IN THE
SUPREME COURT OF MISSOURI

No. SC96276

CITY OF AURORA, MISSOURI, *et al.*,

Plaintiffs/Respondents/Cross-Appellants,

v.

SPECTRA COMMUNICATIONS GROUP, LLC, d/b/a CENTURYLINK, *et al.*,

Defendants/Appellants/Cross-Respondents.

Appeal from the Circuit Court of St. Louis County
Hon. David L. Vincent, III and Hon. Tom W. DePriest, Jr.

BRIEF OF APPELLANTS/CROSS-RESPONDENTS

BRYAN CAVE LLP

Mark B. Leadlove, #33205
Jonathan B. Potts, #64091
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
Tel: (314) 259-2000
Fax: (314) 259-2020
mbleadlove@bryancave.com
jonathan.potts@bryancave.com

Timothy R. Beyer, *pro hac vice*
1700 Lincoln St., Suite 4100
Denver, CO 80203
Tel: (303) 861-7000
Fax: (303) 866-0200
tim.beyer@bryancave.com

RUNNYMEDE law group

Stephen Robert Clark, #41417
Adam S. Hochschild, #52282
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
Tel: (314) 814-8880
sclark@runnymedelaw.com
ahochschild@runnymedelaw.com

Attorneys for Appellants/Cross-Respondents

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JURISDICTIONAL STATEMENT

Defendants/appellants/cross-respondents Spectra Communications Group, LLC ("Spectra"); Embarq Missouri, Inc. ("Embarq"); CenturyTel of Missouri, LLC ("CenturyTel"); CenturyTel Long Distance, LLC ("CenturyTel Long Distance"); Embarq Communications, Inc. ("Embarq Communications"), and the ultimate parent of the previous entities, CenturyLink, Inc. (collectively, "CenturyLink"), appeal from a judgment entered on February 23, 2017 in a court-tried case (Pl-Apdx-A1-A6).[1]

The City of Cameron was awarded damages against CenturyLink for unpaid linear foot fees under a right-of-way ordinance. This right-of-way ordinance is governed by §67.1846,[2] which provides that only "grandfathered political subdivisions" are entitled to impose both existing and new linear foot fees on public utilities operating in the public rights-of-way.

The trial court further entered judgment in favor of the City of Aurora, City of Cameron, City of Oak Grove, and City of Wentzville ("Cities") and awarded damages for unpaid business license taxes under the Cities' respective ordinances. The court also entered a declaratory judgment interpreting these ordinances.

CenturyLink timely filed a notice of appeal from the judgment to this Court on March 3, 2017, and the Cities filed a notice of cross-appeal on May 5, 2017. Jurisdiction lies in this Court under Article V, §3 of the Missouri Constitution, which confers

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[1] The record on appeal in this case is cited as follows: trial transcript ("Tr.-"); legal file ("LF-__"); exhibits ("Ex.-__"); plaintiffs' appendix ("Pl-Apdx-__"); defendants' appendix ("Def-Apdx-__").

[2] Unless otherwise noted, all references are to RSMo.

"exclusive appellate jurisdiction in all cases involving the validity of … a statute" on this Court. CenturyLink challenges the constitutionality of the "grandfathered political subdivision" exemption contained in §67.1846 as an unconstitutional special law under Mo. Const. art. III, §40(30). *See, e.g., Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 51 (Mo. 1999). As explained in Point I of cross-appellants' brief below, §67.1846's exception for "grandfathered political subdivisions" creates an impermissible special law based entirely upon an "immutable" characteristic—namely, "whether an ordinance meeting [certain] specifications … had or had not already been passed and enforced by [a] city prior to [a fixed date]." *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184-185 (Mo. 2006).

CenturyLink also appeals from the trial court's determination of the scope of the Cities' taxing ordinances and of the trial court's determination of the services and revenues subject to the Cities' business license taxes. The trial court both impermissibly expanded the scope of the ordinances and applied them to revenues derived from services not performed within the Cities, and beyond constitutionally permissible and express terms of the ordinances.

STATEMENT OF FACTS

A. The parties and the services provided.

1. The parties.

The Cities are four Missouri municipalities of the third or fourth class. LF-11003-11005. The CenturyLink defendants are telecommunication companies that provide a variety of local and long-distance telecommunications services, as well as items ancillary to such services. Specifically, Spectra, Embarq, and CenturyTel each provide "exchange telephone" and other services in one or more of the Cities. LF-11012-11017. Spectra is the "incumbent local exchange carrier" ("ILEC") for exchange telephone service in Aurora and Cameron. LF-11031. Likewise, Embarq is the ILEC for Oak Grove, and CenturyTel is the ILEC for Wentzville. LF-11031-11032. CenturyTel Long Distance and Embarq Communications provide long-distance service, but do not provide exchange telephone service in any of the Cities. LF-11033. CenturyLink, Inc. is the ultimate parent company of these companies and does not, itself, provide any form of telephone service. LF-11033-11034.

2. The services provided.

Fundamentally, CenturyLink provides two categories of telecommunications services, retail and wholesale. CenturyLink provides retail services such as local and long-distance services to end-user customers such as residences and businesses. Tr.-229-230, 384, 423, 467. CenturyLink's retail customers in the Cities have a "service address"—the physical location of the customer's home or business—within the geographic boundaries of a given City. Tr.-272, 462-463.

CenturyLink provides wholesale "carrier access" services to other telecommunications carriers such as Sprint, AT&T, and MCI to enable those telecommunications carriers to use CenturyLink's network to, in turn, provide long-distance or other services to those carriers' customers in the Cities. Tr.-229-230, 385-386, 422-423, 430, 438-439, 451-452, 466-468. CenturyLink bills its wholesale customers, which then resell the services to end-users. Tr.-386, 406-407; 422-425, 466-467. None of the wholesale carrier access customers has a "service address" in, within, or for that matter anywhere near any of the Cities. Tr.-278, 350-351, 406-407. Similarly, CenturyLink does not send bills for carrier access charges to any end-user in any of the Cities, and the payments CenturyLink receives for carrier access are not made from any of the Cities. Tr.-385-386, 406-407, 424. CenturyLink's access revenues are not received "in" or "within" any of the Cities. Tr.-427-430, 466-467.

The Aurora and Cameron telephone business license tax ordinances specify that they tax revenues only arising from "exchange telephone service." LF-2760 (Pl-Apdx-A24), LF-2763 (Pl-Apdx-A27). The Wentzville telephone business license tax ordinance refers to "telephone service." LF-2768 (Pl-Apdx-A32). The Oak Grove ordinance that CenturyLink contends should be applicable uses the terminology "local exchange telecommunications service" (LF-9800 (Def-Apdx-A56)), while the Oak Grove general utility ordinance sued on by the plaintiffs refers to "telephone services" (LF-2765 (Pl-Apdx-A29)).

"Exchange telephone service" is universally understood in the telecommunications industry, and by federal and state regulators, legislatures and courts, to denote a specific service: basic, local service that allows a customer within a geographic boundary known as an "exchange" to place a call that originates and terminates within that same geographic area. Tr.-

425-429, 462, 474-475. The boundaries of an exchange are established by the Federal Communications Commission. Tr.-426. Exchange boundaries are not co-extensive with municipal boundaries. Smaller municipalities, such as the Cities, are typically served by one CenturyLink company exchange, but that exchange also serves customers outside of the municipal boundaries. LF-7058, 7071 (Aurora); LF-7072 (Cameron); LF-7074 (Oak Grove); LF-7075 (Wentzville). CenturyLink offers myriad services, but exchange telephone service is understood to describe only a specific subset of those available services. Tr.-268, 271, 424-427, 459, 473-474.

"Telephone service" is not limited to calls originating and terminating in the same exchange and, therefore, captures within its meaning additional services. Tr.-292. Long-distance service is an additional type of service that CenturyLink offers to its customers. Long-distance service refers to telephone service between two different exchanges. Tr.-468. This service can be intra-state long-distance, in which a customer's call terminates in another exchange located within the state from which the call is placed, or inter-state long-distance, in which the call originates and terminates in different states. LF-7060. By definition, long-distance service is not "exchange telephone service." Tr.-433-434; lF-7177-7179.

In addition to exchange telephone service and long-distance services to customers, and wholesale carrier access to other telecommunications carriers, CenturyLink is required by law to collect certain fees— known as Universal Service Fund fees ("USF")—from its customers. Tr.-468-469. CenturyLink acts as a "collection agent" for the federal- and state-government USF administrators regarding these fees and does not have use of the fees. Tr.-468-469; *see*

also §392.611.1(1) (requiring telecommunications companies to collect USF from customers and remit to administrator).

Finally, CenturyLink provides a host of ancillary services, some of which relate to telephone service of one form or another and some of which do not. See, e.g., Tr.-462; LF-7184-7185, 8593-8601. In all, 29 different sources of revenue are at issue in this litigation. *See* Ex. W.

B. The ordinances.

Two different types of regulatory and revenue-generating ordinances are at issue in this appeal. The first type is the right-of-way ordinances of Cameron and Wentzville. The second type is the business license tax ordinances of each of the Cities.

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

Cameron and Wentzville each have enacted right-of-way ordinances that purport to require Spectra and CenturyTel, respectively, to enter into right-of-way agreements and pay user and other fees as a condition of using the right-of-way. LF-951-982 (Cameron Code); LF-984-1027 (Wentzville Code).

For years, while Spectra operated in Cameron and CenturyTel operated in Wentzville, the Cities never claimed that the companies were required to enter into an agreement to use the right-of-way and pay fees. LF-1296-1303, 1423-1425. This included several years under the current versions of each City's right-of-way code. The Cameron right-of-way code was enacted on December 5, 2000. *See* LF-952 (editor's note). The Wentzville right-of-way code was enacted on Feb. 18, 2004. *See* LF-985. In or about 2010, Wentzville asserted for the first time that CenturyTel must enter into an agreement to use the right-of-way and pay fees. *See*

LF-1813-1814. In or about 2012, Cameron for the first time asserted that Spectra must enter into an agreement to use the right-of-way and pay fees. LF-1296-1303, 1423-1425.

2. The Cities' business license tax ordinances.

Each City has its own specific business license tax ordinance applicable to companies providing telephone service within the respective city. The Aurora Code provides that any corporation "furnishing **exchange telephone service** in the City of Aurora" shall pay a license tax of 6% on "gross receipts derived from the furnishing of such service **within said City**." LF-2760 (Pl-Apdx-A24) (emphasis added). The Cameron Code is identical to that of Aurora's in this respect, except the tax rate is different. LF-2763 (Pl-Apdx-A27).

The Wentzville ordinance states, in relevant part, that every person "engaged in the business of supplying ... **telephone service** ... **in the City** ... shall pay to the City a license tax" of 5% on "the gross receipts from such business...." LF-2768 (Pl-Apdx-A32) (emphasis added). The Wentzville Code also provides an express exclusion for revenue arising from interstate services: "Nothing in Section 640.020 shall be construed to apply to revenue derived from interstate telephone calls." LF-2768 (Pl-Apdx-A32).

In Oak Grove, a franchise agreement between the City and Embarq (f/k/a United Telephone Company of Missouri) provides that CenturyLink shall pay "five percent of the local service revenues to the City." LF-9800 (Def-Apdx-A56). Under the franchise agreement, "local service revenues" means "all revenues received by Grantee for the provision of **basic local exchange telecommunications service**, including those services which expand the basic local calling scope of the customer or subscriber, but

shall not include charges for special services, long distance calls, access charges, or services not considered basic local exchange telecommunications service." LF-9800 (Def-Apdx-A56) (emphasis added).[3]

The following chart depicts the scheme of the ordinances:

City	**Who Is Taxed?**	**What Is Taxed?**	**Where?**	**What Rate?**
Aurora	"[e]very … company … engaged in the business of furnishing exchange telephone service"	"gross receipts derived from the furnishing of such service"	"within said City"	6%
Cameron	"[e]very … company … engaged in the business of furnishing exchange telephone service"	"gross receipts derived from the furnishing of such service"	"within said City"	5%
Oak Grove	United Telephone Company of Missouri (n/k/a Embarq)	"basic local exchange telecommunications service … but … not	in the City	5%

[3] As noted in this brief, CenturyLink contends that Oak Grove sued upon the wrong ordinance applicable to CenturyLink. The franchise agreement provides that any payments are in "lieu of any general or special license tax …." LF-9800 (Def-Apdx-A56). Oak Grove's general ordinance is similar to Wentzville's, in that the tax is imposed on every person "engaged in the business of supplying … **telephone service** … **in the City**" at a rate of 5% "of the gross receipts from such business." (Pl-Apdx-A29).

		… special services, long distance calls, access charges, or services not considered basic local exchange telecommunications service"		
Wentzville	"[e]very person engaged in the business of supplying … telephone service"	"gross receipts from such business," but not "revenue derived from interstate phone calls"	"in the City"	5%

The Cities' business license taxes describe the tax base so that telephone companies can understand and comply. For decades, telephone companies like CenturyLink and its predecessors remitted taxes based on the express terms of the taxing ordinances. Tr.-263-269. For years, the Cities accepted these payments without dispute or question.

With little notice and no process, the Cities recently decreed that the ordinances required CenturyLink and other telecommunications companies to pay tax on revenues never before understood by CenturyLink to be subject to those taxes, and brought

litigation going back as far as permitted by the alleged statute of limitations. In so doing, the Cities sued to tax all services, whether or not "exchange telephone service" or "telephone service," and regardless of whether the services were provided "within the city." LF-1040, 1047-1054.

C. Procedural history of the litigation.

1. Claims raised in the operative petition.

The lawsuit was initially filed by the Cities (and the City of Harrisonville, which later dismissed its claims pursuant to a settlement) on July 27, 2012. The petition was amended twice, with the operative second amended petition (the "Petition") being filed on November 19, 2013. LF-203-351, 355.

2. The First Partial Summary Judgment Order.

The Cities first moved for partial summary judgment with respect to four sources of revenue, and Wentzville and Cameron moved on their right-of-way ordinance claims.[4] In support of their motion, the Cities did not offer any affidavits or other evidence that purported to establish that any CenturyLink revenues were derived from "exchange telephone service" or "telephone service" under these four ordinances. *See* LF-1199; *see also* LF-394-1039. Likewise, the Cities did not offer any evidence to establish that any of the revenues arose "in" or "within" the Cities. *See* LF-394-1039. Rather, the Cities argued that the ordinances taxed all revenue (gross receipts), regardless of whether the

[4] The four revenue streams that were the subject of the First Partial Summary Judgment Order were: (1) revenue collected from customers specifically for the payment of license taxes (*i.e.*, pass-through tax payments); (2) vertical and optional calling services (such as voicemail and caller ID services); (3) end user common line/subscriber line charges; and (4) federal and state USF charges. LF-1717 (Pl-Apdx-A18).

revenue arises from services that meet the ordinances' wording, and regardless of whether the services were provided within the Cities imposing the tax. LF-1040, LF-1047-1054.

It was undisputed that CenturyLink had been paying license taxes to each City. LF-1237-1238. Nevertheless, the Cities argued that CenturyLink's actions were "willful" because CenturyLink "intentionally excluded certain categories of their revenues earned within the Cities in calculations of their ['']gross receipts['']." LF-1072. The Cities offered no evidence of "willfulness" based upon, for example, depositions of CenturyLink witnesses or internal CenturyLink documents regarding interpretation of the ordinances. Rather, the Cities alleged that they had collectively informed CenturyLink, by letter, of their "desire[] to address tax payment issues" based only on a single demand letter sent by counsel on behalf of Wentzville only (*i.e.*, not Aurora, Cameron, and Oak Grove) dated October 8, 2010 and regarding only Wentzville's ordinance. LF-679-683, 1243.

The Cities also argued that CenturyLink was "aware of this issue through [] ongoing litigation." LF-1072. That litigation, however, consisted only of: (1) a first case that involved an entirely different family of companies (AT&T), different municipalities, and different ordinances; and (2) a second case brought by a different municipality (Jefferson City) against two of the CenturyLink defendants under a different ordinance in that municipality, which the Cities did not even attach to their summary judgment papers. LF-1072, 1244-1245.

On April 17, 2014, the court entered partial summary judgment in favor of the Cities, finding that taxes were due on, and that CenturyLink had failed to pay license taxes with respect to, these four sources of revenue ("First Partial Summary Judgment"). LF-1716-1719 (Pl-Apdx-A17-A20). Despite the Cities' failure to proffer any evidence pertinent to willfulness, the court also entered partial summary judgment for the Cities on their claims under §392.350, holding that CenturyLink's "conduct violated applicable law set forth in city ordinances and Chapter 392; [CenturyLink's] unlawful actions were willful under § 392.350 RSMo." CenturyLink was "ordered to pay Cities their damages, costs, including their attorneys' fees, pursuant to §§ 392.350, 488.472, and 527.100 RSMo." LF-1719 (Pl-Apdx-A20).

In addition, the court entered partial summary judgment in favor of Cameron and against Spectra with respect to Cameron's ROW claims (Counts XVII and XVIII). The court found that "Cameron's User Fee is valid and lawful, under § 67.1846 RSMo., and any other law …"; found that Spectra was required to enter into public ways use permit agreement under the Cameron ROW Code; held that was required to obtain the consent of Cameron to be in the right of way; and ordered the payment of damages premised on a linear-foot fee calculation. LF-1718 (Pl-Apdx-A19).

Similarly, the trial court found in favor of Wentzville and against CenturyTel on Wentzville's ROW claim (Count XIX), and found that CenturyTel was required to obtain a rights-of-way user agreement from Wentzville pursuant to Wentzville's ROW code. LF-1719 (Pl-Apdx-A20).

The trial court (at that time, Judge Vincent) certified its partial summary judgment ruling pursuant to Rule 74.01(b), stating there was no just reason for delay. LF-1719. An appeal was taken to this Court. That appeal was dismissed by order dated February 24, 2015, as having been taken from an order that was not final and appealable. LF-2605-2607.

3. The Second Partial Summary Judgment Order.

The Cities later moved for partial summary judgment with respect to CenturyLink's remaining sources of revenue. The Cities continued to argue that their ordinances taxed CenturyLink's "total gross receipts," regardless of source, and not just from "exchange telephone service" and "telephone service." LF-10990, 10992-10995. Therefore, in support of their motion, the Cities yet again offered no evidence that purported to establish that any of the remaining sources of revenues were derived from "exchange telephone service" or "telephone service" under the four ordinances. *See* LF-11003-11027. They also offered no evidence as to which remaining types of revenue arose "in" or "within" each City. *See* LF-11003-11027. In their reply, the Cities made several assertions about "access revenues"—all of which were controverted by CenturyLink—but none of which actually purported to address whether these revenue streams qualified as "exchange telephone service" or "telephone service." *See* LF-7616, 8586-8587.

CenturyLink simultaneously moved for partial summary judgment with respect to its lack of liability for unpaid license taxes with respect to interexchange services (*i.e.*, services provided between separate telephone exchanges) and interstate services (*i.e.*,

services provided between states). Unlike the Cities, in responding to and supporting the various summary judgment motions, CenturyLink submitted numerous expert reports and other affidavits that explained the meaning and purpose of the various services, explained why they did not qualify as "exchange telephone service" or "telephone service," and further made clear why certain services and functions occurred outside of the Cities. *See, e.g.*, LF-7123-7124, 7184-7185, 7198-7204, 7214-7216, 7219-7221.

For instance, CenturyLink submitted an expert report and affidavit from Glenn Brown, a telecommunications industry engineer and consultant. LF-7175-7196. Brown explained the differences between exchange and interexchange services, and the differences between intrastate and interstate services. LF-7177-7179. Brown further explained why revenue items such as pass-through taxes, the provision of equipment, directory listings, inside wire maintenance, and federal and state USF charges are not considered "telephone service." LF-7184-7185. Brown explained which revenues qualified as *inter*state telephone services (*e.g.*, carrier access - interstate, recurring call plans, and subscriber line chargers - interstate), as well as which revenues qualified as intrastate *inter*exchang*e* telephone services (*e.g.*, carrier access - intrastate, extended area service, intrastate toll). LF-7185-7186.

Another expert, Pam Hankins, explained the meaning of "exchange telephone service" from a regulatory perspective. LF-7198-7204. Yet another expert explained how and where caller-ID and voicemail operate, and the reasons they are not within the definition of exchange telephone service and are not "within the Cities." LF-7214-7216.

In response, the Cities offered no evidence to dispute CenturyLink's description of

these revenue streams, whether they qualify as "exchange telephone service" or "telephone service," or the extent to which services and functions actually occur *outside* the Cities. *See* LF-7310-7311. That is, the Cities did not purport to offer any evidence that any services occurred "in" or "within" a single City. Instead, the Cities only claimed that the evidence providing descriptions of telecommunications services were "legal conclusions." LF-7310-7311.

In response to the Cities' reply statement of facts, CenturyLink submitted a second affidavit from Glenn Brown that further explained the differences between exchange telephone services, interexchange telephone services, interstate telephone services, and non-telephone services. LF-8593-8601.

Finally, CenturyLink submitted a sworn declaration from Harry Newton, the author, publisher, and editor of *Newton's Telecom Dictionary*, which is the "premier" telecommunications dictionary. LF-8618. In his declaration, Newton explained, among other things, the definition and nature of "exchange telephone service." L.F. 8619. Newton also informed the court that, among other services or revenue streams, customer premises equipment (CPE), directory assistance, directory listings, feature activation/deactivation (*e.g.*, call forwarding), federal USF, state USF, inside wire maintenance, telecom equipment (whether leased, rented or sold), voice mail, pole rental, carrier access (interstate and intrastate), interstate services, recurring calling plans that bundle inter- and intra-state long-distance, subscriber line charge (SLC), extended area service (EAS), intrastate toll, intrastate private line, intrastate usage, and a business license tax or the collection thereof are not "exchange telephone service." *Id.*

On April 6, 2016, the trial court (now Judge DePriest) entered another partial summary judgment order in favor of the Cities ("Second Partial Summary Judgment"). In the Second Partial Summary Judgment, the trial court held that CenturyLink was liable for license taxes to each of the Cities for "all revenue they receive **in that respective City.**" LF-9135 (emphasis added). The court found the ordinances for each of the Cities to be unambiguous and stated it was giving "effect to the language as written without regard to extrinsic evidence and it [did] not engage in ordinance construction." LF-9135. The Court ordered that each plaintiff was entitled to judgment on "all revenue received by Defendants **in that City**." LF-9136, Decretal (emphasis added).

Thus, by virtue of its partial summary judgment orders, the trial court decided as a matter of law that the ordinances tax revenues from all sources, regardless of whether they were part of "exchange telephone service" or "telephone service," so long as they occurred "in the City." What revenues were derived from services provided "in the City" was a factual issue left for trial.

4. Order on CenturyLink's affirmative defenses and counterclaims.

CenturyLink asserted several affirmative defenses and counterclaims. The affirmative defenses included, *inter alia*, that "the statutory provision for such fees as a grandfathered political subdivision, found within R.S.Mo. § 67.1846.1, is an unconstitutional special law under, *inter alia*, Article III, § 40(30) of the Missouri Constitution." LF-1808-1809. This constitutional challenge was also raised in Count IV of CenturyLink's counterclaim. LF-1830.

When the Cities first moved for partial summary judgment, Spectra also had asserted the affirmative defense that §67.1846.1 is an unconstitutional special law, which the parties briefed at length. LF-1208-1213, 1469-1474. In the First Partial Summary Judgment, however, the Court concluded that "Cameron's User Fee is valid and lawful, under § 67.1846 RSMo., and any other law." LF-1718 (Pl-Apdx-A19).

By Order of October 31, 2016, the trial court granted the Cities' motion for judgment on the pleadings on almost all of CenturyLink's counterclaims. LF-9757-9759 (Def-Apdx-A3-A5). The only part of the counterclaims that was allowed to stand for trial was CenturyLink's claim that Cameron's use and attachment to Spectra's poles was unlawful and that Cameron should be enjoined from such use. LF-9759.

5. Order denying CenturyLink's Motion to Set Aside regarding Oak Grove's ordinances.

On November 11, 2016, CenturyLink filed a Motion to Set Aside Orders Granting Partial Summary Judgment And Partial Judgment On The Pleadings And For Sanctions related solely to Oak Grove ("Motion To Set Aside"). Through this Motion, CenturyLink challenged that Oak Grove had sued on the wrong ordinance, relying on Oak Grove's general utility taxing ordinance, Oak Grove Ordinance §615.020, which had been passed in 1993, as opposed to a 1996 franchise agreement, specific to telecommunications service in Oak Grove, reached between Embarq (then known as United Telephone Company) and Oak Grove (the "Oak Grove Franchise Agreement"). LF-9764-9777. Under the Oak Grove Franchise Agreement, Embarq was to pay—in lieu of any general or special license tax, occupation tax or any other such tax—a payment of 5% on

Embarq's "local service revenues." LF-9800. "[L]ocal service revenues" was further defined to mean "basic local **exchange telecommunications service**" and expressly excluded "charges for special services, long distance calls, access charges or services not considered basic local **exchange telecommunications service**." LF-9800 (emphasis added).

There was no dispute that in 1996, Oak Grove's Board of Alderman passed, and the mayor signed, Ordinance No. 1145. LF-9766-9767, 9782-9783, 9851-9852 (Pl's brief). There was no dispute that Embarq (then United Telephone) had countersigned the ordinance. LF-9767, 9802-9803, 9806, 9831. Moreover, there was no dispute that CenturyLink paid license taxes to Oak Grove on a quarterly basis (as required under the Oak Grove Franchise Agreement) until January 2013, and there were no records that CenturyLink or its predecessors ever paid Oak Grove on a twice-yearly basis (as required under Oak Grove City Code § 615.020) "since at least 1996." LF-9824.

In response to CenturyLink's motion, Oak Grove submitted an affidavit from the current City Clerk, who lacked any personal knowledge of the transaction, and only stated that Oak Grove does not currently have a copy of an acceptance in its files, though she fails to address that the City's files nevertheless contained a countersigned copy of the agreement. LF-9923-9924.

On December 1, 2016, the court denied CenturyLink's Motion to Set Aside on the merits. LF-9966-9967 (Def-Apdx-A1-A2). The trial court found that there was "no evidence" that Embarq had ever filed an "acceptance" of the Franchise Agreement as required by the applicable ordinance, and the court concluded that "Defendants have

forfeited their franchise" and that the "Franchise Agreement/ordinance is not the controlling ordinance." LF-9967. As a result of this erroneous finding, Oak Grove was allowed to pursue its claims for additional tax revenue based on its general utilities tax ordinance rather than the specific telecommunications agreement it had made, and on which Embarq had performed since 1996.

6. The Final Judgment.

The case proceeded to trial on the issues remaining in the case, which included damages based on revenue for services provided "in" each of the Cities (*see* LF-9136), and the appropriateness of penalties and attorneys' fees, if any. As CenturyLink's counsel repeatedly stated during oral argument, the trial court's rulings meant that the determination of damages depended on finding which revenues were "in" each City. Tr.-25-26, 30-31.

CenturyLink's witnesses testified at trial concerning the nature of the various revenue streams and how they are understood both to CenturyLink and the industry and the extent to which revenues arose "in" the cities, including the fact that carrier access is an interstate revenue for which the customer (another carrier) is outside the City. *See, e.g.*, Tr.-332, 336, 350-351, 356. For example, CenturyLink's director of tax systems and tax billing testified regarding CenturyLink's interpretation of the ordinances and tax payment history. Tr.-221-359. CenturyLink's director of carrier access billing described an error in some early discovery response data and further described the nature of carrier access service and CenturyLink's customers for carrier access service. Tr.-360-411. A director of financial analysis and decision support for CenturyLink (Hankins) testified

regarding the nature of the various services and how they are interpreted from a regulatory standpoint. Tr.-419-448. And industry expert (Brown) testified regarding the nature of CenturyLink's services and described whether those services were provided "in" any of the Cities. Tr.-448-485.

After hearing evidence and argument over the course of three days on December 5-7, 2016, the trial court entered its Final Order and Judgment ("Final Judgment") on February 23, 2017. LF-10815-10820 (Pl-Apdx-A1-A6). The court held that a five-year statute of limitations applied to the Cities' claims and awarded damages under CenturyLink's Exhibit U-2, Scenario 2, entitled "Tax on All Revenue Except Carrier Access - Enforcing Wentzville's Express Interstate Exclusion." LF-10815. Aurora received an award of $490,528.12; Cameron received $608,525.30; Oak Grove received $259,981.80; Wentzville received $226,457.08. LF-10815. The court found that the Cities were not entitled to any penalties from CenturyLink. LF-10817.

The trial court also issued a declaratory judgment that the tax base under Aurora City Code §615.010, *et seq.*, Cameron Ordinance 2878, and Oak Grove City Code §615.010, *et seq.* "is all revenue, other than carrier access revenue, received in each respective city." LF-10816. For Wentzville City Code §640.010 and §640.020, the court declared that the tax base "is all revenue, other than carrier access revenue and revenue derived from interstate telephone calls, received in the [C]ity of Wentzville." LF-10816.

The trial court awarded pre-judgment interest to Aurora, Cameron, and Oak Grove at the rate of 9% per year "pursuant to § 408.020 RSMo." LF-10817. The trial court awarded pre-judgment interest to Wentzville at the "rate of 2% per month, not to exceed

18% per annum, pursuant to Wentzville Code §140.120." LF-10817. In terms of interest, Aurora received $275,494.67; Cameron received $328,683.02; Oak Grove received $141,770.51; and Wentzville received $208.071.00. LF-10817.

The trial court also awarded post-judgment interest to Aurora, Cameron, and Oak Grove at the same rate of 9% per annum "pursuant to § 408.040 RSMo.," and "2% per month, not to exceed 18% per annum" to Wentzville "pursuant to Wentzville Code Section 140.120…." LF-10817.

With respect to the Cameron right-of-way ordinance, the trial court found Cameron to be "entitled to unpaid user fees in the amount of $4,000.00 per month," and that after crediting prior payments, CenturyLink owed Cameron $138,914 in unpaid user fees and $83,348 in interest. LF-10817. But the trial court refused to credit the award of additional taxes that was being made to Cameron under the Final Judgment.

Finally, the trial court determined that CenturyLink's conduct "violated applicable law under the cities' respective ordinances and RSMo. §392.350." LF-10817. As a result, the court awarded the Cities their attorneys' fees and expenses in the amount of $1,190,610.77. LF-10817-10818. The court also determined that the award of attorneys' fees and expenses was "authorized under RSMo. §488.472, RSMo. §527.100, and § 655.070 of Wentzville's Code and the Court's equitable powers." LF-10818.

BRIEF AS APPELLANT

POINTS RELIED ON

I. The trial court erred in awarding Cameron damages in unpaid linear foot fees under the city's right-of-way ordinance, and in granting judgment on the pleadings on Count IV of the Counterclaim, because the "grandfathered political subdivision" exception under §67.1846.1 upon which Cameron relies is an unconstitutional special law in violation of Article III, §40(30) of the Missouri Constitution, in that the exemption creates a fixed, closed class based on immutable historical fact, without substantial justification.

-*City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006)

-§67.1846

II. The trial court erred in entering summary judgment finding that both Cameron's and Wentzville's right-of-way ordinances are valid and enforceable (and in granting the Cities' motion for judgment on the pleadings on Counts I through VII of the Counterclaim), in granting judgment in favor of Cameron and Wentzville on Counts XVII through Count XIX of the Second Amended Petition, and in awarding Cameron damages, because Cameron's and Wentzville's coercive imposition of their respective rights-of-way agreements are illegal and void, in that they constitute mandatory "franchises" prohibited by §67.1842.1(4), and Cameron failed to present any evidence that the costs that it seeks to impose are based on the actual, substantiated costs reasonably incurred by the city in managing its rights of way.

-§67.1842

-§67.1840

III. The trial court erred in entering partial summary judgment as to liability and then awarding the Cities $1,585,492.30 in actual damages for unpaid license taxes because the court misconstrued the Cities' ordinances in the First Partial Summary Judgment and the Second Partial Summary Judgment, in that CenturyLink has numerous categories of revenue that are not derived from "exchange telephone service" or "telephone service" and are not subject to taxation under these ordinances.

-*May Dep't Stores Co. v. University City*, 458 S.W.2d 260 (Mo. 1970)

-*City of St. Louis v. Triangle Fuel Co.*, 193 S.W.2d 914 (Mo.App. 1946)

-§1.090

IV. The trial court erred in awarding the Cities $1,585,492.30 in actual damages for unpaid license taxes because the Cities did not carry their burden of proof, in that the Cities did not establish that the disputed services occurred "in" or "within" the Cities.

-*Mobil-Teria Catering Co., Inc. v. Spradling*, 576 S.W.2d 282 (Mo. 1978)

-*Douglas v. Kansas City*, 48 S.W. 851 (Mo. 1898)

V. The trial court erred in ruling on the claims of Oak Grove because the trial court relied on inapplicable law, in that the Oak Grove Franchise Agreement between the City and Embarq is the controlling ordinance and not Oak Grove's general utility ordinance.

- *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358 (Mo.App. 2015)

VI. The trial court erred in awarding damages for unpaid license taxes beginning on July 27, 2007, because a three-year statute of limitations applies and not a five-year statute of limitations, in that disputes over license tax payments must be initiated within three years after the date of the tax return under §144.220.3.

-*Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919 (Mo. 2003)

-*Missouri Municipal League v. State*, 489 S.W.3d 765 (Mo. 2016)

-§71.625

-§144.220

VII. The trial court erred in awarding prejudgment interest in the amount of $745,948.20 to Aurora, Cameron, and Oak Grove and $208,071.00 to Wentzville because the court incorrectly applied the default statutory interest rate of 9%, in that the interest rate set annually by the Director of Revenue under 12 C.S.R. 10-41.010 governs prejudgment interest in municipal license tax disputes.

- *City of St. Peters v. Roeder*, 466 S.W.3d 538 (Mo. 2015)

-§71.625

-§144.220

-§32.065

-12 C.S.R. 10-41.010

VIII. The trial court erred in awarding post-judgment interest at the rate of 18% per annum to Wentzville because Wentzville's ordinance is invalid to the extent the

ordinance permits an award of post-judgment interest above 9%, in that any award of post-judgment interest above 9% conflicts with the statewide rate set by §408.040.

- *City of St. Peters v. Roeder*, 466 S.W.3d 538 (Mo. 2015)

-§408.040

IX. The trial court erred in awarding $1,190,610.77 in attorneys' fees to the Cities because: (i) §488.472 does not permit the Cities to receive attorneys' fees in that CenturyLink could not be liable to the Cities under Chapter 392 because the trial court lacked primary jurisdiction to find a violation under Chapter 392; the Cities are not "person[s]" or "corporation[s]" entitled to recover under that Chapter; unpaid municipal license taxes are not contemplated by that Chapter; Chapter 392 is inapplicable to CenturyLink; and the evidence does not support a determination that CenturyLink acted "willfully"; and (ii) there are no "special circumstances" warranting an award of attorneys' fees under the trial court's "equitable powers."

-*State ex rel. and to Use of Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. 1940)

-*Overman v. Sw. Bell Tel. Co.*, 706 S.W.2d 244 (Mo.App. 1986)

-*De Maranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674 (Mo.App. 1978)

-§488.472

-§386.020

STANDARD OF REVIEW

This Court reviews a trial court's grant of partial summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). "The propriety of summary judgment is purely an issue of law." *Id.* To succeed on summary judgment, the plaintiff "must establish that there is no genuine dispute as to those material facts upon which the plaintiff would have had the burden of persuasion at trial. *Id.* at 381. Further, the Court reviews the constitutionality of an ordinance *de novo*. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 182 (Mo. 2006).

The judgment of the trial court in a court-tried case may not be upheld if there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). This Court reviews *de novo* "both the trial court's legal conclusions and its application of law to the facts." *Zweig v. Metropolitan St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. 2013).

Whether the trial court applied the proper measure of compensatory damages is a question of law, and is thus reviewed *de novo*. *66, Inc. v. Crestwood Commons Redev. Corp.*, 130 S.W.3d 573, 584 (Mo.App. 2004). This Court reviews the court's award of attorneys' fees for substantial evidence unless the court erroneously applied the law. *David Ranken, Jr. Technical Institute v. Boykins*, 816 S.W.2d 189, 193 (Mo. 1991).

ARGUMENT

I. The trial court erred in awarding Cameron damages in unpaid linear foot fees under the city's right-of-way ordinance, and in granting judgment on the pleadings on Count IV of the Counterclaim, because the "grandfathered political subdivision" exception under §67.1846.1 upon which Cameron relies is an unconstitutional special law in violation of Article III, §40(30) of the Missouri Constitution, in that the exemption creates a fixed, closed class based on immutable historical fact, without substantial justification.

Under the First Partial Summary Judgment and the Final Judgment, Cameron received an award of damages measured in unpaid linear foot fees. LF-1718, 10817. Missouri law generally prohibits the imposition of such linear foot fees. §§67.1830(5), 67.1840. Cameron presented no evidence that its charges for use of the rights-of-way complied with generally applicable statutes, opting instead to rely on the "grandfathered political subdivision" exception provided for in §67.1846. Section 67.1846.1 provides that certain "grandfathered political subdivisions" (such as Cameron) are entitled to impose linear foot fees on public utilities operating in the public right-of-way. The trial court erred in upholding the validity of this ordinance against CenturyLink's constitutional challenge.

A. The "grandfathered political subdivision" exception is an unconstitutional special law.

Since 1865, the Missouri Constitution has prohibited special laws. *City of Normandy v. Greitens*, 518 S.W.3d 183, 191 (Mo. 2017). "The Missouri Constitution

prohibits the legislature from passing 'any local or special law … where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.'" *City of DeSoto v. Nixon*, 476 S.W.3d 282, 287 (Mo. 2016) (quoting Mo. Const. art. III, §40(30)). "A law based on closed-ended (non-changing) characteristics, such as historical or physical facts, geography or constitutional status, is facially special because others cannot come into the group nor can its members leave the group." *Id.* When a "statute's classification is fixed and not open-ended, '***instead of presuming that it is constitutional, the presumption is that it is unconstitutional***.'" *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 186 (Mo. 2006) (quoting *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. 1993)) (emphasis in original). The burden shifts to the party defending the facially special law, who "must demonstrate a substantial justification for the failure to adopt a general law instead." *City of DeSoto*, 476 S.W.3d at 287.

This Court held in *City of Springfield* that a similar grandfathering provision was a special law that violated Article III, §40(30). In particular, the Court struck down a statute that created an exemption based upon a city's adoption and enforcement of a license tax prior to January 15, 2005. *Id.* at 179-180. The Court held that the "immutable characteristics" of facially special laws include "whether an ordinance meeting [certain] specifications … had or had not already been passed and enforced by [a] city prior to [a fixed date]." *City of Springfield*, 203 S.W.3d at 184-185.

Cameron prevailed on Counts XVII and XVIII of the Petition, which alleged that Spectra was obligated to pay the City of Cameron a right-of-way user fee "based on the total linear feet of [Spectra's] facilities occupying Cameron's right-of-way." LF-232. As a general matter, §67.1840 prohibits the imposition of linear foot fees, providing that political subdivisions may only impose right-of-way permit fees to recover "right-of-way management costs," and that such fees must be "[b]ased on the actual, substantiated costs reasonably incurred by the political subdivision managing the public right of way." §§67.1840.1-2. These "right-of-way management costs" do not include linear foot fees. *See* §67.1830(5).

Despite this general law, §67.1846, entitled "Exceptions to applicability of right-of-way laws," purports to furnish a special exception for "grandfathered political subdivisions." These "grandfathered political subdivisions" are defined as any political subdivision that enacted an ordinance reflecting a "policy" of imposing any linear foot fees on any public utility right-of-way user before May 1, 2001. §67.1846.1. These "grandfathered political subdivisions"—and no one else—may "enact[] new ordinances, including amendments of existing ordinances, charging a public utility right-of-way user a fair and reasonable linear foot fee…." *Id.*

The defect in §67.1846.1 is identical to the statutory defect ruled unconstitutional in *City of Springfield*. This exception for "grandfathered political subdivisions" creates a fixed, closed classification based on an immutable historical fact—namely, whether a municipality enacted a certain kind of ordinance before May 1, 2001. Such a

classification is facially special and presumptively unconstitutional. *See City of Springfield*, 203 S.W.3d at 184-186.

Further, Cameron failed to demonstrate a "substantial justification" for the exception in response to CenturyLink's challenge. In the trial court, Cameron argued that the legislature's intent was "not to impact and reduce an immediate … source of funding that some cities may have relied upon," which they argue was "not irrational." LF-1271. Cameron failed to submit or cite any evidence that might support this theory, or any theory, as to why the grandfathering provision was included, or its "substantial justification." *See* LF-1271. But even if this purported rationale made sense (which it does not, *see infra),* a showing that the exception is "substantially justified" requires more than demonstrating that it is merely "not irrational." *See O'Reilly,* 850 S.W.2d at 99.

Moreover, Cameron's rationale is inconsistent with the plain terms of §67.1846.1. Cameron speculates that §67.1846.1's "grandfathered political subdivision" exception serves to "preserve existing revenue sources for local governments and simply prohibit new reliance on such linear foot fees in the future." LF-1271. But this is contradicted by the terms of the statute. The "grandfathered political subdivision" exception does more than preserve already-ongoing taxation. It permits the fixed group of "grandfathered political subdivisions" to enforce, renew, and extend linear foot fee ordinances, and to enact an unlimited number of new linear foot fee ordinances in the future. *See* §67.1846.1. Permitting a privileged class of cities to enact new linear foot fee ordinances was not necessary to avoid upsetting a city's alleged reliance on "existing revenue sources." Therefore, protecting existing revenue streams does not afford a rational basis for the exemption, much less substantial justification.

Cameron argues in its challenge to this Court's jurisdiction that the membership of the class could change if a municipality "amends its linear foot user fee ordinance to eliminate the required credit in § 67.1846.1(1) and (2)." Br.-15. This purely hypothetical scenario is not based upon any predictable occurrence and does not address the fact that it remains impossible for the subset of political subdivisions ever to change because of the historical cutoff date. A municipality could pass an ordinance to eliminate the credit, and then pass another ordinance restoring the credit and still argue that it falls within this class definition because membership is always based upon the cutoff date of May 1, 2001. "Immutability" addresses the unchangeable, historical facts that determine whether a municipality is a member of the class of "grandfathered political subdivisions," not whether the class member ever chooses to take advantage of its special powers.

Because no substantial justification exists for granting special privileges to a closed class of select political subdivisions, §67.1846.1's "grandfathered political subdivisions" exception is unconstitutional under Article III, §40(30) of the Missouri Constitution.[5]

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

After determining that a statutory provision is unconstitutional, a court must consider whether that provision is severable from the rest of the statute in which it resides.

[5] The Cities also suggest that the constitutional challenge was not timely raised. Their own case law disproves this. *See Hollis v. Blevins*, 926 S.W.2d 683, 684 (Mo. 1996) ("The appropriate time to raise the constitutional issue would have been in the answer to the tort petition…."); LF-1808-1809, 1830.

See, e.g., *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353 (Mo. 2013); *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 103 (Mo. 1994). Because §67.1846.1's exception for "grandfathered political subdivisions" violates a substantive (rather than procedural) provision of the Missouri Constitution, severability is governed by §1.140. *Mo. Roundtable for Life*, 396 S.W.3d at 353; *Hammerschmidt*, 877 S.W.2d at 103. The statute was enacted in the year 2001, having been introduced as S.B. 369.

Courts ***must*** sever unconstitutional provisions of any Missouri statute unless those provisions are so essentially and inseparably connected with, and so dependent upon, the valid 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. §1.140; *see also Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007) ("[A]ll statutes should be upheld to the fullest extent possible."). There is a strong presumption in favor of preserving the rest of S.B. 369.

The exception for "grandfathered political subdivisions" is severable under §1.140 because the statutory scheme is perfectly "complete and workable" without it. *SSM Cardinal Glennon Children's Hosp. v. State,* 68 S.W.3d 412, 418 (Mo. 2002). The "grandfathered political subdivision" exception is wholly unrelated to the other provisions of S.B. 369. That is, nothing else in the bill authorizes "linear foot fees" or pertains to "grandfathered political subdivisions." *See* S.B. 369 (2001) (Def-Apdx-A44). Thus, "severance of [the exception] from the remainder of the bill would not impact its other provisions." *Mo. Ass'n of Club Execs., Inc. v. State,* 208 S.W.3d 885, 889 (Mo. 2006).

The few instances in which this Court has found provisions ***not*** severable have involved invalid provisions that were much more tightly bound with valid ones. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 220 (Mo. 2006) (transitional voter identification provisions were ineffective once permanent provisions were invalidated); *Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue,* 98 S.W.3d 540, 546 (Mo. 2003) ("[I]f the homeowner provisions are struck down, then there will be no transfer of title, and so the provisions of [the statute] as to secured parties will never come into play.").

In the opening commentary about this Court's jurisdiction, the Cities suggest that severance "only require[s] deletion of the 'May 1, 2001' date" from §67.1846.1. Br.-15. All this would do is create a presumptively larger subset of "grandfathered political subdivisions" that would nevertheless remain a fixed set of cities with immutable characteristics. This also would amount to eviscerating the general intent of the legislation of banning linear foot fees. Moreover, it would amount to legislative action by the Court by expanding the statute beyond intent of the legislature to encompass these additional political subdivisions, which is certainly not a judicial function. Thus, the "grandfathered political subdivision" language must be stricken in its entirety.

II. The trial court erred in entering summary judgment finding that both Cameron's and Wentzville's right-of-way ordinances are valid and enforceable (and in granting the Cities' motion for judgment on the pleadings on Counts I through VII of the Counterclaim), in granting judgment in favor of Cameron and Wentzville on Counts XVII through Count XIX of the Second Amended Petition, and in awarding Cameron damages, because Cameron's and Wentzville's coercive imposition of their respective rights-of-way agreements are illegal and void, in that they constitute mandatory "franchises" prohibited by §67.1842.1(4), and Cameron failed to present any evidence that the costs that it seeks to impose are based on the actual, substantiated costs reasonably incurred by the city in managing its rights of way.

Missouri's Right-of-Way laws provide that "no political subdivision shall … [r]equire a telecommunications company to obtain a franchise." §67.1842.1(4). Notwithstanding that prohibition, in Counts XVII-XIX of the Second Amended Petition, Cameron and Wentzville sought a declaration that Spectra and CenturyTel violated the applicable ROW ordinances by failing to obtain an agreement from the City granting authorization to use and occupy the rights-of-way. LF-243; *see also* LF-231-237. Such coercively-imposed agreements constitute mandatory "franchises" forbidden by §67.1842.1(4).

Further, Cameron presented no evidence that the fees that it seeks to impose are based on the "actual, substantiated costs" Cameron "reasonably incurred" in managing its public right-of-way, as required by §67.1840.2. Cameron's ordinances make clear that the fees are not so limited. At a minimum, genuine issues of material fact exist as to whether

the Cities' attempts to enforce these requirements are illegal and void. The trial court erred in entering summary judgment for Cameron and Wentzville on those Counts and in awarding Cameron damages. LF-10817.

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

Cameron's ROW Code requires telecommunications companies to enter into a franchise agreement, denominated as a "Public Ways Use Permit Agreement," as a mandatory condition to gaining access to that City's rights-of-way. Cameron ROW Code §10.5-151 (Def-Apdx-A60). Likewise, Wentzville requires telecommunications companies to sign a franchise agreement, misleadingly labeled a "Rights-of-Way Use Agreement," before using the public rights-of-way. Wentzville ROW Code §655.100 (Def-Apdx-A62); *see also* Wentzville ROW Code §655.285(A)(2) (Def-Apdx-A62) ("A ROW agreement shall be required for all other ROW-users….").

Indeed, both Cities require these mandatory contracts even for facilities that have been in the rights-of-way for decades. Cameron ROW Code §10.5-151 (Def-Apdx-A60); Wentzville ROW Code §655.100 (Def-Apdx-A62). The Missouri legislature recognizes that telephone companies need access to the public rights-of-way to provide telephone service to their customers. *See* §67.1832.1 ("[A] political subdivision shall grant its consent to [telecommunications companies and other utilities] … to construct, maintain and operate all equipment, facilities, devices, materials, apparatuses, or media … in the public right-of-way."). In short, these ordinances prohibit CenturyLink from providing any telecommunications

services whatsoever in either city unless and until CenturyLink enters into the cities' mandatory contracts.

Under Missouri law, "franchise" is a broad term, encompassing all transactions in which the government grants a privilege or authorization to an individual entity that is not common to the citizens generally. *See, e.g., State ex Inf. McKittrick v. Murphy,* 148 S.W.2d 527, 530 (Mo. 1941) (defining "franchise" broadly as "[a] special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right"); *see also Poplar Bluff v. Poplar Bluff Loan & Bldg. Ass'n*, 369 S.W.2d 764, 766 (Mo.App. 1963) ("The common definition of a franchise is that it is a special privilege conferred by the sovereign upon a citizen or citizens, which privilege is not common to the citizens generally.").

This definition of "franchise" includes the agreements under which public utilities arrange to provide services in municipalities. *See, e.g., Empire Dist. Elec. Co. v. Southwest Elec. Coop.,* 863 S.W.2d 892, 893 (Mo.App. 1993). Other authorities also confirm this understanding of "franchise." *See, e.g., Black's Law Dictionary* 683 (8th ed. 2004) (defining "franchise" as "[t]he right conferred by the government to engage in a specific business or to exercise corporate powers"). According to *Black's Law Dictionary*, "the rights necessary for public utility companies to carry on their operations are generally designated as franchise rights." *Id.* (quoting 1 *Eckstrom's Licensing in Foreign and Domestic Operations* §1.02[3], at 1-10 to 1-11 (David M. Epstein ed., 1998)).

Because CenturyLink cannot provide telephone service in either City without these mandatory contracts, Cameron's "public ways use permit agreement" and Wentzville's "rights-

of-way use agreement" are "franchises" under Missouri law. Thus, §67.1842.1(4) prohibits Respondent cities from requiring CenturyLink to obtain them.

B. Cameron failed to demonstrate that the costs it seeks to impose are based on the actual, substantiated costs reasonably incurred by the Cities in managing their public rights-of-way.

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

Cameron's ordinance on its face demonstrates Cameron's non-compliance with the statute: the purpose of the fees is "to provide for the payment and recovery of all direct *and indirect* costs and expenses of the city related to the enforcement and administration of this article *as well as fair and reasonable compensation* for the use of public ways." Cameron Code §10.5-201 (Def-Apdx-A61) (emphasis added); *see also* Cameron Code §10.5-52 (Def-Apdx-

A55) (stating that a purpose of the Cameron right-of-way code is to "ensure fair and reasonable ***compensation***...."*)* (emphasis added).

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

The trial court's entry of judgment in favor of Cameron and Wentzville on Counts XVII-XIX of the Second Amended Petition, the award of damages to Cameron based on the rights-of-way ordinance, and entry of judgment on the pleadings on Counts I-VII of the Counterclaim were erroneous and should be reversed.

III. The trial court erred in entering partial summary judgment as to liability and then awarding the Cities $1,585,492.30 in actual damages for unpaid license taxes because the court misconstrued the Cities' ordinances in the First Partial Summary Judgment and the Second Partial Summary Judgment, in that CenturyLink has numerous categories of revenue that are not derived from "exchange telephone service" or "telephone service" and are not subject to taxation under these ordinances.

For years, the CenturyLink entities paid license taxes based on the commonly understood meaning of the express terms of each Cities' ordinances. Tr.-271, 282, 346. Each City crafted its ordinance to capture specific, defined revenue sources, recognizing that its residents would ultimately pay these taxes on their telephone bills and that it needed to balance its tax revenue interest against its residents' interests in minimizing their telephone bills. Aurora, Cameron and Oak Grove (under the Oak Grove Franchise Agreement) chose to limit the tax base to "exchange telephone service" and "basic local exchange telecommunications service," while Wentzville, in taxing "telephone service," would have imposed a much broader burden on its taxpayers, but scaled that back pursuant to a Wentzville code provision that expressly excluded revenue from interstate telephone calls. Pl-Apdx-A24, A27, A32; Def-Apdx-A56. CenturyLink paid tax on the revenues it derived in each city from the services comprising "exchange telephone service" or "telephone service," respectively. *See* Tr.-263-265, 267-269.

In its summary judgment orders the trial court gave no effect to the express terms of the ordinances. *See* LF-9135-9136 (Pl-Apdx-A9-A10). As the Cities currently urge

this Court to do, the trial court gave effect to the "gross receipts" term in the ordinances, but gave no effect to the language identifying the source of such gross receipts and thus imposed taxes on revenues arising from services that are not part of providing "exchange telephone service" or, in Wentzville's case, "telephone service."

In this appeal, CenturyLink urges that this Court give effect to the entire ordinance provisions, which, read in their entirety, fully and properly describe the tax base. Each ordinance identifies (i) **who** is obligated to pay the business license tax; (2) **what** services are subject to the tax; (3) whether the tax is on gross or net revenues derived from such services; (4) **from where** the revenue is derived; and (5) the tax **rate**. The trial court's error was in conflating the concept of "gross receipts"—which relate to whether the taxpayer can deduct expenses in calculating the tax owed—with the concept of what services are included in the tax base, which is specified in each ordinance as either "exchange telephone service" or "telephone service."

The trial court decided the meaning of the ordinances on summary judgment, finding as a matter of law that inclusion of the phrase "gross receipts" means that the ordinances embrace all revenue regardless of source, thereby deleting from the ordinance the critical language identifying the services from which resulting revenue is subject to tax. LF-9136 (Pl-Apdx-A10). This Court is presented with the issue of whether the terms "exchange telephone service" or "telephone service" are to have any meaning in the ordinances, and whether "gross receipts" modifies revenue (gross versus net revenue) or displaces the description of the services (exchange telephone service or telephone service) on which the tax is based.

A. The ordinances confine the tax base to revenues derived from providing "exchange telephone service" or, in the case of Wentzville, "telephone service."

The rules governing interpretation of a statute are employed when interpreting an ordinance. *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. 2015). If there is no definition in the ordinance, the Court will ascertain and give effect to the intent of the enacting legislative body as reflected in the plain and ordinary meaning of the ordinance's language. *Id.* The Court gives effect to the intent "based on a review of the whole ordinance." *State ex rel. Sunshine Enters. of Missouri, Inc. v. Board of Adjustment of City of St. Ann*, 64 S.W.3d 310, 312 (Mo. 2002). Further, "where any real doubt exists" in the construction of tax laws, "the law requires that it be strictly construed in favor of the taxpayer…. Tax laws must be strictly construed and, if the right to tax is not plainly conferred by statute, it will not be extended by implication." *United Airlines v. State Tax Comm'n*, 377 S.W.2d 444, 448 (Mo. 1964); *accord St. Louis County v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. 2011).

"[W]ords and phrases having a technical meaning are to be considered as having been used in a statute or ordinance in their technical sense, unless it appears that they were intended to be used otherwise, and that to interpret them according to their technical import would thwart and defeat the legislative purpose." *City of St. Louis v. Triangle Fuel Co.*, 193 S.W.2d 914, 915 (Mo.App. 1946). "Technical words are those of or pertaining to the useful or mechanical arts, or any science, business, profession or sport, or the like." *Rathjen v. Reorganized School Dist. R-II of Shelby County*, 284 S.W.2d 516, 529 (Mo. 1955) (internal quotation omitted); *see also* §1.090.

When interpreting a tax ordinance that refers to "gross receipts," this Court examines the text of the ordinance to determine "[g]ross receipts from what?" *May Dep't Stores Co. v. University City*, 458 S.W.2d 260, 262 (Mo. 1970). Aurora and Cameron have virtually identical ordinances that tax companies "in the business of furnishing ***exchange telephone service***" based upon gross receipts "derived ***from the furnishing of such service*** within said City…." Pl-Apdx-A24, A27. Oak Grove's Franchise Agreement taxes "local service revenues," meaning "all revenues received by Grantee ***for the provision of basic local exchange telecommunications service***," which "shall ***not*** include charges for special services, long distance calls, access charges, or services not considered basic local exchange telecommunications service." Def-Apdx-A56. Wentzville's ordinance imposes tax on companies "in the business of ***supplying*** … ***telephone service***" based on "gross receipts ***from such business***." Pl-Apdx-A32. Thus, by their express terms each ordinance specifies the services it intended to make subject to the tax. The trial court's fundamental error is the court's unexplained modification of these taxes on gross receipts from providing "exchange telephone service" and "telephone service" into a tax on the gross receipts from "all revenue," from any source. LF-9135-9136 (Pl-Apdx-A9-A10).

The phrase "exchange telephone service" is a term of art in the telecommunications industry. *See, e.g., GTE Sprint Comm'ns Corp. v. Dep't of Treasury*, 445 N.W.2d 479 (Mich. Ct. App. 1989); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977); LF-7041-7042, 7063-7064, 11035-11036, 11038-11040; *see also Strong v. Am. Cyanamid Co.*, 261 S.W.3d 493, 514 n.5 (Mo.App. 2007) (a party

"should" present expert testimony concerning the interpretation of technical statutes and regulations); *UMB Bank, N.A. v. City of Kansas City*, 238 S.W.3d 228, 233 (Mo.App. 2007); *City of Sullivan v. Truckstop Rest., Inc.*, 142 S.W.3d 181, 188-189 (Mo.App. 2004).[6]

For years, CenturyLink has paid millions of dollars in license taxes on the revenue streams derived from providing "exchange telephone service" or "telephone service" under the ordinances. Neither through the summary judgment motions nor at trial did the Cities attempt to have the trial court ascertain the meaning of "exchange telephone service" or "telephone service," instead arguing that each ordinance taxed all of CenturyLink's revenues based on the "gross receipts" provision. The Cities presented no evidence in support of either summary judgment motion as to the meaning of the ordinance terms or whether the 29 services they sought to tax are included within the meaning of "exchange telephone service" or "telephone service." *See* LF-394-1039, 1199, 11003-11027.

By contrast, CenturyLink's showing on summary judgment included a sworn declaration from Harry Newton, who is the author and editor of *Newton's Telecom Dictionary*, which is the authoritative dictionary in the telecommunications industry (akin to *Black's Law Dictionary* in the legal world). LF-8618-8619. Newton explained, for example, that "'[e]xchange telephone service' is dial-up telephone service between two

[6] *See also MC Comm'ns Corp. v. Am. Tel. and Tel. Co.*, 708 F.2d 1081, 1093 n.8 (7th Cir. 1983) (explaining concept of "local exchange telephone service" based upon trial evidence); *Southern Pacific Comm'ns Co. v. Am. Tel. and Tel. Co.*, 556 F. Supp. 825, 855 n.9 (D.D.C. 1982) (explaining concept based upon trial testimony).

points within an exchange area. An "exchange area" is a geographic area in which telephone services and prices are the same. The concept of an exchange area is based on geography, pricing and regulation, not equipment." LF-8619.[7]

Newton also specifically addressed various types of revenue—such as carrier access, extended area service (EAS), inside wire maintenance, among numerous others—and explained why they were not "exchange telephone service" under the industry's understanding of these terms. LF-8619.

Beyond Newton, CenturyLink also furnished expert reports and affidavits from, among others, Brown and Hankins, explaining at length which services did not fall within the industry meaning of "exchange telephone service" and "telephone service." LF-7175-7196, 7198-7204; *see also, e.g.*, *GTE North, Inc. v. Zaino*, 770 N.E.2d 65, 70 (Ohio 2002) ("[B]y definition the primary business of GTE, as a local exchange telephone service, is different from that of an interexchange company."). Plaintiffs offered no contrary evidence, instead choosing to adhere to their position that their ordinances tax all gross receipts from all services.

[7] *See* §386.020(16); *cf. GTE Sprint*, 445 N.W.2d at 478-479 ("[T]elephone exchange service is what a residential or commercial customer utilizes when he picks up the phone receiver, hears a dial tone and places a toll-free call to a local telephone number; it is nothing more and, more importantly, it is nothing less."); *MC Comm'ns*, 708 F.2d at 1093 n.8 ("Local exchange telephone service is the ordinary service used in nearly all homes and businesses. From a technical standpoint, it involves a wire connection between the telephone set and a switching system in a nearby telephone company central office [*i.e.*, telephone exchange] which is connected by transmission trunks to the switching systems in other central offices within the exchange area."); *Southern Pacific Comm'ns*, 556 F. Supp. at 855 n.9 (same explanation); *Pacific Tel & Tel. Co. v. Hill*, 365 P.2d 1021, 1023 (Or. 1961) (defining "'exchange telephone service' [to] mean local calls, that is, calls that can be made without the payment of long distance charge").

Despite the overwhelming and uncontested evidence of what services are - and are not - included within the definition of the ordinances' terms, the trial court ordered that "all revenue," regardless of source, is subject to tax, leaving for trial only the factual questions of which of those revenues were derived "in" the Cities, and whether CenturyLink should be subject to penalties. LF-9136. This was erroneous, and the Court should either enter judgment in favor of CenturyLink based on the undisputed evidence with respect to these revenues, or, at a minimum, remand these issues to the trial court for additional fact-finding.

IV. The trial court erred in awarding the Cities $1,585,492.30 in actual damages for unpaid license taxes because the Cities did not carry their burden of proof, in that the Cities did not establish that the disputed services occurred "in" or "within" the Cities.

The Second Partial Summary Judgment deferred to trial a determination of damages, measured by unpaid tax on revenues derived "in the Cities." LF-9135-9136 (Pl-Apdx-A9-A10). The trial court recognized that a city cannot tax outside of its jurisdiction, and the factual inquiry was to determine what revenues were derived in the Cities, as only those revenues could be taxed. CenturyLink introduced extensive evidence of what revenues were derived "in the Cities." The Cities elected to cross-examine witnesses, but not to present their own evidence on the issue, preferring to adhere to their position that "gross receipts" applies to all revenue—not only regardless of the service that produced the revenue, but also regardless of whether the revenue was derived "in the Cities." The trial court determined correctly that carrier access is not

derived in any of the Cities, but determined erroneously that revenue from all other services arises in the Cities, rather than finding that some services are provided in the Cities and that others arise from services outside of the Cities.

A. The Cities did not carry their burden of proof, and CenturyLink presented unrefuted evidence that numerous services do not occur "in" the Cities.

In the Second Partial Summary Judgment, the trial court concluded that CenturyLink was liable for license taxes to each of the Cities for "all revenue they receive **in that respective City**." LF-9135 (Pl-Apdx-A9) (emphasis added). The Cities bore the burden at trial to demonstrate the revenue received "in" each City.

Instead, the Cities presented accounting testimony based on a calculation of tax on all revenue from all sources, and without regard to whether the revenue was derived in the Cities. Tr.-143-144, 164. In utilizing that approach, the Cities failed even to address their burden to identify the revenue from in the Cities, even though the summary judgment orders left that issue for trial and CenturyLink repeatedly disclosed that its case would be directed at that issue.

CenturyLink's witnesses, who included both CenturyLink employees and an outside expert, testified that the following services did not generate revenue "in" a City: recurring calling plans, subscriber line charges - interstate and intrastate long-distance, directory assistance, directory listing, extended area service (EAS), feature activation/deactivation, ISDN channels, private line features, federal USF, state USF, intrastate usage, voicemail, intrastate private line, private line features, late charges, advertising revenue, intrastate toll, interstate services, and carrier access. Tr.-329-333,

336, 349-351, 433-436, 470-474; Ex. X. Of these, carrier access involved the most substantial revenues, and was the subject of the most testimony.

CenturyLink presented extensive evidence at trial about the characteristics of carrier access, to whom access is sold and where the services are provided and the revenue derived. The Cities did not present any evidence to the contrary. Unlike all of the other services involved in this case, which are sold on a retail basis directly to customers in the Cities, carrier access is a wholesale service sold to other carriers, who in turn provide retail services to the end-user customers in the Cities. Tr.-229-230, 385-386, 422-423, 430, 438-439, 451-452, 466-468. Carrier access involves granting other communications companies access to CenturyLink's system, so that such companies can provide their own long-distance or other service to residents in the Cities. Carrier access is sold directly to these carriers, not to consumers in the Cities; CenturyLink and its customer often connect far away from the city; and the payments for access are set and received far from the Cities. Tr.-278, 350-351, 385-386, 406-407, 424. In no way can carrier access charges be said to be derived "in the Cities," as neither the customer, the service, nor the payment occurs in the Cities. Tr.-332, 336, 350-351, 356, 466-68.

As CenturyLink's director of carrier access billing explained: "Our carrier access customer … is a long-distance telephone company or interexchange carrier, other communication companies that may order services … other than telephone. It could be internet transport. They're not like an end user customer who picks up and makes a long-distance telephone call. They are basically purchasing wholesale services that they are reselling to end user customers." Tr.-386; *see also* Tr.-467.

Not surprisingly, all of this evidence went unrefuted at trial, as there is no defensible basis for contending that carrier access occurs in the Cities. In its Final Judgment, the trial court determined that carrier access was not included in the tax base and, therefore, was not within the measure of damages. LF-10815-10816 (Pl-Apdx-A1-A2). The court's finding on this issue is based upon substantial evidence and should not be overturned. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976).

The award of damages as to other revenue streams that do not occur in the Cities, however, is not supported by substantial evidence or the weight of the evidence because the Cities elected not to present any evidence as to which services generate revenues in the Cities, or why a service is "in the Cities." They simply assumed their conclusion that all revenues are in the Cities. In contrast and as described earlier, CenturyLink presented significant and unrefuted evidence that a number of services were not provided "in" or not provided wholly "within" any of the Cities. The Cities failed to carry their burden, the undisputed evidence in the record supports CenturyLink's position on which revenues are within the Cities and which are not, and the Final Judgment should be reversed with respect to these remaining revenue streams that are not within the Cities. *See, e.g.*, *Buckner v. Jordan*, 952 S.W.2d 710, 712 (Mo. 1997) (reversing judgment as against the weight of the evidence).

B. The Missouri and U.S. Constitutions substantially limit the Cities' powers to tax beyond their borders.

The trial court's Final Judgment also fails to acknowledge constitutional limitations on the Cities' tax collection powers. "As a general rule, 'a municipal

corporation's powers cease at its municipal boundaries, and cannot, without a plain delegation of the necessary power from a proper authority, be exercised outside its geographical limits.'" *Mobil-Teria Catering Co., Inc. v. Spradling*, 576 S.W.2d 282, 283 (Mo. 1978), *overruled in part on other grounds in Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. 1997)[8] (quoting *City of St. Louis v. Lee*, 132 S.W.2d 1055, 1057 (Mo.App. 1939)). "'So far as governmental functions are concerned, it is elementary that a municipal corporation has no extraterritorial powers.'" *Id.* (quoting *City of Sedalia v. Shell Petroleum Corp.*, 81 F.2d 193, 196 (8th Cir. 1936)). This principle includes the power of taxation. *Douglas v. Kansas City*, 48 S.W. 851, 853 (Mo. 1898) (finding that city could not impose license tax on businesses in a region it had illegally annexed because the city "had no authority to exercise any control over territory beyond its borders").

If courts interpreted municipal tax ordinances as applying to all of a company's activities, without regard for their location, the validity of the ordinances "would at least be a matter of grave doubt, and … a construction of such [ordinances] should be adopted which would give validity to the [ordinances] rather than one which would render them void or at least of doubtful validity." *Mobil-Teria*, 576 S.W.2d at 284. The Court should avoid an interpretation of the Cities' ordinances that will result in the taxation of services that are furnished beyond each City's municipal boundaries. That is what the Missouri

[8] *Alumax* only overruled *Mobil-Teria* and other cases "to the extent that they silently acquiesce to this Court's jurisdiction or directly interpret the constitution to permit this Court to assume exclusive appellate jurisdiction where construction of a municipal revenue ordinance is at issue." 939 S.W.2d at 931. That issue is irrelevant here.

Constitution requires. *Id.* at 283-284; *City of Sedalia*, 81 F.2d at 196-197; *Douglas*, 48 S.W. at 853.

In addition to these intrastate limitations, the ordinances' purported interstate application must also be reined in. In 1935, the U.S. Supreme Court invalidated state license taxes on telephone companies because those taxes burdened interstate commerce even though a portion of the services taxed occurred solely within the state. *Cooney v. Mountain States Tel. & Tel. Co.*, 294 U.S. 384, 390-394 (1935). In 1951, the Court slightly relaxed the *Cooney* prohibition but still invalidated a state license tax as applied to a company engaged in interstate commerce. *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951); *see also Freeman v. Hewit*, 329 U.S. 249 (1946). Such a tax was unconstitutional, the Court held, "no matter how fairly it [was] apportioned to business done within the state." *Spector*, 340 U.S. at 609. At the same time, the Court stated:

> [W]here a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on *intrastate* business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business *done within the state*.

Id. at 609-610 (emphasis added).

These ordinances originally were passed in the 1950's and 1960's. Nevertheless, under the Cities' broad interpretation of the ordinances, each ordinance is a tax on the privilege of doing business in the City that applies to revenues from both intra- and extra-territorial transactions. Thus, under *Cooney* and *Spector*, which were the governing standards at the time the ordinances were enacted, this broad interpretation of the Cities' tax ordinances would have been unconstitutional. That fact alone should inform this

Court's interpretation of the ordinance drafters' intent. *See, e.g., Estes v. City of Richmond*, 68 S.E.2d 109, 112 (Va. 1951) (looking at contemporaneous legal authorities for insight into what an ordinance's drafters meant by certain terms). This Court should not lightly conclude that the Cities sought to enact unconstitutional ordinances.

The trial court's interpretation also runs afoul of modern federal Commerce Clause jurisprudence. The U.S. Supreme Court eventually replaced the rigid "*Spector* rule"—"that a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce"—with a more flexible standard that upholds a state's tax on activity in interstate commerce if it "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the states." *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 288-289 (1977).

In *Goldberg v. Sweet*, 488 U.S. 252 (1989), the Court applied this standard to a state tax on intrastate and interstate telephone service, finding that the tax only satisfied *Complete Auto Transit*'s "fairly apportioned" requirement because (a) it posed only a "low" risk of multiple taxation, and (b) that low risk was further mitigated by a provision permitting a credit to any taxpayer who can prove that he has paid tax in another state for the same call. *Id.* at 265. A few years later, the Court reiterated that "in *Goldberg* … we expressed doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 311 (1992).

The taxation of *all* services provided by Defendants without regard to whether those services reach beyond the Cities' municipal boundaries is unconstitutional under this standard. There is nothing in the trial court's interpretation of their ordinances that provides for the taxes on services provided between telephone exchanges ("interexchange" services) or interstate services to be "fairly apportioned" between the City in which those services are billed and any other locality that can claim a sufficient "nexus" to tax that service. There is certainly nothing analogous to the credit provision that saved the state tax at issue in *Goldberg*. *See* 488 U.S. at 256; *see also Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1795, 1806 (2015) (invalidating an income tax scheme that threatened multiple taxation of interstate commerce and noting that "Maryland could cure the problem with its current system by granting a credit for taxes paid to other States").

"[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (citation and emphasis removed). At a minimum, therefore, the Cities' ordinances should be interpreted as being limited in scope to telephone service provided wholly "in" or "within" each city.

V. The trial court erred in ruling on the claims of Oak Grove because the trial court relied on inapplicable law, in that the Oak Grove Franchise Agreement between the City and Embarq is the controlling ordinance and not Oak Grove's general utility ordinance.

Throughout the case, Oak Grove neglected to mention that, despite suing and seeking partial summary judgment under a more general ordinance, in 1996 Oak Grove passed a more specific ordinance unique to this dispute. Notably, this ordinance granted a franchise to CenturyLink's predecessor that taxes "five percent of the local service revenues to the City" and expressly excludes "charges for special services, long distance calls, access charges, or services not considered basic local exchange telecommunications service." LF-9800 (Def-Apdx-A56). When CenturyLink realized that the case brought by Oak Grove was proceeding under the wrong controlling legal authority, CenturyLink moved to set aside the First and Second Partial Summary Judgments as they related to Oak Grove before the case proceeded to trial.

The trial court had the authority to set aside its prior orders, and it should have done so in the interest of justice once it became aware that Oak Grove had misrepresented that the general utilities ordinances was the controlling tax authority. "An interlocutory order is always under the control of the court making it." *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 365 (Mo.App. 2015). As a result, "[a]t any time before final judgment a court may open, amend, reverse or vacate an interlocutory order." *Id.* Here, the court erred by refusing to set aside the First and

Second Summary Judgments to acknowledge the substantial evidence offered by CenturyLink that the Franchise Agreement controlled over §615.020 of the City Code.

There was no dispute that the Oak Grove ordinance was passed or that Embarq f/k/a United Telephone had countersigned the ordinance. LF-9766-9767, 9782-9783, 9802-9803, 9831, 9851-9852. Indeed, Oak Grove's City Clerk possesses the original version of the Franchise Ordinances signed by the mayor and Embarq (f/k/a United Telephone). LF-9796. The officer who signed the Franchise Agreement attested that he believed that he had timely signed the Oak Grove Franchise Agreement, and that the company timely delivered the signed and accepted Oak Grove Franchise Agreement to Oak Grove. LF-9806.

In addition, the Customer Relationship Manager who worked with Oak Grove in 1996 explained, among other things, that if the Oak Grove Franchise Agreement were not effective, she would necessarily have learned of that through her dealings with Oak Grove, but that she never learned anything of that nature. LF-9802-9804. Thus, both Oak Grove and CenturyLink acted in conformance with the Oak Grove Franchise Agreement—not the older general utilities ordinance—for 20 years before Oak Grove sued under the wrong ordinance and then invented a position that the Oak Grove Franchise Agreement.

Oak Grove offered diametrically opposed arguments to avoid the application of the controlling Oak Grove Franchise Agreement. Oak Grove first admitted that the agreement had been enacted, and was in effect for 20 years. Oak Grove then claimed the franchise had been forfeited at some indeterminate time due to alleged non-payment. In

other words, Oak Grove freely admitted that for some substantial period, the Oak Grove Franchise Agreement was in full force and effect. It was only during a deposition of a representative of Oak Grove, and only after consultation with counsel, that Oak Grove took the position that CenturyLink never "accepted" the agreement and it never went into effect. LF 9762-9763; 9765-9766; 9772-9774; 9783-9784; 9792-9795. Oak Grove also submitted an affidavit from the current City Clerk, who stated that the City could not locate a copy of the acceptance in its files. LF-9923-9924. This City Clerk claimed no personal knowledge of the circumstances surrounding the execution and acceptance of the Franchise Agreement.

The court denied CenturyLink's motion. Def-Apdx-A1-A2. In so doing, the court stated: "There is no evidence in the record that any such acceptance was filed. However, there is an affidavit in the record that states no acceptance was ever filed." LF-9967. This ruling is contrary to the undisputed record evidence. There is no affidavit that states that an acceptance was never "filed"—only that after more than 20 years, Oak Grove was unable to locate a copy of the acceptance based upon a review of its records (the thoroughness of this search is unknown). LF-9923-9924. Moreover, the Oak Grove affidavit was not based on personal knowledge of the City Clerk in 1996, but was rather executed by the individual who began serving as the City Clerk in 2000, and who has no personal knowledge of the events at issue. LF-9923.

Next, there is no dispute that Embarq f/k/a United Telephone executed the Oak Grove Franchise Agreement. LF-9767, 9802-9803, 9831. The contemporaneous corporate officer attested to his belief that Company timely delivered the signed and

accepted Oak Grove Franchise Agreement to Oak Grove. LF-9806. This was further bolstered by evidence that, throughout CenturyLink's dealings with Oak Grove, CenturyLink never heard from Oak Grove that the fully signed Franchise Agreement had not been received or that CenturyLink was submitting incorrect payments. LF-9824.

CenturyLink presented substantial evidence that the Oak Grove Franchise Agreement was accepted, while Oak Grove presented no evidence that refuted this showing. And Oak Grove's contradictory arguments, moreover, demonstrate Oak Grove's position was wrong. The trial court erred and applied the wrong law regarding the tax of Oak Grove.

VI. The trial court erred in awarding damages for unpaid license taxes beginning on July 27, 2007, because a three-year statute of limitations applies and not a five-year statute of limitations, in that disputes over license tax payments must be initiated within three years after the date of the tax return under §144.220.3.

Without any analysis, the trial court applied a five-year statute of limitations to the Cities' claims for unpaid license taxes. LF-10815 (Pl-Apdx-A1). This was error, because two interrelated statutes, §71.625 and §144.220, provide that the applicable limitations period for claims concerning delinquent municipal license taxes is three years.

Section 71.625, which governs the "payment of a license tax due to any municipal corporation in this state," provides that "[t]he limitation for bringing suit for the collection of the delinquent tax and penalty shall be the same as that provided in sections 144.010 to 144.510." §71.625.1-.2. Section 144.220 furnishes a statute of limitations. *See Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 923-924 (Mo. 2003).

Under the statute, "every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within three years after the return was filed or required to be filed." §144.220.3. Generously treating the Cities' Petition as the statutorily required "notice" (no notice was mailed), the Cities filed their original Petition on July 27, 2012, so they may not claim license taxes that were allegedly due before July 27, 2009.

The Cities contend that since §71.625 was enacted in 2012 it does not apply to this earlier filed case. However, the statute is procedural, since it concerns "[t]he limitation for bringing suit," so it applies to pending actions. *Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 43 (Mo. 1909) ("Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending and future actions."). Further, "[g]enerally speaking, no one has a vested right in a statute of limitations, and it is competent for the legislature, either by extending or reducing the period of limitation, to regulate the time within which suits may be brought *even on existing causes of action*." *Rabin v. Krogsdale*, 346 S.W.2d 58, 60 (Mo. 1961) (emphasis in original). "A statute which affects only procedure or remedy applies to all actions which fall within its terms, whether commenced before or after the enactment, unless the statute expresses a contrary intention or retrospective application will impair a substantive right vested by the prior statute." *State ex rel. Research Med. Ctr. v. Peters*, 631 S.W.2d 938, 946 (Mo.App. 1982) (internal citations omitted) (citing *Darrah v. Foster*, 355 S.W.2d 24, 30 (Mo. 1962); *Rabin*, 346 S.W.2d at 60; *Wentz v. Price Candy Co.*, 175 S.W.2d 852, 853 (Mo. 1943)).

Section 71.625 does not announce that it is prospective-only or express a contrary intention to the general rule. And even if the Cities attempted to argue that the statute concerns their substantive rights, §71.625 still properly has retroactive effect against the Cities because they are political subdivisions of the State. *Missouri Municipal League v. State*, 489 S.W.3d 765, 768 (Mo. 2016).

For these reasons, the trial court erred in awarding damages beginning in 2007, and the Cities' compensable damages, if any, began on July 27, 2009.

VII. The trial court erred in awarding prejudgment interest in the amount of $745,948.20 to Aurora, Cameron, and Oak Grove and $208,071.00 to Wentzville because the court incorrectly applied the default statutory interest rate of 9%, in that the interest rate set annually by the Director of Revenue under 12 C.S.R. 10-41.010 governs prejudgment interest in municipal license tax disputes.

The trial court erroneously awarded $745,948.20 in prejudgment interest to the Cities of Aurora, Cameron, and Oak Grove under the default statute for prejudgment interest, §408.020. LF-10817 (Pl-Apdx-A3). Similarly, the trial court erroneously awarded $208,071 in prejudgment interest to the City of Wentzville under a Wentzville ordinance. LF-10817 (Pl.-Apdx-A3). These awards fail to follow the specific prejudgment interest scheme for license taxes created by the Missouri General Assembly. The prejudgment interest in a municipal license tax dispute is governed by three interlocking statutory provisions—§§71.625.2, 144.170, and 32.065—that direct courts to utilize the Director of Revenue's annual adjusted rate of interest.

A. Aurora, Cameron, and Oak Grove.

Under §71.625.2, "the interest provisions of section 144.170 … shall apply to delinquent taxes due as a result of the imposition of a license tax by any municipal corporation." That statute provides that unpaid license taxes "shall bear interest at the rate determined by section 32.065 from and after such date until paid." §144.170. The prescribed rate is "[t]he annual rate established under this section shall be such adjusted rate as is established by the director of revenue…." §32.065.1. Therefore, the applicable prejudgment interest rates for this case, as published by the director "[p]ursuant to section 32.065," are: 8% (2007-2008); 5% (2009); and 3% (2010-2016). *See* 12 C.S.R. 10-41.010(1). This interest is ***not*** compounded. 12 C.S.R. 10-41.010(3).

Nevertheless, the Cities argued, and the trial court agreed, that §408.020 (which was last amended in 1979) controlled the rate of interest. This statute, by its terms, does not mention taxes—let alone license taxes—but rather: (1) "written contracts," (2) "accounts after they become due and demand of payment is made," (3) "money recovered for the use of another, and retained without the owner's knowledge of the receipt," and (4) "all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made." §408.020. The Cities cannot wedge license taxes into any of these categories, and their interpretation ignores the basic canon of statutory construction that a later-enacted, more specific statute will prevail over a general statute. *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 673 n.2 (Mo. 2009). Because §71.625.2 (enacted in 2014) governs "delinquent taxes due" in

the specific context of "the imposition of a license tax by any municipal corporation," §71.625.2 controls.

Therefore, the trial court erred in applying a uniform prejudgment interest rate of 9% and in compounding that interest and should have applied non-compounded interest rates of 8% (2007-2008); 5% (2009); and 3% (2010-2016).

B. Wentzville.

The trial court awarded interest to Wentzville based on a Wentzville ordinance that purports to provide interest at a rate of "2% per month, not to exceed 18% per annum." LF-10817 (Pl-Apdx-A3). As stated above, however, §144.170 provides that interest for unpaid license taxes "shall" bear interest at the rate described in the previous Section. Thus, Wentzville cannot grant itself the special privilege to collect interest more than the amount selected by the General Assembly, and the Final Judgment must be modified accordingly to comply with 12 C.S.R. 10-41.010(1).

This Court has held that "[a] municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly or impliedly granted it by the state." *City of Dellwood v. Twyford*, 912 S.W.2d 58, 59 (Mo. 1995). When an ordinance conflicts with a statute, the ordinance is void. *City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. 2015). "An ordinance conflicts with state law if it permits something state law prohibits, or prohibits something state law permits." *Sunshine Enters.*, 64 S.W.3d at 314. An ordinance "may not invade the province of general legislation involving the public policy of the state as a whole." *Missouri Bankers Ass'n, Inc. v. St. Louis County*, 448 S.W.3d 267, 271 (Mo. 2014) (internal quotations

omitted). Thus, Wentzville's ordinance provision on interest cannot be applied in this case, where a superior state statute controls.

VIII. The trial court erred in awarding post-judgment interest at the rate of 18% per annum to Wentzville because Wentzville's ordinance is invalid to the extent the ordinance permits an award of post-judgment interest above 9%, in that any award of post-judgment interest above 9% conflicts with the statewide rate set by §408.040.

As explained in Section VII.B, when an ordinance conflicts with a statute, the ordinance is void. *City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. 2015). As with pre-judgment interest, the trial court committed erred with respect to ***post***-judgment interest by awarding that interest under a special Wentzville ordinance instead of following the governing statute that trumps the ordinance.

By statute, the uniform rate of post-judgment interest in a dispute over municipal license taxes "shall be" 9%. §408.040. As interpreted by the trial court, Wentzville City Code §140.120 grants Wentzville the special right to collect post-judgment interest for delinquent license taxes "at the rate of two percent (2%) per month … not to exceed eighteen percent (18%) per year, until paid." LF-10817 (Pl-Apdx-A3).

Wentzville City Code §140.120 does not mention "post-judgment interest" or remotely attempt to describe itself as applicable to court judgments. In fact, the ordinance states that enforcement of delinquent taxes "shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of State and County taxes, including fees, penalties, commissions and other charges"—language that encompasses the standard

post-judgment interest charge. Wentzville cannot arrogate to itself the right to apply a higher interest rate than that the prescribed by the General Assembly. *See Missouri Bankers*, 448 S.W.3d at 271. Therefore, this Court should either harmonize Wentzville's ordinance with §408.040 or declare it void to the extent it conflicts with state statute, and in either event, apply the statutory 9% post-judgment rate.

IX. The trial court erred in awarding $1,190,610.77 in attorneys' fees to the Cities because: (i) §488.472 does not permit the Cities to receive attorneys' fees in that CenturyLink could not be liable to the Cities under Chapter 392 because the trial court lacked primary jurisdiction to find a violation under Chapter 392; the Cities are not "person[s]" or "corporation[s]" entitled to recover under that Chapter; unpaid municipal license taxes are not contemplated by that Chapter; Chapter 392 is inapplicable to CenturyLink; and the evidence does not support a determination that CenturyLink acted "willfully"; and (ii) there are no "special circumstances" warranting an award of attorneys' fees under the trial court's "equitable powers."

The general rule in Missouri is that absent statutory authorization or contractual agreement, each litigant must bear the expense of his own attorneys' fees. *Mayor, Councilmen, and Citizens of City of Liberty v. Beard*, 636 S.W.2d 330, 331 (Mo. 1982). The trial court nevertheless awarded the Cities $1,190,610.77 in attorneys' fees, purportedly under the authority of §488.472, which would allow a recovery of attorneys' fees upon a finding that a telecommunications company's acts or omissions resulting in liability under §392.350 to be willful. LF-10817-10818 (Pl-Apdx-A3-A4). This award was in error.

A. The Cities' claims suffer from numerous defects under Chapter 392.

The Cities' claims under Chapter 392 suffer from a variety of defects, any one of which is fatal to their claims, and any of which would preclude a finding of liability under the statute and, consequently, a claim for attorneys' fees. These include: (1) the Missouri Public Service Commission ("PSC"), and not a circuit court, has "primary jurisdiction" to first determine whether a claim has been established, and the Cities made no effort to avail themselves of the PSC; (2) the Cities have no standing to assert claims under Chapter 392 as the Cities are not "persons" or "corporations" entitled to relief under the statutory provisions for unpaid business license taxes; (3) unpaid and disputed municipal license taxes are not a claim cognizable under the statutory section; (4) the chapter became inapplicable to CenturyLink with the passage of §392.611; and (5) the evidence fails to support a claim that CenturyLink acted "willfully" as required by the statute.[9]

1. <u>The PSC, and not the circuit court, has primary jurisdiction to hear claims of this nature.</u>

"Under the doctrine of 'primary jurisdiction,' an administrative agency is given the first opportunity to rule on issues which have been placed within the special competence of that agency." *Holland Indus., Inc. v. Div. of Transp.*, 763 S.W.2d 666, 668 (Mo. 1989). For a century, this Court has "consistently adhered to the rule that

[9] Assuming any liability under this section, the compensatory damages (without attorneys' fees) in this case for a violation of §392.250 would be the same as the amount found to be due for unpaid taxes. As a result, CenturyLink raises issues regarding the ability to recover under this statutory section in terms of the award of attorneys' fees. If no taxes are found to be due, no liability under §392.250 can found to be due.

matters within the jurisdiction of the [PSC] must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy…." *State ex rel. and to Use of Cirese v. Ridge*, 138 S.W.2d 1012, 1015 (Mo. 1940); *see also Lamar v. Ford Motor Co.*, 409 S.W.2d 100, 107 (Mo. 1966) (collecting cases regarding primary jurisdiction of PSC).

By its plain terms, §488.472 limits awards of attorneys' fees to "case[s] of recovery" under Chapter 392—coupled with a finding of willfulness. Under the primary jurisdiction doctrine, the circuit court lacked authority to adjudicate any such dispute under Chapter 392 in the first instance because the PSC is vested with primary jurisdiction to determine whether a telephone company has acted unlawfully under that chapter. *Overman v. Sw. Bell Tel. Co.*, 706 S.W.2d 244, 251-252 (Mo.App. 1986); *De Maranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo.App. 1978). The Cities and the trial court, however, did not adhere to the required progression. Instead, in order to seek an unwarranted award of attorneys' fees, the Cities sought to mix apples and oranges by blending a dispute over municipal license tax ordinances with a specialized factual determination about "unlawful" activity under the statutory jurisdiction of the PSC.

2. The Cities lacked standing to bring a claim under Chapter 392 because the Cities are not "person[s]" or "corporation[s]" entitled to recover under the explicit definitions governing that chapter.

The Cities also lack statutory standing to receive either a monetary recovery or attorneys' fees from any tribunal for a violation of Chapter 392. In particular, §488.472

only extends "to the person or corporation affected" by the violation of Chapter 392, and the Cities are not "person[s] or corporation[s]" within the meaning of the statute.

"The provisions of section 386.020, defining words, phrases and terms, shall apply to and determine the meaning of all such words, phrases and terms as used in sections 392.190 to 392.530." § 392.180. "'Corporation' includes a corporation, company, association and joint stock association or company." §386.020(11). "'Person' includes an individual, and a firm or copartnership." §386.020(40). Neither definition includes "municipalities" or "municipal corporations."

In fact, the statute provides a completely separate definition of "municipality," which "includes a city, village or town." §386.020(34). Moreover, chapter 386 treats "persons" and "corporations" as distinct from "municipalities." For example, §386.390.1 separately authorizes complaints to the PSC by "any corporation or person," *or* by "any body politic or municipal corporation." If "person" or "corporation" included municipalities, the legislature's separate definition of the term "municipality" and addition of the term "municipal corporation" in §386.020(34) and §386.390.1, respectively, "would be unnecessary," and "[t]his Court presumes 'that the legislature did not insert idle verbiage or superfluous language in a statute.'" *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. 2015) (quoting *Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. 1993)).

Finally, this differential treatment between persons/corporations and municipalities is consistent with the recognition that "the provision for attorney's fees in the statute is not a penalty, but rather is a method of equalizing the positions of a utility

and a member of the consuming public…." *Overman v. Sw. Bell Tel. Co.*, 675 S.W.2d 419, 423 (Mo.App. 1984) (emphasis added). The municipalities here are not suing as the "consuming public," but rather as governmental tax authorities.

3. Unpaid business license taxes are not the type of claim contemplated for recovery under Chapter 392.

The premise of the Cities' allegations is that CenturyLink subjected the Cities to "undue or unreasonable prejudice" under §392.200. CenturyLink's alleged underpayment of municipal license taxes would not violate §392.200.3 as a matter of law because the purpose of that statute is to protect customers from the harmful effects of rate discrimination, not to furnish governmental entities with a new remedy to pursue the alleged underpayment of taxes. §392.200.3; *see generally State ex rel. Counsel v. Pub. Serv. Comm'n*, 259 S.W.3d 23, 34 (Mo.App. 2008).

First, the title of §392.200 demonstrates its applicability to concerns involving "adequate service," "just and reasonable charges," "unjust discrimination," and "unreasonable preference" granted by telephone companies. §392.200. The Missouri Court of Appeals summarized the intended scope of §392.200 as follows:

> [P]ursuant to § 392.200.2, [telecommunications] companies may not charge any customer more or less for any service than it charges any other customer; pursuant to § 392.200.3, such companies may not give any undue or unreasonable preference to any customer, or subject any customer to any undue or unreasonable prejudice or disadvantage; pursuant to § 392.200.4, such companies may not discriminate based on geographic area or other market segmentation; and, pursuant to § 392.200.5, such companies may not charge a different price for equivalent service over equivalent distances without filing the appropriate tariff."

State ex rel. Coffman v. Public Service Comm'n, 150 S.W.3d 92, 100 (Mo.App. 2004); *see also De Paul Hosp. Sch. of Nursing v. Public Service Comm'n*, 464 S.W.2d 737, 738 (Mo.App. 1970). Municipal license tax collection is not within the scope of the law.

Second, §392.200, which is part of a single statutory scheme within Chapter 392, comprised of §§392.180 to 392.530, regulates telecommunications companies for the benefit of *customers*, not for the benefit of taxing authorities. *See* §392.185 (listing nine customer-oriented purposes of Chapter 392).

Finally, no provision within §§392.180 through 392.530 regulates municipal taxation or addresses a claim that a telephone company failed to pay those taxes in full. Section 392.190, entitled "[a]pplication of sections 392.190 to 392.530," mandates that they are to be viewed as a unified whole. These sections include over 100 references to telecommunication companies' rates or charges, with no reference to payment of license taxes. *See, e.g.*, §392.200 (just and reasonable charges); §392.220 (filing of rate schedules); §§392.230, 392.240 (regulation of rates for certain services).

The Court must read a statutory provision "in the context of the entire statute to determine its plain meaning." *Union Elec. Co. v. Dir. of Rev.*, 425 S.W.3d 118, 122 (Mo. 2014). Here, Chapter 392 confirms that "Section 392.200 forbids discrimination in charges for doing a like or contemporaneous service with respect to communication by telephone under the same or substantially the same circumstances and conditions," *De Paul Hospital*, 464 S.W.2d at 738, and *not* claims by tax collectors who have remedies elsewhere.

4. Chapter 392 became inapplicable to CenturyLink.

The Cities' reliance on Chapter 392 for any recovery, be it for damages or attorneys' fees, is fundamentally flawed by the fact that the chapter became inapplicable to CenturyLink as of August 28, 2014. On that date, §392.611 became effective. This statute made Chapter 392 inapplicable to telephone companies, unless the telephone company elected to remain subject to "certain statutes, rules, or orders by notification of" the PSC. CenturyLink did not elect to remain subject. LF-3161.

The Cities' application of their claims under Chapter 392 is to grant them additional remedies. Section 392.611 does not express any intent of prospective only application and the chapter does not impair a vested substantive right. Consequently, §392.611 is applicable retrospectively. *Darrah*, 355 S.W.2d at 30; *Missouri Municipal League*, 489 S.W.3d at 768. CenturyLink is simply not subject to the Cities claims under Chapter 392.

5. The evidence does not support a finding that CenturyLink acted "willfully" as required to award attorneys' fees under the statute.

CenturyLink paid license taxes to the Cities for decades under a consistent understanding of the scope of the ordinances. That understanding was based on the universal industry understanding of the terms employed by the Cities in their ordinances, even recognizing the differences between ordinances taxing "exchange telephone service" and "telephone service." Tr.-474-475. Stripped of hyperbole and rhetoric, the Cities' argument that CenturyLink acted willfully is based on nothing more than that it did not pay the amounts the Cities now claim are due.

After taking evidence on willfulness at trial, including from the individual who determined what the property tax payments were and whose conduct would have to have been found to be willful, the trial court found no willfulness and imposed no penalties. LF-10817 (Pl-Apdx-A3). But previous summary judgments (one by the trial judge and another by a different judge) adopted the Cities' form of order that included a finding of willfulness, without the presentation of any evidence. LF-1719 (Pl-Apdx-A20).

To enter a summary judgment on state of mind is rarely appropriate. As the appellate courts in this state have consistently held, "[a] party's knowledge, intent, motive, and the like are elusive facts, and summary judgment is rarely appropriate in these types of cases in which the facts must in nearly every case be proven by circumstantial evidence." *Schroeder v. Duenke*, 265 S.W.3d 843, 848 (Mo.App. 2008) (alterations omitted); *see also Amusement Centers, Inc. v. City of Lake Ozark*, 271 S.W.3d 18, 22 (Mo.App. 2008). "In reviewing a summary judgment, we must scrutinize the record in the light most favorable to the party against whom the motion was filed, and accord to that party the benefit of every doubt." *Hawes v. OK Vacuum & Janitor Supply Co.*, 762 S.W.2d 865, 867 (Mo.App. 1989). The Cities therefore bore a heavy burden of establishing that this is one of the rare cases where summary judgment is appropriate on the issue of CenturyLink's intent.

The Cities fell far short of carrying this heavy burden. The Cities purported to show willfulness, with respect to payment of alleged gross receipts taxes, by relying on the definition of "willful" in *De Paul*. Assuming for the sake of argument that *De Paul* is applicable here, the *De Paul* court stated that "willful means either intentionally charging

an incorrect rate knowing it was incorrect, or charging a rate when the utility has no reasonable basis for placing the individual consumer within the classification calling for that rate." 539 S.W.2d at 549. Under *De Paul*, the Cities needed to prove either that CenturyLink knew its interpretation of the ordinances at issue was incorrect, or that CenturyLink has no reasonable basis for their position. The Cities did not and could not prove either.

The Cities' arguments that CenturyLink "knew" its interpretation was incorrect are without merit. Even at trial, when the Cities sought penalties, the Cities presented no evidence to dispute that CenturyLink actually believed its interpretations of these provisions, or that those interpretations were unreasonable. The Cities' position is that if a taxpayer's interpretation of how the tax is to be calculated turns out to be incorrect, its underpayment is necessarily a willful violation of the ordinance.

The Cities argue that since another municipality had raised similar claim in a separate litigation, CenturyLink should be imputed with knowledge that its position was baseless. *See* LF-401, 1072. But that case, between Jefferson City and Embarq, in no way supports the Cities' position that CenturyLink knew its position with respect to ***these*** ordinances was incorrect. In fact, the settlement agreement reached between Embarq and Jefferson City stands for just the opposite proposition. In that agreement (LF-934-949), Embarq clearly stated it continued to dispute Jefferson City's interpretation of its ordinance, and Jefferson City took no position on the validity or invalidity of Embarq Missouri's position. LF-934-935. Thus, that dispute was settled, and no court entered a judgment or opinion on the underlying liability. The evidence of another settlement is

even less probative as to intent with respect to the litigation involving a completely different family of companies (AT&T) and other cities. *See* LF-843-932.

Moreover, the Cities claim that Wentzville's mere transmission of a dispute letter concerning its tax base somehow established willfulness. But Wentzville's counsel's mere assertion—just prior to the start of this litigation—that the Wentzville ordinance should be interpreted a certain way is irrelevant. LF-679-683. In any event, Wentzville's self-serving "admonitions" to pay some of the disputed taxes have no bearing on "willfulness" as to the other Cities.

In short, the Cities failed to carry their burden of establishing willfulness as a matter of law to warrant summary judgment. CenturyLink had meritorious, reasonable, and good-faith bases for interpreting the ordinances as it did. The trial court's entry of partial summary judgment as to willfulness should be reversed.

B. No "special circumstances" warranting an award of attorneys' fees exists to allow for exercise of the trial court's equitable powers to make such an award, in that this is a legitimate tax dispute over the meaning of local tax ordinances.

Missouri follows the common-law rule "that the successful litigant is not automatically entitled to an attorney's fee because the justice of his claim has been established." *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 193 (Mo. 1991), *overruled in part on other grounds in Alumax*, 939 S.W.2d at 911. Although §527.100, the declaratory judgment statute, "authorizes circuit courts to award 'costs' in an amount the court deems equitable and just," these "'[c]osts' do not automatically include attorney fees." *Smith v. City of St. Louis*, 395 S.W.3d 20, 26 (Mo. 2013). Rather, in declaratory

actions, "costs" may only encompass attorney's fees when there are "special circumstances." *Id.*

"Missouri courts have limited the exceptions to those cases involving 'very unusual circumstances' or where the natural and proximate result of a breach of duty is to involve the wronged party in collateral litigation." *Ranken*, 816 S.W.2d at 193 (quoting *Johnson v. Mercantile Trust Co. Nat'l Ass'n*, 510 S.W.2d 33, 40 (Mo. 1974)); *see also Smith*, 395 S.W.3d at 26 (stating that this exception is "narrowly construed"). Missouri courts "have rarely found the very unusual circumstances that permit the award of attorneys fees," and "[s]uch fees have been denied in cases of an improper tax assessment." *Id.*

Courts will not hesitate to reverse an erroneous award of attorneys' fees that does not fall squarely into this "rare" exception to the American Rule. *See, e.g.*, *Ranken*, 916 S.W.2d at 193; *Birdsong v. Children's Div., Missouri Dep't of Soc. Servs.*, 461 S.W.3d 454, 460-461 (Mo.App. 2015); *Rental Co., LLC v. Carter Grp., Inc.*, 399 S.W.3d 63, 67-68 (Mo.App. 2013); *St. Louis Title, LLC v. Talent Plus Consultants, LLC*, 414 S.W.3d 24, 26-27 (Mo.App. 2013).

In *Ranken*, for example, this Court reversed an award of attorneys' fees to the taxpayer in a dispute over license taxes in which the taxpayer was the prevailing party. 816 S.W.2d at 193-194. The same should hold true when the taxing authority is the prevailing party. A dispute over delinquent taxes is far from an "exceptional circumstance" warranting a departure from the American Rule. "As in all litigation, the parties simply advocated inconsistent legal and factual positions. Advocating

inconsistent positions is not a special circumstance; it is the very nature of litigation." *Smith*, 395 S.W.3d at 26.

Moreover, CenturyLink's position "was not frivolous, nor was it without substantial legal grounds." *Id.* In fact, at trial the Cities requested more than $47 million dollars in damages, interest, and penalties (LF-9991), but received $2.7 million.

Therefore, the Court should reverse the trial court's award of $1,190,610.77 in attorneys' fees to the Cities.

BRIEF AS CROSS-RESPONDENT

ARGUMENT

I. The trial court's exclusion of carrier access charges from the tax base for all four Cities and exclusion of interstate telephone revenue for Wentzville did not arise from an improper reconsideration of the earlier summary judgment orders (First Point Relied On).

In their First Point Relied On, the Cities complain that the trial court's Final Judgment excluded carrier access revenue and, specific to Wentzville, revenue derived from interstate telephone calls. Rather than argue that this result is "wrong," the Cities attack the Final Judgment using a procedural ruse tied to the two awards of Partial Summary Judgment.

Specifically, the Cities wrongly try to paint the trial court's exclusion of carrier access charges from the final damages award as a "reconsideration" of the court's prior finding of liability in the Second Partial Summary Judgment. *See* LF-9135-9137 (Pl-Apdx-A9-A11). But the trial court's finding in its Final Judgment was not a matter of liability, but damages. The trial court had found that carrier access falls within the tax base descriptions (exchange telephone service or telephone service) in each ordinance. But both summary judgments expressly limited damages to those revenues the Cities could establish at trial were derived "in" the Cities. The Cities were aware that the extent of damages was an open issue at trial, and the exclusion of carrier access charges from the damages award was a straightforward factual finding by the trial court that these charges arose outside the Cities.

Further, the Cities offer no explanation how the trial court erred in enforcing the plain language of Wentzville's ordinance, which specifically excludes "revenue derived from interstate telephone calls" from that city's license tax base. For the trial court to have ruled otherwise would have been plain error.

A. The trial court properly excluded carrier access charges from all four Cities' tax bases because such charges are not derived in the Cities, but are wholesale services provided to, billed to, and paid for by customers outside the municipal boundaries.

Each of the Cities' tax ordinances expressly limits the scope of the tax to services "in" or "within" the City. Pl-Apdx-A24, A27, A29, A32; Def-Apdx-A55. In the Second Partial Summary Judgment, the trial court ruled that "Defendants are liable for license taxes to each City for all revenue they receive in that respective City." LF-9175 (Pl-Apdx-A9).[10] Because the partial summary judgment ruling addressed liability only, it is axiomatic that the trial court would decide damages at trial, and the Cities do not contest this. But this does not mean that proving the extent of damages required little or no evidence. The Cities direct the Court to CenturyLink's response to their motion in limine and argue that "Defendants confirmed that they 'agree[] that the trial of the tax claims is on damages only….'" Br.-56 (citing LF-9974). This is correct. But as CenturyLink's

[10] To be clear, CenturyLink disagrees that carrier access (along with a host of other services) is properly encompassed under a correct interpretation of the meaning of the "services" covered by the Cities' ordinances. That is one of the subjects of CenturyLink's cross-appeal. But regardless of whether carrier access is, for example, considered to be "exchange telephone service" the factual record clearly shows and the trial court correctly found that carrier access revenue does not arise "in" or "within" any of the Cities.

response continued: "[T]he trial is to address the revenues derived by the Defendants 'in [each] respective City,' and the amount of tax owed as a result." LF-9974.

On the day of trial, the Cities were aware that damages would be hotly contested in this fashion, as noted in their opening statement: "Now, the defendants are going to attempt to introduce evidence today that certain categories of revenue or certain aspects of their revenue is not in the cities and therefore it's not taxable." Tr.-16. CenturyLink reiterated this point during its own opening statement: "[W]hat we're here to discuss today is what revenues were derived in the city from customers in the city from providing services in the city and what tax is due on those revenues. That's the issue that we're here to try." Tr.-26. The trial court also agreed that this was the remaining issue: "I think that's what we're trying to determine now, what is all the revenue…. In the cities." Tr.-162; *see also* Tr.-415 ("That's what I'm trying to determine is, what is all of the revenue earned in the city.").

The Cities, as plaintiffs, simply elected not to present any evidence of which revenues were derived from CenturyLink "in" the Cities. Instead, the Cities called only an accounting expert to sum all revenues from the 29 services, without any regard to whether the revenues were derived in the Cities. Tr.-163-164. They called no additional witness to explain to the Court which of CenturyLink's revenues were derived "in" the Cities. At trial, the Cities adhered rigidly to their position that they could tax all revenues, regardless of whether derived in the Cities or not, and made the strategic decision not to engage on that issue at all.

By contrast, CenturyLink presented testimony from multiple witnesses who explained why carrier access charges are not revenue derived "in" the Cities. Tr.-277-278, 329, 350-351, 356, 385-386, 406-407, 424, 427-428, 466-468. As these witnesses explained, unlike the sale of retail telephone services to residential customers, carrier access is a wholesale service provided to other telecommunications companies, such as Sprint and AT&T. Tr.-385, 466-468. These other telecommunications companies then resell those services to their own end-user customers. Tr.-386.

Carrier access customers (other carriers) do not have a service address in the Cities and do not remit payments in or from any of the Cities. Tr.-278, 350-351, 356, 385, 406-407. AT&T, for example, has a billing address in Alpharetta, Georgia. Tr.-407. When CenturyLink sells access to AT&T, it does not do so in the Cities. Tr.-385. And if AT&T uses that access to provide services to end users in the Cities, AT&T pays license taxes and bills its end user customers accordingly. Even from a regulatory perspective, carrier access charges are also not treated as revenue "in" any of the Cities. Tr.-424, 427-428. Based on this evidence, the trial court found that carrier access revenues are not derived "in" the Cities, and that finding is supported by uncontroverted, substantial evidence, and should not be disturbed on appeal.

The Cities' challenge to this factual finding on damages rests almost entirely upon an intentional misinterpretation of the Second Partial Summary Judgment and a separate discovery order, and an improper conflation of the two. In a June 2, 2014 discovery order, the trial court directed CenturyLink to disclose a broad list of revenues—namely, "revenues that were generated by, allocated to, collected as a result of, or were otherwise

attributable to each Defendant's business in each of the Cities…" LF-2017 (Pl-Apdx-A12). The discovery order also specifically prescribed 29 different revenue streams, including revenue from carrier access. LF-2018 (Pl-Apdx-A13).

This discovery order was intentionally broad—as is typical for discovery—and was not based on evidence of liability. The Second Partial Summary Judgment subsequently held that CenturyLink's liability included "all revenues ***in such City*** specified in the [discovery order] and all other revenue ***in such City***." LF-9135 (Pl-Apdx-A9) (emphasis added). Thus, while the trial court allowed discovery of a broadly defined "attributable revenue," it intentionally modified this term by use of "in such City" in describing liability in the Second Partial Summary Judgment. Thus, the extent to which the revenues produced in response to the discovery order were "in such City" remained an open issue for trial, as recognized by the trial court during trial. Tr.-162, 415. Nevertheless, as stated above, the Cities chose not to present evidence to prove which revenues were derived "in" the Cities, although they carried the burden of proof.

Based on the evidence presented at trial, the trial court made the proper factual finding that carrier access charges are not revenues derived "in" the Cities. The Cities' prolonged discussion of various federal cases about lack of notice for reconsideration is immaterial because the trial court's factual findings on damages were not a reconsideration of its prior legal ruling on liability. *See* Br.-59-62, 64-66. Damages were an open issue. The Cities made the tactical decision to propose the inclusion of every type of revenue imaginable in the tax base instead of presenting evidence to identify which revenues were derived "in" the Cities. The Cities are bound by their strategic

decision to focus on their demand for an excessively high damage award ($47 million) instead of focusing on the actual facts. *Polen v. Kansas City Chip Steak Co.*, 404 S.W.2d 416, 422 (Mo.App. 1966) ("Sometimes litigants must suffer the consequences of their own ill-chosen strategy, and this, for the company, is one of those times."). Therefore, the trial court's finding that carrier access charges should be excluded from the tax base should be affirmed.

B. The trial court properly enforced the express Wentzville interstate exclusion.

The Cities' next argument focuses solely on a purported anomaly in the Final Judgment with respect to Wentzville. Indeed, a first-time reader of the Cities' brief might wonder why the trial court's Final Judgment suddenly excluded "revenue derived from interstate phone calls" from the calculation of Wentzville's damages. *See* LF-10816 (Pl-Apdx-A2). This is because, throughout the entirety of this Point Relied On, Wentzville never directs the Court to its own binding ordinance, Wentzville Code §640.010 (Pl-Apdx-A32), and instead deceptively suggests that the court committed some sort of inexplicable error after trial.[11] The omission of revenue from interstate calls, however, is a straightforward application of the governing law.

Under Wentzville Code §640.020, "[e]very person engaged in the business of supplying … telephone service … 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**."

[11] Indeed, this ordinance is not mentioned in the Cities' Statement of Facts either, and is not even quoted until p. 90 of the Cities' brief (in subsection H of their third Point Relied On).

Ex.-23 (emphasis added); Pl-Apdx-A32. In turn, Wentzville Code §640.010 provides: "**Nothing in Section 640.020 shall be construed to apply to revenue derived from interstate telephone calls.**" Ex.-23 (emphasis added); Pl-Apdx-A32. The meaning of these adjacent city code provisions is clear: Wentzville's license tax on "telephone service … in the City" specifically does not apply "to revenue derived from interstate telephone calls."

The Cities correctly point out that this interstate exclusion was not addressed in the Second Partial Summary Judgment as to liability (one of many reasons why CenturyLink argues the ruling was erroneous). LF-1716-1719, 9134-9135. The trial court's oversight should not be altogether surprising, because when the Cities moved for summary judgment, they did not point out the existence of Wentzville Code §640.010 in their Statement of Uncontroverted Material Facts. *See* LF-394-403, 10980. CenturyLink pointed out the code provision, but the trial court's ensuing summary judgment order did not acknowledge §640.010 at that time.

Then, at trial, the Cities' counsel introduced Wentzville Code §640.010 into evidence. *See* Tr.-175; Ex.-23. It was discussed at length by both parties. *E.g.*, Tr.-32, 159, 164, 172, 174-176, 178, 218-219, 238-239, 241-244, 268, 289, 335, 340, 357-358, 417, 437-439, 475-476. In fact, the Cities' counsel directly informed the Court about the existence of Wentzville's exclusion. Tr.-417. For this reason, Wentzville's argument about lack of notice is not well-taken.

The court, however, ultimately gave force to the heretofore-ignored code provision in the Final Judgment. It was well established that the trial judge had the authority to fix

this oversight from the Second Partial Summary Judgment, because an interlocutory order "is always under the control of the court making it," and "[a]t any time before final judgment a court may open, amend, reverse or vacate an interlocutory order…." *State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229, 232 (Mo. 1969); *see also Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 365 (Mo.App. 2015); Rule 74.01(b). Here, the court timely corrected its prior ruling before entering its judgment.

The Cities cite no Missouri case law that reconsideration is improper when a trial judge alters a prior interlocutory ruling in light of undisputed trial evidence. Their reliance on federal authorities is unpersuasive, as federal trial courts are equally free to correct obvious legal errors committed in prior rulings. As one court has explained:

> If the district court determines that it has erred in such an interlocutory order, it would be a waste of judicial resources to force it to perpetuate such error through a trial on the remaining issues, even though it believed the ultimate judgment would have to be reversed on appeal…. [I]t is particularly difficult to understand how the ends either of justice or of orderly procedure would be furthered were we to hold that the plaintiff is entitled to summary judgment when the facts adduced at the full trial on the merits adequately support the findings and judgment for defendants.

Zimzores v. Veterans Admin., 778 F.2d 264, 266-267 (5th Cir. 1985); *see also Alston v. King*, 157 F.3d 1113, 1116 (7th Cir. 1998) (adherence to a prior ruling "is no more than a presumption, one whose strength varies with the circumstances; it is not a straightjacket"). In Missouri too, an appellate court should not reverse a reconsidered ruling unless an alleged error "materially affected the merits of the action under review." *Around The World Importing, Inc. v. Mercantile Trust Co., N.A.*, 795 S.W.2d 85, 88-89 (Mo.App. 1990); *see also Englezos v. Newspress & Gazette Co.*, 980 S.W.2d 25, 36

(Mo.App. 1998) (party challenging reconsideration must demonstrate prejudice). Here, the Cities fail to demonstrate any such prejudice. Throughout the entirety of its brief, Wentzville offers no explanation of how the trial court's exclusion of "revenue from interstate telephone calls" from the total amount of damages was incorrect. Just because the Cities hoodwinked the trial court on summary judgment, they should not receive the benefit of a reversal because the true facts came to light during trial.

Therefore, the Court should affirm the trial court's exclusion of interstate revenues from Wentzville's tax base.

II. The trial court did not abuse its discretion in admitting evidence on the central triable issue of which revenues were derived "in" the Cities (Second Point Relied On).

The Cities' second Point Relied On is essentially a rehashing of their arguments in the first Point Relied On, but recast as an evidentiary issue instead of as a matter of "notice." A trial court has broad discretion in admitting or excluding evidence. *Barkley v. McKeever Enters., Inc.*, 456 S.W.3d 829, 842 (Mo. 2015). A trial court abuses its discretion only when its ruling is "clearly against the logic of the circumstances then before the court, and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Id.* No abuse of discretion was committed here by allowing CenturyLink to present evidence concerning which revenues were derived "in" the Cities.

The Second Partial Summary Judgment stated that "Defendants are liable for license taxes to each City for all revenue they receive in that respective City," and that

"Defendants must pay license taxes in each City on all revenues in such City specified in the [discovery order] and all other revenue in such City." LF-9135-9136 (Pl-Apdx-A9-A10). Therefore, evidence regarding which of CenturyLink's revenues were derived "in" each City and concerning the Wentzville interstate exclusion was not only logically and legally relevant based on the plain terms of the Cities' ordinances, but the evidence was indispensable for trial. The probative value of this evidence far outweighs any counterargument that the Cities can muster, and in no way can the admission of this evidence be considered "so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Barkley*, 456 S.W.3d at 842.

Moreover, in addition to damages in the form of back taxes, the trial court also had before it the issue of penalties the Cities sought to impose on CenturyLink, which involves CenturyLink's reasons for calculating its tax payments. *See* Section VII, *infra*. The evidence presented went to CenturyLink's interpretation of the Cities' ordinances and the reasonableness of the decisions CenturyLink had made in historically paying the taxes over the years. *See* §144.250.2.

Notably, the Cities do not discuss a single piece of evidence or testimony to explain why the evidence was irrelevant or how they were improperly prejudiced. The Cities certainly cannot challenge the admission of Wentzville's ordinance containing the interstate exclusion, which is plainly relevant, and the Cities offered that into evidence themselves. Tr.-175; Ex.-23. With respect to carrier access charges, CenturyLink presented extensive evidence that neither its customer, nor the service provided, nor that payment, is made in the Cities. Tr.-278, 350-351, 356, 385, 406-407. This is

corroborative or dispositive evidence that carrier access charges are not revenues "in" the City.

For the most part, the Cities continue to paint this evidence as concerning CenturyLink's "liability" instead of damages. Moreover, the Cities essentially treat revenue data produced in response to a discovery order as a purported admission by CenturyLink, which was not the case. The trial court itself considered these disclosures as being "gross" numbers that did not take into consideration the nuances of the ordinances. Tr.-416-417. Furthermore, CenturyLink's witness who prepared the data testified that CenturyLink did not consider the data produced in response to the discovery order as being limited to revenues "in the city" that would be taxable. Tr.-266-267, 353.

"A plaintiff does not get to decide which evidence will (and will not) be used to prove or disprove particular facts, nor is a defendant prohibited from presenting relevant evidence merely because the plaintiff already has done so." *Barkley*, 456 S.W.3d at 842-843. The First and Second Partial Summary Judgment left open the issue of what revenues were "in" the City, and this is the precise question that this evidence answered. For these reasons, the Cities' evidentiary arguments are groundless.

III. The trial court properly excluded carrier access charges from the tax base for all four Cities because such revenues were not derived "in" the Cities as required by the ordinances, and properly excluded interstate telephone revenue for Wentzville based on the plain terms of Wentzville's ordinance (Third Point Relied On).

The Cities' third challenge to the exclusion of carrier access charges and interstate charges (in Wentzville) is the same wrong legal argument the Cities have pressed

throughout this case: that the Court should impose a tax on all gross receipts instead of enforcing the actual language of the Cities' tax ordinances. To the Cities, a license tax is always a tax on ***all*** gross receipts, regardless of the express limitations in their own ordinances. For obvious reasons, this is incorrect.

A. The Cities' license tax ordinances specify the services whose gross receipts are subject to tax.

With respect to a license tax on gross receipts, the threshold question that always confronts a court is: "gross receipts from what?" *May Dept. Stores Co. v. University City*, 458 S.W.2d 260, 262 (Mo. 1970).

The Cities' ordinances all articulate in express terms the services subject to tax: "exchange telephone service" in Aurora and Cameron, "basic local exchange telecommunications service" in Oak Grove,[12] and "telephone service" in Wentzville. Pl-Pl-Apdx-A24, A27, A32; Def-Apdx-A56. Wentzville also has an express exclusion of "revenue derived from interstate telephone calls." Pl-Apdx-A32. Notwithstanding their own ordinance's express terms, the Cities argue with a straight face that the tax is on the entire "total gross receipts attributable to [CenturyLink's] business" (Br.-77) and not the gross receipts "from" or "derived from" the actual "service[s]" specified by the plain terms of the Cities' ordinances. *See also* Br.-79 (ordinances impose a flat percentage on "'*gross* receipts' from doing [any] business in the Cities"); Br.-80 (contending that license taxes "are not imposed on specific *revenues*, they are imposed on the telephone

[12] The Cities sued on and the trial court relied on the Oak Grove general utility tax ordinance, whose tax base is "telephone service."

company"). It is telling that the Cities only partially quote their own ordinances a single time in this entire Point Relied On. Further, they do so in a manner that may serve to mislead the reader by quoting only the first part of the ordinance and omitting the key language delimiting the services subject to the tax, and then mischaracterize the relevant language rather than quoting it. *See* Br.-76-77 (emphasis added).

Because the Cities' argument contradicts the ordinances themselves, the Cities attempt to conjure a legal fiction that a license tax ordinance necessarily taxes all of a company's gross receipts, regardless of the language employed in the ordinance, thereby apparently asking this Court to adopt a rule of construction that the actual language utilized in a tax ordinance is irrelevant. Not surprisingly, the Cities' authorities do not support this remarkable position.

The Cities' reliance on *Laclede Gas Co. v. City of St. Louis*, 253 S.W.2d 832 (Mo. 1953), is entirely misplaced. There, the Court considered language that is substantially identical to the ordinances in this case. In particular, the *Laclede Gas* ordinance provided: "Every person engaged ***in the business of*** selling or distributing * * * gas for hearing, lighting, power and refrigeration in the city shall pay the city, as a license tax, a sum equal to five per cent of the gross receipts ***from such business***." *Id.* at 846-847 (emphasis added). As this Court then repeatedly explained throughout its opinion in *Laclede Gas*, the ordinance did not impose a tax on ***all*** of the company's gross receipts, regardless of source, but rather imposed a tax on receipts from the sale of gas in the city. *See id.* at 834 (ordinance "imposed a license tax of 5% on plaintiff's gross receipts ***from the sale of gas in said city***") (emphasis added); *id.* at 835 (tax is "measured by the benefit

to be realized by plaintiff from its gross receipts ***from the sale of gas in the city***"). This is the precise point that CenturyLink has been making throughout the course of this case: the Cities' ordinances only tax receipts from furnishing and supplying "telephone service" and "exchange telephone service" that is "in" or "within" a City.

The Cities' surgical quotation of a single passage in *Laclede Gas* concerning the meaning of the two-word phrase "gross receipts" (*see* Br.-78-79) has nothing to do with interpreting the ordinance. *See also Laclede Gas*, 253 S.W.2d at 835 ("The word 'receipts' appearing in the term 'gross receipts,' as used in the ordinance, connotes the monies received and taken in by plaintiff ***from the sale of gas in the city***….") (emphasis added). In fact, the *Laclede Gas* court made the opposite point that the Cities now make here:

> But does this ordinance impose a 5% tax upon, and must the tax due the city be measured by every dollar received by plaintiff, even though a portion of the dollars so received by plaintiff do not benefit plaintiff at all, and constitute no yardstick by which to measure the gross income from 'selling and distributing gas for heating, lighting, power or refrigeration?' That question must be answered in the negative.

Id.; *see also id.* at 837 ("We therefore rule that, as used in Ordinance 41325, the term 'gross receipts' means ***only such receipts from the sale of gas in said city*** as the plaintiff 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.") (emphasis added).

The other cases cited by the Cities are not helpful to their position. For example, the actual ordinance is never quoted in *Ludwigs v. City of Kansas City*, 487 S.W.2d 519 (Mo. 1972), and only described as "lev[ying] an annual occupation license tax upon each

utility company in an amount equal to a certain percentage of the company's gross receipts collected from its customers in the city." *Id.* at 520. Even as described, this provision did not include the service-specific limitation found within the Cities' own ordinances. Furthermore, even the *Ludwigs* ordinance would exclude carrier access revenues, which are collected from other telecommunications companies outside the city and not from "customers in the city."

Likewise, in *Kansas City v. Graybar Elec. Co., Inc.*, 485 S.W.2d 38 (Mo. 1972), the ordinances collectively required: "Every … company … engaged in ***any*** business … shall procure and pay for a license therefor from the city" in the amount of "[o]ne dollar per $1,000 of annual gross receipts," where "gross receipts" was defined to mean "twelve times the average monthly gross receipts for the time during which ***any*** business in question shall have been conducted…." *Id.* at 40, nn. 3, 4 (emphasis added). Thus, the tax base was imposed on every single company and every single line of business. Unlike the Cities' own ordinances, the *Graybar* ordinance was not limited to any particular subset of a company's gross receipts: (1) "from" or "derived from" a particular service such as exchange telephone service, telephone service (or, in *Laclede Gas*, the "sale of gas"), (2) that occurred "in" or "within" the City.

Moreover, it is doubtful that *Graybar* would be decided the same way if determined today. First, *Graybar* was decided five years before the United States Supreme Court handed down *Complete Auto Transit*, 488 U.S. at 274 (discussed *supra*, pp. 68-69) in which nexus, fair apportionment, non-discrimination and "fairly related to services provided by the taxing jurisdiction" were discussed as tests for determining

whether a local tax is constitutional, concepts not considered in *Graybar*. Additionally, *Mobil-Teria*, which emphasized the lack of municipal power beyond municipal boundaries, was decided by this Court in 1978, some six years after *Graybar*.

Like any written law, the Cities' license tax ordinances must be enforced according to their actual terms. The Cities cannot simply substitute the moniker of "gross receipts license taxes" to replace their own legislative actions. For this reason, the trial court correctly determined that carrier access revenues and interstate telephone call revenue (as to Wentzville) could be excluded under the plain terms of these ordinances.[13]

B. The Cities' telecommunications cases are inapposite.

Finding no authority from the courts of this State, the Cities have turned to non-binding cases that involved completely different issues arising under differently worded ordinances.

For example, in *City of Jefferson City, Mo. v. Cingular Wireless, LLC*, 531 F.3d 595 (8th Cir. 2008), the narrow interpretive issue concerned whether cellular phone services fell within an ordinance that taxed "supplying telephones, and telecommunications and telephonic service, and telecommunications services, within the city." *Id.* at 597. The taxation of cell phone service is not a disputed issue in this case, nor is amending ordinances so as to keep pace with evolving technology, as were at issue in *City of Jefferson*. While many types of telecommunications services existed at the time the Cities' ordinances were enacted, the Cities deliberately chose to tax only the

[13] The Cities' argument that all gross receipts may be taxed by a municipality, regardless of source, also raises serious constitutional issues, which are addressed at pp. 65-69, *supra*.

narrow subset of "exchange telephone service" or "telephone service" that occurred "within the City."

Next, the Cities twist the discussion in *Sprint Spectrum, L.P. v. City of Eugene*, 35 P.3d 327 (Or. App. 2001). In that case, telecommunications companies brought a facial challenge to an ordinance under the Oregon state constitution. The companies argued that "the city effectively 'taxes telephone calls made to locations outside the City limits,' which they contend[ed] exceeds the authority reserved under the state constitution." *Id.* at 328. The Cities point out the court's italicized phrase "*gross revenues derived from its telecommunications activities within the city*," evidently to suggest the court was broadly interpreting a similar ordinance. Br.-83. To the contrary, this was literally a quotation of the underlying ordinance. *Sprint*, 35 P.3d at 329. Moreover, the court was making the *opposite* point that the Cities now make. First, the court was differentiating "activities" from actual "transactions." Second, the court explained that "a tax on specific transactions that may involve customers beyond the city's jurisdiction" presented an "interesting question" that was "not presented in this case." *Id.* But the limitation on activities "within the city" eliminated any constitutional problems with the ordinance.

The other cases are equally inapposite. The point of *Taylor v. Rosenthal*, 213 S.W.2d 435 (Ky. App. 1948), is well-summarized by its first sentence: "The sole question presented on this appeal is what meaning did the parties to a lease covering the rental of a motion picture theater for twenty years intend to give the term 'gross receipts'?" In *Pacific Greyhound Lines v. Johnson*, 54 Cal. App. 2d 297, 301 (1942), the court was merely applying the principle of *expressio unius est exclusio alterius*, by holding that, for

a California statute, "[a] statement of exceptions excludes all others." No case cited by the Cities supports their position that in interpreting a tax ordinance a taxpayer or a court should ignore the plain language of the ordinance. Moreover, in Missouri, tax ordinances must be strictly construed, meaning courts must apply the construction most favorable to the taxpayer. *See Petrolene, Inc. v. City of Arnold*, 515 S.W.2d 551, 552-553 (Mo. 1974), *overruled in part on other grounds in Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. 1997).

C. The trial court correctly enforced Wentzville's express exclusion from the tax base of revenues from interstate services.

Astonishingly, Wentzville asks this Court to impose tax on interstate services—and then penalties for willful non-payment of tax on such services—even though its ordinances expressly excludes interstate service revenue from the tax base. The Cities cast this issue as one of burden of proof, claiming CenturyLink failed to carry its burden, even though the interstate service exclusion appears on the face of the ordinance.

The Cities' claim that the interstate exclusion articulated in §640.101 of the ordinance is an "exemption," placing the burden on CenturyLink to prove the applicability of §640.010 of the Wentzville Code. But §640.010 is not an exemption from the established tax base. It is, along with §640.020, the establishment of the tax base. Because the exclusion is part of the definition of the tax base in the first instance, not an inferred exemption, the burden remains on Wentzville to prove up a basis for taxing revenues the ordinance expressly excludes. And in evaluating whether Wentzville meets that burden, the Court should strictly construe the ordinance in favor of

CenturyLink. *United Airlines v. State Tax Comm'n*, 377 S.W.2d 444, 448 (Mo. 1964). CenturyLink satisfied any burden it bore by directing the trial court to the express language of the ordinance that excludes form the tax base revenues from interstate services.

The Cities' own cited cases show that an appellate court still reviews the record to see whether it is supported by substantial evidence. "Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. 2014). When reviewing whether the circuit court's judgment is supported by substantial evidence, appellate courts view the evidence in the light most favorable to the circuit court's judgment and defer to the circuit court's credibility determinations. *Id.* at 200. Appellate courts accept as true the evidence and inferences favorable to the trial court's decree and disregard all contrary evidence. *Id.* Further, "this Court has made clear that no contrary evidence need be considered on a substantial-evidence challenge, regardless of whether the burden of proof at trial was proof by a 'preponderance of the evidence' or proof by 'clear, cogent, and convincing evidence.'" *Id.*

Thus, the Cities are wrong in casting the exclusion of interstate revenue as a burden of proof issue. The Court should look no further than the face of the ordinance and, as the trial court did, enforce it as written. To prevail on a substantial evidence challenge, the Cities "must demonstrate that there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." *Ivie*, 439 S.W.3d at 200. Here, the ordinance itself satisfied that requirement.

IV. The trial court did not abuse its discretion in admitting CenturyLink's summary charts describing damages scenarios, including Exhibit U-2, Scenario 2, because the charts summarized voluminous amounts of data and were based upon revenue and payment data in the Cities' possession (Fourth Point Relied On).

In the fourth Point Relied On, the Cities make an evidentiary challenge to the trial court's receipt of Exhibit U, which summarizes CenturyLink's potential tax liability premised on various assumptions. "A summary of voluminous records is admissible if (1) the competency of the underlying records is established, and (2) such records have been made available to the opposing party for purposes of cross-examination." *Nooter Corp. v. Allianz Underwriters Ins. Co.*, --- S.W.3d ----, 2017 WL 4365168, at *30 (Mo.App. Oct. 3, 2017) (citing *Healthcare Servs. of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 616 (Mo. 2006)). CenturyLink satisfied both requirements.

To assist the trial court in its damages finding, CenturyLink prepared 10 different damage scenarios based on the issues that remained open after the First and Second Partial Summary Judgments. Two sets of five scenarios were offered based on whether the court employed a three-year (Exhibit U-1) or five-year (Exhibit U-2) statute of limitations. Tr.-245. Using the revenue data produced to the Cities during discovery and the tax payments made to the Cities, CenturyLink offered five damages scenarios covering all the possible outcomes before the trial court, such that once the court decided the issues before it and arrived at a damages scenario, the court could find that scenario among those presented in Exhibit U-1 or U-2 and enter the correct damages calculations. Tr.-238-245, 291-292. Ultimately, the court selected Exhibit U-2 because it applied

(erroneously) a five-year statute of limitations, and Scenario 2 (excluding carrier access and enforcing the Wentzville exclusion of interstate services). LF-10815 (Pl-Apdx-A1).

These charts in Exhibit U were prepared based upon a comparison of CenturyLink's produced revenue data against its prior tax payments. With respect to the revenue data, CenturyLink's witness testified that he relied upon the same information that was furnished to the Cities during discovery. Tr.-237-238. The underlying revenue data that gave rise to the calculations is provided in Exhibit W, which provides a listing of revenue by service, by month, for each of the Cities. There is no legitimate issue with regard to the data concerning the revenue received by CenturyLink.

With respect to the data reflecting CenturyLink's tax payments, CenturyLink's witness testified that the charts comprising Exhibit U were compiled based on the payments that were sent ***to the Cities*** to pay the license taxes. Tr.-236, 246. These payment records are therefore in the Cities' possession and have been for years. The Cities do not identify any actual discrepancy between the payment data CenturyLink offered at trial and was admitted by the trial court.

Since damages were to be calculated as the difference between tax payments the court decided should have been paid and the payments actually made, the parties presented the court with competing summaries of both sides of the equation. And since the parties did not yet know how the court would rule on which revenues the taxes should have been paid, and since the data was extraordinarily large and complex (*see* Exs. 1-8), the summaries were essential tools for the court in making its damages award. CenturyLink's summary was Exhibits U-1 and U-2, and the Cities' summary was Exhibit

22. The trial court did not abuse its discretion in admitting and considering both summaries, particularly in a bench trial, and the Cities, having offered a summary of their own, cannot now claim error in the trial court admitting Exhibit U when the Cities offered Exhibit 22 for the same purpose.

The data supporting these charts stands in contrast to *Healthcare Servs. of the Ozarks* and *Bolling Co. v. Barrington Co.*, 398 S.W.2d 28 (Mo.App. 1965), both cited by the Cities, because in these cases the information was purely internal documents that were never "made available" to the opposing party. Here, as noted, all the supporting materials were in the Cities' possession either through discovery or in their own files. The trial court acted properly in its discretion by receiving these summary charts.

V. The record evidence supports the trial court's exclusion of carrier access revenue from damages and Wentzville's express exclusion of interstate revenues, and the Cities presented no contrary evidence (Fifth Point Relied On).[14]

The Cities argue that the trial court was somehow bound to accept their calculation of damages figures, regardless of the flaws in their methodology. The Cities are incorrect.

A. The trial court properly excluded carrier access revenue and interstate revenues (as to Wentzville) based on the evidence presented.

When the burden of proof is placed on a party, the trier of fact has the right to believe or disbelieve even uncontradicted or uncontroverted evidence. *White v. Dir. of*

[14] The Cities' fifth Point Relied On is multifarious and should be stricken on that basis alone. *Wolf v. Midwest Nephrology Consultants, PC*, 487 S.W.3d 78, 84 (Mo.App. 2016).

Revenue, 321 S.W.3d 298, 305 (Mo. 2010). "If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party." *Id.* In fact, "'[g]enerally, the party not having the burden of proof on an issue need not offer any evidence concerning it.'" *Id.* (quoting *Stiff v. Stiff*, 989 S.W.2d 623, 628 (Mo.App. 1999)).

The Cities did not present a single fact witness at trial. Rather, they presented an accountant who, by his own admission, relied solely upon the instruction of the Cities' counsel in determining which revenues to include in his calculations of the Cities' damages. Tr.-142-144. The accountant had no understanding of the basis for the decision to include or not include certain revenues. "The trial court is free to believe or disbelieve all, part or none of the testimony of any witness." *T.B.G. v. C.A.G.*, 772 S.W.2d 653, 654 (Mo. 1989). Here, the judge was certainly within his discretion is choosing not to accept the testimony of a paid, non-fact witness, whose sole source of knowledge was a party's own counsel. And, in this case, it was not necessarily the witness the trial court was disbelieving, but rather the assumptions the Cities' counsel had instructed that witness to follow.

As noted above, each of the Cities' ordinances covers services "in" or "within" each City, and the Second Partial Summary Judgment restricts its scope to revenues "in each City." Yet even on appeal, the Cities do not follow the language of their own ordinances or the prior ruling and describe their trial evidence as presenting "revenue information … ***attributable to*** one of the Plaintiff Cities." Br.-101-103. This "attributable" revenue information, which was produced in discovery, is broader than

what was required to be proved at trial, which is the revenue "in" each City. None of the Cities' ordinances impose sort of vague nexus requirement of "attribution," as the Cities now suggest (and which would be impossible for taxpayer companies to understand, aside from obvious constitutional issues).

Further, there was no "judicial admission" by CenturyLink about the scope of the ordinances when CenturyLink produced certain data, including carrier access data, in response to the trial court's discovery order. Indeed, the discovery order specifically required the production of this data. At trial, CenturyLink's witnesses explained that the revenue information produced under the terms of the discovery order and then used by the Cities' accounting expert was not the same as revenue "in" each City. Tr.-291, 329. This is well supported by testimony from multiple witnesses concerning the unique nature of carrier access charges. Tr.-277-278, 329, 350-351, 356, 385-386, 406-407, 424, 427-428, 466-468. The Cities' single, non-fact witness was "advised by counsel what the law says" and had no concept of the systems used for billing carrier access. Tr.-140, 148, 160. Ultimately, the trial court agreed with CenturyLink's witnesses that carrier access charges should be excluded from the tax base as not arising. This finding is supported by substantial evidence, is consistent with the weight of the evidence, correctly declares the law, and correctly applies the law. Therefore, the trial court's exclusion of carrier access revenues and interstate revenues should be affirmed.

B. CenturyLink's damages figures are supported by substantial evidence and the weight of the evidence.

The Cities next argue that there was "no evidence" that CenturyLink's damages figures in Exhibit U-2, Scenario 2 were correct and that the testimony did not explain "what type of interstate revenue" was included for Wentzville. Br.-104, 106. This is simply not true.

To prevail on a substantial evidence challenge, the opposing party "must demonstrate that there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." *Ivie*, 439 S.W.3d at 200. CenturyLink's witness testified that he derived the information on all the charts, including Exhibit U-2, Scenario 2, by pulling together all of the revenue and tax data for the period from 2009 through June 30, 2016. Tr.-232. He personally gathered the data and confirmed its accuracy. Tr.-233, 317. The calculations were based upon the same data that was provided to the same Cities. Tr.-237-238, 252. The witness testified that Scenario 2 excluded the carrier access data and the interstate revenues for Wentzville. Tr.-240-241. Then, on cross-examination, counsel specifically asked "which revenues are captured in Damage Scenario 2, and "what's excluded," to which the witness responded that, out of the 24 revenues listed, the excluded revenues consisted of "[s]ubscriber line charge-inter; the recurring -- interstate portion of the recurring calling plans; the interstate services; and interstate private lines," as well as carrier access. Tr.-335-336; *see also* Tr.-475-476. Therefore, there was sufficient evidence for the Court to decide whether the interstate exclusion was proper.

Aside from this erroneous argument that overlooks their own cross-examination, the Cities argue that the finding was wrong because Wentzville's exclusion only applies to "interstate telephone calls." Br.-104. The Cities, however, offered no evidence that these revenues are ***not*** "derived from interstate telephone calls," as the ordinance provides. Ex.-23; Pl-Apdx-A32. Therefore, the trial court's finding was supported by substantial evidence and was not against the weight of the evidence.

The Cities next attempt to shift the burden of proof, citing inapposite case law that arose in the context of a taxpayer-initiated challenge. *See* Br.-107. As described above, the Cities offer no case law that a taxpayer carries the burden of proof to disprove damages for the alleged violation of a municipal taxing ordinance. To the extent that the burden falls on CenturyLink, however, the evidence at trial amply supports the trial court's final determination for the reasons described above.

VI. The trial court correctly excluded from damages, and gave CenturyLink credit for, tax payments CenturyLink made to the Cities under protest pursuant to Missouri statute (Sixth Point Relied On).

The Cities next argue that the trial court should not have credited the tax protest payments that CenturyLink has been making to each of the Cities in connection with protective lawsuits for the last several years. There is no dispute that tax payments have been made, under protest, and that the statutorily prescribed lawsuits have been filed. The purpose of the Cities' challenge regarding CenturyLink's protest payments in this appeal is unclear, other than as an attempt to obtain statutorily disallowed interest or

perhaps a double recovery. Regardless of the Cities' motivation, however, their arguments are groundless.

A. The Cities do not establish error in the trial court's handling of CenturyLink's tax protest payments.

In calculating the amounts actually paid, the trial court correctly included the payments actually remitted to the Cities without protest, and the amounts remitted under protest. *See* Tr.-236, 246. Doing so precludes the possibility of a double recovery by the Cities for the same unpaid tax: first as damages in this case, and then potentially in the tax protest cases. The trial court resolved any potential for a double recovery by providing that CenturyLink would be credited with the protest payments, and was ordered to release the protest payments to the Cities.

The Cities have presented a variety of purported challenges (which, as explained below, are all illusory or groundless), but they fail to identify a single witness or other piece of evidence to establish that CenturyLink, for example, did not make tax protest payments at all, or paid the wrong amount, or did not make the payments on time. More importantly, the Cities fail to accept that even if claims of defective tax protest lawsuits are accurate, the result is— much like the trial court's order in this case—a release of the protested taxes to the Cities.

Instead, the Cities relied on an expert witness with no personal knowledge of the underlying facts, was unfamiliar with the governing statute, and then provided his opinion, as an accountant, whether duly paid protest payments should be treated as "income." Tr.-190-191. Indeed, the expert witness (who was not experienced in protest

lawsuits) admitted that he and counsel concocted the theory to not account for the taxes paid under protest. Tr.-191. CenturyLink, for its part, presented a witness more experienced in this field who held the opposite opinion. Tr.-246-247. Moreover, as recognized by this court, payment under protest is the equivalent of payment. *John Calvin Manor, Inc. v. Aylward*, 517 S.W.2d 59, 63 (Mo. 1974).

It was not error to include the payments under protest in the damages calculation, and then to preclude any inconsistent outcome in the protest cases by ordering CenturyLink to withdraw the protests and release the protested payments to the Cities.

B. CenturyLink's protest payments were properly credited under §139.031.

Section 139.031 provides a set of procedures under which a taxpayer may pay taxes under protest. "Under this protest payment statute the taxpayer, having paid the sum to the collector, is not liable for interest or penalties during the impoundment even [if] he fails in his protest and even though the [state] cannot use the tax money in the interim." *Boyd-Richardson Co. v. Leachman*, 615 S.W.2d 46, 49 (Mo. 1981).

Despite this clear statement of the law, the Cities maintain that CenturyLink should not receive any benefit from its filing of the tax protest actions, even if there is no dispute that the amounts have been paid or that prophylactic protest lawsuits have been filed throughout the pendency of the case. The Cities further assert that CenturyLink should still be assessed interest and penalties for these paid amounts *in this case*. Both arguments defeat the entire purpose of §139.031 and would render the protest statute meaningless. If the Cities' argument is given any credence by this Court, taxing authorities throughout Missouri will be free to file an end-run lawsuit around every tax

protest action, transforming that case into a tool to extract the same interest and penalties from which the taxpayer is insulated under §139.031.

Similarly, the Cities wrongly suggest that the trial court or this Court should effectively adjudicate the merits of the tax protest actions. Essentially, the Cities assert that the trial court in St. Louis County should review the papers filed in Boone County, Jackson County, Lawrence County, and St. Charles County, and determine their validity even though the St. Louis County court cannot actually adjudicate the merits of the actual lawsuits. This makes no sense. Under §139.031.2, the venue of these tax protest lawsuits is statutorily prescribed to be in the same circuit as the local collector's office. Those circuit courts have exclusive jurisdiction over the merits of the tax protest actions, and the St. Louis County circuit court (in this case) may not usurp that role. Indeed, as the Cities aptly observe, "[t]his is not a tax protest case" (Br.-117), and "those protests are still subject to the jurisdiction of the courts in which the protest actions are pending" (Br.-114).

At best, the Cities' argument about the parallel tax protest cases boils down to an argument that the Cities want money now and dislike the regime created by §139.031.[15] This is not an excuse for municipalities to disregard the will of the state legislature. Those lawsuits will be handled in due time, but they cannot serve as a basis for further damages, interest, or penalties in this case.

[15] Pursuant to §139.031.8, if the Cities wanted use of the protested tax funds during the pendency of the dispute, they could petition the circuit court for release and made the required showings under the statute.

C. There is no legitimate evidentiary dispute about the tax protest payments.

The Cities also present a similar evidentiary challenge with respect to the tax protest lawsuits that they presented with respect to CenturyLink's damages calculations as a whole—namely, by bringing a myopic challenge to summary charts although they already possess the underlying documents. As previously described, a summary of voluminous records "is admissible if (1) the competency of the underlying records is established, and (2) such records have been made available to the opposing party for purposes of cross-examination." *Nooter*, --- S.W.3d ----, 2017 WL 4365168, at *30.

As CenturyLink's witness testified, these lawsuits have been filed in each of the jurisdictions every three months since 2013. Tr.-236, 249. There is no genuine dispute about CenturyLink making the protest payments and filing the protective tax protest lawsuits under §139.031 while these proceedings have been ongoing. The Cities do not actually dispute that CenturyLink submitted checks to them, or that the Cities were served with the petitions filed by CenturyLink under §139.031 (in cases in which the parties are represented by the same counsel (*see* Tr.-554)). As acknowledged by their expert witness at trial, the Cities have evidence of these protested payments and used that information in preparation of their case. Tr.-190. In sum, these records are certainly "available" to the Cities. *Nooter*, --- S.W.3d ----, 2017 WL 4365168, at *30.

Therefore, the trial court properly considered this evidence.

VII. The trial court did not abuse its discretion in awarding no penalties for CenturyLink's alleged underpayments of business license taxes, based on undisputed evidence of CenturyLink's reasonable, good faith interpretation of the license tax ordinances (Seventh Point Relied On).

Under §71.625.2, which governs "the imposition of a license tax by any municipal corporation," "[t]he limitation for bringing suit for the collection of the delinquent tax and ***penalty*** shall be the same as that provided in sections 144.010 to 144.510." (Emphasis added). In turn, §144.250.2 provides that "[i]n case of failure to pay the full amount of tax required under sections 144.010 to 144.525 on or before the date prescribed therefor … unless it is shown that such failure is due to reasonable cause and not the result of willful neglect, evasion or fraudulent intent, there shall be added to the tax an amount equal to five percent of the deficiency." *See also Lora v. Dir. of Rev.*, 618 S.W.2d 630, 634 (Mo. 1981) (discussing prior version of statute).

CenturyLink presented voluminous testimony and other evidence at trial concerning the reasonableness of its determination of the amount due under its license taxes. Tr.-474-475. As explained above, CenturyLink's interpretation complied with the industry meanings of the terms employed in the ordinances. *See, e.g.*, Tr.-263-265, 267-269, 271, 424-427, 434-434, 459, 462, 473. The Cities called only a damages expert, an accountant, as their sole witness and offered no contrary evidence about CenturyLink's intent. After hearing all the evidence, the trial court declined to impose any penalties on CenturyLink. LF-10817 (Pl-Apdx-A3). Thus, by its judgment, the trial court determined that CenturyLink's alleged failure to pay the full amount of taxes was due to reasonable

cause and was not based upon willful neglect, evasion or fraudulent intent and therefore did not violate §144.250.2. The trial court had broad discretion in deciding to award penalties, and the Court "will only interfere with the trial court's exercise of discretion where it has been manifestly abused." *State ex rel. Ashcroft v. Church*, 664 S.W.2d 586, 589 (Mo.App. 1984). In light of the evidence adduced, which consisted of *no* evidence offered by the Cities, the trial court's decision rested well within that discretion.

The Cities, however, would like their ordinances to override the mandatory language of these two statutes, §§71.625 and 144.250. This is impermissible. *City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. 2015) (when an ordinance conflicts with a statute, the ordinance is void). None of the cases cited by the Cities remotely suggest that an ordinance's penalty provision may supersede a statutory penalty provision. *See, e.g.*, *Stein v. State Tax Comm'n*, 379 S.W.2d 495 (Mo. 1964) (language of penalty-imposing statute never even discussed), *overruled by Boyd-Richardson*, 615 S.W.2d at 49 (finding penalties could not be imposed in light of protest payments); *City of Bridgeton v. Nw. Chrysler-Plymouth, Inc.*, 37 S.W.3d 867 (Mo.App. 2001) (rejecting challenge to ordinance increasing interest and penalties as a "tax levy" in violation of the Hancock Amendment); *City of Sunset Hills v. Sw. Bell Mobile Sys., Inc.*, 14 S.W.3d 54 (Mo.App. 1999) (no discussion of any challenge to penalty); Further, each of these cases predates the General Assembly's amendment of §71.625 that added §71.625.2. *See* H.B. 1504 (2012).

The Cities' decision not to inform this Court of §71.625—which was directly raised in post-trial briefing (LF-10940-10941)—and its potential applicability to this

case, is nothing short of disingenuous. Instead of directing the Court to this controlling authority, the Cities both argue that their ordinances apply and contradictorily argue that a different statute, §144.157, is applicable.

Section 144.157 does not apply. By its plain terms, that statute concerns tax collection—that is, it concerns "person[s] required to collect, truthfully account for and pay over any tax imposed" under certain sections of ch. 67, ch. 94, and ch. 144. §144.157; *see, e.g.*, §94.812 (stating that retailer, vendors, and operators are "responsible for the collection and payment" of municipal tourism taxes); §144.635 (vendors collect use tax from purchasers). In other words, that statute concerns penalties applicable when a third person is responsible for paying certain taxes of another person and fails to do so.

There is no alleged discrepancy about CenturyLink's collection and transmission of taxes from its customers. Moreover, even §144.157.1 still requires "willful" failures "to collect such tax or truthfully account for and pay over such tax" and "to evade or defeat the tax or the payment thereof." As with the intent requirements under §144.250, the trial court's judgment reflects that the court did not find that CenturyLink acted in such a manner.

Even if this Court believes that the Cities' ordinances control the penalty determination, the Cities continue with their disingenuous arguments by claiming that the penalty must be $500 per day. Once again, the Cities' fail to faithfully report to this Court what the penalty provisions in ordinances for at least three of the Cities. Indeed, those provisions provide that penalties shall be imposed, but "not exceeding" $500. Pl-Apdx-A36, A38, A39, A41. These ordinances do "no more than place a limit on any

penalty imposed, not to *exceed*" $500. *Battis v. Hofmann*, 832 S.W.2d 937, 941 (Mo.App. 1992) (emphasis in original). The trial court had "the discretion to impose a penalty within the statutory range, after consideration of the attendant circumstances. There is no mandatory penalty." *Id.*; *see also Church*, 664 S.W.2d at 589 (upholding refusal to award *any* civil penalty under statute allowing penalty "not to exceed" $10,000 per day). Thus, if the ordinances control, the trial court in its discretion could have awarded any amount of penalty short of $500 per day.

These ordinances also stand in contrast to the cases cited by the Cities, *Westrope & Assocs. v. Dir. of Rev.*, 57 S.W.3d 880 (Mo.App. 2001), and *City of Kansas City v. Garnett*, 482 S.W.3d 829 (Mo.App. 2016), in which the governing statute and ordinance did not use the "up to" or "not exceeding" language found in the Cities' own ordinances, but rather set the penalties at a certain invariable rate (*Westrope*: 10%, and *Garnett*: 5%).

Furthermore, although the Cities merely requested monetary penalties, a review of their ordinances demonstrates that they are actually criminal in nature and should not have been used at all. The Aurora and Cameron ordinances call these "offenses" that carry the possibility of 3 months' imprisonment; and the Wentzville ordinance and the Oak Grove general ordinance upon which the Cities rely[16] describe a "conviction" for these "offenses" and allows for 90 days' imprisonment. Pl-Apdx-A36, A38, A39, A41. The Cities were not pursuing criminal infractions in civil proceedings. *See Damon v.*

[16] CenturyLink observes the Cities have also failed to direct the Court to Oak Grove's seemingly on-point ordinance adjacent to its license tax provision, which is also criminal ordinance that requires a finding that the defendant is "guilty of a misdemeanor." Pl-Apdx-A30.

City of Kansas City, 419 S.W.3d 162, 188 (Mo.App. 2013) (additional procedural protections required for criminal ordinances). And the Cities certainly did not meet the applicable "beyond a reasonable doubt" standard. *Id.*

In the end, imposing penalties was a matter of discretion for the trial judge who actually heard the evidence. Even if the Cities' ordinances containing penalty provisions were applicable, the Cities offer no reason why, if penalties are mandatory, the maximum amount should now be awarded or why the trial court could not award a *de minimis* amount of penalties (*e.g.*, $0.01 instead of $0). Finally, they offer no reason why *this* Court, instead of the trial court, should suddenly assume the role of fact-finder and adjust the amount of penalties to the statutory maximum. The trial court heard the testimony of the witnesses, reviewed all the evidence, and concluded that no penalties were warranted. This Court should affirm.

VIII. The trial court properly declined to impose penalties based upon alleged violations of the right-of-way code in Cameron because Cameron erroneously relied upon a criminal ordinance that is inapplicable in a civil case (Eighth Point Relied On).

As explained in Points I and II of CenturyLink's brief, Points I and II (pp. 44-55, *supra*), the trial court erred in imposing right-of-way fees on Spectra. As a result, this issue should be moot.

Cameron City Code §10.5-59 provides that a fine will be imposed upon anyone "found guilty" for "violating, disobeying, omitting, neglecting or refusing to comply with" any provisions in the article, and imposes a fine. Apdx-A49. The ordinance's

specific reference to "guilt" makes it clear that this is a criminal infraction, not a civil infraction. The criminal nature of the ordinance is further confirmed by the supposedly mandatory fine of $500 per day, regardless of the severity of the offense. These proceedings, which were conducted entirely under the Rules of Civil Procedure and not as a municipal prosecution, did not comply with the necessary procedural requirements for a criminal proceeding, not least of which is the beyond-a-reasonable-doubt standard of proof. *See City of Kansas City v. Oxley*, 579 S.W.2d 113, 114 (Mo. 1979); *Damon v. City of Kansas City*, 419 S.W.3d 162, 188 (Mo.App. 2013).

For these reasons, the trial court properly declined to impose any penalties under this ordinance.

CONCLUSION

The Court should find the "grandfathered political subdivision" exemption in §67.1846 to be an unconstitutional special law to be severed and stricken from the rest of the statute. The Court should also affirm the trial court's finding that access revenue does not give rise to taxable revenue under any of the Cities' ordinances and affirm application of the Wentzville exclusion for long-distance revenue, but reverse taxation on other revenues as either not being "exchange telephone service" or "telephone service," or not arising "in" or "within" the Cities; reverse the award of damages for linear foot fees under the City of Cameron ordinance; and reverse the award of attorneys' fees. The Court should also (i) find a three-year limitations period applicable and limit any damages to those accrued beginning on July 27, 2009; (ii) modify the rate of pre-judgment interest to non-compounded interest rates of 8% (2007-2008) (if applicable),

5% (2009), and 3% (2010-2016); and (iii) modify the rate of post-judgment interest with respect to the City of Wentzville to 9%.

Respectfully submitted,

BRYAN CAVE LLP

/s/ Mark B. Leadlove
Mark B. Leadlove, #33205
Jonathan B. Potts, #64091
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102
(314) 259-2000
(314) 259-2020 (fax)
mbleadlove@bryancave.com
jonathan.potts@bryancave.com

Timothy R. Beyer, *pro hac vice*
1700 Lincoln St., Suite 4100
Denver, CO 80203
(303) 861-7000
(303) 866-0200 (fax)
tim.beyer@bryancave.com

RUNNYMEDE law group

Stephen Robert Clark, #41417
Adam S. Hochschild, #52282
7733 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
(314) 814-8880
sclark@runnymedelaw.com
ahochschild@runnymedelaw.com

Attorneys for Appellants/Cross-Respondents

January 22, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief for Appellants/Cross-Respondents complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 30,400 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ Mark B. Leadlove

Attorney for Appellants/Cross-Respondents

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, I electronically filed the foregoing Brief for Appellants/Cross-Respondents and Appendix with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Mark B. Leadlove

Attorney for Appellants/Cross-Respondents