

SC94208

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IN THE  
SUPREME COURT OF MISSOURI

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**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 Twenty-First Judicial Circuit, St. Louis County, Missouri  
Honorable David Lee Vincent, III, Division IX**

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**RESPONDENTS'/CROSS-APPELLANTS' INITIAL BRIEF**

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## INTRODUCTION

This case stems from Appellants' willful failure to pay taxes and comply with the laws of various cities. The facts are not genuinely in dispute - particularly on the summary judgment record before the Court in which Appellants failed to effectively controvert *any* material fact. Appellants have failed to pay municipal License Taxes, comply with cities' Rights-of-Way Codes, and comply with their contractual obligations. Despite admitting such failures, Appellants seek to avoid liability based on their strained and incorrect interpretation of the Respondents' ordinances and the law. The trial court correctly entered partial summary judgment against Appellants on the record before it. But for the same reasons, Harrisonville also was entitled to summary judgment on its breach of contract claim.

Respondents/Cross-Appellants (collectively, "Cities") are Missouri cities of the third and fourth class, who each have a validly enacted tax on the gross receipts of telephone companies that do business in the Cities ("License Tax"). Legal File ("LF") 362-64, 1286-88, 1290-94. The cities of Cameron and Wentzville also both have lawfully enacted Rights-of-Way Codes ("ROW Codes"), which require consent of the cities and a Public Ways Use Permit Agreement or a Rights-of-Way Use Agreement prior to occupation and use of the rights-of-way. LF 1319-20, 1323-24.

Appellants/Cross-Respondents (collectively, "CenturyLink") are telephone companies that individually or collectively provide telephone service to residents and businesses within the Cities. LF 365-66; v.11, 1294-1300. Individual appellant CenturyLink, Inc. is the parent company of all other appellants. LF 366, 1300.

Individual Appellants Spectra Communications Group, LLC (“Spectra”) and CenturyTel of Missouri (“CenturyTel”) occupy and use the rights-of-way of the cities of Cameron and Wentzville, respectively, without consent and without a Public Ways Use Permit Agreement or Rights-of-Way Use Agreement. LF 1318-24. Spectra also occupies and uses the rights-of-way of Cameron without paying the applicable User Fee based on the total linear feet of Spectra’s facilities occupying the rights-of-way. LF 1322-23.

In 2009, the Cities learned of the apparent telecommunications industry practice of failing to pay taxes on certain amounts of revenue, excluding many categories of revenue that are subject to the taxes, and not reporting revenue categories excluded. LF 1315-16. The taxes at issue in this case are self-reporting, and nothing in the reports filed by CenturyLink shows how the taxes are calculated, rather, the reports show the amount of tax being paid. LF 184, 1290-94, 1300.

The Cities learned that CenturyLink inconsistently includes or excludes revenues from the same services between different cities and even between different tax reporting periods in the same city. LF 1009-1010. The Cities informed CenturyLink that the Cities desired to address such tax payment issues and require CenturyLink to pay the full amounts due to the Cities under their respective License Taxes. LF 1314-15. The tax payment issues were not adequately addressed, and, therefore, an audit was performed on one of the CenturyLink entities. LF 609-27. As a result of such audit, the Cities learned that CenturyLink had failed to include necessary categories of revenue in its calculation of taxes.

The Cities filed suit on July 27, 2012, alleging that CenturyLink was underpaying License Taxes, violating the ROW Codes of Cameron and Wentzville, and had breached a contract with Harrisonville. LF 10, 12. After seventeen months of litigation, including extensive discovery and a parallel federal case filed by CenturyLink in which there was also discovery, the Cities filed a motion for partial summary judgment seeking legal declarations that CenturyLink was liable to pay License Taxes on four categories of revenue and an award of damages on one of those categories; that CenturyLink was in violation of the ROW Codes of Cameron and Wentzville; and that Appellant Embarq Missouri, Inc. (“Embarq”) breached a contract with Harrisonville. LF 1-11, 340, 408-520, 521-68, 1113-17, 1132-39; Appendix p.A50-A67. It was undisputed that CenturyLink does not pay License Taxes in the Respondent Cities on the four categories of revenue at issue in the summary judgment proceedings. LF 1308-13. CenturyLink admitted that despite not paying License Taxes on these categories in the Respondent Cities, it does pay License Taxes on these four categories in another city. LF 1316. The trial court therefore granted the Cities’ motion for partial summary judgment on all counts at issue except the breach of contract claim. LF 1671.

## JURISDICTIONAL STATEMENT

Article V, Section 3 of the Missouri Constitution confers exclusive jurisdiction in the Missouri Supreme Court where an appellant challenges the validity of a Missouri statute, as CenturyLink does here. The Court also has jurisdiction over the Cities' cross-appeal. "Appeals are not bifurcated under our practice." *State ex rel. Union Electric Co. v. Public Serv. Comm.*, 687 S.W.2d 162, 165 (Mo. 1985). "The historic and sound rule is that the appeal is properly lodged in the court having jurisdiction over all issues in the case." *Id.*; *See State v. Nathan*, 404 S.W.3d 253, 257 (Mo. 2013); *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 758 (Mo. 2010).

The Court should exercise its jurisdiction to review the Cities' cross-appeal of the denial of partial summary judgment on Count XVI because judicial economy and efficiency will be served by such review and the merits of the denial are intertwined with the trial court's grant of summary judgment on the other counts. *See Carman v. Wieland*, 406 S.W.3d 70, 73 (Mo. App. 2013) (reviewing both the grant in part and denial in part of a party's motion for summary judgment); *Boatmen's Trust Co. v. Conklin*, 888 S.W.2d 347, 350 (Mo. App. 1994) (exercising the court's discretion to review the denial of a summary judgment motion); *National Heritage Life Ins. Co. v. Frame*, 41 S.W.3d 544, 551 (Mo. App. 2001) (reviewing the denial of summary judgment); *Sharpton v. Lofton*, 721 S.W.2d 770, 774 (Mo. App. 1986) (holding that denial of a summary judgment motion is reviewable after a final judgment has been rendered in a case).

Because CenturyLink’s appeal is within the Court’s jurisdiction, the Cities’ cross-appeal is also within its jurisdiction. The denial of summary judgment may be reviewable on appeal if “the merits of that motion are intertwined with the propriety of an appealable order granting summary judgment.” *Helenthal v. Lathrop & Gage, L.C.*, 272 S.W.3d 302, 303 (Mo. App. 2008) (internal quotations omitted); *Dodson Intern. Parts, Inc. v. National Union Fire Ins. Co. of Pittsburg Pennsylvania*, 332 S.W.3d 139, 156 n.13 (Mo. App. 2010) (“There is an exception where a denied motion for summary judgment is inextricably intertwined into a motion for summary judgment that has been granted.”). Where this occurs, the appellate court may direct “the judgment that the court should have entered.” *State v. Nationwide Life Ins. Co.*, 340 S.W.3d 161, 179-80 (Mo. App. 2011). The propriety of granting summary judgment on Count XVI is intertwined with the propriety of the grant of summary judgment on all other counts. Count XVI alleges a breach of contract claim against CenturyLink. The very same factual record established by the parties that entitles the Cities to summary judgment on their other claims, also entitles Harrisonville to summary judgment on its breach of contract claim. Accordingly, the grant of summary judgment on most counts and the denial of summary judgment on Count XVI are intertwined such that review of the denial is permissible.

Furthermore, this Court has created an exception to the general non-appealability of a denial of summary judgment. If the appeal is otherwise properly before the Court, and a question of law is almost certain to arise again in the trial court and has been fully briefed by the parties, “the issue will be addressed as a matter of judicial efficiency and economy.” *James v. Paul*, 49 S.W.3d 678, 682 (Mo. 2001). This is such a case. The

breach of contract claim against CenturyLink will arise again in the trial court if not dealt with here. Further, the parties have fully briefed and argued the propriety of judgment as a matter of law on the claim, and there is no genuine issue of fact. The parties admitted the validity and contents of the documents at issue, and the matter is solely a question of law. Therefore, as a matter of judicial efficiency and economy, while reviewing the propriety of the grant of summary judgment on the other Counts, this Court should review the denial of summary judgment on Count XVI.

## **STATEMENT OF FACTS**

### **Procedural Background**

The Cities' initial petition was filed on July 27, 2012. LF 10, 12-28. CenturyLink requested and was granted additional time to respond to the Cities' petition. LF 9. The Cities filed an amended petition on August 23, 2012. LF 9, 74. CenturyLink moved to dismiss that petition on November 5, 2012. LF 9, 156. CenturyLink never sought a hearing on its motion to dismiss. LF 1-11.

On November 12, 2013, after identifying additional causes of action against CenturyLink, the Cities requested leave to file a second amended petition, and leave granted on November 19, 2013. LF 7, 168, 172, 175. Counts I-V of the second amended petition sought declaratory and injunctive relief on CenturyLink's failure to pay the Cities' License Taxes; Counts VI-X sought an accounting for the full amounts due to the Cities under the License Taxes; Counts XI-XV alleged an action for delinquent taxes, interest, and penalties; Count XVI alleged a breach of contract claim against Embarq on behalf because the City of Harrisonville; Counts XVII and XIX sought declaratory and

injunctive relief on CenturyLink's failure to comply with Cameron's and Wentzville's ROW Codes; Count XVIII alleged an action for delinquent rights-of-way User Fees, interest, and penalties for Cameron; and Counts XX-XXIV sought damages under §392.350 RSMo. for CenturyLink's willful violation of the Cities' ordinances. LF 185-217. CenturyLink requested and was granted more time to respond to the Cities' second amended petition. LF 7. On December 11, 2013, CenturyLink moved to dismiss the second amended petition. LF 7, 324.

Approximately seven months after the Cities filed suit in St. Louis County, Spectra filed a parallel lawsuit against Cameron in federal court, seeking a determination of the legality of Cameron's ROW Code, Public Ways Use Permit Agreement requirement and User Fee as to Spectra. *See, e.g.*, LF 1113, 1219, 1221; Appendix p. A50. Spectra, and all of the Appellants, still had not sought a hearing on the motion to dismiss the Cities' second amended petition in the case pending in St. Louis County. LF 1-11.

Over the seventeen months of litigation leading to the trial court's final judgment on the Cities' partial summary judgment motion, the parties engaged in extensive written discovery in both state and federal court, including interrogatories, requests for production, and requests for admissions. *See, e.g.*, LF 6, 9, 10, 408-520, 521-68, 1113-17, 1132-39. Additionally, the parties used depositions taken in the parallel federal litigation to support their various arguments in the trial court. LF 1113-17, 1132-39.

On December 19, 2013, over thirteen months after the Cities filed their second amended petition, the Cities moved for partial summary judgment on Counts I-V and

XVI-XXIV. LF 7, 340. The parties fully briefed the summary judgment issues, with CenturyLink opposition the motion, asserting additional facts, and filing a surreply to the Cities' additional facts. LF 340, 1028, 1068, 1222-25, 1246, 1286, 1464, 1646, 1656, 1662. In opposing summary judgment, CenturyLink asserted various affirmative defenses to the Cities' claims. LF 1028-67.

CenturyLink, in asserting additional facts, filed an affidavit from an alleged CenturyLink employee, Kiram Sheshagiri. LF 1216-1221. Kiran Seshagiri stated the alleged meaning of terms within the Cities' ordinances, which CenturyLink entities allegedly provide "telephone service" and which do not, and the alleged meaning of the categories of revenue at issue in the summary judgment proceedings. LF 1216-18. CenturyLink also put forth "Exhibit G," in support of its opposition to the summary judgment motion, which was an excerpt from a deposition taken in the parallel federal case filed by Spectra. LF 1113.

The Cities moved to strike portions of the Seshagiri Affidavit, Exhibit G, and all portions of CenturyLink's memoranda in opposition and statement of facts that relied on the Seshagiri Affidavit and Exhibit G. LF 1222-30. The Cities moved to strike the Seshagiri Affidavit because it contained conclusory allegations, legal conclusions, statements that were predicated on hearsay, facts that would not be admissible in evidence in violation of Rule 74.04(e), and facts that were improper contradictions of prior statements made by CenturyLink. LF 1225. The Cities argued that paragraphs 3-19 of the Seshagiri Affidavit failed to comply with Rule 74.04(e) because they directly contradicted statements made by CenturyLink to its customers, were based on hearsay,

contained legal conclusions, and violated this Court's holding that conclusory declarations of the meaning of terms in a License Tax ordinance are insufficient to create a genuine issue of material fact. LF 1226-28. The Cities argued that Exhibit G should be stricken because it consisted solely of the legal conclusions of the affiant about the meaning and effect of the Cities' ordinances and violated Rule 74.04(e). LF 1227. At the argument on the motion, the Cities argued that all of CenturyLink's affidavits should be stricken for additional reasons. The trial court did not deny the Motion to Strike, and never expressly ruled it. LF 1-11.

With the Cities' motion for partial summary judgment and motion to strike looming, CenturyLink finally sought a hearing on its motion to dismiss, almost four months after filing the motion. LF 5. The motion was heard and submitted on April 1, 2014. LF 5. The Cities' motion for partial summary judgment was heard and submitted on April 10, 2014. LF 5, 1655. On the same day, the trial court denied CenturyLink's motion to dismiss. LF 5, 1655. The trial court also granted CenturyLink's request for additional time to respond (requested even though the summary judgment hearing had already occurred), and ordered CenturyLink to respond within thirty days. LF 5, 1655. On April 14, 2014, at the request of the trial court, the parties filed additional memoranda on the issue of willfulness under 392.350 RSMo. LF 4, 1656, 1662. After receiving the requested extensions, CenturyLink's final deadline to respond to the Cities' second amended petition was almost six months after the petition was filed and almost two years after suit was initially filed. LF 4, 175. CenturyLink was not deprived of the opportunity to file its response to the second amended petition. LF 14-16, 1697-1979. After its

requested extensions were granted, CenturyLink filed its answer and affirmative defenses on May 12, 2014. LF 14-16, 1697-1979.

On April 17, 2014, the trial court granted partial summary judgment on all but one count. LF 1671-74. The trial court did not simply state that summary judgment was “granted.” LF 1671-74. The trial court issued a four-page order and judgment, granting summary judgment in favor of the Cities on Counts I-V and XVII-XXIV, and denying summary judgment on Count XVI. LF 1671-74. The trial court separately addressed each similar group of counts, explaining separately why judgment was granted on Counts I-V, on Counts XVII and VIII, on Count XIX, and on Counts XX-XXIV. LF 1671-74. The only portion of the judgment that was not explained was the denial of summary judgment on Count XVI. LF 1671.

CenturyLink filed its notice of appeal on April 25, 2014, indicating that it was appealing to this Court. LF 4. Therefore, when the Cities timely filed their notice of cross-appeal on May 5, 2014, they also indicated that they were appealing to this Court. LF 4. The Cities timely filed a jurisdictional statement on May 15, 2014. On May 27, the parties filed a joint notice that the Defendants shall be deemed the Appellants pursuant to Rule 84.04(i).

### **Summary Judgment Record**

CenturyLink’s Statement of Facts puts forth several assertions that were not properly before the trial court because they did not comply with Rule 74.04(c). *See, e.g.*, Appellants’ Brief (“App. Br.”), 6-7 (stating “facts” that rely on a deficient affidavit included in pages 1216-17 of the Legal File). Below is a summary of facts that were

properly in the summary judgment record, in that they were either admitted by both parties or not properly denied or controverted by CenturyLink.

### **Failure to Pay License Tax**

The Cities have validly enacted License Taxes, which impose a tax on the gross receipts of companies that provide telephone service in the Cities. LF 1290-94. The License Taxes are self-reporting. LF 1290-94. The gross receipts upon which the License Tax payments are calculated are to be reported by CenturyLink's sworn statement to the Cities. LF 1290-94. Nothing in the reports filed shows the calculation of the tax, but rather, CenturyLink itself calculates the tax and the reports show the amount of taxes paid. LF 1300. The Cities alleged in their second amended petition that CenturyLink was underpaying License Taxes on approximately twenty-five different categories of revenue that should have been included in such calculations. LF 10, 12-28, 180-82. The motion for partial summary judgment addressed only four of those categories. LF 342.

The License Taxes impose a tax on the gross receipts of those that are engaged in or render "exchange telephone service" or "telephone service" in the Cities. LF 390, 393, 399, 401, 404. None of the License Taxes impose a tax on the gross receipts of those that are engaged specifically and only in "local" or "basic" exchange telephone service. LF 390, 393, 399, 401, 404, 1290-94. None of the License Taxes even use the words "local" or "basic." *Id.*

Aurora's License Tax provides: "[e]very person, firm, company or corporation now or hereafter engaged in the business of furnishing **exchange telephone** service in the

City of Aurora, Missouri, shall pay the said City as an annual License Tax, six percent (6%) of the gross receipts derived from the furnishing of such service within said City, as hereinafter set forth.” LF 390 (emphasis added).

Cameron’s License Tax (Ordinance No. 2878) provides: “[e]very person, firm, company or corporation now or hereafter engaged in the business of furnishing **exchange telephone service** in the City of Cameron, Missouri, shall pay the said City as an annual License Tax, five percent (5%) of the gross receipts derived from the furnishing of such service within said City, as hereafter set forth.” LF 393 (emphasis added). In 2006, Cameron adopted Ordinance No. 5287, codified as Cameron Code §§6-41 to 6-47, which replaced Ordinance No. 2878. LF 1291-92. Ordinance No. 5287 provided that “[i]n the event the Municipal Telecommunications Business License Tax Simplification Act shall be repealed or shall be declared unconstitutional in total or in substantial part, it is the intent of the City to continue in effect the provisions of Sections 6-41 through 6-43 of the Municipal Code as they existed prior to the effective date of the Act....” LF 1360. Ordinance No. 5287, therefore, became null and void by operation of law upon this Court invalidating the Municipal Telecommunications Business License Tax Simplification Act in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006) (hereinafter “*Sprint Spectrum*”). LF 1292. Ordinance No. 2878 is the operative ordinance in Cameron. LF 1292.

Harrisonville’s License Tax provides: “[a] License Tax of five percent (5%) of the taxable gross receipts of any telephone company rendering **telephone service** and operating within the City of Harrisonville, Missouri, is hereby imposed. For purposes of

this Chapter, a telephone company rendering telephone service and operating within the City of Harrisonville, Missouri, shall include every person or entity providing any telephone, telegraph, and other telecommunications services within the City as are permitted by law to be subject to this gross receipts tax.” LF 399 (emphasis added). Harrisonville’s License Tax ordinance was enacted on May 7, 1958. LF 1325. Another Harrisonville ordinance was enacted on December 7, 2009, and that ordinance merely codified and clarified the language of the License Tax ordinance. LF 1325.

Oak Grove’s License Tax provides: “[e]very person now or hereafter engaged in the business of supplying gas, **telephone service** or water for compensation for any purpose in the City of Oak Grove and every manufacturing corporation now or hereafter engaged in the manufacture of gas for compensation for any purpose in the City of Oak Grove shall pay to the City of Oak Grove as a License Tax a sum equal to five percent (5%) of the gross receipts from such business.” LF 401 (emphasis added).

Wentzville’s License Tax provides: “[e]very person engaged in the business of supplying electricity, **telephone service**, natural or manufactured gas by and through a central distribution system, or water for compensation in the City shall pay to the City a License Tax of five percent (5%) of the gross receipts from such business, except as otherwise provided.” LF 404 (emphasis added).

CenturyLink provides telephone service in each of the Cities. LF 1294-1300. Spectra provides telephone service in Aurora, Cameron, and Wentzville. LF 1294-95, 1299. Embarq provides telephone service in Cameron, Harrisonville, and Oak Grove. LF 1296-98. CenturyTel of Missouri, LLC provides telephone service in Aurora,

Cameron, and Wentzville. LF 1294-96, 1299. The Appellants directly or indirectly, by and through their subsidiaries and affiliates, act in concert with each other in the provision of telephone service and payment of the License Tax in each of the Cities. LF 1295-99. CenturyLink, Inc. calculates and pays the License Taxes on behalf of each other Appellant. LF 1300. CenturyLink has paid certain amounts in License Taxes on gross receipts to each of the Cities. LF 1300-1303. CenturyLink charged to and collected from its customers in the Cities sums to pay the Cities' License Taxes. LF 1304-1307.

CenturyLink admitted that it does not include the following four categories of receipts in its calculations of gross receipts, and accordingly fails to pay taxes on them:

1. Monies CenturyLink collected from its customers to recoup certain costs to it in providing some services, known as End User Common Line Charge, and denominated by CenturyLink as "Subscriber Line Charge,"
2. Monies CenturyLink collected from its customers to pay its obligations to the Federal Universal Service Fund and the Missouri State Universal Service Fund,
3. Monies CenturyLink charged its customers for optional or vertical telephone services such as, but not limited to, caller ID and call waiting, and
4. Monies CenturyLink collected from its customers to pay its obligations under the License Taxes.

LF 1308-13.

Each of the Cities have previously interpreted the License Taxes to include as gross receipts under the License Taxes those four categories of revenue. LF 1472-73.

CenturyLink admitted that it does not consider the amounts it charges to its customers to satisfy its obligations to the Cities under the License Taxes to be “gross receipts,” and they have not paid taxes on those amounts. LF 1308-13. CenturyLink has inconsistently included or excluded these revenues from its calculations. For example, CenturyLink included at least some revenues from vertical services in its calculation of Wentzville’s License Tax for at least one tax-reporting period, but excluded these amounts in the other cities, despite similarities in ordinance language. LF 390, 393, 399, 401, 404, 1314.

CenturyLink receives revenue from those four categories in return for services it provides in the Cities. LF 1466-70. The CenturyLink entities issue bills to customers in each of the Cities, which detail the charges and fees that comprise the bill. LF 1465. Bills issued by CenturyLink entities, including CenturyTel Long Distance, LLC, to customers in the Cities include monthly charges to pay the License Tax, and monthly charges for “Federal Subscriber Line and Access Recovery Charge,” which are described as and categorized by CenturyLink as “Local Exchange Services.” LF 1466-67. CenturyLink has refused to pay Federal Subscriber Line Charges. LF 1308-13. CenturyLink argued to the trial court that such revenue is not taxable “exchange telephone service” [LF 1038-39], despite unequivocal statements to customers – even after this lawsuit – that such charges were for “Local Exchange Services.” LF 1466-67. Bills issued by CenturyLink entities to customers in the Cities also include monthly charges for USF fees and for vertical and optional calling services. LF 1469-70.

CenturyLink argued to the trial court that optional services and the money collected therefrom are not included in “Exchange Telephone Service” as set forth in the

tax ordinances even though CenturyLink's own tariff expressly stated that they are included within the services defined and regulated by the General and Local Exchange Tariffs. LF 1040-41, 1308-14. In that tariff, the term "exchange services" are CenturyLink's telecommunications services "specified in the Local or General Exchange Tariffs." LF 1466-67, 1480. CenturyLink's statement to the trial court regarding the interpretation of exchange service was directly contrary to what CenturyLink tells the tariffs and bills. LF 1040-41, 1308-14, 1480.

The Cities informed CenturyLink of its unlawful conduct in failing to pay the License Taxes, among other things, and yet CenturyLink persisted. LF 1314-15. CenturyLink was also aware of this issue through the ongoing litigation throughout the state between municipalities and telephone companies over this very issue, which included a lawsuit that involved one or more CenturyLink entities in Jefferson City. LF 1315-16.

### **ROW Code Violations**

Both Cameron and Wentzville have enacted ordinances that provide requirements for the management of the rights-of-way of those cities, specifically providing requirements on public utility rights-of-way users such as CenturyLink and allowing them to install and maintain their facilities in the rights-of-way. LF 1319-20, 1323. Cameron and Wentzville's ROW Codes require that rights-of-way users obtain an agreement from the cities granting authorization to use and occupy the rights-of-way. LF 904-906, 931, 955-56.

Spectra and CenturyTel use and occupy the public rights-of-way of Cameron and Wentzville, respectively. LF 1320-24. Spectra has poles, piers, wires, and other fixtures in Cameron's rights-of-way. LF 1320, 1322. CenturyTel has poles, piers, wires, and other fixtures in Wentzville's rights-of-way. LF 1323-24. Despite its use and occupation of Cameron's rights-of-way, Spectra has failed to obtain a Public Ways Use Permit Agreement from Cameron. LF 1320-24. Despite CenturyTel's use and occupation of Wentzville's rights-of-way, CenturyTel has also failed to obtain a Rights-of-Way Use Agreement from Wentzville. LF 1320-24. No other Appellant that may use or occupy the rights-of-way of Cameron or Wentzville has an agreement with the cities. LF 1471-72.

CenturyLink admitted that these types of agreements are lawful. LF 586, 1470-71. CenturyLink and its subsidiaries have entered into agreements they expressly acknowledge as "lawful" with municipalities in numerous cities. LF 573-74, 583, 586-92, 604-605, 1375-76, 1387, 1401-1407, 1408-1427, 1470-72. Now, however, CenturyLink inconsistently denies such lawfulness and refuses to comply with such rights-of-way requirements in Cameron and Wentzville after the same cities caught CenturyLink violating the tax ordinances. LF 1471-72. Embarq has already entered into a Rights-of-Way Agreement with Harrisonville and CenturyTel Long Distance, LLC and Embarq

Communications, Inc., through predecessor entity Qwest Communications Corporation,<sup>1</sup> are bound by a Rights-of-Way Agreement with Wentzville; each Rights-of-Way Agreement provides that it is a “lawful contract.” LF 586, 1470-71. Additionally, CenturyTel Fiber Company II LLC, entered into a Rights-of-Way Use Agreement with the City of Wildwood, Missouri in 2003 and a Communications Transmission System License Agreement with the City of St. Louis, Missouri in 2013. LF 1471.

Cameron’s ROW Code also requires payment of a linear-foot User Fee of the City’s rights-of-way. LF 1322. Section 10.5-207 of Cameron’s ROW Code imposes a linear-foot User Fee on public utility rights-of-way users and requires that “each public ways use permittee shall pay to the city as monthly compensation for the use of the public way a public ways user fee as follows: [...] (2) Fifteen cents (\$0.15) per linear foot up to a maximum monthly charge of four thousand dollars (\$4,000.00).” LF 912. Cameron’s ROW Code further provides: “public ways use permittee shall be entitled to a credit against the user fee due hereunder equal to the payment(s) made to and received by the city from such public ways use permittee for the same time period for the gross receipts tax on public ways use permittee’s communications services....” LF 912. Spectra has had and continues to have over 26,667 linear feet of facilities in the rights-of-way of Cameron. LF 1322. Spectra is subject to the maximum monthly User Fee of \$4000,

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<sup>1</sup> Qwest Communications Corporation is the predecessor to Qwest Communications Company, LLC and is now the same company as Defendants CenturyTel Long Distance and Embarq Communications. LF 1348, 1470.

required by section 10.5-207 of Cameron's ROW Code. LF 1322-23. Spectra owes Cameron \$138,914.04 in delinquent User Fees for tax reporting periods from January 1, 2007 to December 31, 2012, as calculated by determining the maximum User Fee for this period and subtracting the total amount of License Taxes paid to Cameron for this period. LF 353-54, 1301, 1322. Spectra has not paid this User Fee. LF 1322.

### **The Harrisonville Contract**

Harrisonville entered into a contract with Embarq entitled "Rights-of-Way Use Agreement for Communications Facilities" ("Harrisonville Contract"), on October 26, 2009. LF. p. 1318. Pursuant to the Harrisonville Contract, Harrisonville agreed to allow Embarq to occupy its rights-of-way and install and maintain certain communications facilities therein in consideration for Embarq's agreement to comply with Harrisonville's ordinances, including an express agreement to pay Harrisonville's License Tax, and several additional promises and obligations. LF 587, 1318-19. Those other additional promises and obligations included Embarq's agreement 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, among other consideration and mutual promises. LF 587-91, 1318.

The Harrisonville Contract also provided that Harrisonville is entitled to its "costs of enforcement, including reasonable attorneys' fees in the event that [Embarq] is determined judicially to have violated the terms of [the Harrisonville Contract]." LF

1319. Embarq explicitly agreed and bound itself to being subject to audit, and to “itemize by category of service the amount received and taxes paid for services provided by” its presence in Harrisonville’s rights-of-way. *See* LF 1318.

Harrisonville’s License Tax itself does not have several of the contractual obligations found in the Harrisonville Contract. LF 399, 587-91, 1318. The License Tax, by contrast, contains no requirements that a telephone company comply with certain limitations on its use of the rights-of-way; reimburse the city for its costs associated with the installation, maintenance, repair, and use of Embarq’s facilities; obtain insurance to protect the city; indemnify the city; or forego any cause of action against the city for loss, cost, expense, or damage to Embarq’s facilities. LF 399.

Harrisonville performed its obligations under the Agreement Contract. LF 1318-19. Despite the express contractual obligation to comply with the duly enacted ordinances of Harrisonville, Embarq failed to pay the full amounts due to Harrisonville under its License Tax by routinely excluding from its calculations of its gross receipts amounts that by law were required to be included. LF 1310-11. Harrisonville has been damaged by Embarq’s breach of the Harrisonville Contract at least in the amount of \$20,401.78. LF 1317.

Additional facts may be discussed as needed in the relevant argument sections of the brief.

## PRESERVATION OF ERROR AND STANDARD OF REVIEW

Several of CenturyLink's arguments on appeal are not preserved because CenturyLink failed to raise them in the trial court. "Even in a court-tried case...the appellant must make some effort to bring the alleged error to the trial court's attention." *Bank of America, N.A. v. Duff*, 422 S.W.3d 515, 518 (Mo. App. 2014) (internal quotations and citations omitted). "With only rare exceptions, an appellate court will not convict a trial court of error on an issue that was never presented to the trial court for its consideration." *Id.* at 519 (internal quotations and citations omitted); *Hadley v. Burton*, 265 S.W.3d 361, 372 (Mo. App. 2008) (holding that the failure to allege error in summary judgment proceedings precluded review of the issue on appeal); *Fluker v. Lynch*, 938 S.W.2d 659, 660-61 (Mo. App. 1997) (denying point relied on in appeal of summary judgment where the appellants failed to present the claim of error to the trial court). The Cities have indicated in the argument section which points were preserved and which were not preserved.

For those arguments that are preserved, and for the Cities' cross-appeal, the Court's review is essentially de novo. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). The Court should affirm the trial court's grant of summary judgment "if the record shows that summary judgment was appropriate either on the basis it was granted by the trial court or on an entirely different basis, if supported by the record." *Brehm v. Bacon Tp.*, 426 S.W.3d 1, 4 (Mo. 2014); *Grieshaber v. Fitch*, 409 S.W.3d 435, 437 (Mo. App. 2013) ("[W]e must affirm the trial court's judgment if, as a matter of law, it is sustainable under any theory."); *Rocha v.*

*Metropolitan Property and Cas. Ins. Co.*, 14 S.W.3d 242, 245 (Mo. App. 2000) (“If the trial court’s ruling can be sustained under any theory, it must be affirmed.”).

Summary judgment is proper when the pleadings, discovery, exhibits, or affidavits demonstrate that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *ITT Commercial Finance Corp.*, 854 S.W.2d at 380-81; Rule 74.04(c)(6). Once a movant demonstrates a right to judgment as a matter of law, “the non-movant’s *only recourse* is to show – by affidavit, depositions, answers to interrogatories, or admissions on file – that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed.” *Id.* at 381. If the non-movant fails to make such a showing, the movant is entitled to judgment as a matter of law. *Id.*

“The adage that the record is viewed ‘in the light most favorable to the non-movant,’” does not mean that the court “disregard[s] facts favorable to the movant ... rather, it means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted.” *Holzhausen v. Bi-State Development Agency*, 414 S.W.3d 488, 493 (Mo. App. 2013) (quoting *ITT Commercial Finance Corp.*, 854 S.W.2d at 382). Facts set forth in support of a party’s motion for summary judgment are “taken as true unless contradicted by the non-moving party’s response to the summary judgment motion.” *ITT Commercial Finance Corp.*, 854 S.W.2d at 376.

Consideration of the record is “limited to the summary judgment record made on [the Cities’] motions.” *Holzhausen*, 414 S.W.3d at 493. “[A]ll facts must come into the summary judgment record in the manner required by Rule 74.04(c)(1) and (2)....” *Id.*

(quoting *Syngenta Crop Protection v. Outdoor Equip.*, 241 S.W.3d 425, 429 (Mo. App. 2007)). “A party confronted by a proper motion for summary judgment may not rest upon mere allegations or denials in his or her pleadings, but in order to overcome the motion, the party must set forth specific facts supported by affidavits, discovery, or admissions on file showing a genuine issue for trial.” *Holzhausen*, 414 S.W.3d at 493 (quoting *ITT Commercial Finance*, 854 S.W.2d at 381); Rule 74.04(e). “A non-movant who relies only upon mere doubt and speculation in its response to the motion for summary judgment fails to raise any issue of material fact.” *Holzhausen*, 414 S.W.3d at 493. “A response that alleges insufficient information to admit or deny a fact does not raise an issue of material fact, and therefore, the fact is deemed admitted.” *Id.* “Further, a denial must be supported ‘with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.’” *Id.* (quoting Rule 74.04(c)(2)). “The failure to submit any evidence to support a denial constitutes an admission.” *Id.* “In addition, if evidence is cited to support a denial, but that evidence does not expressly support a denial, [the court] deem[s] the statement admitted.” *Id.*; Rule 74.04(c)(2). On appeal, the court’s review is confined to the facts properly within the summary judgment record. *Holzhausen*, 414 S.W.3d at 494.

## ARGUMENT

- I. **The trial court did not err in granting summary judgment on Counts XVII-XVIII because the constitutionality of the grandfathering provision of §67.1846.1 was not at issue in that even if the provision were impermissible, Cameron’s linear foot User Fee is still valid.**

The trial court did not err in granting summary judgment on Counts XVII-XVIII because Cameron established a right to judgment as a matter of law and there is no genuine dispute of fact that CenturyLink is required to pay a linear-foot User Fee as a user of Cameron’s public rights-of-way. The grandfathering provision of §67.1846.1 is not an impermissible special law. However, even if it were, the rules of severance demand that statutes be invalidated the minimum amount possible; in this case, leaving Cameron’s authority to maintain its User Fee in place. The trial court did not need to reach the constitutionality argument because under either result, Cameron’s User Fee is valid and enforceable.

CenturyLink fundamentally misstates the law in a way that colors not only its first point relied on, but also its later claims regarding the constitutionality of Cameron’s ROW Code. This must be corrected. Specifically, the limitation on cities’ ability to recover “right-of-way management costs” found in §§67.1830-67.1846 RSMo. has nothing to do with the authority of "grandfathered political subdivisions" to impose linear

foot charges on public utility right-of-way users.<sup>2</sup> The general prohibition on non-grandfathered political subdivision's ability to charge public utility right-of-way users for use of the rights-of-way is contained in §67.1842.1(4), which provides:

In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall . . . require a public utility right-of-way user to pay for the use of the public right-of-way, except as provided in sections 67.1830 to 67.1846[.]

Section 67.1842.1(4) RSMo (emphasis added).

The political subdivision's ability to recover rights-of-way management costs has nothing to do with SB 369's prohibition on requiring public utility right-of-way users to "pay for the use of the public right of way." In fact, §67.1830(5) RSMo. expressly mandates: "Management costs or rights-of-way management costs *shall not include payment by a public utility right-of-way user for the use or rent of the public right-of-way....*" (emphasis added).

Therefore, while most political subdivisions are prohibited from charging for use of the rights-of-way, as a grandfathered political subdivision, Cameron is statutorily authorized to impose such a User Fee under §67.1846 RSMo. which provides, in pertinent part:

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<sup>2</sup> Passed in 2001 without a title, §§67.1830-67.1846 RSMo. are commonly referred to by practitioners as "Senate Bill 369," or "SB 369."

Nothing in sections 67.1830 to 67.1846 shall prevent a grandfathered political subdivision from . . . enforcing or renewing existing linear foot ordinances for use of the right-of-way, provided that the public utility right-of-way user either: (1) Is entitled under the ordinance to a credit for any amounts paid as business License Taxes or gross receipts taxes; [ . . . ].

Cameron is a “grandfathered political subdivision” under §67.1846 in that Section 10.5-207 of Cameron’s ROW Code, imposing linear foot fees on public utility right-of-way users, was enacted prior to May 1, 2001. LF 1319. Specifically, Ordinance No. 4816, under which §10.5-207 was adopted, was enacted by the Cameron on December 5, 2000. *Id.*

Section 10.5-207 of Cameron’s ROW Code requires that “each public ways use permittee shall pay to the city as monthly compensation for the use of the public way a public ways user fee as follows: [...] Fifteen cents (\$0.15) per linear foot up to a maximum monthly charge of four thousand dollars (\$4,000.00).” *See* LF 1319. This section goes on to provide: “public ways use permittee shall be entitled to a credit against the user fee due hereunder equal to the payment(s) made to and received by the city from such public ways use permittee for the same time period for the gross receipts tax on public ways use permittee's communications services.” *Id.* Thus, Cameron is a “grandfathered political subdivision” and its ordinance provides that public utility rights-of-way users are entitled to a credit for “any amounts paid as business License Taxes or gross receipts taxes,” fulfilling the two statutory requirements to impose linear foot charges on rights-of-way users such as CenturyLink. *See* §67.1846.1 RSMo.

It is undisputed that CenturyLink has well over the minimum total of 26,667 linear feet of facilities in the public rights-of-way to reach the maximum monthly User Fee of \$4,000 (or \$48,000 annually). LF 1322-23. Therefore, the trial court properly granted summary judgment on this issue.

**a. The trial court did not need to reach CenturyLink’s constitutional arguments and neither does this Court.**

CenturyLink argues under Point I that, among other errors, the trial court erred because it did not address CenturyLink’s allegation that the grandfathering provision was an unconstitutional special law.<sup>3</sup> This is incorrect. First, a court need not address in its judgment every argument raised by a party. The trial court does not even need to specify the basis upon which it grants summary judgment. *Central Missouri Elec. Co-op. v. Balke*, 119 S.W.3d 627, 635 (Mo. App. 2003) (recognizing that a trial court may not always specify the basis upon which the motion for summary judgment was granted). Second, courts should avoid deciding a constitutional issue if the case can be fully resolved without reaching it. *State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. 2012) (“[T]his Court will avoid deciding a constitutional question if the case can be resolved fully without reaching it.”). Here, the trial court did not need to decide the constitutionality of the grandfathering provision in order to grant summary judgment in favor of Cameron. Cameron’s ordinance imposing the linear foot User Fee is

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<sup>3</sup> Point I is yet another example of CenturyLink’s violations of Rule 84.04(d), as described in the Cities’ motion to dismiss and strike.

“presumed to be valid,” and CenturyLink failed to rebut that presumption. *Great Rivers Habitat Alliance v. City of St. Peters*, 384 S.W.3d 279, 296 (Mo. App. 2012). Whether or not the court had reached it, summary judgment still would have been proper for the Cities. If the grandfathering provision were unconstitutional, the court could have only done one of two things, as explained more fully below in section c: (1) struck only the May 1, 2001 date certain contained in §67.1846 RSMo. as unconstitutional, thereby honoring legislative intent that all statutes should be upheld to the fullest possible extent and resulting in Cameron’s status as a grandfathered political subdivision intact, or (2) struck the entirety of SB 369, leaving general linear foot fee authority in place. Either way, Cameron was entitled to summary judgment because its User Fee is valid and lawful under any of those results. Therefore, the trial court did not err in not specifically addressing CenturyLink’s constitutional arguments. Similarly, this Court does not need to determine the constitutionality of the grandfathering provision in order to hold that summary judgment was properly granted.

**b. The grandfathering provision is not an impermissible special law.**

Section 67.1846.1’s grandfathering provision is not an impermissible special law because it seeks to minimize the impact of SB 369 on the existing rights of cities, not create new rights for a special class of cities or create a new subclass defined on the affirmative actions of grandfathered cities, as in *Sprint Spectrum*, 203 S.W.3d 177. CenturyLink challenges not the linear foot charge of Cameron uniquely, but rather the constitutionality of the statute under which all political subdivisions’ linear foot-based fees are authorized to remain in effect. The speciousness of CenturyLink’s argument that

linear foot-based fees imposed by grandfathered political subdivisions are unconstitutional is most readily evidenced by CenturyLink's treatment of and agreement to pay linear-foot based fees to cities throughout the state. Specifically, the prior acts of CenturyLink show that linear foot charges are lawful, in that entities under the control of CenturyLink have executed agreements to pay linear foot charges in other Missouri cities and conceded that such were a "legal agreement."<sup>4</sup> See LF 1340, 1402, 1410. Because CenturyLink has entered into agreements requiring payment of linear-foot based fees and stipulated that such agreements were "lawful," CenturyLink is barred from asserting that the statute upon which all linear-foot based fees on public utility right-of-way users rely is unconstitutional. Furthermore, that CenturyLink's opposition to linear-foot based fees in this litigation. CenturyLink actually executed an agreement to pay linear foot charges with the City of St. Louis during the pendency of this litigation. LF 1471.

It must be noted that the local federal court here has specifically upheld the grandfathering provision under Missouri law. *Level 3 Commc'ns, LLC v. City of St. Louis*, 405 F. Supp. 2d 1047, 1063 (E.D. Mo. 2005) *rev'd on other grounds*, 477 F.3d 528 (8th Cir. 2007) While the issue of whether the grandfathering provision was a *special law* was not specifically taken up by the court in that case, the grandfathering provision was upheld. That it was not challenged as special law only a few years after being

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<sup>4</sup> The party to the agreements containing linear foot charges is CenturyTel Fiber Company II, LLC, who is now the same company as Appellants CenturyTel Long Distance and Embarq Communications. See LF 1340, 1361.

adopted shows that no party seriously thought the statute to have constitutional deficiencies.

CenturyLink places great weight on *Sprint Spectrum*, 203 S.W.3d 177. App. Br. 23-25. However, contrary to CenturyLink's arguments, the grandfathering provision does not suffer from the same alleged defect found in *Sprint Spectrum*. The statute in *Sprint Spectrum* impermissibly excluded from the "grandfathered" class cities that had not sought to affirmatively *enforce* their License Taxes. In *Sprint Spectrum*, this Court framed the question before it: "does the exception set out in this statute for those cities that *enforced* a wireless telephone service ordinance prior to January 15, 2005, constitute a 'special law'" *Id.* at 184 (emphasis added). The Court particularly focused on the fact that the Cities had to take affirmative enforcement action to fall within the class, and held that because of the additional enforcement requirement, the statute was a special law. *Id.* at 184-85 ("[T]he sections require a municipality to *both adopt and enforce* such an ordinance...") (emphasis in original). Here, in contrast, there is no such requirement of affirmative enforcement or action, rather, it is simply the continuation of previously established authority to charge linear foot user fees.

The legislature often enacts and Missouri courts often uphold and enforce statutes that allow entities and people who exercised lawful authority before a statute is enacted to retain the previous lawful authority even though such authority would have otherwise been affected or restricted by the new statute. *See, e.g., State ex rel. Safety Ambulance Serv., Inc. v. Kinder*, 557 S.W.2d 242, 247 (Mo. 1977) (holding that ambulance providers operating when new act went into effect were exempt from new public hearing

requirements to renew license); *State ex rel. Vossbrink v. Carpenter*, 388 S.W.2d 823, 829 (Mo. 1965) (holding that school superintendents who served as such were grandfathered from being required to obtain teaching certificate under new act); *Union Elec. Co., v. Cuivre River Elec. Co-op., Inc.*, 726 S.W.2d 415, 418 (Mo. App. 1987) (upholding electric cooperative's right to continue to provide service in manner as of the date specified in [Act's] first sentence under "grandfather clause.") This is what the grandfathering provision of §67.1846.1 does: it allows cities who adopted the lawful authority to impose linear-foot based fees on public utility right-of-way users to retain such authority even though such authority would have been otherwise restricted under the new act.

The statute in *Sprint Spectrum*, by contrast, did much more than this common and well accepted statutory practice. It drew the classification based on another historical fact: whether a city affirmatively sought to enforce its previously lawfully enacted License Tax ordinance. It is this second statutory limitation that rendered the statute an unconstitutional special law based on an unjustified classification. *Sprint Spectrum*, 203 S.W.3d at 187 (holding that there was no "substantial justification" for statutory requirement for cities to have "taken affirmative action to collect such tax from wireless telecommunications providers prior to January 15, 2005.").

Furthermore, the grandfathering provision of §67.1846.1 RSMo. applies to and affects too many political subdivisions to be deemed an impermissible special law. The cases cited by CenturyLink in which special laws were struck down only affected one or two political subdivisions. *See Sprint Spectrum*, 203 S.W.3d at 185 (special law applied

only to two cities); *Tillis v. City of Branson*, 945 S.W.2d 447, 448 (Mo. 1997) (special law only applied to the single city of Branson); *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. 1993) (special law applied only to St. Louis County); *Jefferson County Fire Protection Dist. Ass'n v. Blunt*, 205 S.W.3d 866, 867 (Mo. 2006) (special law only applied to one county). This Court in fact identified that “[l]egislation that is not open-ended typically singles out one or a few political subdivisions by permanent characteristics. Such legislation is ‘special....’” *O'Reilly*, 850 S.W.2d at 99 (emphasis added). This case is distinguishable in that the alleged closed-classification encompasses many more than just “one or few political subdivision.” In addition to Cameron, other grandfathered political subdivisions that have imposed linear foot charges include, for example, the City of St. Louis (*see Level 3*, 405 F. Supp. 2d at 1063; LF 1471). While Cameron is unaware of any effort to ever identify every “grandfathered political subdivision,” it is believed to include at least a dozen political subdivisions throughout the state. It would likely be unprecedented in Missouri law to strike down a statute as special where a statute applies to a number of political subdivisions that is great than just “one or a few.”

Even if a facially special law, there is substantial justification to allow Cities that previously enacted linear-foot fee authority to continue to be authorized to collect such fees, and therefore it is not impermissible. *Sprint Spectrum*, 203 S.W.3d at 182 (special laws will be upheld where “substantial justification is shown for utilization of a special rather than a general law”). By including the grandfather provision, it is the clear intent of the legislature was not to impact and reduce a source of funding that cities have relied

upon. By enacting linear foot fees, cities likely had foreborne pursuing revenue from other sources like taxes and other user fees. Because existing sources of revenue would be lost without operation of the grandfathering provision, there is substantial justification to preserve existing revenue sources for local governments and simply prohibit new reliance on such linear foot fees in the future.

Balancing the preservation of “sound municipal revenue” with economic interests of businesses has been held to be a substantial justification for a special law. In *Union Elec. Co. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. App. 1998), the court analyzed a business License Tax that created an exemption for certain entities and was allegedly a special law. The court held that even if the tax created a closed-class, it was substantially justified because it “generally benefit[ed] the community at large,” and balanced the “economic enticements offered to prospective business with sound municipal revenue.” *Id.* Here, the legislature sought to balance the interests of public utility rights-of-way users with the interest of municipal revenue streams, and thus, the grandfathering provision protecting that revenue is substantially justified. Additionally, in *City of Sullivan v. Sites*, 329 S.W.3d 691, 694-95 (Mo. 2010), the Court held that an ordinance imposing higher fees on a class of new sewer connections was substantially justified, and therefore not an illegal special law, because it “contemplated an important government function” in that it was “an important component of the City’s overall efforts to implement its sewer improvement project....” Here, the User Fee satisfies an important government function as an important component of the Cities’ existing revenue streams and ROW Code enforcement.

Unlike *Jefferson County Fire Prot. Dist.*, where the court rejected the purported rationale for special legislation because it did not explain how the included county was “significantly different from other counties[,]” here, the grandfathered political subdivisions under §67.1846.1 are significantly different than political subdivisions that did not adopt linear foot fees prior to the enactment of SB 369. *Jefferson County Fire Protection Dist.* 205 S.W.3d at 867. If SB 369’s prohibition on charging for use of the right-of-way affected all political subdivisions, including political subdivisions that previously adopted linear charges, such political subdivisions would have been faced with the elimination of a source of revenue. Faced with such elimination, without the grandfathering provision of §67.1846.1, these political subdivisions would have likely had to impose some other source of funding to make up lost revenues; mostly by seeking to enact new taxation. Allowing grandfathered political subdivisions to continue to rely on linear foot fees from use of the rights-of-way and avoid potential enactment of new taxation on the general public is certainly an important government function and “substantial justification.” Furthermore, because the grandfathering provision of §67.1846.1 applies to political subdivisions above “one or a few,” substantial justification can be found by this very fact. Cameron submits that even where a statute sets forth a closed class of political subdivisions, substantial justification for such closed class is found where the number of member political subdivisions in such closed class is greater than “one or a few.”

CenturyLink’s argument that the grandfathering provision is illegal because it allows cities to “enforce, renew, and extend linear foot fee ordinances and *to enact an*

*unlimited number of new linear foot fee ordinances in the future*” misses the point. The legislature set up a system in which grandfathered political subdivisions can continue to impose and rely upon linear foot fees as part of their revenue makeup indefinitely. The ability to enforce, renew, and enact new linear foot fee ordinances is inherently necessary to accomplish this goal. For example, Cameron’s linear foot charge is limited to \$0.15 per linear foot with a maximum monthly charge of \$4,000. Cameron City Code 10.5-207; LF 912-13. At some time in the future, these amounts are not going to have the same financial impact as they do today. Section 67.1846’s authority to enact new linear foot fee ordinances will allow Cameron to enact new ordinances that adjust these amounts upward, so that its revenues are able to keep up with inflation and increases in costs. In this way, Cameron can continue to rely on these revenue and avoid future tax increases.

- c. Even if the grandfathering provision is an impermissible special law, offending language must be narrowly excised from the statute consistent with the legislative intent and Cameron’s User Fee is still valid.**

There is no dispute that if the grandfathering provision of §67.1846.1 is found to be an impermissible special law without a substantial justification, the statutes contain provisions that are severable from the unconstitutional language. *See* App. Br., 28. The only dispute is the amount of language that should be struck down to the address the alleged constitutional deficiencies. Section 1.140 governs severability here. If the grandfathering provision of §67.1846.1 is unconstitutional based on CenturyLink’s

argument, the law should be reformed only to eliminate the restricting date that creates the allegedly closed class; specifically: “For purposes of this section, a ‘grandfathered political subdivision’ is any political subdivision which has, ~~prior to May 1, 2001,~~ enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user. . . .” (words in strikethrough indicate language that would be appropriately struck out of the statute). This would eliminate the allegedly offending date requirement.

Restraint in striking out language found to be invalid would honor this Court’s instruction that “‘all statutes ... should be upheld to the fullest extent possible.’” *Nat’l Solid Waste Mgmt. Ass’n v. Dir. of Dep’t of Natural Res.*, 964 S.W.2d 818, 822 (Mo. 1998) (refusing to strike out more than necessary to make statute apply constitutionally) (citing *Associated Indus. of Missouri v. Dir. of Revenue*, 918 S.W.2d 780, 784 (Mo. 1996) (where the “full operation of the statute is unattainable” and the legislative intent would not be served by striking only the unconstitutional provision, the entire statute was struck down)). This would also preserve any legislative intent of limiting the use of linear foot based fees, because §67.1846.1(1)’s limiting requirement that public utility rights-of-way users be entitled to a “credit for any amounts paid as business license taxes or gross receipts taxes...” would be left intact. This would eliminate the requirement that cities enact such a fee before May 1, 2001, and allow linear foot based fees for all political subdivisions, but only on a limited basis, consistent with the intent of the legislature.

This was the approach taken by this Court in *Sch. Dist. of Riverview Gardens v. St. Louis Cnty.*, 816 S.W.2d 219, 223 (Mo. 1991), which found §137.115.1(2) RSMo. to be an unconstitutional special law, but by applying §1.140 RSMo., struck out only those provisions that limited application of the statute to St. Louis City and County. In doing so, the Court left in place provisions of the statute that had previously only applied to the closed class of St. Louis City and County and made them applicable to all Missouri political subdivisions. *See id.* at 223-224 (“Those portions of the text which are italicized are declared unconstitutional. The portions of the statute which are not italicized remain in effect and now apply to all political subdivisions in the state.”) (emphasis added).

Excising only “prior to May 1, 2001,” §67.1846.1 leaves a statute that is “complete and capable of being executed.” *Id.* Particularly, leaving authority for linear foot based fees in §67.1846.1 ensures that the provision of 67.1842.1(4), that prohibits cities from charging for use of the public right-of-way, “except as provided in sections 67.1830 to 67.1846” has meaning. This is so because the linear foot provisions of 67.1846.1 are the *only* provisions within §§67.1830 to 67.1846 that provide a means to require public utility right-of-way user to pay for use of the rights-of-way (recall that this provision cannot refer to recovery of “right-of-way management costs,” because §67.1830(5) expressly mandates that right-of way management costs do not include payment for use of the rights-of-way).

**1. If language cannot be narrowly excised, the entire Senate Bill 369 must be struck.**

If the grandfathering provision of §67.1846.1 cannot be limited by striking only the May 1, 2001 date from the provision and this Court finds that the entire grandfathering provision must be struck down, leaving no authority for cities like Cameron with pre-SB 369 linear foot fees to continue to enforce such fees, then the entirety of SB 369 must be struck down. Section 1.140 provides:

If any provision of a statute is found by a court of competent jurisdiction to be unconstitutional, the remaining provisions of the statute are valid unless the court finds the valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one; or unless the court finds that the valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

Section 1.140 RSMo.

Striking the grandfathering provision in its entirety would make applicable both provisions of §1.140 requiring the entire statute to be struck down. First, striking the entire grandfathering provision would leave SB 369 incomplete and incapable of being executed in accordance with the legislative intent, particularly §67.1842.1(4) which provides:

In managing the public right-of-way and in imposing fees pursuant to sections 67.1830 to 67.1846, no political subdivision shall [. . .] Require 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. . . .*

Section 67.1842.1(4) RSMo. (Emphasis added).

If the grandfathering provision is completely struck, then there is no other provision that allows political subdivisions to “[r]equire a public utility right-of-way user to pay for the use of the public right-of-way,” leaving §67.1842.1(4) meaningless and incapable of any operation. This is not a mere “cross-reference” as suggested by CenturyLink, but is evidence that the legislature intended SB 369 to operate as a unit. Striking the entire grandfather provision would make that section meaningless, it would impact the operation of the entire bill, and it would eliminate a right guaranteed by law. CenturyLink argues that where this Court has found provisions not severable, those provisions have been “more tightly bound up” with the valid provisions. App. Br. 29. This is incorrect. In *Conseco Fin. Servicing Corp*, the Court found it could not sever the invalid provision because if it did so, the other provisions in the statute would never come into play. *Conseco Fin. Servicing Corp. v. Mo. Dep’t of Revenue*, 98 S.W.3d 540, 546 (Mo. 2003). This is exactly what would occur here. If the grandfathering provision is severed, then portions of §67.1842.1(4) would never come into play and would be meaningless. *See State ex rel. Union Electric Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. 1979) (courts “should not assume the legislature intended these words to have no

meaning”).

Furthermore, it cannot be presumed the legislature would have enacted the valid provisions without the grandfathering provision. If there is even “reasonable doubt” that the bill would have passed without the provision, then it cannot be severed. *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 354 (Mo. 2013) (holding that section could not be severed because reasonable doubt existed that the bill would have passed without the section where prior versions of the bill without the section had failed to pass). The grandfathering provision did not appear in SB 369 until the Truly Agreed and Finally Passed version of the bill. That version was drafted in conference after the Senate refused to concur with House Committee Substitute for SB 369, which did not include the grandfathering provision. LF 1428-29.<sup>5</sup> It is clear, therefore, that the grandfathering provision was not included in SB 369 as an afterthought or in an ad hoc manner but that it was the result of a compromise to get the entire bill enacted. Given that several large and likely influential cities in Missouri have a linear foot user fee and make use of the grandfathering provision, it would not be surprising that the bill could not pass without the grandfathering provision. *See, e.g., Level 3*, 405 F. Supp. 2d at 1063; LF 1471 (City of St. Louis); LF 1471 (City of Wildwood). The 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. But

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<sup>5</sup> “The courts take judicial notice of the records of the general assembly.” *State ex rel.*

*Snip v. Thatch*, 195 S.W.2d 106, 107 (Mo. 1946).

for the grandfathering provision, it cannot be presumed that *any* provision of SB 369 would have been become law at all.

If SB 369, or at least §67.1842.1(4) with which the grandfathering provision is “inseparably connected,” is struck down, Cameron is left with its longstanding, pre-SB 369 authority to impose fees to use the rights-of-way, in place and unlimited. *See St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) (“[W]e find that the charge imposed for the privilege of using the streets, alleys and public places, and is graduated by the amount of such use...It is more in the nature of a charge for the use of property belonging to the city,—that which may properly be called rental.”); *see also St. Louis v. Western Union Tel. Co.*, 760 S.W.2d 577, 580 (Mo. App. 1988) (affirming trial court’s holding that an ordinance “provided for a fee or a rental, not a tax. That section requires an annual report of the extent of use of streets, alleys and public places and imposes a charge for the privilege to use such areas.”). Therefore, while the constitutionality of the grandfathering provision should not be reached, even if it is, and even if the trial court had found that provision to be unconstitutional, Cameron’s User Fee would still be valid and lawful, and it is undisputed that CenturyLink has not paid the fee. The trial court did not err in granting summary judgment on Counts XVII-XVIII.

**II. The trial court did not err in granting summary judgment on Counts XVII-XIX because there was no genuine issue of material fact that CenturyLink violated the ROW Codes, and the Rights-of-Way Agreements are not illegal franchises.**

**a. Preservation of error**

CenturyLink alleges in its second point that the trial court erred in granting summary judgment because Cameron “failed to demonstrate that the costs it seeks to impose are based on the actual, substantiated costs reasonably incurred by the Cities in managing their public rights-of-ways.” App. Br. 36. This argument is not preserved because CenturyLink did not assert it in the trial court. Additionally, the point is multifarious, in violation of Rule 84.04, and not preserved for appellate review. CenturyLink asserts “two errors” of the trial court under one point, in violation of Rule 84.04(d). App. Br. 36. Point II is properly denied.

**b. The trial court properly entered summary judgment on the cities’ rights-of-way claims.**

It is undisputed that CenturyLink, specifically through Appellants Spectra and CenturyTel, is illegally operating in Cameron and Wentzville’s rights-of-ways because those entities do not have the required Rights-of-Way Agreements and/or permits. LF 1320-24. CenturyLink does not dispute that it is occupying the cities’ rights-of-way nor does it dispute that it does not have the necessary agreements. CenturyLink simply argues that the agreements are unlawful, despite having already admitted that other similar

agreements are “lawful.” LF 583, 592, 1340, 1375, 1387, 1395. The agreements are lawful and therefore the trial court properly entered summary judgment.

Cameron and Wentzville’s ROW Codes require public utility rights-of-way users such as Spectra and CenturyTel to comply with certain procedures in order to install and maintain facilities in the rights-of way. LF 890, 922, 1319, 1323. Both Cameron’s and Wentzville’s ROW Codes require that rights-of-way users obtain an agreement from the City granting authorization to use and occupy the rights-of-way. LF 904, 931, 955-56. These requirements are similar to the requirements of the ROW Code of Harrisonville under which Embarq Missouri, Inc. entered into its Rights-of-Way Use Agreement with Harrisonville. LF 968-71.

Despite their use and occupation of the public rights-of-way of Cameron and Wentzville, Spectra and CenturyTel have failed to obtain a Public Ways Use Permit Agreement from Cameron or a Rights-of-Way Use Agreement from Wentzville (Collectively, “Rights-of-Way Agreements). LF 1320-1324. The trial court properly entered judgment that Spectra and CenturyTel’s use and occupation of the public rights-of-way is subject to the requirements of Cameron’s and Wentzville’s respective ROW Codes, and that Spectra and CenturyTel must obtain a Public Ways Use Permit Agreement from Cameron and a Rights-of-Way Use Agreement from Wentzville.

**c. Cameron and Wentzville’s required Rights-of-Way Agreements are not prohibited “franchises.”**

CenturyLink cannot dispute that it is operating in the cities’ rights-of-way without the required agreements, so it attempts to avoid those requirements by mischaracterizing

them as “illegal mandatory franchises.” CenturyLink essentially creates its own definition of a franchise – agreements that are “coercively imposed” – without any support for such a definition and without even pointing to evidence that the agreements here are in fact “coercively imposed.” *See* App. Br. 32. Even under CenturyLink’s manufactured definition, this argument fails.

The Rights-of-Way Agreements are not prohibited franchises. Missouri law provides that cities like Cameron and Wentzville cannot “[r]equire a telecommunications company to obtain a franchise ... except as provided in sections 67.1830 to 67.1846.” Section 67.1842.1(4). Subsection 67.1842.1(5) goes on to limit agreements that are still authorized by precluding only such “contract or any other agreement for providing for an exclusive use, occupancy or access to any public right-of-way[.]” (emphasis added). The Rights-of-Way Agreements grant authority to use and occupy the cities’ rights-of-way. They are not franchises, but rather are entirely lawful “contracts” or “other agreement[s],” contemplated by §67.1842.1(5) and §67.1846.1. That there is a distinction between a “franchise” and a “contract” or “other agreement” is clear when examining the entirety of SB 369. The statute distinguishes a “franchise” and a “contract or any other agreement” in that it limits franchises for telecommunication companies but retains authority for Cities to enter into *contracts and agreements*, providing only that they cannot be for “exclusive” use of the rights-of-way. Section 67.1842.1(5); 67.1846.1 (“Nothing in sections 67.1830 to 67.1846 shall be deemed to relieve a public utility right-of-way user of the provisions of an existing franchise, franchise fees, license or other agreement or permit in effect on May 1, 2001.”).

CenturyLink argues that the term “franchise” should encompass all transactions in which a government grants a privilege or authorization to an individual entity that is not common to the citizens generally. App. Br. 33. Such a definition is incorrect, unworkable, and cannot apply to the provisions of Chapter 67. The practical effect of that definition is entirely too broad and would encompass any person or entity-specific transaction entered into with a government, potentially including leases, contracts, or business licenses. This clearly cannot be the case. *State ex rel. McKittrick v. Murphy*, 148 S.W.2d 527, 530 (Mo. 1941), and *Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo. App. 1963), which CenturyLink cites for its broad definition do not analyze the term “franchise” in light of SB 369. *Murphy* analyzed the term “‘franchise’ as used in connection with the writ of quo warranto[.]” and defined it also as “[a] royal privilege or branch of the king’s prerogative subsisting in the hands of a subject.” *Murphy*, 148 S.W.2d at 490 (citations omitted). *Murphy*’s analysis of the term is inapplicable here. *Poplar Bluff*, meanwhile, recognized that “[t]here are many definitions of the words ‘franchise....’” *Poplar Bluff*, 369 S.W.2d at 766. The definition and context in which “franchise” arises here must be analyzed by analyzing how the term is used in SB 369 and similar areas.

Missouri courts (unlike CenturyLink’s cases from other jurisdictions) have supplied a definition for “franchise” in a closely analogous area: “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.” *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 805 n.4 (Mo. App. 2004). The primary function of a franchise is

to provide authorization to do business. *See State ex rel. Peach v. Melhar Corp.*, 650 S.W.2d 633, 636 (Mo. App. 1983) (holding that a franchise is an agreement that grants contractual rights to do business in a municipality, and a “franchise is contractual in nature”). A “franchise,” therefore, is an agreement or license from a governing body that *authorizes the provision of services*. *Ogg* distinguished a franchise issued in neighboring municipalities, for instance, from the mere license to use the right-of-way at issue in that case. 142 S.W.3d at 805. *Ogg* recognized that the mere license to use and occupy public rights-of-way in a certain area was not a franchise that authorized a cable company to sell and provide its service in that area. *Id.* at 807-809. Clearly, a license or agreement merely to use the rights-of-way has already been repeatedly distinguished from a franchise that authorizes a company to sell its services to the public. As the Rights-of-Way Agreements here are each accurately described as an agreement granting permission for the non-exclusive use of the Cities’ rights-of-way, not as authorization to provide services, and, therefore, not “franchises.”

This Court long ago distinguished a franchise that authorized providing certain services, which requires a vote and other statutory procedures related to franchises, from instruments that only grant authorization to use the public rights-of-way, which do not have such statutory requirements. *See State ex rel. McKittrick v. Springfield City Water Co.*, 131 S.W.2d 525, 531 (Mo. 1939) (only that portion of franchise authorizing business to provide service in City was subject to franchise-related requirements like voter approval; portion of franchise that was only an agreement granting consent to use street was a “mere granting of street easement” that was not a franchise requiring voter

approval). Authorization to supply service in cities only upon a vote of the people is reflected throughout the Missouri statutes. *See* §§71.530 (gas, electric, water), 88.613 (street lighting), 88.770 (street lighting), 88.773 (waterworks) RSMo. Thus, irrespective of the name, a mere right-of-way license that only allows use of the public rights-of-way, does not serve as the legal authority to do business in a jurisdiction, and is not required to be approved by a vote of the people, is not a “franchise” for our purposes. Here, there is no showing that Cameron’s or Wentzville’s ROW Codes require any kind of agreement in order for CenturyLink to do business or offer any service in the Cities. On the contrary, the Rights-of-Way Agreements merely provide permission to occupy the rights-of-way should they choose to provide such service.

CenturyLink argues that the Rights-of-Way Agreements are franchises because a franchise includes all agreements under which public utilities arrange to provide services in municipalities and because it cannot provide telephone service in either city without the Rights-of-Way Agreements, then they must be franchises. App. Br., 34. CenturyLink misunderstands the import of the Rights-of-Way Agreements. Certainly there are several prerequisites to CenturyLink’s lawful provision of telephone service, but not every prerequisite is individually a franchise. While a franchise might grant authority to provide service, the Rights-of-Way Agreements, in contrast, merely grant authority for the use and occupation of the rights-of-way for CenturyLink’s facilities. As the court recognized in *Springfield City Water Co.*, the use of the rights-of-way might be a *component* of a franchise, but that is not in and of itself a franchise or subject to franchise requirements or procedures. *See Springfield City Water Co.*, 131 S.W.2d at 531. The Rights-of-Way

Agreements here do not purport to grant exclusive use or occupation of the public rights-of-way, to authorize the provision of any services in those respective Cities, or to regulate a provider's conduct of business, the rates it charges its customers, or any other technical requirements. As if these clear distinctions were not enough, the actual ROW Codes specifically state that Rights-of-Way Agreements "shall not be subject to [the] procedures applicable to franchises." See LF 904 (Cameron City Code §10.5-151), 1319-20, 1323; 955-56 (Wentzville City Code §655.285.A.2). Furthermore, Appellants have already entered into Rights-of-Way Agreements with Harrisonville and Wentzville, that provide they are "lawful contracts." LF 592, 1340, 1395. CenturyLink cannot now deny the legality of Rights-of-Way Agreements.

CenturyLink also argues that the Rights-of-Way Agreements prohibit it from providing services whatsoever in Cameron or Wentzville, and for that reason the agreements are coercive and therefore illegal franchises (again, without actually supporting its manufactured definition of franchises as coercive agreements). App. Br. 33, 34. This is neither factually nor legally correct. Even without a Rights-of-Way Agreement, CenturyLink is still able to occupy private easements and fee-owned land to provide services. Additionally, that Cameron and Wentzville require Rights-of-Way Agreements for facilities that have occupied and used the rights-of-way for decades does not mean that the agreements are prohibited franchises. Where a company occupies and uses the rights-of-way, the continuing consent of the City is required and the company must maintain that consent throughout the term for which the rights-of-way are used and occupied. *State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co.*,

85 S.W.2d 613, 617 (Mo. 1935) (“*City of Lebanon*”). The Rights-of-Way Agreements are not prohibited “franchises” under SB 369.

**1. SB 369 only prohibits exclusive or discriminatory agreements.**

Because the Rights-of-Way Agreements are not “franchises,” but are “contracts,” “licenses,” or “other agreements,” they are not prohibited because they are not exclusive or discriminatory. CenturyLink’s argument that non-exclusive franchises may exist, even if accurate, is irrelevant to the issue at hand. SB 369 only prohibits exclusive or discriminatory agreements, and neither Cameron’s nor Wentzville’s agreements are exclusive or discriminatory. CenturyLink relies on §67.1842.1(4). That section states that political subdivisions shall not “require a telecommunications company to obtain a franchise...except as provided in sections 67.1830 to 67.1846.” §67.1842.1(4) RSMo. (emphasis added). The law goes on to state explicitly that “[n]othing in sections 67.1830 to 67.1846 shall prohibit a political subdivision or right-of-way user from renewing or entering into a new or existing *franchise, so long as all other public utility rights-of-way users have use of the public right-of-way on a nondiscriminatory basis.*” §67.1846.1 RSMo. (emphasis added). Accordingly, when read *in pari materia*, it is clear that the legislature’s intent in enacting SB 369 was to prohibit agreements that provide for the *exclusive or discriminatory* use of the public rights-of-way, not to completely ban them as urged by CenturyLink. Both Cameron’s and Wentzville’s ROW Codes explicitly mandate that Rights-of-Way Agreements are *not* for the exclusive use of public rights-of-way and that they are non-discriminatory. LF 907 (Cameron Code §10.5-154 (“No public

ways use permit granted under this article shall confer any exclusive right, privilege, license or franchise to occupy or use the public ways....”)); 956 (Wentzville City Code §655.285.B (“The authority granted by the City in any agreement or franchise shall be for non-exclusive use of the rights-of-way...All franchises and agreements shall be approved by ordinance of the Board of Aldermen on a non-discriminatory basis....”)); 901 (Cameron Code §10.5-151.C (“All public ways use permits shall be approved by ordinance of the city council on a non-discriminatory basis....”)). Even if a non-exclusive agreement could be deemed a “franchise,” that is irrelevant. All that is prohibited in SB 369 are exclusive and discriminatory agreements. The Rights-of-Way Agreements required in Cameron and Wentzville are simply not prohibited by SB 369 as they are neither exclusive nor discriminatory, irrespective of whatever name one chooses to apply to them.

**2. Section 67.1842.1(4), RSMo. cannot be interpreted unconstitutionally.**

If given CenturyLink’s interpretation, §67.1842.1(4) would be a prohibited “special law” repugnant to Art. III, §40(28) of the Missouri Constitution, and thus it cannot be interpreted in that manner. If §67.1842.1(4) were interpreted to exempt telecommunications companies from all non-exclusive contracts and agreements to use the public right-of-way, and not just “franchises,” it would operate as an unconstitutional special law giving telecommunications companies special rights not provided to other similarly situated rights-of-way users. Such an interpretation has been rejected under *Planned Industrial Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772

(Mo. 1981) (“*PIEA*”), in which this Court struck down an amendment to §392.080 that purported to give telecommunications companies a property right in the rights-of-way, but did not give the same rights to “all companies which distribute their services beneath the public ways.” *Id.* at 777 (“the 1974 amendment confers a special privilege and benefit upon telecommunications companies vis-a-vis other utility companies whose customers might be served through the use of public streets and alleys. ... There appears to be *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.”) (emphasis added). This is precisely the case here. CenturyLink essentially alleges that it is *only* telecommunications companies that are arbitrarily free from any agreement a city might reasonably impose on all rights-of-way users. This is an unconstitutional interpretation.

“[I]f one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. 1991). Accordingly, because CenturyLink’s proffered interpretation of §67.1842.1(4) RSMo. would plainly run afoul of the Missouri Constitution’s prohibition against special legislation, it must be rejected in favor of the more reasonable interpretation, namely the only thing prohibited by §67.1842.1(4) RSMo. are “franchises” that purport to provide authority for telecommunication companies to provide services in a particular political subdivision, or other agreements

that provide for the *exclusive* use of a city's rights-of-way.

**d. Cameron did not need to demonstrate that its fees are based on actual, substantiated costs.**

CenturyLink argues that the trial court “committed two errors” in failing to require Cameron to submit evidence of compliance with §67.1840.2(1) and in granting summary judgment where Cameron did not comply with that statute. Cameron did not need to present such evidence in order to be entitled to summary judgment. Cameron’s fees under its ROW Code fall outside of §67.1840.2(1). In general, linear foot fees fall wholly outside of the rights-of-way management costs otherwise imposed under §67.1840. *See Level 3 Commc’ns, LLC*, 405 F. Supp. 2d at 1063 (holding that St. Louis, as a grandfathered political subdivision, was exempt from the provisions of SB 369 for the purposes of its linear foot ordinance. . . “the Court concludes City's fees are not invalid under state law.”). Linear foot fees are not part of the management costs for rights-of-way, rather, they provide means for compensation. Therefore, they cannot be prohibited in general based on §67.1840’s language restricting ROW permit fees to “ROW management costs.” The trial court did not err in granting summary judgment on Counts XVII-XIX.

**III. The trial court did not err in granting summary judgment on Counts I-V because there is no genuine issue of fact that CenturyLink has failed to pay the License Taxes on all gross receipts and the License Taxes apply to the four revenue streams at issue.**

CenturyLink has willfully failed to pay its taxes, depriving the Cities of necessary revenue. Now that CenturyLink is being taken to task on its failure to pay taxes on all gross receipts, it does not dispute failure to pay those amounts. Instead, CenturyLink misinterprets and misreads the License Taxes and argues that additional limitations – which are not in the text of the License Taxes – bar application of the taxes to the revenue.

Almost immediately CenturyLink demonstrates the fundamental flaw in its misleading theory. CenturyLink alleges, “[b]y **their terms**, the tax ordinances apply to revenues derived from the provision of **local** telephone service...” App. Br. 38 (emphasis added). CenturyLink then spends most of its argument describing why the disputed revenue streams are not within the purview of a tax on *local* telephone service. The problem with CenturyLink’s argument is that by their terms the taxes do not tax “local” service. LF 220, 223, 226, 231, 234. CenturyLink has taken it upon itself to add qualifiers to the Cities’ tax ordinances, qualifiers that do not exist. Indeed, not a single ordinance at issue here uses the term “local” telephone service. There is no genuine dispute of fact and the law is clear that CenturyLink has failed to properly pay the License Taxes and that the revenue at issue is subject to the taxes. Accordingly, the trial court did not err in granting summary judgment on Counts I-V.

**a. Preservation of error**

CenturyLink argues that the trial court erred because the “longstanding course of conduct” and historical context demonstrate that the tax ordinances do not apply to the four disputed revenue sources. App. Br. 38, 50-52. These arguments were not asserted in the trial court and are not preserved. Further, point III violates 84.04(d) because it asserts several errors within one point. Point III preserves nothing for appellate review and is appropriately denied.

**b. CenturyLink’s Improper Testimony**

CenturyLink relies heavily on affidavits and deposition testimony that were defective, not properly in the summary judgment record, and otherwise did not properly controvert facts presented by the Cities. *See, e.g.*, App. Br. 53, 48, 55. In fact, the Seshagiri affidavit and the Galloway deposition (that CenturyLink advances by Galloway’s affidavit), wherein purported CenturyLink employees testified as to the meaning of the Cities’ ordinances, were the subject of a motion to strike because the testimony contained conclusory allegations, legal conclusions, statements that were predicated on hearsay, none of which would be admissible in evidence in violation of Rule 74.04(e). LF 1216-30. As the Cities argued at the hearing on their motion for partial summary judgment and motion to strike, none of the affidavits CenturyLink relies on to controvert the Cities’ material facts in their summary judgment motion are made “on personal knowledge” as required by the Rule. They are all made merely on the “best” of the affiants’ “information and belief.” The Galloway affidavit is not even properly notarized and facially defective. Like all of CenturyLink’s affidavits, the top of the first

page of Galloway's affidavit denotes where it was made and signed: Denver County, Colorado in the case of that affidavit. But, Galloway's affidavit shows it was notarized in Missouri before a Missouri notary who obviously could not have properly notarized an affidavit that he made and signed in another state. LF 1221.

The "testimony" contained in the affidavits also is deficient. Mr. Seshagiri asserts only a conclusion in paragraph 3 that the term "telephone service" in each of the Cities' ordinances means "basic local exchange service." LF 1216. Such a statement is devoid of any foundation or reasoning, wildly speculative, and inadmissible for those reasons. In paragraph 4, Seshagiri states he reviewed certain, unknown "tax data" and that the rest of his affidavit is based on his review of that undisclosed information. *Id.* Contrary to Rule 74.04(e), the "tax data" to which he refers was not "attached thereto or served therewith." Even if the "tax data" existed, like his statement in paragraph 3, the remainder of his affidavit regarding that information is conclusory speculation made without any foundation. It is also hearsay and inadmissible.

Mr. Galloway's affidavit suffers similar defects and is likewise inadmissible. His deposition statements are conclusory speculation for which he offers no or insufficient foundation and often are hearsay. Similarly, the testimony being offered by CenturyLink's counsel, James Wyrsh, in paragraph 2 of his affidavit about Cameron's ordinances and in paragraph 3 regarding a deposition is hearsay and/or unfounded speculation, and not admissible. LF 1219.

None of CenturyLink's "evidence" could controvert any of the facts advanced by the Cities in their motion for summary judgment. This Court has already held that

conclusory declarations of the meaning of terms under a license tax ordinance in an affidavit are insufficient to state a “genuine factual issue for trial.” *Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 521-522 (Mo. 1972). In *Ludwigs*, the party seeking to avoid summary judgment simply asserted in an affidavit that the license tax ordinances were “ambiguous,” and the Supreme Court held that merely making such a claim “does not demonstrate that they are; nor does it raise a fact issue,” but instead states only “conclusions” that are “insufficient.” *Id.* Moreover, the Cities were not required to rebut those legal conclusions. *See Xavier v. Bumbarner & Hubbell Anesthesiologists*, 923 S.W.2d 428, 433 (Mo. App. 1996) (“On consideration of motions for summary judgment, bare legal conclusions...can be disregarded.”).

CenturyLink’s affidavits also attempt to improperly contradict previous statements made by CenturyLink and directly contradict what CenturyLink has been telling its own customers. For example, Seshagiri states in paragraphs 13-14 that the EUCLC is “not payment for local exchange telephone service,” and alleges as fact that it is for a “customer’s ‘connection into the *interstate* network.’” Yet these statements completely contradict the representations CenturyLink has been making to its customers about this charge. In the bills it sends to its customers, CenturyLink categorizes the EUCLC in its section under “Local Services” and explicitly lists the EUCLC within the section of charges for “Total Local Exchange Services.” LF 1339.

Missouri courts have long rejected attempts to defeat summary judgment by non-movants when their own contradictory statements are offered to create a “genuine issue of fact.” *See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854

S.W.2d 371, 388 (Mo. 1993) (“a party may not avoid summary judgment by giving inconsistent testimony and then offering the inconsistencies into the record in order to demonstrate a genuine issue of material fact.”); *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 645-646 (Mo. App. 1994) (conclusory, self-serving, and inconsistent testimony cannot defeat a motion for summary judgment). Accordingly, these self-serving and contradictory legal conclusions do not create a genuine issue of material fact. *See Rustco Products Co. v. Food Corn, Inc.*, 925 S.W.2d 917, 923-924 (Mo. App. 1996) (holding that inconsistent testimony on an issue failed to create genuine issue of material fact and upholding summary judgment).

**c. The License Taxes are presumed valid and the trial court did not err in “fail[ing] to identify” specific authority.**

The License Taxes are “presumed to be valid.” *Great Rivers Habitat Alliance*, 384 S.W.3d at 296. CenturyLink contends the trial court erred in failing to identify any “specific authority” for the taxes. App. Br. 42. The trial court was not required to do anything other than grant or deny summary judgment, and therefore it did not err in failing to explicitly conclude that these taxes are authorized by Chapter 94 RSMo. Rule 74.04(c). The Cities explained the taxes are authorized by Chapter 94, which allows cities of the third class and fourth classes to impose a license tax on telephone companies. LF 984-85, 1286-88; §§94.110, 94.270. The trial court is “is presumed to have based its decision on the grounds” in the motion. *McDowell v. Waldron*, 920 S.W.2d 555, 562 (Mo. App. 1996) (rejecting argument that trial court should have identified certain facts or conclusions of law in granting summary judgment).

**d. The License Taxes require CenturyLink to pay the tax on all gross receipts.**

The Cities have all lawfully enacted an ordinance requiring, *inter alia*, telephone companies to pay a tax based on the gross receipts from doing business in each city. LF 1290-94. CenturyLink admitted that it provides telephone services in the Cities. LF, 1294-1300. It is beyond dispute that CenturyLink is subject to the License Taxes in the Cities.

The definition of “gross receipts” for purposes of municipal License Taxes is not open to interpretation or debate. The issue of what should properly be considered a part of a utility-type company’s “gross receipts” for purposes of a municipality’s License Tax was first brought before this Court in *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832 (Mo. 1953). In that case, Laclede Gas sought judicial determination that money it had sequestered in a special account for purposes of a possible refund to its customers pending the outcome of a rate case was not to be considered “gross receipts” for purposes of the St. Louis License Tax. This Court recognized: “[i]n its usual and ordinary meaning, ‘gross receipts’ of a business is the whole and entire amount of the receipts without deduction.” *Laclede Gas Co.*, 253 S.W.2d at 835. The word “gross,” the Court continued, “appearing in the term ‘gross receipts,’ as used in the ordinance, must have been and was there used as the *direct antithesis* of the word ‘net.’” *Id.* (emphasis added). Building upon that definition, the Court held that the term “gross receipts” means such receipts from the sale of goods or services in the taxing authority’s jurisdiction as the taxpayer “was entitled to retain and use for the benefit of its business and *out of which*

*receipts it could pay and discharge the obligations of its business.” Id. at 837 (emphasis added). This core definition of “gross receipts” for purposes of a municipal License Tax has remained unchanged for sixty years, and as established in *Hotel Continental*, License Taxes are obligations of *the business* on which they are levied, and are part of their operating expenses. *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 82-83 (Mo. 1960)*

**i. The Cities’ License Taxes apply to “telephone services” and “exchange telephone services,” not “local” or “basic” exchange telephone services.**

The terms “exchange telephone service” and “telephone service” in the License Taxes are each more than broad enough to encompass the sources of revenue that were the subject of the summary judgment motion. CenturyLink argues that the Cities’ ordinances only encompass purely local telephone service. Again, this is clearly false given that the ordinances by their terms do not tax “local” telephone service. LF 220, 223, 226, 231, 234.

Contrary to CenturyLink’s argument, Aurora and Cameron’s use of the word “exchange” is not a limitation of the scope of service taxed, but is a description of the type of telephone services that Aurora and Cameron tax; telephone services that are provided within (but not necessarily *wholly* within) an exchange. Section 386.020(16) defines “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.” Each of the sources of revenue at

issue here are provided within an exchange (and within each City), as CenturyLink is able to charge and collect these revenues from identifiable customers within each applicable exchange on monthly bills to customers within each City. LF 1339-40, 1343-44, 1350, 1363, 1367-69, 1377.

CenturyLink's arguments that the revenue collected by CenturyLink for three of the revenue streams are not "exchange telephone services" or "telephone services" rely on an interpretation that impermissibly adds the qualifying language of "basic local" to the License Taxes. LF 1295-99. None of the Cities' License Taxes tax "basic local" or "local" telephone service – the License Taxes are not limited in that way. While the Cities recognize the platitude that taxing statutes must be interpreted strictly, this principle does not allow qualifying language such as "basic" or "local" to be artificially inserted into tax legislation to narrow the meaning of the ordinance below that which the ordinance actually addresses. Ordinances that impose taxes are like ordinances that impose zoning regulations. While they should be construed strictly, the interpretation placed upon the ordinance by the body in charge of its enactment and application is entitled to great weight. *Taylor v. City of Pagedale*, 746 S.W.2d 576, 578 (Mo. App. 1987). The Cities' interpretation of their respective License Taxes is also entitled to similar weight.

Each License Tax unambiguously requires payment of the sources of revenue at issue as a matter of law. However, to the extent that CenturyLink argues ambiguity or contrary application, the Court defers to the entity enacting and enforcing the law – here, the Cities. Each City has interpreted and enforced its License Tax to collect the same

sources of revenue from AT&T. *See* LF 796-97 (Settlement Agreement accepted by the Cities describing revenues that the License Taxes are interpreted to cover, including EUCLC, SUSF, FUSF, items defined under §144.010, which include Vertical Services, and amounts collected to pay the License Taxes); LF 783, 1341, 1452-61.

CenturyLink's reliance on cases outside Missouri construing various terms enacted under various statutory schemes does not overcome the interpretation of the License Taxes advanced by the Cities, especially where there is Missouri authority on point. For example, in *North Carolina Utilities Commission v. FCC*, 522 F.2d 1036, 1045 (4<sup>th</sup> Cir. 1977), the court cited one definition of telephone exchange service provided in a federal statute, which is not at issue in this case, and the court ignored the second definition provided by that statute. Similarly, a Michigan state court's description of telephone exchange service in a case analyzing a Michigan use tax law is inapplicable here. *GTE Sprint Comm's Corp. v. Dep't of Treasury*, 445 N.W.2d 476, 478-79 (Mich. App. 1989). Nor is Newton's Telecom Dictionary's definition of "exchange" applicable where there is Missouri authority on the term.<sup>6</sup> What we can discern from Newton's Telecom Dictionary, however, is that its lack of a definition for "exchange telephone service," refutes CenturyLink's argument that such is an "industry term of art." The term

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<sup>6</sup> Nor can the dictionary be relied on when the definitions are clearly intended to be tongue-in-cheek. *See* Harry Newton, NEWTON'S TELECOM DICTIONARY, 1171 (27<sup>th</sup> ed. 2012) (defining "telephone" as "[t]he invention of the devil...[t]he most intrusive device ever invented...[t]he biggest time waster of all time...").

could hardly be considered an industry term of art when it is not even defined in what CenturyLink calls, “a well-respected industry authority.” App. Br. 45.

Turning to Missouri law, CenturyLink cites §386.020(32) as authority demonstrating how the term “exchange telephone service” should be construed. This section defines “local exchange telecommunications service,” the key being the limiting qualifier of “*local*.” The qualifier *local* appears in none of the License Taxes. Nevertheless, the definitions contained in §386.020 are helpful in interpreting the term “exchange telephone service” under Missouri law. Much as §386.020(32) includes the qualifier “local” before “exchange telecommunications service,” §386.020(3) uses a different qualifier: “*Basic interexchange telecommunications service*,” which is defined: “at a minimum, two-way switched voice service between points in different local calling scopes as determined by the commission and shall include other services as determined by the commission by rule upon periodic review and update.” (Emphasis added). Similarly, §386.020(25) defines “*Interexchange telecommunications service*,” as “telecommunications service between points in two or more exchanges.” (Emphasis added). Finally, §386.020(17) defines “Exchange access service” as “a service provided by a *local exchange telecommunications company* which enables a telecommunications company or other customer to enter and exit the *local exchange telecommunications network* in order to originate or terminate *interexchange telecommunications service*” (emphasis added) and thus provides a link between *local* exchange telecommunications services and *interexchange* telecommunications services. Thus, the unqualified term “exchange telephone service,” as used in Aurora and Cameron’s taxes serves as an

umbrella under which the narrower terms “*local* exchange telecommunications service,” “*Basic interexchange* telecommunications service,” “*interexchange* telecommunications service,” and “Exchange *access* service,” are covered. Accordingly, under Missouri law, exchange telephone service does not have a single definition, but is rather defined by the narrower component parts that make up the whole of “exchange telephone service.” Consistent with the Cities’ previous interpretation of the License Taxes and scheme of statutory definitions found in Chapter 386 each of the sources of revenue are covered by the taxes.

**ii. Expert testimony was not required.**

“Exchange telephone service,” is not a “technical term,” nor is its definition a matter for expert opinion. Even if expert testimony were appropriate, allowing or disallowing expert opinion is a matter for the trial court’s discretion and it was certainly not required here, where there is statutory guidance on the term’s meaning. *See, e.g., State Bd. of Chiropractic Examiners v. Clark*, 713 S.W.2d 621, 628-29 (Mo. App. 1986) (expert testimony was not required to determine a question of law – whether a particular treatment fell within the definition of the practice of chiropractic). Even CenturyLink’s cases recognize that expert testimony is a matter for the trial court’s discretion and that it is not *required* in this situation. *Strong v. Am. Cyanamid Co.*, 261 S.W.3d 3d 493, 512 (Mo. App. 2007) (recognizing that expert testimony is a matter for trial court discretion and noting that it was *appropriate* in order to determine whether the *conduct* at issue applied to the standard of care); *UMB Bank, N.A. v. City of Kansas City*, 238 S.W.3d 228, 233 (Mo. App. 2007) (recognizing that expert testimony is a “matter within the discretion

of the trial court”); *City of Sullivan v. Truckstop Rest., Inc.*, 142 S.W.3d 181, 188-89 (Mo. App. 2004) (*rejecting* argument that trial court erred in granting motion for prejudgment interest because the damages were not readily ascertainable without expert opinion). Expert testimony was not required in this case, and it was not error for the trial court to proceed without it.

Additionally, the conclusory testimony of the purported CenturyLink employees as to the meaning of the License Taxes does not support CenturyLink’s arguments that the term “local” should be added to the License Taxes. App. Br. 47-48; *supra*, Section III.b. The trial court presumably recognized that the License Taxes *are not limited* by the word “local.” CenturyLink’s attempt to create an issue of fact where none existed does not change this.

**iii. The License Taxes’ application to services provided “within” or “in” each city does not mean the tax only applies to local exchange telephone service.**

CenturyLink contends that because the License Taxes limit coverage to services provided “within” each city that means the License Taxes must only apply to local service. Such language does not provide a basis to conclude that the ordinances only extend to basic local telephone exchange service. Here again, CenturyLink ignores the actual language of the License Taxes and improperly adds the additional qualifiers of “basic” and “local” to the taxes.

CenturyLink’s reliance on *May Department Stores Co. v. University City*, 458 S.W.2d 260 (Mo. 1970) is misplaced. CenturyLink argues that *May Department Stores*

bars the Cities from imposing their License Tax on services that are furnished partly outside of the Cities. However, the case does not stand for that proposition. In *May Department Stores*, University City argued Famous Barr was required to pay License Taxes on sales made in buildings in the City of Clayton that were “wholly outside the limits of University City.” *May Dept. Stores. Co.*, 458 S.W.2d at 262. The court rejected that argument and held that Famous Barr was not required to pay taxes on sales made “wholly outside” the city. *Id.* This is completely different from this case, where the Cities presented undisputed evidence that the furnishing of telephone service occurs in the Cities. Further, *May Department Stores* actually held that a percentage of License Taxes were owed on sales that were made in departments “located in both municipalities.” *Id.* at 263. Therefore, *May Department Stores* is inapplicable, as it only stands for the proposition that a city cannot impose a License Tax on sales made “wholly outside” the city.

CenturyLink’s attempt to distinguish *Ludwigs* also fails. App. Br. 50; *Ludwigs*, 487 S.W.2d at 522. CenturyLink argues that the Cities’ ordinances are more limited than that in *Ludwigs*, because the ordinance in *Ludwigs* only taxed gross receipts collected from customers in the city, whereas the Cities tax gross receipts derived from the furnishing of service in the city. However, that 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,” and held that so long as the tax used the term “gross receipts,” the tax applied to *all* gross receipts. *Ludwigs*, 487 S.W.2d at 522 (“[G]ross receipts’ of a business is the whole and entire amount of the receipts without

deduction.”). Here, the Cities provided undisputed evidence that CenturyLink billed customers within the Cities for the revenue streams at issue.

**iv. The historical context of the License Taxes and enforcement practices do not mean the tax only applies to local exchange telephone service.**

CenturyLink argues that by virtue of the historical context in which the License Taxes were enacted and prior enforcement practice that the License Taxes only apply to “local” exchange telephone service. While the historical context in which an ordinance was enacted may be relevant for certain inquiries, Missouri law is clear that a City need not constantly change the wording of their ordinances to keep up with changes in technology. *See City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595, 608 (8<sup>th</sup> Cir. 2008) (“Springfield is not required to update its Code for the purpose of recognizing the advent of each new form of technology used to provide telephonic services.”); LF 1430 (*City Collector of Winchester v. Charter Communications Inc.*, Cause Nos. 10SL-CC02719, 10SL-CC03687 Order and Judgment, at \*17 (St. Louis County Cir. Ct., Feb. 11, 2014) (“[M]unicipalities are not required to amend their tax ordinances with the development of each new technology.”)).

Any “enforcement practices” would not establish a tax limited to local exchange service because CenturyLink ignores an essential fact: the License Taxes are self-reporting. It is incorrect to assert that the Cities themselves have interpreted their License Taxes to only apply to basic local telephone exchange service, because it is *CenturyLink* who is responsible for paying the appropriate taxes. This situation is nothing like the

cases cited by CenturyLink where an agency has established a longstanding interpretation, because here, the Cities were not responsible for paying and reporting the taxes. App. Br. 51. Indeed, the Cities only recently learned that CenturyLink was not paying the appropriate amount of License Taxes, and CenturyLink gave no indication to the Cities that it had been in non-compliance for years. CenturyLink’s argument is akin to a taxpayer failing to report and pay income tax and then blaming the IRS for the taxpayer’s failure to pay.

**e. CenturyLink failed to pay the License Tax on ALL gross receipts – including the four revenue streams at issue.**

CenturyLink admitted that it failed to include the following four categories in their calculations of its gross receipts when calculating and paying the License Taxes: 1) the End User Common Line Charge, denominated on customer bills as a “Subscriber Line Charge;” 2) charges for the Federal and State Universal Service Funds; 3) charges for so-called “vertical” or “optional” telephone services; and 4) money that the CenturyLink collects from its customers to pay the Cities’ License Taxes themselves. All of these sources of revenue must be included as “gross receipts” and CenturyLink must pay taxes on them. Therefore, the trial court properly granted summary judgment.

**i. The License Taxes apply to revenue CenturyLink has collected from its customers for the “End User Common Line Charge” and CenturyLink has failed to include that revenue.**

CenturyLink has admitted that it did not include within its calculations of its gross receipts money collected from its customers in the Cities to pay the “End User Common

Line Charge” (“EUCLC”), also denominated by CenturyLink as the “subscriber line charge”.<sup>7</sup> LF 922 (Safe Harbor Agreement between Embarq and Jefferson City, treating subscriber line charge and EUCLC as same revenue source); 1308-13. While CenturyLink aggressively argued in the trial court and continues to argue here that the EUCLC is not covered by the License Taxes, CenturyLink at the same time expressly admits to its customers that the EUCLC charge is “local exchange service.” LF 1339, 1343-87. Therefore, even under CenturyLink’s narrow (and incorrect) view of the License Taxes as encompassing only local exchange service, this charge is without question subject to the taxes.

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<sup>7</sup> The EUCLC, like many other cryptically-named telephone bill charges, has many names, and is also referred to as the Federal Access Charge, the Customer Line Charge as well as the Subscriber Line Charge. *See* “Understanding Your Phone Bills,” Missouri Office of Public Counsel, at <http://www.opc.mo.gov/Understanding%20Your%20Bill/Understanding%20your%20phone%20bills.html> (“Federal Subscriber Line Charge”) (Last accessed October 17, 2014); *see also* the Federal Communication Commission’s description of the EUCLC at: <http://www.fcc.gov/encyclopedia/faqs-telephone%23slc#slc> (Last accessed October 17, 2014) (“The money received from the subscriber line charge goes directly to local telephone companies”); and again at <http://www.fcc.gov/guides/understanding-your-telephone-bill> (“**These charges are not a government charge or tax.**”) (emphasis in original) (Last accessed October 17, 2014).

The EUCLC is a charge designed to recover costs incurred by local telephone service providers in providing access to their customers to long-distance service providers. *See Southwestern Bell Tel. Co. v. Combs*, 270 S.W.3d 249, 257 (Tx. App. 2008) (hereinafter “*Combs*”) (The EUCLC “is a flat rate charge designed to recover a portion of [the local telephone company’s] cost of providing the local loop to transport customers’ long distance calls to [long distance telephone company].”). CenturyLink recognized in the trial court that the EUCLC is a charge collected by the local telephone company that “goes to the local company to pay for part of the cost of local lines, wires, poles, conduit, equipment and facilities that connect [subscribers] to the interstate phone network.” LF 1039. Although telephone companies are permitted to separately itemize the charge on the bills they send to their customers, and ascribe to it a rather official-sounding name, the charge is really nothing other than a means by which telephone companies like CenturyLink can recoup one of their *costs of doing business* from their customers. The EUCLC is, accordingly, just another source of money CenturyLink can use to pay its bills—it is not a tax or any other kind of fee levied on the consumer. As *Laclede Gas*, *Hotel Continental*, and *Ludwigs* unambiguously instruct, such monies are “gross receipts,” “out of which receipts it could pay and discharge the obligations of its business,” and CenturyLink must include these sums when calculating its gross receipts. *See Ludwigs*, 487 S.W.2d at 522.

CenturyLink relies on two out-of-state cases to argue that the EUCLC is not subject to the License Taxes because it is not a local charge. CenturyLink asserts in *City of Dallas v. GTE Southwest*, 980 S.W.2d 928 (Tex. App. 1988), the court held that the

EUCLC was excluded from the payment base of the city's tax. App. Br. 60-61. The court's holding in that case, however, was not so clear. While the court held that the was not taxable under the ordinance, it arrived at that determination because the City had waived its right to claim that the EUCLC was taxable after being alerted to the company's failure to pay and continuing to accept the payments. *GTE Southwest*, 980 S.W.2d at 939. Here, there was no waiver.

To the extent the Court looks to other jurisdictions, the more recent *Combs* case is a great deal more analogous than the cases CenturyLink cites. *Combs* specifically considered whether the EUCLC is properly included within the definition of "gross receipts" under a franchise tax virtually identical to those at issue, and concluded that it is. *Combs*, 270 S.W.3d at 262 ("we find as reasonable the [state] Comptroller's interpretation that" the EUCLC and other fees "represent 'gross receipts from business done in Texas.'"). The court held that EUCLC was taxable under a state franchise tax on "business done in Texas" because EUCLC charges were for "services" performed by "telephone companies." *Id.* at 261-62. *Combs* similarly involved a tax on gross receipts (which must include the "whole and entire amount of the receipts without deduction"). *Ludwigs*, 487 S.W.2d 522.

Additionally, the best evidence that revenues collected from EUCLC are taxable gross receipts derived from "exchange telephone service" is CenturyLink's own treatment of EUCLC in its day-to-day transactions with customers. On CenturyLink's bills, there are included charges for "Federal Subscriber Line & Access Recovery Charge," which are included under the listing for Local Services. LF 1344, 1350, 1363,

1367, 1377. Specifically, these amounts charged to customers are totaled and identified on CenturyLink's bills as part of "Local Exchange Services." LF 1339. Thus, CenturyLink itself identifies and treats the Federal Subscriber Line Charge (a/k/a EUCLC) as "Local Exchange Service." A telecommunications carrier's own description of its services will control whether services are taxable. *See* LF 1430 (*City Collector of Winchester*, Cause Nos. 10SL-CC02719, 10SL-CC03687 Order and Judgment, at \*19 n.7 ("In reaching their decisions in *City of Sunset Hills v. Southwestern Bell Mobile Sys., Inc.*, 14 S.W.3d at 59, and *City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d at 608, the court referenced the carriers' own characterizations and descriptions of their products and services.")). Just this year, a Missouri court, in determining that Voice Over Internet Protocol service was "telephone service" under the City of Winchester's gross receipts License Tax, relied on "Charter's own descriptions of its service and how it works supports Winchester's position.... For example, Charter routinely referred to itself as a 'telephone company' in regulatory filings, trademarked the term Charter Phone™, and claimed to offer its customers 'regular telephone service' that happens to be provided using a different technology." *Id.* at \*14.

CenturyLink argues that the descriptions on these bills are not persuasive evidence because they are designed for review by lay people. This argument fails. The Public Service Commission explicitly requires descriptions of charges to customers to be "clear, full, and meaningful." 4 CSR 240-33.045. In addition, this regulation requires "Governmentally mandated or specifically authorized charges . . . shall be identified on the customer's bill in easy to understand terms and in a manner **consistent with their**

**purpose or applicability.”** *Id.* (emphasis added). Even though the bills may be designed for lay persons, the charges must still be consistent with their purpose or applicability, which, admittedly by CenturyLink, is local exchange service. Thus, Missouri law places great weight on CenturyLink’s own admissions and characterization of services.

Further, while CenturyLink’s acknowledgment on the bills that the EUCLC is local telephone service is irrefutable evidence that the charge is local, it is *not* evidence that the other three revenue streams are not local. *See* App. Br. 61-62. CenturyLink would have the Court employ the logical fallacy that simply because the EUCLC is listed on a bill as local telephone service, the other three revenue streams cannot be local telephone service. That argument does not follow. Nor does Mr. Seshagiri’s affidavit properly dispute these admissions from CenturyLink. *Supra* Section III.b.

The treatment of EUCLC by CenturyLink as taxable under a gross receipts tax on telephone services is further demonstrated by CenturyLink’s agreement with Jefferson City to include EUCLC in its gross receipts on Jefferson City’s tax on “gross receipts solely derived from the charges for local telephone or telecommunication services in the city.” LF 873. Therefore, even under CenturyLink’s proffered narrower definition of exchange telephone services to include the qualifier “local,” EUCLC is clearly taxable under each of the License Taxes and the trial court properly granted summary judgment.

- ii. The License Taxes apply to revenue CenturyLink has collected from its customers for the Missouri Universal Service Fund and Federal Universal Service Fund in the calculations of gross receipts and CenturyLink has failed to include that revenue.**

It was undisputed in the trial court that amounts collected by CenturyLink customers for CenturyLink's contributions to the Missouri State Universal Service Fund ("SUSF") and Federal Universal Service Fund ("FUSF") are not included in calculating its payments of License Taxes to the Cities, and thus no License Taxes are paid on such amounts so collected. LF 1308-13. Just like the gross receipts License Taxes themselves, these are charges levied *on the companies*, not the end consumers. CenturyLink passes along these costs to customers in a separate itemization on its bills. Accordingly, just like the EUCLC, any sums collected by CenturyLink from its customers to pay *their* obligations to these Funds are "gross receipts."

Federal law requires "all *telecommunications carriers* who provide interstate and/or international services to pay a portion of *their revenues* to the Federal Universal Service Fund," which in turn is used to help those with disabilities or those who live in rural areas receive adequate telephone service. *Trevino v. Sw. Bell Tel. Co., L.P.*, CIV.A. M-04-377, 2005 WL 2346950, \*1 (S.D. Tex. Sept. 26, 2005) (emphasis added). Congress permitted the states to levy a similar charge on companies on purely intrastate phone services for state universal service funds. *Id.* Missouri has created such a fund. §392.248; 4 C.S.R. 240-31.010 – 31.110. These universal service fund charges are not fees levied upon *consumers*, but rather upon the businesses themselves, and telephone

companies may *elect* to separately itemize the FUSF charge on their customers' bills but are not required to do so.<sup>8</sup> The statute creating the SUSF specifies that the fund "shall be funded through assessments on all *telecommunications companies* in the state." Section 392.248.3 (emphasis added). These are, therefore, *costs of doing business* to CenturyLink that it separately itemizes on the bills to its customers.

CenturyLink argues that the Cities provided no authority for the inclusion of these revenues in the License Tax, however, the Cities asserted and the holdings of *Laclede Gas*, *Hotel Continental*, and *Ludwigs* are dispositive: 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. *But for* CenturyLink's provision of exchange telephone service or telephone service in each City, CenturyLink would not collect amounts to pay into the SUSF and FUSF from customers in each City. USF fees are similar to the gross receipts taxes in *Ludwigs*. USF fees are used to provide telephone services on a local level to schools, hospitals, or rural access, for example. Amounts collected from customers within each of the Cities under line items such as "Universal Service Fund Surcharge" are available to CenturyLink to pay these costs, making such revenues taxable gross receipts under *Ludwigs*. 487 S.W.2d at 522 (amounts collected by telephone

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<sup>8</sup> CenturyLink even states on its website that it is required to pay the FUSF out of its own revenues, and states that it recovers this cost by passing it on to its customers. *See* <http://www.centurylink.com/help/index.php?assetid=59> (Last accessed October 17, 2014).

companies “out of which receipts it could pay and discharge the obligations of its business” were taxable gross receipts under Kansas City’s License Tax). That such amounts arise out CenturyLink’s business of furnishing exchange telephone service or telephone service within each of the Cities and thus are taxable gross receipts is indisputable, because CenturyLink collects such amounts from identifiable customers specifically within each of the Cities. *See* LF 1339, 1344, 1350, 1363, 1369, 1377. CenturyLink admits that it does not include money it collects to pay the USF fees in its calculations of gross receipts, and these fees are taxed as revenue available to CenturyLink to pay costs of doing business in the Cities. Accordingly, the trial court did not err in granting summary judgment.

**iii. The License Taxes apply to revenue CenturyLink has collected from its customers for vertical or optional calling services and CenturyLink has failed to include that revenue.**

CenturyLink also admitted that it did not include in its calculation of its gross receipts money it charged customers for so-called “vertical” or “optional” calling services (“Vertical Services”), and thus no License Taxes are paid on such amounts so collected. LF 1308-12.<sup>9</sup> Vertical Services are extra services offered by telephone companies, whether as part of a bundled package or *à la carte*, such as caller ID, call waiting, call

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<sup>9</sup> It appears that CenturyLink did pay Wentzville’s license tax on Vertical Services in at least one taxing period (LF 1314), despite its assertion that this is not covered by license tax.

forwarding. *See Sw. Bell Tel. Co. v. Director of Revenue*, 78 S.W.3d 763, 764-765 (Mo. 2002) (offering a broad outline of telephone service and a definition of “vertical” services). There is simply no reason in law or logic supporting CenturyLink’s refusal to include in its statements of gross receipts money it charged customers for providing *actual telephone services*.

Vertical Services are “telephone services” like basic telephone services, and revenue received by CenturyLink from Vertical Service is appropriately included within “gross receipts.” This Court has held the same. *See Sw. Bell Tel. Co.*, 78 S.W.3d at 764-65 (“basic telephone service” and “vertical services operate in a similar manner”). This is also evidenced by the Missouri Public Service Commission’s (“MoPSC”) treatment of Vertical Services. Specifically, the MoPSC’s rules at 4 CSR §240-32.100, provide:

- (1) Each basic local telecommunications company shall provide all the minimum elements necessary for basic local interexchange telecommunications service prescribed in this rule.
- (2) The following technologies and service features shall constitute the minimum elements necessary for basic local and interexchange telecommunications service:

[ . . . ]

- (F) Availability of custom calling features including, but not limited to, call waiting, call forwarding, three (3)-way calling and speed dialing;

Consistent with these regulations are the “General and Local Exchange Tariffs” of Spectra and Embarq. These tariffs set forth descriptions and maximum charges for Vertical Services as part of each company’s General and Local Exchange Tariff that is filed with MoPSC, and also set forth the maximum charges for basic local telephone service. LF 639 (Spectra Tariff); 674 (CenturyTel Tariff), and 712 (Embarq Tariff).<sup>10</sup> CenturyLink argues that the tariffs demonstrate that Vertical Services are not “taxable local exchange services.” App. Br.. p. 64. While the Cities’ licenses taxes do not tax *local* exchange services, CenturyLink’s argument would fail even if the licenses taxes were so limited. The tariff defines exchange service as “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.” The “regulations and charges specified in the local or general exchange tariffs” *include* vertical services. Therefore Vertical Services are undoubtedly within the definition of telephone exchange service.

As it stands, Missouri law provides that Vertical Services are part of the “minimum elements necessary for basic local and interexchange telecommunications service” and gross receipts include the “the whole and entire amount of the receipts without deduction.” *Laclede Gas Co.*, 253 S.W.2d at 835. CenturyLink fails to distinguish this authority. Ultimately, CenturyLink provides no rationale for its unilateral

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<sup>10</sup> Courts make take judicial notice of tariffs filed with the MoPSC. *Cent. Controls Co., Inc. v. AT & T Info. Sys., Inc.*, 746 S.W.2d 150, 153 (Mo. App. 1988).

deduction of revenue derived from Vertical Services from gross receipts in calculating its License Taxes, nor can it, given the plain language meaning of telephone services and the state's regulatory treatment of Vertical Services.

That these revenues are properly included is perhaps best illustrated by the fact that CenturyLink included at least some revenues from Vertical Services in its calculation of Wentzville's License Tax for at least one tax-reporting period, but excluded these amounts in the other Cities, despite similarities in ordinance language. LF 1314. Thus, despite this Court's instruction that for purposes of occupational License Taxes, gross receipts include "the whole and entire amount of the receipts without deduction," CenturyLink is excluding revenue from Vertical Services. *Laclede Gas Co.*, 253 S.W.2d at 835; *Ludwigs*, 487 S.W.2d at 522. Because these revenues are collected for the provision of telephone services in all of the respective Cities, they are indisputably subject to the License Taxes.

**iv. CenturyLink did not include revenue collected from customers to pay the Cities' License Taxes, in violation of well-settled Missouri law.**

CenturyLink is required to pay License Taxes on revenue that it passes through and extracts from customers in order to pay the License Taxes. *Ludwigs*, 487 S.W.2d at 522. CenturyLink has admitted that it does not consider the amounts that it charges to its customers to satisfy its obligations to the Cities under the Cities' License Taxes to be "gross receipts," and has not paid taxes on those amounts. LF 1308-13. CenturyLink apparently believes that the definition of "gross receipts" is open to interpretation or

debate, and argues that the License Tax Fees are not “specifically authorized.” However, the law is clear. Over 40 years ago, the Court unequivocally held that the money telephone companies and other utilities collect from their customers to pay municipal gross receipts License Taxes should be included in the definition of “gross receipts.”

Relying on the foundation laid in *Laclede Gas*, this Court held that money collected to pay municipal gross receipts License Taxes are themselves “gross receipts.” *Ludwigs*, 487 S.W.2d at 522-23. In *Ludwigs*, the plaintiffs, citizen-taxpayers of Kansas City, argued that the city violated the law when it subjected the amount of money collected by a local utility from its customers to pay its municipal gross receipts tax to the gross receipts tax itself. In other words, the city taxed the amount that the utility company “passed on” to its customers to pay their obligations under Kansas City’s License Tax. The plaintiffs argued that the gross receipts License Tax should only apply to the sums collected for the actual sale of services. Citing *Hotel Continental* and *Laclede Gas*, among other authorities, the Court rejected that argument, stating that the License Tax is a tax levied on the *companies*—not the consumers—and “as such it is an item of cost or expense of doing business.” *Ludwigs*, 487 S.W.2d at 521-523. It was proper for the city to include in its calculation of the utilities’ gross receipt License Taxes the amount collected by the utility companies from the consumers to pay that tax. *Id.* Accordingly, the amounts that the utilities collected from their customers to pay the utilities’ gross receipts tax due to the city were “properly included as a part of the base for computing the tax....” *Id.* at 522. Again, this has been the law for decades. It is undoubted that any amounts charged by a company to its customers to pay the company’s municipal License

Tax is itself part of that company's "gross receipts," and taxes must be paid on those amounts.

CenturyLink attempts to distinguish *Ludwigs* by arguing that the ordinance in *Ludwigs* was broader than that in the Cities. However, CenturyLink misses the point of *Ludwigs*. The exact language of the ordinance in that case was never even analyzed. Rather, the Court held in general, broad terms, that the amount collected from customers to pay a gross receipts tax was properly included as part of the base. The revenue that is taxable here is not that arising from CenturyLink's compliance with the taxation ordinances, as CenturyLink argues, but rather it is that arising from CenturyLink furnishing telephone service to its customers in the Cities. CenturyLink would not collect License Taxes from customers were it not for CenturyLink furnishing services to customers.

Moreover, *Ludwigs* is not the only authority in which this tax was upheld. Even before *Ludwigs*, the Court and the MoPSC determined that such sums were properly included as gross receipts. In *State ex rel. Hotel Continental*, the Court noted that a tariff approved by the MoPSC that required a company to itemize sums collected for a License Tax on the company's customers' bills did nothing more than "permit [the] company to collect the money *with which to pay* the gross receipts tax imposed on *it* by [the] city." *Hotel Continental*, 334 S.W.2d at 77 (emphasis added). The Court observed that the MoPSC determined, in finding that the company was entitled to a certain rate of return on its business, that the company was entitled to an additional \$139,718 in revenue to be charged to its customers, which *included* \$75,491 *to pay the License Tax. Id.* The Court

even noted the testimony of one of the company's officers who stated that the amount charged to the customer would be "*the same* whether the gross receipts tax is shown as a separate item or is included in the...rate as such[.]" *Id.* at 84. The Court clearly contemplated that collection of amounts from customers to pay License Taxes are revenues *to the company*. And in an entirely separate order, in 1972, the MoPSC authorized an increase in rates that *specifically included* the gross receipts tax. *Application of Southwestern Bell Telephone Co.*, 17 MoPSC (N.S.) 234, 1972 WL 26198, \*10 (1972) ("Company will be authorized to file tariffs designed to provide gross intrastate revenues in the amount of \$336,742,140 per annum, including Municipal Gross Receipts and Franchise Taxes of approximately \$15,707,200[.]"). Therefore, it is beyond doubt that under Missouri law sums collected by companies to pay their gross receipts franchise taxes are themselves a gross receipt subject to the tax.

The Fifth Circuit Court of Appeals also examined this very issue and is in accord. *See City of Dallas v. Federal Communications Commission*, 118 F.3d 393 (5<sup>th</sup> Cir. 1997). In *City of Dallas*, cities appealed a decision of the FCC that excluded from the definition of "gross revenues" that portion of the revenue collected by cable operators from their customers to pay the cities' franchise fees. The court reversed the FCC's rulings and rejected the cable companies' arguments, reasoning that because the fee is levied on the companies and not the consumers, it is a simple cost of doing business, and the term "gross receipts" therefore "unambiguously" includes all revenues derived from business within the respective jurisdictions, including money collected to pay the fee in question. *Id.* at 396-398. The exact situation is presented here. There were no material facts in

dispute and the law is indisputable. The trial court did not err in entering summary judgment on Counts I-V.

**IV. The trial court did not err in imposing a five year statute of limitations or awarding damages pursuant to that statute of limitations because §516.120 applies in that §71.625.2 was not in effect at the time this action was filed.**

**a. Preservation of error**

CenturyLink asserts for the first time on appeal that several statutes of limitation apply to bar the Cities' claims, and that the Cities are "creatures of the legislature" and therefore they have no vested or substantial rights immune to retrospective application of the law. App. Br. 72-73. These arguments are not preserved and should be denied.

**b. The new three year statute of limitations operates prospectively only and does not apply to the Cities' prior-filed claims.**

On the date this suit was filed, July 27, 2012, the governing limitations period for the Cities' claims for delinquent taxes and fees was five years under §516.120 RSMo.; *see Kansas City v. Standard Home Improvement Co., Inc.*, 512 S.W.2d 915, 918 (Mo. App. 1974) (§516.120 applied to municipal License Tax). CenturyLink urges this Court to apply; §71.625.2, but that statute did not take effect until August 28, 2012. That statute applies prospectively only.

CenturyLink misstates the law when it claims that a new statute of limitations works retroactively to limit the Cities' damages. CenturyLink's focus on vested rights misses the point. Whether or not the new statute of limitations operates prospectively or retrospectively is not based on vested rights in this case. The correct standard for

determining whether a new, shorter statute of limitations period applies retrospectively is if the legislature provided a “savings clause” so that those with existing claims could have some grace period to assert those claims. *Goodman v. St. Louis Children’s Hosp.*, 687 S.W.2d 889, 891-892 (Mo. 1985) (while statutes of limitations *may* apply retrospectively, “those 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*” under the new statute (emphasis added)). If no such “savings clause” provision is included, it is presumed that the legislature intended the new limitations period to apply prospectively only. *Id.*; *Swartz v. Swartz*, 887 S.W.2d 644, 650-651 (Mo. App. 1994) (when no grace period provided for, new limitations period shortening time only applies prospectively); *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 826 n.1 (8<sup>th</sup> Cir. 2004) (“Missouri courts will not apply a shortened limitations period to a pending claim, however, unless the statute has some ‘saving language’ in it providing for a reasonable time in which to file suits on existing claims.”). In fact, the *Goodman* court *permitted* the plaintiff before it to sue under the older, longer limitations period because the new statute did not have such a savings clause. This has been the law in Missouri for over a century, and CenturyLink cites no recent case that disputes any of the authority provided here. *Cranor v. Sch. Dist. No. 2, of Twp. No. 62, of Range No. 32, in Gentry Cnty.*, 151 Mo. 119, 52 S.W. 232, 233 (1899) (new limitations statute without a grace period “would not be a statute of limitations, but an unlawful attempt to extinguish rights, and destroy the force of contracts. It is essential, therefore, to their validity that they allow a reasonable time after they are passed for the commencement of suits upon existing causes of action”). Section

71.625.2, does not have a savings clause. Accordingly, it only applies prospectively, and the correct limitations period here is five years.

In a last ditch attempt to assert that the Cities' claims are barred by *some* statute of limitations, CenturyLink argues for the first time on appeal that six different statutes of limitation apply here. However, none of these statutes are applicable to the Cities' claims. Section 516.120 is the proper statute of limitations in this case. *Standard Home Improv. Co.*, 512 S.W.2d 915, 918 (Mo. App. 1974) (statute of limitations for City's occupational License Tax was five years pursuant to §516.120); *Stone v. Dir. of Revenue*, 358 S.W.3d 514, 519 and n.6 (Mo. App. 2011) ("The five-year statute of limitations for civil actions under section 516.120, not the three-year limit of section 143.951, applies to statutory tax collection actions."). The trial court properly applied a five year statute of limitations in this case.

The trial court also properly awarded damages going back to January 1, 2007. Any of CenturyLink's unpaid taxes in calendar years 2007-2012 (including unpaid taxes from the first day of 2007), which were due after July 28, 2007, five years prior to the date of the filing of this lawsuit, were properly at issue in this case. The statute of limitations begins to run the day a tax becomes delinquent. *Columbia ex rel. Exchange Nat'l Bank v. Johnson Inv. & Rental Co.*, 462 S.W.2d 133, 136 (Mo. App. 1970) ("[N]either Section 516.120 nor any other statute of limitations commences to run until the obligation to pay arises," and thus the statute of limitations ran from the day the taxes were "due and payable.") The taxes at issue were due after July 28, 2007, and accordingly the trial court did not err in awarding damages going back to the beginning

of 2007.

**V. The trial court did not err in granting summary judgment on Counts XX-XXIV because there was no genuine issue of fact, the Cities are persons entitled to sue under §392.350, and CenturyLink willfully violated the law.**

**a. Preservation of error**

CenturyLink argues for the first time on appeal that the court should have applied the principle of *noscitur a sociis* and that evidence of willfulness only related to the License Tax claims and not the rights-of-way claims. App. Br. 90. These claims are incorrect, not preserved, and should be denied. Further, this point violates 84.04(d) because it asserts several errors within one point. App. Br. 74. Point V preserves nothing for appellate review and is appropriately denied.

**b. Summary Judgment on Counts XX-XXIV was proper.**

Section 392.350 provides a cause of action to anyone who suffers any “loss, damage or injury” as a result of any telephone company’s act that is “prohibited, forbidden or declared to be unlawful.” It also allows a court to award attorneys’ fees to the plaintiff if the court concludes that the unlawful conduct of the telephone company was “willful.” It is the “long standing doctrine that the statute is to be liberally construed for the public’s...protection,” and “with a view to the public welfare.” *De Paul Hosp. Sch. of Nursing, Inc. v. Sw. Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo. App. 1976) (hereinafter “*De Paul*”). Any consideration given to the telephone company or other utility is “merely incidental.” *Id.*

In Counts I-XIX, the Cities put forth undisputed evidence that CenturyLink

underpaid the License Taxes in each City, and violated the ROW Codes of Cameron and Wentzville. These violations also contravene §392.350 which is a “remedial provision,” and allows “persons affected by *any act or omission in violation of the law* or order of the Public Service Commission to recover from the offending company all losses resulting therefrom....” *De Paul*, 539 S.W.2d at 548 (emphasis added). Therefore, summary judgment was properly entered.

**c. The Cities are “persons” entitled to sue under §392.350.**

The Cities are “persons” for purposes of §392.350, entitled to sue under that statute. The Cities did not assert in the trial court, nor do they assert here, that they are “corporations” under §392.350, so CenturyLink’s arguments regarding municipalities as corporations under the statute are irrelevant. The Cities *are* persons, however, and Missouri courts have so held. *See Shaw v. City of St. Louis*, 664 S.W.2d 572, 576 (Mo. App. 1983) (holding that municipalities are “persons” under 42 U.S.C. §1983). CenturyLink’s attempt to twist the Cities out of standing to sue under §392.350 fails because it is unsupported by a fair reading of the plain text of the statute.

While the definitions established in §386.020 apply to §392.350, they do not provide a conclusive answer as to who is a “person.” Under §386.020, the entirety of the definition of “person” states that it “*includes* an individual, firm or copartnership.” §386.020(40) (emphasis added). When a statutory definition uses the word “includes,” it “has almost universally been construed by Missouri courts as a term of enlargement, as providing an illustrative, non-exclusive, example, or as both.” *Short v. S. Union Co.*, 372 S.W.3d 520, 532 (Mo. App. 2012). When the legislature defines a term using the word

“includes, it is not a hard-and-fast definition of a closed class, but is an open-ended list of items that it has in mind as a base line or as a guide for interpretation. Here, by using the word “includes” in the definition of “person,” the legislature was giving examples of entities it had in mind as a “person” but was not providing an exhaustive list.

The fact that “person” is not conclusively defined in §386.020 is further buttressed by a comparison to other terms that *are* conclusively defined in the statute. For instance, a “noncompetitive telecommunications service”, *is* “a telecommunications service other than a competitive or transitionally competitive telecommunications service” (§386.020(37)), and the “Commission” *is* “the ‘Public Service Commission’ hereby created” (§386.020(7)), while a “line” “*includes* route” (§386.020(29)) (emphasis added). Accordingly, the definition of “person” under §386.020 does not exclusively establish what entities are or are not “persons.”

Furthermore, another statute indicates that a city is a “person” for purposes of §392.350. Section 1.020, applicable to *all* statutes states: “unless otherwise *specifically provided* or unless plainly repugnant to the intent of the legislature or to the context thereof ... [t]he word ‘person’ may extend and be applied to bodies politic and corporate.” (emphasis added). Here, the statute does not specifically provide that §1.020 does not apply, and therefore CenturyLink’s assertion that it should not apply has no merit. CenturyLink, citing *J.S. DeWeese Co.*, 881 S.W.2d 638, contends that the definitions in §1.020 do not apply where they contradict the specific definition of “person” provided in the relevant statute. Here, unlike *J.S. Deweese Co.*, the definition of

“person” in §1.020 does not conflict with the definition of “person” in §386.020 because merely provides examples, not an exhaustive list.

Because §386.020 does not specifically provide an exclusive enumeration of what “person” includes, merely examples, and it is not “plainly repugnant” to legislative intent or the context of §392.350, municipalities can be included as “persons.” On the contrary, a plain reading of §392.350 suggests that it is intended to provide a broad remedy for *any* person aggrieved and injured by the unlawful conduct of a telephone company, not just “private business organizations, and private individuals” as urged by CenturyLink. App. Br. 77. Indeed, §392.350 is a “remedial statute,” and is accordingly to be “liberally construed.” *De Paul*, 539 S.W.2d at 548; *see Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. 1999) (“[r]emedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.”) (internal quotation and citation omitted).

CenturyLink’s arguments that municipalities are not “persons” do not change the plain import of the law. Basic principles of statutory construction indicate that municipalities may sue as persons under §392.350 RSMo. Yes, “municipality” has its own definition, but to suggest that a “municipality” cannot also be a “person” is nonsensical. Both “municipality” and “person” are open-ended definitions, and nothing in the text of the statute prohibits the interpretation that a “municipality” can be a “person” depending on the context. Section 392.350 explicitly states that any person may sue a telecommunications company when its unlawful act causes damages, and the courts have

stated that this law is to be construed liberally to effect its remedial purposes. *De Paul*, 539 S.W.2d at 548. Nor is a municipality precluded from being a person under *Chapter 392* simply because the words are listed separately in the same lists in various inapplicable provisions of Chapter 386. *See App. Br. 78-79*. Accordingly, that a municipality is a “person” is not “plainly repugnant” to the intent of the legislature; it is perfectly in alignment with its intention that the law be “remedial.”

**d. CenturyLink’s unlawful actions under Counts I-V and violations of §392.200.3 provided a basis for relief under §392.350.**

CenturyLink, through its willful violations of the various provisions of the Cities’ codes, has violated §392.200.3, that prohibits telephone companies from subjecting any “person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever....” The law is to be construed liberally. *De Paul*, 539 S.W.2d at 548. All of the Cities have been unduly and unreasonably prejudiced and disadvantaged by CenturyLink’s willful refusal to fully report its gross receipts and pay all amounts due to the Cities under the License Taxes, which in turn has deprived them of significant revenue to which they are legally entitled. Harrisonville has likewise been unduly and unreasonably prejudiced and disadvantaged by Embarq’s willful breach of its contract with Harrisonville. Cameron and Wentzville have suffered the additional undue and unreasonable prejudice and disadvantage by CenturyLink’s unlawful occupation of the their rights-of-way, and Cameron has suffered the further undue and unreasonable prejudice and disadvantage by the CenturyLink’s refusal to pay the required User Fee. There were no genuine issues of material facts regarding these violations.

**1. The language of §392.200.3 is clear and unambiguous, and CenturyLink’s interpretation imposes limitations contrary to its plain terms.**

CenturyLink argues that §392.200.3 does not apply. CenturyLink’s arguments, however, amount to nothing more than an invention of a limitation of scope that simply does not exist in the language of the statute itself. Indeed, the plain text of §392.200.3 is clear and expansive: no telecommunications company shall subject *any* person to “*any* undue or unreasonable prejudice or disadvantage *in any respect whatsoever...*” (emphasis added). There simply is no ambiguity in this language, nor are there any qualifiers or modifiers in the text that would limit its applicability. Missouri courts cannot read a legislative intent into a statute that contradicts the plain language used by the legislature, and courts “will not add exceptions or exclusions beyond those explicitly provided by the legislature.” *State v. Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc.*, 97 S.W.3d 54, 61 (Mo. App. 2002). If the legislature intended that §392.200.3 be applied only to cases of “rates charged and services provided,” or only be applied to protect certain customers, as urged by CenturyLink, then it would have used such language, instead of using the entirely opposite language that the section applies “in any respect whatsoever.” *See Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 402 (Mo. 1986) (“courts must construe a statute as it stands...and must give effect to it as written.... This Court may not engraft upon the statute provisions which do not appear in explicit words or by implication from the words in the statute.”) (internal citation omitted). CenturyLink’s refusal to comply with the Cities’ lawfully enacted

ROW Codes and refusal to pay the License Taxes constituted “unreasonable disadvantage” as proscribed by §392.200.3. Because the Cities are “persons” entitled to sue for any “unreasonable prejudice or disadvantage,” there is no doubt that the trial court’s judgment was proper.

Moreover, this section is a remedial statute, and is to be read broadly with a “view to the public welfare,” and with the “protection given to the utility is merely incidental.” *De Paul*, 539 S.W.2d at 548. Indeed, when §392.200.3 is read in *pari materia* with §392.350, and in light of this remedial purpose, the intent of the legislature becomes abundantly clear: telecommunications companies are to be held strictly accountable for any unlawful acts, which include subjecting any person to any “unreasonable prejudice or disadvantage *in any respect whatsoever*.”

Further, while *one* of the purposes of the law is to prohibit rate discrimination and protect customers, that is not the *only* type of malfeasance the legislature intended to prohibit. Again, if the legislature intended such a limitation, it would have included such language in the text of the statute. Instead, the statute unequivocally applies to actions by “*any* particular person.” Simply because there exist statutes for the Cities to collect unpaid taxes does not preclude the Cities’ ability to sue for willful violations of its laws under Chapter 392. CenturyLink’s argument that this Court should apply limitations that are not found in the text of the statute itself must be rejected. CenturyLink’s illegal behavior subjected the Cities to “undue or unreasonable prejudice or disadvantage” by depriving them of revenues to which they were legally entitled.

e. **CenturyLink's violations of §392.080 provided a basis for relief under §392.350.**

Section 392.080 provides, “any telegraph or telephone company desiring to place their wires, poles, and other fixtures in any city, ... they shall first obtain consent from said city through the municipal authorities thereof.” Here, CenturyLink provides telephone service and has placed poles, wires, and other fixtures and property incidental to providing such service in Cameron and Wentzville's' rights-of-way, and yet they has willfully refused to obtain the consent for that occupation.

CenturyLink relies solely on its flawed argument that the Rights-of-Way Agreements are franchises to refute this clear basis for liability. As explained above, those agreements are legal and are not franchises. Cameron's ROW Code provides that any person “who desires to use, operate, maintain, or otherwise locate facilities within any public way shall first obtain...a public ways use permit granting the use of such public ways.” LF 1319-20; 897 (Cameron's ROW Code, §10.5-55). Section 10.5-151 of Cameron's ROW Code also instructs those who desire to occupy the rights-of-way of Cameron to apply for and obtain such consent in the form a public ways use permit agreement. LF 904. Similarly, Wentzville's ROW Code requires a Rights-of-Way Agreement. LF 1322; 931(Wentzville's ROW, §655.100). CenturyLink has not obtained the required agreements and consequently is occupying the public rights-of-way of those cities in violation of the ordinances and §392.080, which requires municipal consent. This illegality provided additional grounds for relief.

**1. Section 392.080 requires the *current* consent of the municipality.**

CenturyLink argues that it has not violated this law because it believes that it only requires permission *before* the rights-of-way are accessed. CenturyLink argues that since it is occupying the rights-of-way *presently*, irrespective of whether such occupation is now authorized, then §392.080. does not apply. However, §392.080 requires municipal consent for telephone companies to place their facilities in a city's rights-of-way.

This Court has already rejected CenturyLink's interpretation, and CenturyLink does nothing to refute or distinguish that authority. App. Br. 85-86. Indeed, where a telephone company was present in the rights-of-way through a franchise, but the franchise had expired, the Court granted a writ of ouster to the city because the telephone company *no longer* had the consent of the city, citing the predecessor to §392.080. *City of Lebanon*, 85 S.W.2d at 617. Just as it was not relevant to the Court in *City of Lebanon*, it does not matter here that the CenturyLink entities are currently in the rights-of-way, or arguably were present at some point with Cameron's or Wentzville's permission. What matters now is that Spectra and CenturyTel of Missouri are defiantly refusing to obtain the consent of the Cameron and Wentzville as required by state law and the respective Cities' ROW Codes. Webster's Dictionary definition of the word "place" cannot change the fact that Missouri courts have *already determined* that continuing and present consent is necessary under this statute.

**f. The trial court did not err in finding CenturyLink’s conduct was willful under §392.350.**

As explained above, CenturyLink’s violations of the License Taxes and ROW Codes was clear and the law is well-settled. The trial court therefore did not err in awarding the Cities attorneys’ fees. Even where the law has been settled for decades, even in the face of state-wide class actions suits wherein it agrees to pay taxes on these services, and somehow ignoring the explicitly contradictory statements it makes to its own customers, CenturyLink claims its failure to pay taxes was not willful. CenturyLink has no good faith argument that it has been following the law, and its improper affidavits do not provide it with one. CenturyLink’s outright duplicity and willful behavior is evident by its statements to the Court that directly contradict its admissions to its own clients – for example, maintaining that EUCLC is not included in local exchange telephone service while *telling its customers* that EUCLC is “local exchange telephone service.”

CenturyLink has acted in an inconsistent and arbitrary manner, and the trial court properly found its behavior to be willful under §392.350. The “willful” standard under §392.350 must be “liberally construed” as a remedial statute to protect the public. *De Paul*, at 548. In *De Paul*, the Court upheld attorneys’ fees for a “willful” violation of tariffs under §392.350 where a telephone company classified a nursing school improperly at a higher tariff classification, yet chose to classify other similar businesses with a different interpretation of the tariff. The Court held that under §392.350 the term “willful” merely requires a showing of conduct of a telecommunications company that

had a “conscious disregard” or acted in a manner that was “**inconsistent and arbitrary.**” *Id.* at 548-49, 552 (emphasis added). Specifically, the Court held that in the context of rate discrimination (like the telephone company’s arbitrary and discriminatory tax payments here), the term:

‘willful’ means either intentionally charging an incorrect rate knowing it was incorrect, or charging a rate when the utility has no reasonable basis...

This construction is consistent with the regulatory scheme of the law which places the burden of charging the correct rate and the correct rate only, upon the utility.

*Id.* at 549.

Thus, the higher standard of “intent” – such as the intent required for “malicious” prosecution – has no bearing on a statutory standard that is satisfied with no showing of any ill intent and merely requires lack of “reasonable basis,” or inconsistent or arbitrary actions, which are legally construed to meet the liberal statutory standard established by §392.350.

Applying *De Paul* to the instant case, it is clear that CenturyLink’s conduct towards the Cities was “willful” under §392.350. It intentionally underreported and underpaid the License Taxes *knowing that it was unlawful*. It has *admitted* that it intentionally excluded certain categories of revenues earned within the Cities in its calculations of gross receipts. And as set out above, the definition of “gross receipts” for purposes of municipal License Taxes has been settled *for decades*. There is no dispute that the categories of revenues that CenturyLink routinely excluded from its calculations

of its gross receipts for purposes of the License Taxes was unlawful, and yet CenturyLink did it anyway, without any reasonable justification in law. Moreover, the Cities' counsel informed CenturyLink's counsel of their unlawful conduct, and yet they persisted. LF 1314-15. CenturyLink was also aware of this issue through the ongoing litigation throughout the state between municipalities and telephone companies over this very issue, one which included a lawsuit involving a CenturyLink entity in Jefferson City, and one which included several CenturyLink entities and cities across the state. LF 1315-17. In both of these instances, it was clear to cities all over the state that these taxes were owed, and CenturyLink agreed to pay taxes on some disputed amounts. That these cases involved different cities and different ordinances is unimportant – there is a state-wide consensus, known by CenturyLink, that these taxes are owed. Despite this unequivocal law, despite the litigation over this issue, and despite the admonitions from the Cities, CenturyLink simply persisted in underreporting and underpaying the License Taxes. No other conclusion can follow from this than CenturyLink knew that what it was doing was unlawful, and yet it continued.

CenturyLink alleges that the Cities' evidence of willfulness in the trial court was limited to CenturyLink's knowing misinterpretation of law and CenturyLink's admission in an agreement with Jefferson City. App. Br. 88. This is incorrect. CenturyLink's own assertions to the trial court and now this Court are directly contradicted by party admission in description of the revenue to its own customers and the MoPSC. Specifically, CenturyLink – even after the lawsuit – refused to pay Federal Subscriber Line Charges (LF 1308-13) and argued to the trial court that such revenue is not taxable

“exchange telephone service” (LF 1038-39), despite unequivocal statements to customers – even after this lawsuit – that such charges were for “Local Exchange Services.” LF 1466. By definition, continuing to assert diametrically opposite statements to this Court and the public is certainly “inconsistent and arbitrary” and lacks any reasonable basis. In short, both statements cannot be true – thus proving the “willful” conduct under the statute.

Similarly, CenturyLink asserts Vertical Services, and the money collected therefrom (LF 1308-14) are not included in “Exchange Telephone Service” as set forth in the tax ordinances even though its own Tariff expressly states that they are included within the services defined and regulated by the *General and Local Exchange* Tariffs. In that tariff, the term “exchange services” are CenturyLink’s telecommunications services “specified *in the Local or General Exchange Tariffs.*” LF 1466, 1480. Again, CenturyLink asserted in the trial court an interpretation directly contrary to what the MoPSC and public are told is included within “exchange services.” CenturyLink and its subsidiaries have also entered into agreements they expressly acknowledge as “lawful” with municipalities in numerous cities (LF 573-83, 604, 1387, 1401, 1412, 1470-71), but inconsistently, discriminatorily, and without any reasonable explanation deny such lawfulness and refuse to comply with such rights-of-way requirements for an agreement in Cameron and Wentzville after the same cities caught CenturyLink violating the tax ordinances. LF 1471-72.

In short, regardless which of CenturyLink’s stories is true – the one it has told the MoPSC and its own consumers every month on the bills or the one it told the trial court

and asserts in this Court to evade its tax obligations – there was no genuine dispute that CenturyLink’s violations are based on the same kind of “inconsistent and arbitrary” conduct that the *De Paul* court held satisfied the definition of “willful” under the remedial statute.

Moreover, CenturyLink’s behavior forced the Cities to turn to litigation to enforce their rights, which is further evidence of willfulness under *De Paul*. The *De Paul* court considered such unjustifiably hostile posturing, which requires litigation to vindicate clear rights, to itself be evidence of unlawful “willfulness” under §392.350: “Forcing [the nursing school] to pursue its claim through the Public Service Commission and the courts to rectify this situation, constituted a willful violation of its duty to charge only the correct rate.” *De Paul*, 539 S.W.2d at 552. Here, CenturyLink’s refusal to comply with the Cities’ ordinances, despite the unequivocal precedent on the subject, and its insistence that the Cities subject themselves to the expense and annoyance of litigation buttresses the proposition that CenturyLink’s conduct was “willful.”

CenturyLink’s attempt to distinguish *De Paul* completely fails because it misconstrues the full import of what that case holds, again attempting to impermissibly narrow the law. *De Paul* does not stand for the narrow proposition that the “willfulness” standard only applies in cases of rate discrimination. Rather, it unambiguously instructs that as a “remedial provision,” §392.350 allows “persons affected by *any act or omission in violation of the law* or order of the Public Service Commission to recover from the offending company all losses resulting therefrom.” *De Paul*, 539 S.W.2d at 548 (emphasis added). Here, the Cities laid out *numerous* violations of the law, both state and

municipal, ranging from failure to pay the requisite taxes, failure to obtain municipal consent to occupy the rights-of-way, and breach of contract. The Cities also established that they have been damaged by this unlawful conduct, most notably by being deprived of significant amounts of revenues to which they are legally entitled.

**g. The Cities established undisputed evidence of CenturyLink’s willful violations of the ROW Codes.**

CenturyLink argues for the first time on appeal that the Cities’ evidence establishing willfulness only related to the License Tax claims, and not the rights-of-way claims. This is untrue. As explained above, the Cities established undisputed evidence that CenturyLink and its subsidiaries have entered into agreements they expressly acknowledge as “lawful” with municipalities in numerous cities (LF 573-83, 604, 1318, 1387, 1401, 1412, 1470-72) but inconsistently, discriminatorily, and without any reasonable explanation deny such lawfulness and refuse to comply with Cameron and Wentzville’s ROW Codes. LF 1471-72. Therefore, there was no genuine dispute of fact that the Cities were entitled to summary judgment on Counts XX-XXIV.

**VI. The trial court did not err in entering summary judgment against CenturyLink, Inc., CenturyTel Long Distance, LLC, and Embarq Communications, Inc., because they were proper defendants in that they engaged in illegal actions.**

CenturyLink argues that summary judgment was improperly granted against three specific appellants essentially because the Cities failed to “pierce the corporate veil.” App. Br. 91-93. This point relies exclusively on CenturyLink’s improper reading of the

License Taxes to include the word “local” where no such word exists, and on the faulty and conclusory affidavit discussed by the Cities under point III.b. It could be denied for those reasons alone. Moreover, however, CenturyLink’s legal argument is false. The Cities were not required to pierce the corporate veil or satisfy the “*Mitchell*” factors. The Cities did not seek summary judgment against CenturyLink, Inc, CenturyTel Long Distance, LLC or Embarq Communications, Inc. based on the judgments against Spectra, CenturyTel of Missouri, and Embarq. Rather, the Cities established that they were entitled to summary judgment against those appellants *in their own right*, based on the activities of those entities. This is not about piercing the corporate veil, it is about the illegal activities of each and every CenturyLink entity.

A municipal occupational License Tax like those at issue, imposed as they are on the CenturyLink’s gross receipts, is a tax “upon the privilege of doing business” within the taxing authority’s jurisdiction. *Kansas City v. Graybar Elec. Co., Inc.*, 485 S.W.2d 38, 40 (Mo. 1972) (“The License Tax in question is imposed upon the privilege of conducting the business of merchant in Kansas City.”). These taxes are imposed on the *companies* for the privilege of access to customers within the respective cities, and not the companies’ end consumers themselves. Missouri courts have consistently and for decades held that the “*company* must pay the tax, whatever the total amount thereof, and that total is a fixed and unchangeable...*operating expense*.” *Hotel Continental*, 334 S.W.2d at 82 (emphasis added). This Court has even said that “[n]o one will deny...that the amount...of a valid gross receipts tax assessed against [the] company by [a] city constitutes an expense of operation in the exact amount of the total of the tax so

assessed.” *Id.* (emphasis added). The License Taxes are, therefore, levied upon the *CenturyLink entities*, wherein their gross revenues derived from customers in the Cities are essentially a metric for the value of the privilege of doing business in the Cities, and are *not* imposed upon the end consumers for the value of any sale of any specific service. Accordingly, it is *CenturyLink’s* legal responsibility to pay the License Taxes as a cost of doing business.

It is admitted that CenturyLink, Inc, pays “License Taxes to [City] on behalf of the entities that provide telephone service in [City].” LF 1301-1304. It also admitted “that companies subject to the ordinance are required to report the taxable gross receipts in a sworn statement.” LF 1290-94. As such, CenturyLink, Inc. has purported to calculate and pay the License Tax required to be submitted under a sworn statement – underpayment of which was the very act of illegality. Therefore, this is unlike *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W.2d 779 (Mo. App. 1993), where payment of rent did not make a parent company liable for the many obligations under the lease. Here, the act of underpaying the License Taxes, required to be submitted under sworn statement, cements CenturyLink, Inc.’s guilt because it is the act of underpayment itself which is illegal. The Cities sought a declaration that going forward, License Taxes are to be paid on the sources of revenue at issue. Therefore, a judgment against CenturyLink, Inc., as payor of the taxes was not only appropriate, it was necessary. This was to ensure that the taxes will be properly paid in the future.

CenturyLink argues that CenturyTel Long Distance and Embarq Communications were not proper defendants because “neither provided local exchange telephone service”

in the Cities. App. Br. 93. To support this conclusion, CenturyLink again relies on its improper testimony. *Supra* III.b. As explained above, the Cities' License Taxes do not tax the gross receipts of companies furnishing *local* exchange telephone service – this term is a creation of CenturyLink's put forth to avoid liability. Further, those entities have provided telephone service and/or exchange telephone service. CenturyTel Long Distance, LLC is currently paying the License Tax in Cameron and Wentzville (LF 1286-87, 1350, 1377) and thus through its actions admits that it provides services subject to taxation under those respective License Taxes. Again, the telecommunications carrier's own description of the services it provides carries great weight, and Appellants cannot continue to say one thing to their customers while saying something else to the Court. The trial court did not err in granting summary judgment against these three entities, each of whom violated the law.

Summary judgment for tax liability against defaulting taxpayers such as CenturyLink here was both appropriate and supported by precedent specifically on claims regarding interpretation of municipal gross receipts License Taxes, because such issues are matters of law. *See Ludwigs*, 487 S.W.2d 519 (granting summary judgment holding that amounts collected by telephone company and other utilities to pay Kansas City's gross receipts License Tax was taxable under such tax); *City of Jefferson v. Cingular Wireless, LLC*, 04-4099-CV-C-NKL, 2005 WL 1384062 (W.D.Mo. June 9, 2005) (granting Cities' motion for partial summary judgment that mobile telephone service was subject to License Taxes on telephone or telephonic services); LF 1430 (*City Collector of Winchester*, Cause Nos. 10SL-CC02719, 10SL-CC03687, granting partial summary

judgment to City that VoIP provider was subject to City's License Tax on telephone services). The trial court properly granted summary judgment on all of the above counts.

**CROSS APPEAL**

**POINT RELIED ON**

- I. The trial court erred in denying summary judgment on Count XVI because there was no genuine dispute of fact that Harrisonville was entitled to judgment as a matter of law on the breach of contract claim in that Embarq's contract with Harrisonville was supported by adequate consideration.**

**ARGUMENT**

Harrisonville demonstrated a right to judgment as a matter of law and the trial court erred in denying summary judgment on Count XVI because the behavior found illegal under Counts I-V established a breach of the Harrisonville Contract. Harrisonville entered into a contract with Embarq entitled "Rights-of-Way Use Agreement for Communications Facilities" ("Harrisonville Contract"), on October 26, 2009. LF 1318. In the Harrisonville Contract, Harrisonville agreed to permit Embarq to occupy and use its rights-of-way to install and maintain certain communications facilities. LF 587. This agreement was in exchange for Embarq's express, contractual agreement to comply with Harrisonville ordinances and pay all municipal taxes due to Harrisonville, including the License Tax; 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, among other consideration and mutual promises. LF 587-91, 1318.

Nevertheless, despite this express contractual obligation to comply with the duly enacted ordinances of Harrisonville, Embarq failed to pay the full amounts due under its License Tax by routinely excluding from its calculations of its gross receipts amounts that by law were required to be included, in violation of the law, and consequently Embarq materially breached its contract with Harrisonville. LF 1310-11.

To establish a breach of contract, the party claiming breach must show: (1) the existence of an enforceable contract; (2) the presence of mutual obligations arising under the contract; and (3) the failure to perform an obligation specified in the contract. *School Dist. of Kansas City v. Bd. of Fund Comm'rs*, 384 S.W.3d 238, 259 (Mo. App. 2012). Additionally, where the party claiming breach seeks a remedy at law, it must show damages. *Id.*

Here, there was no dispute that Harrisonville satisfied all elements of its breach of contract claim and was entitled to judgment as a matter of law on that claim. Harrisonville has an enforceable contract with Embarq. LF 1318. There was no genuine dispute that Harrisonville performed its obligations under the contract by granting to Embarq the privilege of constructing, operating, and maintaining its facilities within the rights-of-way of Harrisonville. LF 1318-19. Embarq, however, breached the Harrisonville Contract by failing to pay the full amounts due under Harrisonville's License Tax and by failing and refusing to comply with Harrisonville's ordinance imposing the License Tax, as recognized by the grant of summary judgment on Counts I-V. LF 1310-11, 1692-95 ("Judgment is entered in favor of Cities...Harrisonville...Defendants failed to pay taxes, as required by law, under the

Cities' respective License Tax Ordinances...."). As a consequence of this breach of a material term of the Harrisonville Contract, Harrisonville was damaged in that it was deprived revenue to which it was legally entitled. LF 1693 ("Damages are hereby awarded to plaintiff Cities and against defendants jointly and severally as follows: ... \$20,401.78 for Harrisonville...."). There were no material facts in dispute because Embarq actually admitted that it routinely excluded certain categories of revenues from its calculations of its gross receipts for purposes of Harrisonville's License Tax that by law should have been included. LF 1310-11. As a result of Embarq's undisputed breach of the Contract, Harrisonville demonstrated entitlement to an award of attorneys' fees. LF 1319 (Section 7.3 of the Harrisonville Contract).

In the trial court, Embarq's only argument was that the Harrisonville Contract failed for lack of consideration because of the pre-existing duty rule. LF 1044-46. Embarq contended that it was already obligated to pay taxes under Harrisonville's ordinance so the contract was not supported by consideration. Obviously, this argument ignores Embarq's other obligations under the contract such as complying with certain limitations on its use of the rights-of-way, reimbursing the City for its costs associated with the installation, maintenance, repair, and use of Embarq's facilities, obtaining insurance to protect the City; indemnifying the City, and foregoing any cause of action against the City for loss, cost, expense, or damage to Embarq's facilities. Those contractual obligations are not imposed by the ordinance and therefore an exception to the pre-existing duty rule applies, as point out by Harrisonville in the trial court.

Missouri law is clear that where a subsequent contract imposes duties different from pre-existing duties in an original agreement or law, these duties are sufficient consideration to support the new contract. *Harris v. A.G. Edwards & Sons, Inc.*, 273 S.W.3d 540, 544-45 (Mo. App. 2008) (“[I]f the subsequent contract imposes new or different obligations, i.e., it is not identical to the pre-existing duties, this constitutes sufficient consideration.”); *Ashland Oil, Inc. v. Tucker*, 768 S.W.2d 595, 601 (Mo. App. 1989) (holding that there was “adequate consideration” to support a new contract where the new contract, in addition to the pre-existing legal obligations, required new obligations including “additional responsibility”); *Eiman Brothers Roofing Systems, Inc. v. CNS International Ministries, Inc.*, 158 S.W.3d 920, 922 (Mo. App. 2005) (holding that later contract was supported by sufficient consideration where the duties in the earlier and later contract “were not identical.”). In *Harris*, the plaintiff argued that an arbitration agreement was void because it was not supported by consideration. Specifically, the plaintiff asserted that the defendants were already required to arbitrate under the rules of the Financial Industry Regulatory Authority (FINRA), so the arbitration agreement entered into was void. *Id.* The Court of Appeals disagreed, recognizing that while the FINRA rules required only that the parties arbitrate, the arbitration agreement imposed new obligations, such as the agreement as to time and place of arbitration and to voluntarily submit to court jurisdiction. *Id.* Therefore, the court held there was sufficient consideration because the arbitration agreement set forth new obligations. *Id.* at 545.

Here, like in *Harris*, the contract agreement was not limited to performing a pre-existing duty. In this case, in exchange for the City granting Embarq use of the rights-of-way, Embarq agreed to obligations in addition to payment of taxes. LF 587-91. Each of these obligations was a new and different duty in addition to Embarq's commitment to pay all applicable taxes as a condition of the City granting Embarq use of the City's rights-of-way. The duties imposed by the Harrisonville Contract "were not identical" to the duties imposed by the applicable taxes, and, therefore, there was sufficient consideration for the contract. *Eiman Brothers Roofing Systems, Inc.*, 158 S.W.3d at 922-23 (rejecting pre-existing duty argument).

CenturyLink relied principally on two cases in the trial court, neither of which defeat the City's right to judgment as a matter of law on this count. LF 1044-45; *Wise v. Crump*, 978 S.W.2d 1, 3 (Mo. App. 1998) and *Holcomb v. United States*, 622 F.2d 937, 941 (7<sup>th</sup> Cir. 1980). Reliance on these cases is misplaced because neither involved an instance where the contract required new, additional, or different obligations than that of the pre-existing legal obligation. In *Wise v. Crump*, the plaintiff was injured when she was struck by the defendant's uninsured motor vehicle that was being driven by another person. *Wise*, 978 S.W.2d at 1. The plaintiff sued for, among other things, breach of contract. *Id.* at 2. She alleged that the car owner breached a constructive contract with the State to maintain financial responsibility for the vehicle in exchange for the privilege of titling his car in Missouri. *Id.* at 3. The plaintiff alleged that the car owner's failure to provide financial responsibility for his vehicle was a breach of the constructive contract, and the plaintiff was injured as a result. *Id.*

The court rejected this argument, holding that the record supported no contract – constructive or otherwise. *Id.* The court also held that the car owner’s promise to provide financial responsibility could not serve as consideration for the *alleged* contract, because the car owner was already legally obligated to secure financial responsibility for his vehicle. *Id.* *Wise* is entirely distinguishable from this case, and does not support the denial of summary judgment on the Cities’ Count XVI. In that case, there was nothing in the record to support the existence of the alleged “constructive contract,” whereas here, there is no dispute that the City and Embarq entered into a valid and enforceable contract. Further, to the extent any constructive contract would have existed in *Wise*, the contract was limited to the identical duty already imposed by law to maintain financial responsibility. Here, the Harrisonville Contract is by no means limited to the duties imposed under the taxes.

Similarly, *Holcomb v. United States*, relied on by Embarq in the trial court, does not apply because the exception to the pre-existing duty rule was not at issue. There, the court held that a taxpayer’s agreement to make payments to the IRS for tax liability was not sufficient to create a contract obligating the government to apply the proceeds to reduce the taxpayers’ personal liability. *Holcomb*, 622 F.2d 937. The exception to the pre-existing duty rule was not applicable in *Holcomb*, however, because the alleged contract included no additional, different, or new obligations. The taxpayers in that case *only* agreed to make payments to the IRS, they “gave up nothing else,” and therefore the alleged contract solely contained an obligation to do that which the taxpayers were legally obligated to do. *Id.* at 941. There was also “no evidence” that the IRS actually

promised to allocate the payments to reduce the taxpayers' personal liability, and therefore neither side took on additional, different, or new obligations. *Id.* Here, the written contract establishes a series of rights and obligations that go much beyond the simple duty to pay taxes. Additionally, the other two cases cited by Embarq in the trial court did not involve the exception to the pre-existing duty rule. *See* LF 1045; *Wilhoite v. Missouri Dept. of Social Services ex rel. Levy*, No. 2:10-CV-03026-NKL, 2011 WL 2884919, at \*16 (W.D. Mo. July 15, 2011); *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 742 (Mo. App. 2011). As such, there is no genuine dispute of law or fact that the exception to the pre-existing duty rule applies here and the Harrisonville Contract was supported by sufficient consideration. The City demonstrated right to judgment as a matter of law, and the trial court therefore erred in denying summary judgment on Count XVI.

### CONCLUSION

The trial court properly entered summary judgment in favor of the Cities. On the parties' record before the court, CenturyLink wholly failed to controvert the evidence provided by the Cities or present evidence that would establish a genuine issue of material fact. Given the clear law, the Cities demonstrated that they were entitled to summary judgment. For the same reasons and the same facts, the trial court erred in its denial of summary judgment on Count XVI. Therefore, given the record before the court and the state of the law, the trial courts' grant of partial summary judgment on Counts I-V and XVII-XXIV should be affirmed and its denial of summary judgment on Count XVI should be reversed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 21<sup>st</sup> day of October, 2014 the foregoing was filed electronically via Missouri CaseNet and served electronically to:

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The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 30,571 words, exclusive of sections exempted by Rule 84.06(b), based on the word count function of the Microsoft Word 2010 word processing software.

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