%) of said person’s gross receipts from said business for the preceding six (6) calendar months.”). In the absence of evidence from

the Cities, the issue whether taxes were due prior to July 28, 2007 presents, at very least, a disputed issue of material fact that should have prevented summary judgment.

V. The Trial Court Erred in Finding of Liability Under RSMo. § 392.350 Because the Cities Are Not “Persons” Authorized to Sue Under That Statute, the Cities Failed to Prove Any “Unlawful” Behavior, and the Cities Submitted No Plausible Evidence of “Willfulness” (Reply in Support of Appellant’s Point V).

The Cities do not and cannot demonstrate that they are “persons” authorized to sue under RSMo. § 392.350, that CenturyLink committed any substantively “unlawful” behavior under § 392.350, or that any plausible evidence supported the trial court’s finding of “willfulness.”

A. CenturyLink properly preserved its arguments for appeal.

The Cities contend that CenturyLink did not preserve for appeal the argument that the Cities failed to present any evidence of willfulness as to their right-of-way claims, and that the *noscitur a sociis* canon applies to the definitions section of Chapter 392. Resp. Br. 98. These claims have no merit.

In trial court briefing, CenturyLink explicitly addressed the Respondents’ complete lack of evidence of willfulness on the right-of-way claims: “Plaintiffs Fail to Prove any ‘Willful’ Misconduct as to any ROW Agreement.” LF 1668. CenturyLink argued in the trial court that “Cameron and Wentzville point to no purported evidence whatsoever, other than the existence of a[] ROW agreement with Harrisonville. Cameron and Wentzville do not and cannot explain how the mere existence of the Harrisonville ROW agreement evidences any willful misconduct with respect to any of the cities.” *Id.*

CenturyLink also addressed the *noscitur a sociis* canon in the trial court, though in English rather than Latin. In its summary judgment briefing on Counts XX-XXIV, CenturyLink addressed the argument that the Cities are neither persons nor corporations. LF 1058-1060. Among other arguments, Appellants argued that the term “municipality” is separately defined from “person” or “corporation,” and that the lists of words comprising the definitions for each of these three terms were so distinct from each other that they plainly and unambiguously separated municipalities from either persons or corporations. *Id.* The Latin term for this argument is *noscitur a sociis*.

B. Respondents are not “persons” who may sue under RSMo. § 392.350.

In section V.c of their brief, Respondents restate, nearly verbatim, their trial court arguments regarding the interpretation of “person” in RSMo. § 392.350. *See* Resp. Br. 99-102; LF 1003-1005, 1276-1277. The Cities argue that the statutory definition’s use of the word “includes” broadens the definition of “person” far beyond the subjects identified in the definition—*i.e.*, “individual, firm, or copartnership.” RSMo. § 386.020(40), Appx. A55. *See* Resp. Br. 99-100. This argument has no merit. The definition of “person” may include things other than an “individual, firm, or copartnership,” but only those that are relevantly similar to the listed subjects—*i.e.*, other individuals or groups of individuals, not governmental entities. That is the meaning of the *noscitur a sociis* canon. *Union Electric Company v. Director of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014) (defining the canon *noscitur a sociis*, or “a word is known by the company it keeps,” as the principle by which “a court looks to the other words listed in the statutory provision to help it discern which of multiple possible meanings the legislature intended”).

Moreover, nothing supports the Cities' erroneous conclusion that the definition of "person" includes an item that is *separately defined in the same definitions section*, as "municipality" is. See RSMo. § 386.020(34), Appx. A54. In fact, the Cities appear to argue that the definition of "person" only *sometimes* includes municipalities, as they argue that "a 'municipality' can be a 'person' *depending on the context.*" Resp. Br. 101 (emphasis added). Such an on-again, off-again interpretation of the definition of "person" would render the statutory definitions meaningless.

The Cities' discussion of RSMo. § 1.020 and *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638 (Mo. App. E.D. 1994), also misses the mark. The Cities argue that, "unlike *J.S. DeWeese Co.*, the definition of 'person' in § 1.020 does not conflict with the definition of 'person' in § 386.020." Resp. Br. 100. The Cities incorrectly imply that *J.S. DeWeese* rejected the definition of RSMo. § 1.020 only because it conflicted with another definition of "person." In actuality, the *J.S. DeWeese* Court refused to apply the definition of "person" from RSMo. § 1.020 *even in the absence of any other applicable statutory definition.* *J.S. DeWeese*, 881 S.W.2d at 643 ("The text of the sales commission statutes do not specifically provide for the definition of 'person.'"). Regarding the default definition in RSMo. § 1.020, *J.S. DeWeese* held that "[t]he use is permissive and not mandatory." *Id.* Even more so in this case, the "permissive" definition of "person" in RSMo. § 1.020 should not be grafted onto § 392.350, where the statute already provides a governing definition of "person."

C. Section 392.200.3 applies to claims by “persons,” not municipalities, and provides relief to consumers, not tax authorities.

In its Opening Brief, CenturyLink argued that the trial court erred in granting summary judgment on Counts XX-XXIV because RSMo. §§ 392.200.3 and 392.350 apply to discriminatory rates and services, not to disputes between telecommunication companies and taxing authorities, and thus no evidence suggests that CenturyLink committed any “unlawful” behavior under § 392.350. *See* App. Br. 81-84. The Cities respond to this argument by arguing that they are “persons” protected by RSMo. § 392.200.3. *See* Resp. Br. 104. This argument fails for the reasons just stated—the Cities are not “persons” under § 392.200.3, any more than they are “persons” under § 392.350, because both sections are governed by the same definition of “person,” which does not include municipalities. *See* RSMo. § 386.020(40), Appx. A55; *supra* Part V.B. For this reason alone, § 392.200.3 does not apply in this case.

Moreover, the Cities also misinterpret the rate-discrimination provisions of § 392.200.3 by reading them far too broadly. That statute confirms that its prohibition against “unreasonable preference or advantage” refers to rate discrimination by providing, immediately following that prohibition, a targeted exemption for a certain kind of rate discrimination—*i.e.*, “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. A60 (emphasis added). The prohibition against “unreasonable preference or advantage” should be read in this

context, with its specific reference to rate discrimination, “in order to avoid the giving of unintended breadth in statutory construction.” *Union Electric*, 425 S.W.3d at 123.

The Cities rely on *De Paul Hospital School of Nursing, Inc. v. Southwestern Bell Tel. Co.*, 539 S.W.2d 542 (Mo. App. 1976), to argue that RSMo. §§ 392.200 and 392.350 should be interpreted broadly to provide remedies for *any* unlawful act, not just those relating to rate discrimination. *See* Resp. Br., at 102, 104, 111. *De Paul* actually confirms that RSMo. §§ 392.200 and 392.350 provide relief to consumers, not governmental taxing authorities.

In *De Paul*, a nursing school residence hall sued Southwestern Bell for charging the rate for “commercial” telephone service rather than for “hotel-motel” telephone service. *De Paul*, 539 S.W.2d at 544. The case did not hold that RSMo. §§ 392.200 and 392.350 apply to tax disputes, because *De Paul* did not involve any such dispute. The case pertained to past overcharges by a telecommunication company to a telephone customer. The facts of *De Paul*, therefore, support CenturyLink’s argument that § 392.200.3 protects consumers, not tax collectors. In fact, the Cities have not cited a single case applying RSMo. §§ 392.200 and 392.350 to tax disputes, and CenturyLink is aware of none. *See* Resp. Br. 98-112.

The Cities quote *De Paul* as stating RSMo. § 392.350 is to be “construed liberally,” Resp. Br., at 102, but, tellingly, they fail to quote the full sentence from *De Paul*. That sentence states: “In construing ‘willful’ as used in § 392.350, we bear in mind the long standing doctrine that the statute is to be liberally construed for the public’s, *ergo the consumer’s*, protection.” *De Paul*, 539 S.W.2d at 548 (emphasis added). The

court continues: “the Public Service Commission Law ... is to be liberally construed with a view to the public welfare, efficient facilities and substantial justice *between patrons and public utilities.*” *Id.* (emphasis added). There is a “*consumer protective purpose* apparent in the whole regulatory scheme of the Public Service Commission law.” *Id.* at 547 (emphasis added). In other words, *De Paul* specifically instructs that the “liberal” construal of § 392.200.3 pertains to the protection of consumers—not tax collectors.

D. CenturyLink had municipal consent prior to placing facilities in the rights-of-way under RSMo. § 392.080.

As to CenturyLink’s putative “unlawful” behavior under the right-of-way codes, the Cities again restate nearly verbatim their trial court arguments regarding CenturyLink’s alleged liability under RSMo. §§ 392.080 and 392.350. *See* Resp. Br. 105-106; LF 1006-1007, 1280-1281. CenturyLink anticipated and refuted these arguments in Point V.B.2 of the Opening Brief. *See* App. Br. 84-86. Notably, CenturyLink had been legally operating in the rights-of-way of Cameron and Wentzville, with the unquestioned consent of both municipalities, for many decades prior to any dispute about its access.

Moreover, though the pertinent statute only requires consent prior to placing facilities in the rights-of-way, *see* RSMo. § 392.080, Appx. A58, the Cities also fail to acknowledge that CenturyLink has offered evidence of continuing consent by Respondent Cameron. CenturyLink is party to a pole-attachment agreement dating to 1959, through which Cameron pays rent to CenturyLink for Cameron’s use of CenturyLink’s poles in Cameron’s right-of-way. LF 1062 (arguing this issue to the trial

court); LF 1330-1332, ¶¶ 20-29 (Appellants' Statement of Additional Facts and Respondents' Response Thereto); LF 1122-1131 (Pole Attachment Agreement).

To be sure, Cameron's city council purported to authorize the termination of the Pole Attachment Agreement on October 21, 2013. LF 1333-1334, ¶¶ 30-35. The Cities then filed their Second Amended Petition alleging CenturyLink lacked consent to access Cameron's rights-of-way, on November 12, 2013. LF 172, 176. Not until December 2, 2013, *after* Cameron had sued CenturyLink for allegedly "unlawful" behavior, did Cameron provide notice to CenturyLink that Cameron had purported to terminate the decades-old Pole Attachment Agreement. LF 1334, ¶¶ 34-35; LF 1145-1146. Moreover, by the terms of the Agreement, that notice of termination was not effective for another 30 days, until January 1, 2014. *See* LF 1129, art. X. In other words, while this litigation was pending, Cameron purported to terminate the longstanding Pole Attachment Agreement, added claims against Spectra for allegedly occupying the right-of-way without consent, and only then notified Spectra that it had purported to terminate the Pole Attachment Agreement.

Cameron's course of conduct serves to distinguish this case from any case in which "the telephone company *no longer* had the consent of the city." Resp. Br. 106 (italics in original) (citing *State ex rel. McKittrick v. Missouri Standard Tel. Co.*, 85 S.W.2d 613 (Mo. 1935) (cited by the Cities as *City of Lebanon*)). Unlike *Missouri Standard*, this is not a case in which the utility engaged in illegal behavior in the right-of-way without the municipality's consent. In this case, CenturyLink had Cameron's continuing consent to occupy the right-of-way and attach to the poles at least through the

time that Cameron sued CenturyLink for allegedly attaching to the poles without consent. Cameron's consent lasted for as many decades as the Pole Attachment Agreement has been in place.

Moreover, the *Missouri Standard* case the Cities cite was decided before Missouri enacted a general prohibition on telecommunications franchises. *See* RSMo. § 67.1842.1(4), Appx. A39. When a franchise was required, a city could legally control which telecommunication companies operated within its border by granting, revoking, or withholding franchises. The 2001 legislation eliminated municipal requirements that “impose[d] a barrier to entry” and required municipalities to govern their rights-of-way in “a reasonable, competitively neutral and nondiscriminatory and uniform manner.” RSMo. § 67.1830(6), Appx. A35. These changes restrict the Cities' ability to arbitrarily revoke their longstanding consent to Spectra and CenturyTel's occupation of the rights-of-way.

E. No plausible evidence even suggests CenturyLink committed any “willful” violation of the law.

1. CenturyLink did not “willfully” refuse to pay license taxes.

In support of their contention that CenturyLink's putative failure to pay license taxes was “willful” under RSMo. § 392.350, the Cities argue that (i) their interpretation of their ordinances is allegedly so settled and clear that any failure to pay under their view must have been willful; (ii) some CenturyLink entities pay similar License Taxes under settlement agreements with cities, not parties to this action, with different tax ordinances; and (iii) CenturyLink has allegedly made statements contradictory to its present defense. Resp. Br. 107. All of these contentions lack merit.

First, the law is not “well-settled” in favor of Cities’ interpretation of the tax ordinances—on the contrary, the Cities’ interpretation is clearly incorrect. *See* App. Br. 38-67; *see also supra* Part III. The Cities argue that “the definition of ‘gross receipts’ for purposes of municipal License Taxes has been settled *for decades*,” Resp. Br. 108 (italics in original), but this argument rehashes their erroneous focus solely on the phrase “gross receipts” in the tax ordinances, to the exclusion of the other limiting language in those ordinances. *See supra* Part III.B-D. Moreover, even if the court were to hold CenturyLink liable for any alleged underpayment of License Taxes, CenturyLink has an eminently reasonable basis for its position, and therefore the Appellants are not liable for “willful” misconduct under RSMo. § 392.350. *See De Paul*, 539 S.W.2d at 552. The Cities rely on *De Paul* to argue that CenturyLink’s decision to defend the Cities’ lawsuit reflects “willfulness,” Resp. Br. 111, but *DePaul* holds that litigation shows “willfulness” only when one’s legal positions have no reasonable basis. *De Paul*, 539 S.W.2d at 552. “When a utility attempts to make reasonable classifications of its consumers, it should not be penalized for drawing firm lines.” *Id.*

Second, the Cities attempt to prove willfulness by referring to two settlement agreements—one between “a CenturyLink entity [and] Jefferson City,” and one allegedly between “several CenturyLink entities and cities across the state.” Resp. Br. 109 (citing LF 1315-1317). The former agreement appears to refer to a settlement agreement between Embarq and the City of Jefferson City. *See* LF 873-889. The latter agreement appears to refer to a settlement agreement between several entities affiliated with Southwestern Bell/AT&T, and the cities of Wellston and Winchester. *See* LF 783-872.

Contrary to the Cities' characterization, Resp. Br. 109, the latter agreement does not involve "several CenturyLink entities" or, indeed, any CenturyLink entities at all—it involves affiliates of AT&T, a CenturyLink competitor. *See* LF 783-784.

CenturyLink anticipated and refuted Respondents' arguments regarding the Embarq/Jefferson City settlement agreement in Section V.C.1 of the Opening Brief, App. Br. 88-90, by noting that this settlement arose out of separate circumstances (involving a different city, a different tax ordinance, and an audit and assessment), that the settlement agreement was not an admission of wrongdoing or a concession of a legal position, and that under Missouri law a settlement does not involve any adjudication of the merits of a claim. *See State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 428 (Mo. App. 1997).

Even more so, the settlement agreements involving CenturyLink's competitor AT&T provide no indication of CenturyLink's willfulness. CenturyLink has no control over legal positions taken by its competitors, and these positions have no conceivable bearing on CenturyLink's liability under these License Tax ordinances. Further, both settlement agreements explicitly state that the parties make no admission of liability as to any claim. *See* LF 825 (AT&T Agreement, stating that nothing in the Agreement "shall be construed as or deemed to be legal evidence of an admission by [AT&T] with respect to the merits of the claims alleged in the Action"); LF 877 (Embarq Agreement, stating that the Agreement "is not an admission of liability or of indebtedness by any of the Parties").

Third, the Cities argue that CenturyLink has made contradictory statements regarding the classification of certain revenue streams. Specifically, Respondents allege that CenturyLink has made contradictory statements about the Common Line Charge, Resp. Br. 107, the USF Fees, Resp. Br. 109-110, and the Optional Charges, Resp. Br. 110. These arguments have been addressed and refuted above. *See supra*, Part III.F.

One specific misstatement of the factual record pertaining to these services, however, must be addressed here because of its misleading character. The Cities claim that CenturyLink's tariffs support their position, but the Cities misquote the tariffs. CenturyLink' tariffs provide the classification of the companies' services and service prices to the Missouri Public Service Commission. LF 1475-1531 (Spectra Tariff); LF 1532-1573 (Embarq Tariff); LF 1574-1625 (CenturyTel Tariff). Respondents argue that the Spectra tariff defines "exchange service" as "CenturyLink's telecommunication services 'specified in the Local or General Exchange Tariffs.'" Resp. Br. 110 (quoting LF 1480). This is a misleading and selective quotation of the tariff. The full sentence from which the Respondents quote is: "Exchange Service – The 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 1480. The full sentence makes clear that the tariff does not define "exchange service" as those services listed in the tariffs, but instead "exchange service" is defined as a specific service—i.e. the "furnishing of facilities for the telephone communication *within an exchange area*"—the charges for which are listed in the tariff. *Id.* (emphasis added). An examination of the tariff reveals its basic structure: introductory material and definitions,

LF 1475-1481; services that qualify as local exchange service, LF 1482-1502; and additional services, “Custom Calling Services,” that are above and beyond those services that qualify as local exchange service, LF 1503-1531. The other two tariffs follow the same pattern. LF 1532-1573; LF 1574-1625. The tariffs, rather than contradicting CenturyLink’s position, confirm that CenturyLink offers a variety of services, only some of which are subject to the municipalities’ taxation of local or “exchange” telephone service.

2. CenturyLink did not “willfully” violate the right-of-way codes.

Regarding CenturyLink’s putatively “willful” violation of the right-of-way codes, the Cities contend that this argument was not preserved for appeal. Resp. Br. 112. For the reasons stated above, this allegation is plainly false. *See supra* Part V.A.

On the merits, the Cities merely assert, in conclusory fashion, that “the Cities established undisputed evidence that CenturyLink and its subsidiaries have entered into agreements they expressly acknowledge as ‘lawful’ with municipalities in numerous cities.” Resp. Br. 112 (citing LF 573-583, 604, 1318, 1387, 1401, 1412, 1470-1472). The Cities provide no further explication of their voluminous citation of pages in the Legal File, and for this reason, this Court should disregard their argument. *See Miller v. Ernst & Young*, 892 S.W.2d 387, 389 (Mo. App. E.D. 1995) (“It is not the function of an appellate court to sift through a voluminous record, separating fact from conclusion, admissions from disputes, the material from the immaterial, in an attempt to determine the basis for the motion.”). In any event, the citations provided by the Cities provide no

conceivable support for their claim that CenturyLink engaged in “willful” violations of the right-of-way codes.

The Legal File citations in the Cities’ brief comprise the following documents: (1) an affidavit of the Cameron City Clerk, accompanied by a list of License Tax payments and a “Public Ways Use Permit Agreement Application Form” from Cameron, submitted by Appellant Spectra (LF 573-582); (2) an affidavit of Wentzville City Clerk, stating the Appellants do not have a right-of-way use agreement with Wentzville (LF 604); (3) an admitted statement of uncontroverted material fact that Respondent Harrisonville and Appellant Embarq entered into a rights-of-way use agreement (LF 1318); (4) a right-of-way agreement between Qwest Communications Corporation, a non-party to this case, and the city of Wentzville (LF 1387-1396); (5) a right-of-way agreement between CenturyTel Fiber Company II, LLC, a non-party to this case, and the city of Wildwood, a non-party to this case (LF 1401-1411); (6) a right-of-way agreement between CenturyTel Fiber Company II, LLC, a non-party to this case, and the city of St. Louis, a non-party to this case (LF 1412-1427); and (7) summary judgment pleadings regarding the above agreements (LF 1470-1472).

The Cities evidently infer from these documents that CenturyLink has waived its ability to assert its legal rights under the Missouri right-of-way laws, which prohibit “franchises,” because other entities have engaged in such agreements from time to time. Resp. Br. 112. The Cities provide no support for this argument, and none exists. Even if CenturyLink had entered into right-of-way permit agreements with other cities in the

past, such agreements would not constitute a waiver of CenturyLink’s ability to object to other, more onerous franchise agreements.’

Further, there is no support for the Cities’ claim that CenturyLink has “expressly acknowledge[d] as ‘lawful’” these other agreements. Resp. Br. 112. On the contrary, one searches the documents cited by the Cities in vain for any such admission that all such right-of-way agreements are inherently “lawful.” Even if such an admission existed, moreover, it would not constitute a binding admission by the signer that all similar unlawful agreements were nevertheless lawful. *See, e.g., Watkins v. Floyd*, 492 S.W.2d 865, 872 (Mo. App.1973) (“The rule is that estoppel by acceptance or ratification of an act or transaction does not apply if the act or transaction be void for violation of a mandate of the law.”).

The Cities refer to the agreement between Embarq and Harrisonville—*i.e.*, the agreement on which the trial court in this case refused to grant summary judgment. LF 1671; *see infra*, Appellants’ Response to Cross-Appeal. Respondents make no argument as to why Appellant Embarq’s past actions evidenced willfulness on the part of Appellant Spectra. LF 1010. Respondents fail to explain how Embarq’s actions in Harrisonville implicate CenturyTel’s actions in Wentzville, besides pointing the trial court, without analysis, to 87 pages of ordinances from the three cities. *See* LF 1010 (directing court to Exhibits 31, 32, and 33, found at LF 890-976). Such fleeting reference to large tracts of information, with little or no supporting analysis, falls far short of meeting the Cities’ burden of establishing “willfulness.”

VI. The Judgment Against Appellants CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications, Inc., Lacks Any Basis in Fact or Law Because These Entities Do Not Provide Local Exchange Service in Any City (Reply in Support of Appellants' Point VI).

Appellants thoroughly established that the License Taxes apply only to providers of local exchange telephone service. *See* App. Br. 38-67; *supra*, Part III. Appellants likewise demonstrated that CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications, Inc., did not provide local exchange service in any of the Cities. *See* App. Br. 91-94 (citing, *inter alia*, LF 1075-1078, ¶¶ 19, 23, 25, 27, 30, 31; LF 1216-1217, ¶¶ 1-12; LF 1216-1217, ¶¶ 1-3, 10-12). Conversely, the Cities failed to establish uncontroverted facts that these three entities did provide local exchange service.⁸ Thus, by their own terms, the tax ordinances do not apply to these three entities, and the trial court erred in granting judgment against them.

Respondents nevertheless assert that liability arose from the “illegal activities of each and every CenturyLink entity.” Resp. Br. 113. They also assert a responsibility of “CenturyLink” (undifferentiated by entity) to pay license taxes. Resp. Br. 114.

⁸ The putative disputed evidence consists of two past customer bills issued by an unknown CenturyLink entity, and it does not establish that any of these three defendants ever provided local exchange telephone service or was ever subject to the License Taxes. *See* App. Br. 93-94 (discussing customer bills at LF 1348-1355, 1375-1382).

However, these bald assertions, and the two cases Respondents cite, do not justify (or even consider) imposing tax liability on entities that do not conduct taxable activities in the city.

First, *Kansas City v. Graybar Elec. Co., Inc.*, 485 S.W.2d 38 (Mo. banc 1972), considered the appropriate scope of taxation levied against Graybar, a business that was indisputably subject to Kansas City's occupational license tax because it maintained an active Kansas City business office. *Graybar*, 485 S.W.2d at 41. In *Graybar*, the court specifically noted that Graybar's business activities within Kansas City subjected it to the tax. *See id.* (holding that sales in Kansas City were "essential to a determination that a person is engaged in a taxable occupation"). In this case, no undisputed evidence suggests that CenturyLink, Inc., Embarq Communications, Inc., or CenturyTel Long Distance, LLC, has engaged in a "taxable occupation" in any of the Cities.

The Cities also cite *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960), which ratified the Public Service Commission's decision to allow a power company to automatically pass on to customers their "proportionate share" of taxes imposed on the company's receipts. 334 S.W.2d at 77. In *Hotel Continental*, no one disputed that the power company was legitimately taxed for conducting business in the city. The Cities quote *Hotel Continental* as stating that "a valid gross receipts tax assessed against the company ... constitutes an expense of operation." *Hotel Continental*, 334 S.W.2d at 82 (quoted in Resp. Br. 113-14). But this assertion has no bearing on the liability of entities that unquestionably did not conduct any business activities in the taxing cities. Neither that statement, nor any other element of the case, expands the reach

of the tax ordinances beyond those entities that conduct local exchange telephone service in the Cities.

Thus, despite arguing that CenturyLink, Inc.'s liability, as well as that of Embarq Communications, Inc., and CenturyTel Long Distance, LLC, is "based on" their own "illegal activities," Resp. Br. 113, the Cities do not cite any valid evidence of taxable activity by any of these Appellants, nor any case expanding the scope of tax ordinances to hold entities liable for the taxes imposed on their associates or subsidiaries.

Finally, although it is true that CenturyLink, Inc. has in the past paid taxes on behalf of its subsidiaries, such voluntary payments do not render it liable for taxes imposed on its subsidiaries. A party seeking to hold a parent corporation liable for the obligations of its subsidiaries must submit evidence justifying "piercing the corporate veil." *Mitchell v. Home Ins. Co.*, 865 S.W.2d 779, 783 (Mo. App. 1993). The Cities failed to adduce any such evidence. *See* Resp. Br. 113. Past voluntary payments on a subsidiary's behalf do not provide an "end run" around piercing the corporate veil. *See Mitchell*, 865 S.W.2d at 784 (rejecting the same argument with respect to a parent company that had paid for insurance and rent for a subsidiary).

The Cities contend, without support, that CenturyLink, Inc. should be held liable because "it is the act of underpayment itself which is illegal." Resp. Br. 114. This assertion cannot be squared with the text of ordinances taxing only those entities conducting business in the cities, not on entities administering tax payments on their behalf. *See* Appx. A5 (LF 220) (Aurora Ordinance); Appx. A7 (LF 223) (Cameron Ordinance); Appx. A9 (LF 226) (Harrisonville Ordinance); Appx. A11 (LF 231) (Oak

Grove Ordinance); Appx. A13 (LF 234) (Wentzville Ordinance). Moreover, notwithstanding the Cities' unsupported suggestion, it makes no difference whether CenturyLink, Inc.'s past voluntary payments completely satisfied the tax obligations of its subsidiaries or, after this litigation, turn out to have been only partial payments. *See* Resp. Br. 114. Either way, CenturyLink, Inc.'s voluntary payment of taxes imposed on its subsidiaries does not confer liability on the payor. *See Mitchell*, 865 S.W.2d at 784.

Moreover, absolutely no evidence supports the Cities' assertion that "a judgment against CenturyLink" was "not only appropriate," but "necessary," to "ensure that the taxes will be properly paid in the future." Resp. Br. 114. This *ipse dixit* provides no legal support for a judgment against entities that have no liability of any kind.

Because nothing in the record or the Cities' brief provides any valid basis for liability against Embarq Communications, Inc., CenturyTel Long Distance, LLC, or CenturyLink, Inc., the trial court erred in granting summary judgment against them.

CROSS-RESPONDENTS' BRIEF

I. The Trial Court Correctly Refused to Grant Summary Judgment on Harrisonville's Breach-of-Contract Claim, Because Embarq Did Not Underpay Any License Taxes, and Because the Agreement Was Not Supported by Consideration (Responds to Cross-Appellants' Point I).

This Court should deny Harrisonville's cross-appeal seeking summary judgment on Count XVI of the Second Amended Petition. In the cross-appeal, Harrisonville claims that, if this Court finds that Embarq has not paid its full tax liability in past years, then that failure also constitutes a breach of the "Rights-of-Way Use Agreement for Communications Facilities" between Harrisonville and Embarq ("Harrisonville Agreement"), LF 586-94. Resp. Br. 117. There is no jurisdiction over this cross-appeal because the order denying summary judgment is not "completely intertwined" with the merits of the appealable claims. Even if there were jurisdiction, this Court should reject this cross-appeal because (1) the Harrisonville Agreement is an illegal "franchise" under RSMo. § 67.1842.1(4); (2) Embarq did not underpay its license taxes, so no basis for contractual liability exists; and (3) a promise to perform what one has an independent legal obligation to do is unenforceable in contract law, and the Harrisonville Agreement lacks consideration for the same reason.

A. There is no jurisdiction over the Cities' cross-appeal from an order denying summary judgment.

A denial of summary judgment is not a final judgment and therefore is not reviewable on appeal. *See Wilson v. Hungate*, 434 S.W.2d 580, 583 (Mo. 1968) (noting

that the rule is “almost without exception”). The Cities invoke an exception to that rule where a denial is appealed in conjunction with an appealable order and “the propriety of the appealable order is *completely intertwined* with the merits of the denial.” *Kaufman v. Bormaster*, 599 S.W.2d 35, 38 (Mo. App. 1980) (emphasis added). This Court’s cases make clear that this exception is narrow—the merits are “intertwined completely” only when a party is challenging both the grant of summary judgment to its adversary and the denial of summary judgment to itself, as to the same legal issue. *Bob DeGeorge Assocs. v. Hawthorn Bank*, 377 S.W.3d 592, 596-97 (Mo. banc 2012); *Dhyne v. State Farm Fire & Cas. Co.*, 188 S.W.3d 454, 456 n.1 (Mo. banc 2006) (“[D]enial of a summary judgment motion is not appealable and will only be reviewed when its merits are completely intertwined with a grant of summary judgment in favor of an opposing party.”).

Indeed, courts frequently decline to review denials of summary judgment relating to the same legal claims as in appealable orders, on the grounds that the merits are not sufficiently “intertwined” to warrant making an exception from the general rule. *See Kaufman*, 599 S.W.2d at 38; *Intermed Ins. Co. v. Hill*, 367 S.W.3d 84, 85 n.1 (Mo. App. 2012); *Manner v. Schiermeier*, No. ED96143, 2011 Mo. App. LEXIS 1715, *4 n.1 (Mo. App. Dec. 27, 2011) (“The denial of a motion for summary judgment is not an appealable order, even when the order denying summary judgment to one party is entered at the same time as an appealable order granting summary judgment to the other party.”); *Merlyn Vandervort Invs., LLC v. Essex Ins. Co.*, 309 S.W.3d 333, 335 n.1 (Mo. App.

2010); *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 106 n.1 (Mo. App.

2009); *Leiser v. City of Wildwood*, 59 S.W.3d 597, 605 (Mo. App. 2001).

Under these principles, there is no jurisdiction to review the Cities' cross-appeal. The trial court's denial of summary judgment relates to a distinct count of the Cities' petition (Count XVI), raising a distinct legal issue (a breach-of-contract claim), based on distinct facts (the terms of a contract between Harrisonville and Embarq). There is no "grant of summary judgment in favor of" Embarq on appeal, as required by *Dhyne*. *Dhyne*, 188 S.W.3d at 456 n.1. The Cities make no attempt to show that the merits of the denial are "completely intertwined" with those of the circuit court's appealable order granting summary judgment to the Cities on other claims. The Cities argue that the breach-of-contract claim involves "[t]he very same factual record" as the appealable claims, but they provide no support for that claim. Resp. Br. 18. They also offer no case law suggesting that "the very same factual record" establishes that two distinct legal claims are "completely intertwined" on appeal. *Kaufman*, 599 S.W.2d at 38.

The Cities also attempt to fit this case under a putative judicial efficiency exception articulated in *James v. Paul*, 49 S.W.3d 678, 682 (Mo. 2001). But *James* provides no support for the Cities' position. As in *Kaufman* and similar cases, *James* involved appeals of both the grant of summary judgment to one party, and its denial to the other, on precisely the same issue—namely, whether an insurer was entitled to judgment on a coverage exclusion for intentional conduct, when the tortfeasor had pleaded guilty to first-degree assault based on the same conduct. *See id.* at 689. In

James, unlike here, the order denying summary judgment was completely intertwined with the order granting summary judgment.

B. The Harrisonville Agreement is an illegal mandatory “franchise.”

For the reasons discussed above, the Harrisonville Agreement is an illegal mandatory “franchise” that violates RSMo. § 67.1842.1(4). *See supra* Part II. Just like the Cameron and Wentzville ordinances, Harrisonville’s ordinance imposes the right-of-way agreement as a mandatory condition of access to the right-of-way. *See* LF 968-969 (Harrisonville Ordinance § 530.025) (providing that “no ROW user may construct, maintain, own, control or use facilities in the public rights-of-way without a franchise or ROW agreement with the City”). As an agreement to authorize a public utility access to and use of the right-of-way, moreover, the Agreement satisfies this Court’s longstanding definition of “franchise.” *See supra* Part II. Thus, by imposing the Agreement as a mandatory condition of using the right-of-way, Harrisonville has violated section 67.1842.1(4) by “requir[ing] a telecommunications company to obtain a franchise” and cannot enforce the Agreement. RSMo. § 67.1842.1(4), Appx. A39.⁹

⁹ Admittedly, CenturyLink did not challenge the Harrisonville Agreement on this particular ground in the trial court. In this cross-appeal, however, CenturyLink requests affirmance of the trial court’s ruling on Count XVI, and it is well established that “the trial court’s judgment may be affirmed on any basis supported by the record.” *Nail v. Husch Blackwell Sanders, LLP*, 436 S.W.3d 556, 561 (Mo. 2014).

C. Embarq has fully paid its tax liability to Harrisonville.

Second, Harrisonville's claim fails because the only breach of contract it claims is the alleged underpayment of business license taxes. *See* Resp. Br. 118. For the reasons discussed above in the Reply Brief, Part III, the claim that Embarq underpaid license taxes has no merit. *See also* App. Br. 38-67. Because there was no underpayment, there is no basis to claim breach contract.

D. Embarq's alleged promise to perform its preexisting legal obligations is unenforceable as a matter of black-letter contract law.

1. A promise to perform a preexisting legal duty is not consideration.

Even if Embarq had underpaid license taxes, Harrisonville's breach-of-contract claim would be meritless. To establish a claim for breach of contract, a plaintiff must first plead the existence of a valid contract, the basic elements of which are offer, acceptance, and consideration. *Wise v. Crump*, 978 S.W.2d 1, 3 (Mo. App. E.D. 1998). "A preexisting duty . . . cannot furnish consideration for a contract." *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 742 (Mo. App. W.D. 2011) (quoting *Egan v. St. Anthony's Med. Ctr.*, 244 S.W.3d 169, 174 (Mo. banc 2008)). In other words, "[a] promise to do that which one is already legally obligated to do cannot serve as consideration for a contract." *Wise*, 978 S.W.2d at 3. This includes a preexisting duty owed under law by or to a governmental entity. *Id.*; *Wilhoite v. Mo. Dep't of Soc. Servs.*, No. 2:10-CV-03026-NKL, 2011 U.S. Dist. LEXIS 77150, at *42 (W.D. Mo. July 15, 2011) ("[T]here is no consideration in a promise to do what the law already requires one

to do.”); *In re Wood’s Estate*, 232 S.W. 671, 674 (Mo. banc 1921); *see also* 3 WILLISTON ON CONTRACTS, § 7:42 (4th ed.).

In *Wise*, the Missouri Court of Appeals affirmed the trial court’s dismissal of the plaintiff’s breach-of-contract claim under the preexisting duty rule. *Wise*, 978 S.W.2d at 3. The plaintiff, injured in a car accident allegedly caused by the defendant, claimed that she was entitled to enforce the defendant’s implied promise to the State to insure his vehicle, which she alleged he made in exchange for the privilege of titling his vehicle. *Id.* The Court of Appeals held that because the defendant was already obligated by law to insure his vehicle, his promise to obtain insurance could not serve as consideration for the claimed contract. *Id.*

Similarly, in *Holcomb v. United States*, 622 F.2d 937, 941 (7th Cir. 1980), the court applied the preexisting legal duty rule to a taxpayer’s obligation to pay taxes. The court affirmed a judgment denying a breach-of-contract claim for lack of consideration where the plaintiff taxpayers promised to make monthly payments to the IRS for a tax liability they were already legally obligated to pay. *Id.* at 940-41. The court held that the alleged contract was unenforceable under the preexisting duty rule, stating that “a promise to do something which the promisor is already legally obligated to do does not constitute consideration.” *Id.*

Here, the Cities claim that Embarq has breached its “contract” with Harrisonville by failing to meet its pre-existing tax obligations under Harrisonville’s municipal tax ordinance. *See* Resp. Br. 117-18. However, Embarq’s alleged contractual promise to “comply with Harrisonville ordinances and pay all municipal taxes due to Harrisonville”

(see Resp. Br. 117) is not valid consideration. *Wise*, 978 S.W.2d at 3; *Holcomb*, 622 F.2d at 941.

2. Harrisonville cannot enforce a promise to perform a preexisting legal duty under a breach-of-contract theory.

Harrisonville nevertheless claims that other commitments Embarq made within the Agreement were sufficient consideration to render it a binding contract. *See* Resp. Br. 119-21. This argument fails for two reasons. First, Harrisonville is not seeking to enforce those collateral provisions of the contract. Rather, it seeks to enforce the obligation to pay business license taxes, which is unquestionably governed by an independent, preexisting legal duty. *See* Resp. Br. 118. Even if other provisions of the contract provided valid consideration, Harrisonville cannot enforce the very provision of the contract that is illusory because it is congruent with a preexisting legal duty. *See Wise*, 978 S.W.2d at 3 (“A promise to do that which one is already legally obligated to do cannot serve as consideration for a contract.”).

In other words, Harrisonville’s attempt to hold Embarq liable *in contract* for its alleged promise to perform actions that it had a preexisting legal duty to do—*i.e.*, pay all taxes due and owing under Harrisonville’s license taxes—violates a fundamental principle of contract law. *See Holcomb*, 622 F.2d at 941 (“The general rule is that a promise to do something which the promisor is already legally obligated to do does not constitute consideration.”) (citing 17 Am. Jur. 2d CONTRACTS, § 119, and RESTATEMENT, CONTRACTS § 76). Harrisonville, in effect, seeks a double judgment against CenturyLink for the same putative tax liability—it requests a judgment rooted in contract law for the

same alleged liability it asserts under its tax ordinances. The black-letter law of contracts does not permit such a double judgment. *See id.* To permit it, moreover, would potentially allow the Cities to end-run around other legal bars to the collection of tax liability against Embarq—most notably, the three-year statute of limitations applicable to claims to tax claims brought by third- and fourth-class cities. *See supra* Part IV.

The cases cited by Harrisonville are unavailing. *See* Resp. Br. 120. None of these cases considered awarding contract damages for the failure to fulfill a preexisting legal duty. Instead, in each of these cases, the court was concerned with finding whether a true bargain was present when one of the parties to a preexisting contract claimed that a second agreement imposed new obligations on the other party. This is not the case between Embarq and Harrisonville.

In *Ashland Oil v. Tucker*, 768 S.W.2d 595, 601 (Mo. App. E.D. 1989), the court found that an employee was subject to a service agreement with his company despite entering into it when he was already subject to a pre-existing employment agreement, because “promotions, additional responsibility, and pay increases constitute[d] adequate consideration” for the new agreement. *Id.* at 601. Likewise, *Harris v. A.G. Edwards & Sons, Inc.*, 273 S.W.3d 540 (Mo. App. E.D. 2008), considered whether mutual promises were sufficient consideration for enforcement of an arbitration agreement where one party had had a prior duty to arbitrate. The court found that additional terms that were not present in the prior agreement exceeded the earlier obligation to arbitrate and therefore constituted sufficient consideration (though “slight”) for a new agreement. *Id.* at 544-45. Similarly, *Eiman Bros. Roofing Sys. v. CNS Int’l. Ministries, Inc.*, 158 S.W.3d

920, 922-23 (Mo. App. W.D. 2005), upheld a straightforward contract modification that added both additional duties and additional consideration to a pre-existing roofing contract.

In each of these cases, the two parties were obligated to one another by an earlier contract, and there was a subsequent alleged bargain to modify or update that contract. Here, by contrast, Harrisonville seeks a second enforcement against Embarq for an alleged failure to pay its taxes, and thus attempts an end-run around other legal hurdles to collection of back tax liability, such as the three-year statute of limitations. *See supra* Part IV. Harrisonville has offered no examples of a court allowing such double enforcement, and the “pre-existing duty” rule makes clear that Embarq’s obligation to follow laws and pay taxes are not a legitimate subject of bargaining between parties.

Harrisonville’ argument that the contract is supported by independent consideration, therefore, is beside the point. The Cities are seeking to enforce the very promise within the contract that is coextensive with a preexisting legal duty. Under basic principles of contract law, this promise carries no *contractual* duty.

3. The entire Harrisonville Agreement lacks consideration.

Moreover, even if Harrisonville were seeking to enforce some other provision of the contract, the additional promises cited by Harrisonville do not constitute consideration, but serve merely as conditions of Embarq’s performance. For this reason, the entire contract lacks consideration.

The Cities contend that the Agreement imposes additional obligations on Embarq “to comply with certain limitations on its use of the rights-of-way; to reimburse the City

for costs associated with the installation, maintenance, repair, and use of Embarq's facilities; to obtain insurance to protect the City; to indemnify the City; and to forego any cause of action against the City for loss, cost, expense or damage to Embarq's facilities," Resp. Br. 117. These collateral obligations are not bargained-for consideration, but merely conditions of Embarq's performance.

"To constitute consideration, a performance or a return promise must be bargained for." RESTATEMENT (SECOND) OF CONTRACTS § 71. A promise is "bargained for" sufficient to constitute valid consideration when it and the return promise "bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration." *Id.* (cmt. b.); *see also* E. Allan Farnsworth, *Contracts* § 2.9 (3d ed.) (identifying consideration by whether inducing the performance or promise was the "purpose" of the other party's promise).

After eliminating the pre-existing obligations included in the Agreement, Embarq's remaining obligations are not "bargained-for" consideration, because they would not have induced Harrisonville to offer use of its rights-of-way. That is, Harrisonville cannot plausibly claim that it granted Embarq use of its rights-of-way *for the purpose of* becoming the beneficiary of insurance and indemnity related to Embarq's use of the rights-of-way, or for the purpose of receiving reimbursement for expenses related to Embarq's use of the rights-of-way. Such requirements as limitations on use, insurance coverage, indemnification, and other commitments cited by Harrisonville are therefore not consideration, but rather "conditions" on Harrisonville's permission. *See, e.g., Carlisle v. T&R Excavating*, 704 N.E.2d 39, 45 (Ohio App. 1997) ("A condition for

a promise, therefore, is different from consideration. Consideration induces the promise of the promisor, is bargained for, and results in a benefit to the promisor or a detriment to the promisee.... A condition for a promise, in contrast, does not induce the promise, is not bargained for, and is not reasonably understood as consideration.”); Farnsworth, *Contracts* § 2.9 (giving a classic example of a condition rather than consideration, *i.e.*, offering an employee a gold watch if he will stop by the office to pick it up). Because these collateral commitments merely establish parameters for Embarq’s use of the right-of-way, and were not “bargained for” inducements to Harrisonville to grant such use, they do not constitute independent consideration.

Carlisle illustrates this distinction and is analogous to the instant case. In *Carlisle*, the Ohio court of appeals held that a wife had not offered “consideration” merely by promising to fulfill a financial “condition” of her husband’s gratuitous promise. *Carlisle*, 704 N.E.2d at 44. A married couple preparing for divorce had agreed in writing that the husband would provide free excavation services to help his wife to build a preschool, if she would reimburse his company the cost of materials. *Id.* at 42. When he withdrew from the job before finishing, the wife sued for breach of contract. The court of appeals held that the wife’s promise to reimburse material costs was not consideration, because “consideration” would have to take the form of some inducement for the husband to make his promise. *Id.* at 43-44. Reimbursement for materials would not be an inducement for him to offer his services for free; instead, it was merely a condition for fulfillment of his gratuitous promise to provide excavation services. Thus, no enforceable contract existed. *Id.* at 43-44.

Similarly, here, Embarq's indemnity and insurance obligations and the other commitments it made in the Agreement all pertain to its use of the rights-of-way, and they did not "induce" Harrisonville to offer use of its rights-of-way in the first place. As such, they are not "consideration for" but merely "conditions of" Embarq's use of the rights-of-way.

The text of the Agreement strongly supports this conclusion. Section II of the Agreement is entitled "Grant of Authority to Use the Rights-of-Way," and it outlines the scope of Embarq's permission to use the right-of-way in detail. LF 587. There is no corresponding section outlining Embarq's collateral commitments. Instead, the provisions requiring Embarq to comply with applicable laws, maintain insurance, and forego suing Harrisonville are listed four sections later, under the heading "General *Conditions*." LF 589-91 (emphasis added). Thus, the Agreement itself characterizes the collateral obligations that the Agreement places on Embarq as mere "conditions" on Harrisonville's grant of authority. They are not "bargained for" inducements for Harrisonville to contract, so they do not constitute "consideration." Lacking consideration, the Agreement is not a valid contract.

CONCLUSION

For the reasons stated, Appellants/Cross-Respondents respectfully request that this Court reverse the judgment of the trial court granting summary judgment to Respondents/Cross-Appellants on Counts I-V and XVII-XXIV of the Second Amended Petition, and either dismiss the cross-appeal for lack of jurisdiction or affirm the judgment of the trial court declining to grant summary judgment to Respondents/Cross-Appellants on Count XVI of their second amended petition.

Dated: November 20, 2014

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 Reply Brief and Cross-Appeal Respondent's Brief 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 November 20, 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 30,805 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: November 20, 2014

/s/ Stephen Robert Clark
Stephen Robert Clark

CERTIFICATE OF SERVICE

This certifies that on the 20th day of November, 2014, the foregoing brief was filed electronically with the Court, to be served by operation of the Court's electronic filing system upon the following counsel of record:

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

Attorneys for Plaintiffs-Respondents

/s/ Stephen Robert Clark