SC96276

IN THE
SUPREME COURT OF MISSOURI

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 Twenty-First Judicial Circuit, St. Louis County, Missouri
Honorable Tom W. DePriest, Jr., Div. 8

RESPONDENTS'/CROSS-APPELLANTS' REPLY AND RESPONSE BRIEF

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RESPONSE TO CENTURYLINK'S STATEMENT OF FACTS

Appellants/Cross-Respondents ("Defendants" or "CenturyLink")'s brief alleges numerous "facts" that were not properly before the circuit court, do not arise from admissible evidence, or are inaccurate. Respondents/Cross-Appellants ("Cities") correct many of these inaccuracies in the argument sections below.

For example, although CenturyLink contends otherwise, it was undisputed in summary judgment that the Cities informed CenturyLink of the requirement to pay the full amount of license taxes and that CenturyLink failed to do so. *See* Legal File ("LF") 2983. Citing the summary judgment record, CenturyLink also seeks to differentiate its various subsidiaries and argue that some entities only provide certain kinds of services, and that CenturyLink, Inc. itself provides no telephone services. CenturyLink Brief ("Br."), p.21. It was undisputed, however, that all Defendants, directly or indirectly, engage in the business of supplying or furnishing telephone or exchange telephone service in the Cities, and that CenturyLink, Inc. provides services. LF 1397-1403, 11091-97, 11101-111. CenturyLink's various inconsistent statements about its services, "exchanges," and "exchange telephone service," were also disputed and unestablished in summary judgment. CenturyLink Br., pp.22-24; LF 111076-11231. For instance, there was no admissible evidence to support CenturyLink's assertion that "[s]maller municipalities, such as the Cities, are typically served by one CenturyLink company exchange, but that exchange also services customers outside of municipal boundaries." CenturyLink Br., p.23 (citing Summary Judgment Exhibits K, L); LF 11094-95 (explaining the deficiencies with those exhibits).

In both summary judgment proceedings, CenturyLink failed to properly controvert a single fact put forth by the Cities. *See* LF 1389-1447, 7597-7602, 7687-8058. Furthermore, CenturyLink's own facts were unsupported by admissible evidence complying with Rule 74.04. CenturyLink offered various "affidavits" that were inadmissible, including because they lacked foundation, contained hearsay and legal conclusions, and contradicted CenturyLink's prior admissions. LF 1258-1379, 1486-1509. None of CenturyLink's affidavits controverted the Cities' facts or demonstrated a right to judgment for CenturyLink. CenturyLink relies heavily on that testimony in its brief, but this Court cannot consider it.

ARGUMENT

I. The trial court erred in entering final judgment inconsistent with its prior summary judgment because the court failed to follow the required procedures in that the court did not provide adequate notice and an opportunity for the Cities to respond to or prepare to address the newly re-opened issues of liability.

The court erroneously re-opened summary judgment and expanded the scope of trial to permit re-litigation of established matters. The court did so without providing notice and an opportunity for the Cities to prepare for and adjust the presentation of their case. The Cities are not attempting to "us[e] a procedural ruse" to claim error. CenturyLink Br., p.92. The final judgment was erroneous both because it was improper as a matter of law to exclude certain receipts from Defendants' tax liability and damages (Point III) *and* because that improper judgment resulted from a prejudicial, improper procedure (Point I).

CenturyLink does not dispute that a court cannot modify summary judgment and broaden the scope of trial without sufficient notice to the parties. *See* CenturyLink Br., pp.92-100; *State ex rel. Schweitzer v. Greene*, 438 S.W.2d 229, 232 (Mo. banc 1969) (modification of prior orders "should be taken only after proper notice to the parties"); *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica*, 242 F.3d 418, 422 (1st Cir. 2001) (upon modifying summary judgment "and broaden[ing] the scope of trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue"); *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 386 (2d Cir. 1989) ("clear notice" and "an adequate opportunity to adjust the presentation of their case

once [court] decided not to follow the order" required where court re-opens summary judgment); *Singh v. George Washington Univ. Sch. of Med. & Health Scis.*, 508 F.3d 1097, 1106 (D.C. Cir. 2007).

CenturyLink also does not dispute that matters determined in a partial summary judgment are "taken as established at trial," and parties are entitled to rely on such matters as already-determined. *See* Rule 74.04(c),(d); *Singh*, 508 F.3d at 1106; *Moreland v. Farren-Davis*, 995 S.W.2d 512, 516 (Mo. App. 1999) (partial summary judgment on liability "as envisioned in Rule 74.04(c)(3), result[s]…in the removal of that theory at trial…."). Accordingly, it was error for the court here to ignore the matters that had been established in summary judgment, expand the scope of trial, and modify summary judgment without sufficient notice and opportunity to the Cities.

Because it cannot dispute these standards, CenturyLink ignores them and argues that certain items (carrier access and interstate revenue) should not be considered taxable. CenturyLink Br., pp.93-99. Those arguments are incorrect, as explained in the Cities' Point III below.

a. The final judgment was impermissibly inconsistent with the prior summary judgment.

CenturyLink's sole argument in response to the error raised in Point I is that CenturyLink does not believe the summary judgment ruling on liability was changed or modified, and that the court only decided that carrier access "does not arise 'in' or 'within' any of the Cities" for the purposes of *damages*, not liability. *See* CenturyLink Br., pp.92-93, n.10. This is belied by the language of the final judgment, stating, "Defendants shall

prospectively pay…taxes on the foregoing tax bases…all revenue, other than carrier access revenue, in each respective city….” LF 10816. It is further belied by CenturyLink’s own statements elsewhere in its brief. CenturyLink Br., p.115 (court held “that carrier access charges should be excluded from the tax base”).

This was a modification to the liability determination, not just a determination of damages. The court had previously determined as a matter of law in summary judgment that “Defendants are liable for license taxes to each City for all revenue they receive in that respective City.” LF 9135 (emphasis added). The court explained what it meant by “all revenue they receive in that respective City,” by incorporating specific *types* of revenue to be included in that base, such as carrier access. LF 9135, 2017-19. By contrast, the final judgment states that Defendants’ “tax base[]” was “all revenue, *other than* carrier access revenue, in each respective city.” LF 10816 (emphasis added). Thus, for the purposes of determining Defendants’ liability to pay tax on their gross receipts, the court previously included “all revenue,” but then modified that determination in the final judgment to “all revenue, other than carrier access revenue.” LF 9135, 10816.

It also was not just a determination that carrier access “does not arise ‘in’” the Cities. *Cf.* CenturyLink Br., p.93, n.10. It was the opposite. The court concluded that “carrier access” revenue *does* arise in the Cities, but for some unexplained and erroneous reason, Defendants are only required to pay all revenue “in each respective city,” “*other than* carrier access.” LF 10816 (emphasis added). If the court had found that carrier access did *not* arise in the Cities, there would be no need to exclude it from that sentence. LF 10816 (“Defendants shall prospectively pay, without protest, taxes…on *all revenue, other than*

carrier access, received in each respective city…") (emphasis added).

b. The court determined what revenue is attributable to business "in" the Cities prior to trial.

CenturyLink's blames the Cities for their alleged choice "not to present any evidence of which revenues were derived from CenturyLink 'in' the Cities." CenturyLink Br., p.94. The Cities were not required to do so. The Court had already determined what revenue was taxable. LF 9135, 2017. Further, the issue of what revenue is "in" the Cities had been determined and "should have been, deemed established" for trial. *See Brenneke v. Department of Missouri, Veterans of Foreign Wars of U.S. of America*, 984 S.W.2d 134, 146 (Mo. App. 1998). The court had already properly determined in summary judgment that CenturyLink was required to pay damages for unpaid license taxes "on all revenues *in such City specified in the Court's Order of June 2, 2014*…." LF 9135; 2017-18 (emphasis added). Thus, that determination was a finding by the Court that the revenues "specified in the Court's Order of June 2, 2014," are "in" the Cities and should be included in Defendants' gross receipts tax base. This included carrier access and interstate services revenue. LF 2018.

Furthermore, the June 2, 2014 Order was limited in its entirety by what it defined as "Attributable Revenue." LF 2017. "Attributable Revenue" was the only type of revenue Defendants were ordered to disclose, the revenue upon which the Cities based their damages calculation, and the revenue that the court incorporated into its 2016 summary judgment, declaring it taxable. LF 2017, 9135. "Attributable Revenue" was defined *only* to include 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 (emphasis added). Therefore, any revenue information Defendants disclosed in response to that Order was required to be revenue "in" the Cities. *Id.*

Defendants argue that the June 2, 2014 Order was "discovery," which the Cities "conflate" with summary judgment, and that the Court should ignore it. CenturyLink Br., p 95. It was not a mere discovery order. Although it initially arose from the Cities' motion to compel, the summary judgment decision thereafter incorporated it and specifically named it to define Defendants' tax liability. LF 9135; Cities' Initial Br., p.30, n.7. The court's use of that Order in summary judgment to define the tax base was a liability determination on those categories of revenue. LF 9135.

"Once a district judge issues a partial summary judgment order removing certain claims from a case, *the parties have a right to rely on the ruling* by forbearing from introducing any evidence or cross-examining witnesses in regard to those claims…." *Alberty-Velez*, 242 F.3d at 424 (emphasis in original). The Cities were thus entitled to rely on the ruling that Defendants must pay license taxes on "all revenue" attributable to their business in the Cities, including all revenue named in the June 2, 2014 Order. LF 2017, 9135.

The only task for trial was a calculation of damages based on the revenue CenturyLink disclosed in response to the June 2, 2014 Order, all of which was identified *by CenturyLink*, piece by piece, as attributable to its business "in" each City. Trial Exhibits 1-8. The court's broadening of the issues at trial to examine the taxability of each various category of revenue was in direct contravention to its prior summary judgment. *See* LF

9136 (summary judgment, holding "Defendants argue that an analysis of each receipt of revenue is required to determine whether the received revenue is taxable, but this is incorrect.").

c. There was insufficient notice that the court was re-opening summary judgment.

CenturyLink incorrectly claims that the Cities were aware the issue of whether certain categories of revenue are properly taxable would be a live issue at trial. CenturyLink Br., p.94. Given CenturyLink's previous tactics, the Cities became aware that *CenturyLink* would attempt to assert that certain categories of revenue were not taxable, and the Cities appropriately filed a motion in limine to keep the scope of trial limited to the remaining disputed issues. LF 9950-53. Although the Cities were aware *CenturyLink* might try to raise an issue at trial, that does not mean the Cities were provided sufficient notice that the *court* would ignore proper procedure and entertain re-litigation. CenturyLink had been attempting to re-litigate issues determined in the summary judgments ever since they were entered. *See, e.g.*, TR Dec. 18, 2015; LF 7256-88, 8874-78. If the Cities had indulged CenturyLink every time it wanted to re-litigate issues, the case never would have ended. CenturyLink's insistence on attempting to re-litigate matters cost the Cities heavily in terms of time and resources, but, prior to trial, the court had always refused to overturn its prior summary judgments. LF 7256-88, 8813, 9966-67. The Cities had no reason to anticipate that the court would suddenly re-open summary judgment and expand the scope of trial.

The court's passing statements, made once trial had begun, that "I think…we're

trying to determine now, what is all the revenue…In the cities," did not constitute adequate notice. *See* CenturyLink Br., p.94 (citing Trial Transcript, December 2016 ("TR")[1] 415). "[P]assing comment[s]" during trial are insufficient notice. *Alberty-Velez*, 242 F.3d at 423; *State ex rel. Schweitzer*, 438 S.W.2d at 232 ("proper notice" is an absolute prerequisite to re-litigating). Even statements of "explicit reconsideration" are insufficient where they come after the trial has already begun. *Alberty-Velez*, 242 F.3d at 424. Adequate notice is required because *both* parties must have an opportunity to prepare for and present their case.

CenturyLink points the Court to Missouri cases stating that courts may alter prior orders, but those cases did not involve summary judgments, which require "newly discovered evidence" that is "so material it would probably produce a different result," in order to reconsider. *Eureka Pipe, Inc. v. Cretcher-Lynch & Co.*, 754 S.W.2d 897, 899 (Mo. App. 1988). Those cases also do not hold that a court can alter summary judgments *without* proper notice and an opportunity to present a case in accordance with the re-opened matters. *See State ex rel. Schweitzer*, 438 S.W.2d at 232 ("proper notice" required); *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 364-65 (Mo. App. 2015) (court may modify "orders or judgments," however, "any such action should be taken only after proper notice to the parties"); *Around The World Importing, Inc. v. Mercantile Trust Co., N.A.*, 795 S.W.2d 85, 88-89 (Mo. App. 1990) (*nunc pro tunc* modification was permissible "because the trial court followed proper procedure" of notice).

[1] Unless otherwise indicated, citations to "TR" hereinafter refer to the trial transcript December 5-7, 2016.

Zimzores v. Veterans Admin., which held that reconsideration of summary judgment was permissible, is inapposite. 778 F.2d 264 (5th Cir. 1985). In *Zimzores*, the court reconsidered and vacated the prior summary judgment "several months" before even *setting* a trial on the remaining issues. *Id.* at 266. Accordingly, the parties were on notice for *months* that summary judgment was vacated. Here, there was no such notice. In fact, just four days before trial, the court refused to vacate the prior summary judgments. LF 9966. *Zimzores* only highlights the egregiousness of the court's error here. *Alston v. King*, similarly fails to support CenturyLink's argument, as it recognizes the "general principle" that "a ruling made at one stage of the proceedings will be adhered to throughout the suit," and that only "[w]hen a party *is not prejudiced* by the change, the district court should be allowed to change its ruling." 157 F.3d 1113, 1116 (7th Cir. 1998) (emphasis added). Here, The Cities were blindsided by the re-opening of these issues and the final inconsistent judgment, with no opportunity to adequately discover evidence or prepare or present their case at trial regarding the re-opened issues. This resulted in prejudice to the Cities and an erroneous final judgment.

This Court should reverse the final judgment, reinstate summary judgment, and enter a proper damages judgment in accordance with that ruling. *See* Cities' Initial Br., pp. 66-68; *Hayes v. Price*, 313 S.W.3d 645, 656 (Mo. banc 2010) (reversal and entry of increased damages judgment that should have been entered is appropriate).

II. The trial court erred in admitting evidence of Defendants' liability, because such evidence was irrelevant, beyond the scope of the trial, and was inconsistent with the court's prior summary judgment in that Defendants' liability had already been determined in full.

The court's admission of evidence on matters that had already been determined was erroneous and requires reversal. LF 9135. Evidence regarding an issue that "the circuit court had already determined" is "irrelevant" and inadmissible. *In Interest of J.P.B.*, 509 S.W.3d 84, 93 (Mo. banc 2017). CenturyLink does not dispute this. Instead, CenturyLink claims that the issue of what revenue was "in" the Cities for purposes of CenturyLink's liability was a live issue for trial. It was not. The court properly determined in summary judgment that CenturyLink was required to pay damages for unpaid license taxes "on all revenues *in such City specified in the Court's Order of June 2, 2014*…." LF 9135; 2017 (emphasis added). The June 2, 2014 order was limited in scope to revenue "in each of the Cities." LF 2017. Thus, that determination was a finding by the Court that the revenues "specified in the Court's Order of June 2, 2014," are "in" the Cities.

The only revenue Defendants disclosed in response to that June 2, 2014 Order should have been revenue "*in*" the Cities, as the June 2, 2014 Order required. LF 2017. That revenue was the only revenue the Cities presented at trial and used to calculate their damages, and the court had already determined it was taxable. Trial Exhibits 1-8; LF 10301-302 (CenturyLink representative who compiled the information testifying that he had compiled revenues that were "attributable to each defendant's business in each of the cities"). The issue of what revenue was taxable, including what revenue was "in" a city,

had already been determined in summary judgment and "should have been, deemed established," "result[ing]…in the removal of that theory at trial." *Brenneke*, 984 S.W.2d at 146; *Moreland*, 995 S.W.2d at 516. The sole authority cited by CenturyLink in response to this point addresses the admission of character evidence that was directly relevant to a pending issue at trial, and is inapposite. *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829 (Mo. banc 2015). *Barkley* did not allow admission of evidence regarding matters that had been determined in summary judgment.

Finally, CenturyLink claims that the issue of penalties required the presentation of such evidence, but that is incorrect. As explained below in Point VII, the penalties are imposed regardless of Defendants' mindset. Accordingly, even for the purposes of penalties, such evidence was irrelevant and inadmissible.

III. The trial court erred in holding in the final judgment that carrier access revenue in the Cities and revenue derived from interstate telephone calls in Wentzville is not taxable because such decision erroneously applied the law and was unsupported by the evidence in that Defendants are subject to the Cities' license taxes and admitted that they earned revenue from carrier access and interstate telephone calls that was attributable to their business in the Cities.

"[A] gross-receipts-occupational-license tax starts with the revenue received by the licensee, not the basic charge made to the customer by the merchant, and assesses a tax equal to a percentage of those revenues **without regard to the makeup of the revenue** and without restrictions to the percentage stated in the taxing ordinance." *Suzy's Bar &*

Grill, Inc., 580 S.W.2d 259, 262 (Mo. banc 1979) (emphasis added). This Court has held gross receipts therefore means "the whole and entire amount of the receipts without deduction." *Ludwigs v. City of Kansas City*, 487 S.W.2d 519, 522 (Mo. 1972). Nevertheless, CenturyLink "admits that it did not pay License Tax to [the Cities] on every dollar of revenue generated or collected by Defendant within the City…because certain services and charges are not subject to License tax…." LF 449, 494, 516, 527

CenturyLink's construction of the license taxes as transaction taxes that do not apply to "certain services and charges," urges a departure from the above and was rejected by this Court decades ago in cases such as *Ludwigs* and *Suzy's Bar & Grill*. CenturyLink attempts to distinguish *Ludwigs*, *Laclede Gas*, *Graybar*, and similar cases because they involved taxes on other industries, or involved ordinances that might have had immaterial differences. However, this Court rejected the very same analysis CenturyLink now proposes, in *Ludwigs.* There, it was argued that the license tax was "illegally computed on the whole amount of its receipts (including the license tax) collected from its customers, whereas the tax should have been computed only upon the amount of its receipts from the sale of its service or product…" *Ludwigs*, 487 S.W.2d at 520-21. It was claimed that amounts collected from customers to pay the license tax could not be considered "receipts from its service or product," and should not be included in gross receipts. *Id.* This Court disagreed and held that because an occupational license tax is "a tax upon the utility companies," and it is "an…expense of doing business," even though amounts collected to pay the license tax might not be considered "receipts from the sale of its service or

product," those amounts must be included in the "gross receipts" tax base, because they result from doing business in the city. *Id.* at 522-23.

This Court also explained "how an occupational license tax on gross receipts actually operates" in *Suzy's Bar & Grill*, using the following illustration:

> [W]here a merchant follows the practice of selling an article for $1.00 and adds 3 cents thereto to reimburse himself for the (3%) tax which he will be required to pay, his gross receipts from such sale are $1.03, and he will be required to pay a tax at the rate of (3%) of $1.03 and not at the rate of (3%) of $1.00.

580 S.W.2d at 263 (internal quotation omitted).

Thus, contrary to the already-rejected interpretation that CenturyLink urges this Court to adopt, although the technical amount the business received from the *sale* portion was $1.00, in total the merchant received $1.03 from doing business in the City, and therefore the merchant's *gross* receipts were $1.03. *Id.* It is the *gross* revenue received "pursuant to the carrying out of the business operations" that forms the basis of gross receipts, and nothing less. *See Kansas City v. Standard Home Imp. Co., Inc.*, 512 S.W.2d 915, 917 (Mo. App. 1974) (rejecting argument that "gross" receipts means less than the "whole; entire; total" receipts from "carrying out []the business"); *Ludwigs,* 487 S.W.2d at 522.

The "threshold question," is not, as CenturyLink claims, "gross receipts from what?" CenturyLink Br., p.103 (citing *May Dep't Stores*). While those words appear in *May Dep't Stores*, they are taken out of context and mischaracterized. In that case, University City argued a store was required to pay license taxes on sales made in buildings

in another city that were "wholly outside the limits of…[the] City." *May Dep't Stores Co. v. University City,* 458 S.W.2d 260, 262 (Mo. 1970). Thus, the Court analyzed *where* the gross receipts came from and held that the store was not required to pay taxes on business conducted "wholly outside" the city. *Id.*

May Dep't Stores. is inapposite because the Cities are not asking the Court to require CenturyLink to include gross receipts from business wholly *outside* the Cities. The law requires CenturyLink's gross receipts attributable to CenturyLink's business in the Cities be included in the tax base. In fact, *May Dept. Stores* held that gross receipts included revenue from sales that were made in departments "located in both municipalities." *Id.* at 263. This is permissible, because a City is authorized to impose a tax "upon a…business conducted within the city limits, although a portion of the business is carried on or the transaction is factually completed outside such municipality." *Kansas City v. Graybar Elec. Co., Inc.,* 485 S.W.2d 38, 42 (Mo. banc 1972).[2]

CenturyLink's attempts to distinguish *City of Jefferson v. Cingular Wireless, LLC* and *Sprint Spectrum, L.P. v. City of Eugene* also fail. CenturyLink argues that *City of Jefferson* is inapplicable because it dealt with cellphone service, and because "amending ordinances so as to keep pace with evolving technology" is not an issue in this case. 531 F.3d 595, 608 (8th Cir. 2008). The fact that the specific service at issue in *City of Jefferson* was cellphone service does not change the court's ruling that the provider could not evade

[2] CenturyLink argues, without much analysis, that *Graybar* would be decided differently after 1977. CenturyLink Br., pp. 106-107. However, *Graybar* has been cited positively since then. *City of Bridgeton,* 37 S.W.3d at 872; *City of O'Fallon v. CenturyLink*, 930 F.Supp.2d 1035, 1042 (E.D. Mo. 2013).

taxes through semantics and technicalities in the ever-changing technology of telephones. *Id*. CenturyLink's position in this case can be summarized as arguing that the Cities must specifically amend their ordinance every time the telephone industry modifies its technology, and specifically designate that modified technology as included in "gross receipts." *City of Jefferson's* pronouncement that a City does *not* have to do so is relevant.

No matter how hard CenturyLink tries to frame them as such, neither the text of the ordinances nor the law support CenturyLink's claim that the license taxes are imposed on specific transactions or receipts. *See Sprint Spectrum, L.P. v. City of Eugene*, 35 P.3d 327, 328 (Or. App. 2001) (tax on the business activities of a telecom is not a transaction tax). CenturyLink's attempt to distinguish *Taylor v. Rosenthal* only hurts its claims by highlighting that when the court analyzed the meaning of "gross receipts," it concluded the term meant "every penny." 213 S.W.2d 435, 437 (Ky. App. 1948).

The Cities' taxes are imposed on companies "engaged in the business" of "furnishing" or "supplying" "exchange telephone service" or "telephone service" in the Cities. LF 424-443. Defendants have never disputed that they are subject to the taxes, paying certain (albeit, deficient) amounts in license taxes. LF 1397-1407. Defendants are engaged in that business, and only that business, in the Cities. LF 1391-92, 9135, 9175, 1397-1407, 10327-10331, 11079-11082, 11090-11111. Accordingly, Defendants must pay a license tax on their *gross* receipts received from maintaining such a business in the Cities, because that is their only business in the Cities. An analysis of each separate receipt is unnecessary, and the court erred in cherry-picking certain transactions as non-taxable.

As explained in the Cities' initial brief, even if an analysis of each receipt was required, carrier access and interstate telephone calls satisfy this test. CenturyLink argues that carrier access should not be included in gross receipts because the "carrier access customers...do not have a service address in the Cities," carrier access does not arise from "customers in the city," and carrier access is "wholesale," not retail. *See*, CenturyLink Br., pp.95, 106. That the customers for a specific transaction do not have a service address in the Cities is irrelevant. The ordinances do not tax "customers," much less only customers that are residents of the City. LF 424-43; *Ludwigs*, 487 S.W.2d at 522 (it is "a tax upon the utility companies as distinguished from a tax upon…their customers"). It is *CenturyLink's* presence in the City that is essential to taxation, not the customer's. The words "customer," "retail," and "service address" appear nowhere in the ordinances. The relevant question is satisfied: but for Defendants' presence in the Cities, they would not earn such revenue, and therefore it is taxable. TR 332-333. This was made abundantly clear by CenturyLink's own designation of the amount of carrier access that was attributable to each City. *See* Trial Exhibit 5.

Defendants admitted and identified the portion of their revenue that resulted from their business in each City. LF 2017; Trial Exhibits 1-8; Summary Judgment Exhibit 54.[3] The makeup of that revenue is immaterial, because it all arose from Defendants' sole business in the Cities. The court erred in holding that the Cities were not entitled to judgment and damages on those amounts.

[3] The Cities' Summary Judgment Exhibit 54 is contained on a CD that was sent directly to the Court.

IV. The trial court erred in admitting Defendants' Exhibit U2, a summary of other documents, because it was inadmissible hearsay in that Defendants did not establish the competency of the underlying documents and the underlying documents were never made available to the Cities.

Defendants' Exhibit U2, a chart allegedly summarizing revenue information and tax payments, was inadmissible because CenturyLink did not establish the competency of the underlying documents, which were never made available to the Cities for cross-examination purposes. According to CenturyLink, Exhibit U2 summarizes two things: 1) "revenue data produced to the Cities during discovery" and 2) "tax payments made to the Cities." CenturyLink Br., p.111. It is the latter that were never produced to the Cities in this case for cross-examination, making Exhibit U2 inadmissible. *See Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 615-16 (Mo. banc 2006).

Although CenturyLink claims that its witness "testified that he relied upon the same information that was furnished to the Cities during discovery," that was not the testimony. CenturyLink Br., p.112 (citing TR 237-38). Mr. Seshagiri allegedly composed Exhibit U2 and testified that he did not know whether the documents were produced to the Cities. TR 234:8-9. He did not even look at all of the documents that supposedly were summarized in Exhibit U2. TR 318:16-18. CenturyLink *carefully* avoids saying that it *did* produce the tax payments for cross-examination, because that would be an outright lie. *See* CenturyLink Br., p.113 ("[A]ll the supporting materials were in the Cities' possession either through discovery *or* in their own files.") (emphasis added). Although CenturyLink's counsel initially claimed to have produced the payments (TR 234), counsel later admitted, off the

record, that they had not and their prior statement was incorrect. City's Initial Brief, p.96. CenturyLink does not dispute this. Instead, CenturyLink argues that the Cities could not be prejudiced because the documents summarized were payments "sent to the Cities" at some point in time. CenturyLink Br., p.112.

Even if it were true that Exhibit U2 summarizes tax payments "sent to the Cities," outside of litigation, that does not satisfy the foundational requirements for a summary exhibit. *See Healthcare Services of the Ozarks, Inc.*, 198 S.W.3d at 615-16. The underlying records must be "made available to the opposite party *for cross-examination purposes*," so that the opponent has an opportunity to challenge the bases of and claims made therein. *Id.* (emphasis added). Even the authority CenturyLink cites recognizes this. *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 293 (Mo. App. 2017). Furthermore, there must be an "indication in the record" that this was satisfied. *Healthcare Services of the Ozarks, Inc.*, 198 S.W.3d at 616. Here, neither occurred. Exhibit U2 was inadmissible.

As the Cities explained, this was prejudicial because the *amount* of tax payments CenturyLink claimed to have made differed from the Cities' records, and tax payments are one component of the damages calculation. TR 233-34. Therefore, the admission of an exhibit summarizing differing records that CenturyLink refused to produce, upon which damages were calculated and awarded, was prejudicial and erroneous.

V. The trial court erred in awarding a reduced damages amount as set forth in Defendants' Exhibit U2, Scenario 2, because such award erroneously applied the law and was unsupported by substantial evidence in that (a) the court should have assessed damages based on Defendants' disclosed revenue, all of which they admitted to be attributable to the Plaintiff Cities, (b) the court's award did not include damages for Defendants' failure to include carrier access receipts and "interstate" receipts in their "gross receipts" when paying the tax, (c) even if it were proper to exclude carrier access and "interstate" in Wentzville, there was insufficient evidence regarding such exclusions in Exhibit U2, Scenario 2, (d) even if there was an exemption from taxation for receipts from carrier access and "interstate," there was insufficient evidence to establish Defendants' right to such exemption, and (e) by utilizing Exhibit U2, Scenario 2, the court improperly excluded revenue Defendants admitted was attributable to the City of Oak Grove.

Point V is not multifarious. The Cities challenge one error: awarding damages as set forth in Exhibit U2. There are multiple legal reasons supporting this point, and that is permissible under Rule 84.04(d).

As explained above, CenturyLink must pay a license tax on its total gross receipts from doing business in the Cities, "without regard to the makeup of the revenue." *Suzy's Bar & Grill, Inc.*, 580 S.W.2d at 262. CenturyLink's total gross receipts is knowledge peculiar to CenturyLink. Thus, the Cities and the court were at CenturyLink's whim when

it came to determining the amount of gross receipts on which to pay taxes. CenturyLink took advantage of that position. Cities' Initial Br., pp.30-34, 62-64. Throughout the case, CenturyLink presented an ever-changing and contradictory account of its gross receipts, with each successive account resulting in a lower number. *Id.*

The court ordered CenturyLink to "disclose the amount and source of *all* revenues received by each Defendant from business or operation in each Plaintiff City…." LF 2017. In response to that order, CenturyLink produced the information contained in trial exhibits 1-8, which the Cities used to calculate damages (*see* Trial Exhibit 9). LF 10300-302.

CenturyLink argues its revenue disclosures are not binding admissions, but merely discovery production. CenturyLink provides no legal support for that proposition and does not distinguish the legal authority cited by the Cities. CenturyLink Br., p.115. Moreover, the revenue disclosures were not mere discovery responses, they were responses to a court *order* "concerning a material fact peculiarly within that party's knowledge," and therefore judicial admissions. *Stidham v. Stidham*, 136 S.W.3d 74, 78 (Mo. App. 2004).

Not only was the revenue information binding admissions that the court should have utilized to calculate damages instead of the unsupported Exhibit U2, but CenturyLink also failed to satisfy its burden that any of the revenue did not result from its business in the Cities. The "longstanding principle in Missouri" is that the burden of proof "rests with the party who asserts the affirmative of the issue, unless the facts are peculiarly within the knowledge of the opposing party." *Kennedy v. Fournie*, 898 S.W.2d 672, 680 (Mo. App. 1995). Therefore, "[a]lthough plaintiff has the general burden of proof, the burden of producing evidence peculiarly within his own knowledge was upon the defendant."

Anderson v. Anderson, 437 S.W.2d 704, 711 (Mo. App. 1969); *Lekander v. Estate of Lekander*, 345 S.W.3d 282, 289 (Mo. App. 2011) ("[T]he party asserting the affirmative of an issue has the burden of proof…unless the facts are peculiarly within the knowledge of the opposing party.") (internal quotations omitted).

It was CenturyLink's burden to establish that any of its receipts qualified for an exemption, and it was CenturyLink's burden to overcome its admissions that the revenue information resulted from business in the Cities. *Tracfone Wireless, Inc. v. Director of Revenue*, 514 S.W.3d 18, 21-22 (Mo. banc 2017) ("The burden is on the taxpayer to prove an exemption applies by 'clear and unequivocal proof,' and 'all doubts are resolved against the taxpayer.'"). CenturyLink failed to satisfy either burden, and there was no evidence supporting the purported exclusion of carrier access revenue or interstate telephone call revenue (in Wentzville) in Exhibit U2.

CenturyLink does not identify any evidence in the record that specifies what exact revenue items were excluded from Exhibit U2 as "interstate" in Wentzville or carrier access. *See* Cities' Initial Br., pp.104-106; CenturyLink Br., pp.113-115. It is impossible to discern, because there was no evidence explaining the specific exclusions, aside from vague and conclusory testimony. Accordingly, there was insufficient evidence to support a damages award excluding such amounts.

CenturyLink cites to testimony it claims established that the revenue CenturyLink disclosed in response to court order "was not the same as revenue 'in' each City." CenturyLink Br., p.115 (TR 291, 329). The cited testimony does not support such a claim, and there is no reason why it would. The only revenue information Defendants were

ordered to disclose was revenue "from business or operation in each Plaintiff City." LF 2017. *If* it is true, as CenturyLink now claims, that CenturyLink violated court orders and disclosed revenue that was *not* "from business or operation in each Plaintiff City," they should not be rewarded for that. Either way, there is no dispute that *CenturyLink itself* identified each item of revenue as being revenue "from business or operation in each Plaintiff City," as it specifically labeled the revenue with a certain City. Trial Exhibits 1-8; TR 53, 57, 60-61, 68-69, 73, 76, 80, 83-84, 300-301, 302, LF 10504.

Finally, Defendants do not even attempt to rebut that the damages awarded pursuant to Exhibit U2 improperly excluded revenue from Oak Grove's damages calculations above and beyond carrier access (the sole exclusion the court found applicable in Oak Grove). *See* Cities' Initial Br., pp.108-109; CenturyLink Br., pp.113-15; LF 10816.

Accordingly, Defendants admitted to receiving the following receipts "from business or operation in each Plaintiff City": $22,210,826 in Aurora, $36,937,458 in Cameron, $23,260,847 in Oak Grove, and $143,316,626 in Wentzville. Exhibit U2 purported to exclude much of this admitted revenue, and it was error for the court to ignore such admissions and use other amounts to calculate damages.

VI. The trial court erred in crediting tax payments Defendants allegedly made pursuant to §139.031 RSMo. under "protest" in the damages award because that decision erroneously applied the law, was unsupported by sufficient evidence, and deprived the Cities of damages to which they were entitled in that the Cities are not entitled to use any protest payments, there was no evidence regarding the specific amounts of or manner in which Defendants protested, and the lack of evidence led to an inaccurate calculation of interest.

The court erred when it credited alleged "protest" payments for which there was no evidence regarding the amounts or satisfaction of the protest statute. The "protest" payments are in the jurisdiction of other courts, and it was improper for the court here to consider them.

In order for the Cities to be made whole here, the court should not have credited amounts Defendants claimed were paid under protest. First, as described below and unchallenged by CenturyLink, there was no evidence of the specific amounts of "protest payments." CenturyLink points to unnamed "summary charts," but even CenturyLink's summary charts did not state the amount of taxes CenturyLink claims it protested for each taxing period. CenturyLink Br., p.121. The Cities do not deny that CenturyLink has been attempting to protest *some* amount of taxes (although the Cities have always disputed that CenturyLink has complied with the requirements of §139.031, *see* TR 554-55). However, because there was no evidence of the amounts, per taxing period or per month, there was insufficient evidence to credit such alleged payments and the calculation of damages and

interest (required to be calculated *per taxing period*) was necessarily inaccurate.

Second, the most recent Missouri authority confirms that taxes submitted under "protest" pursuant to §139.031 do not constitute taxes "paid." *See State ex rel. Summit Natural Gas of Missouri, Inc. v. Morgan County Commission*, 536 S.W.3d 729, 735 (Mo. App. 2017).

Third, there was no evidence that Defendants followed the strict requirements of §139.031 and protested "pursuant to Missouri statute," as Defendants contend. CenturyLink Br., p.117-18. To distract from the absolute dearth of evidence, CenturyLink attempts to shift the burden to the Cities and argues that the Cities have no proof §139.031 was *not* satisfied. CenturyLink Br., p.118. That is not the Cities' burden. It is the taxpayer's burden to establish strict compliance with §139.031. *See Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 798-99 (Mo. App. 2005) (taxpayers must "strictly comply" with §139.031 RSMo.). If the taxpayer does not properly protest, the protest fails, and the taxpayer cannot claim relief under §139.031 and cannot claim that interest should not accrue on those amounts.

These were all determinations for the *protest* court to make, not this trial court. The Cities do not contend the court here *should* have adjudicated the propriety of Defendants' protests. However, the fact that the court had *no basis or evidence* to do so illustrates the absurdity of the court exercising jurisdiction over the "protest" amounts and concluding that interest should not accrue on those amounts *because* they were protested "pursuant to RSMo. §139.031." LF 10815. Simply put, even if the protest statute stops the imposition of interest on taxes *properly* paid *pursuant* to §139.031, there was no evidence these

amounts were, and no authority to refuse to award interest on those amounts.

The only evidence of tax payments made for the specific taxing periods was the evidence offered by the Cities. Trial Exhibits 9, 22; TR 93-94. There was insufficient evidence to credit "protest" payments, and the resulting interest and damages on license taxes and user fees (for Cameron) were accordingly erroneous.

VII. The trial court erred in failing to impose penalties for Defendants' violations of the Cities' license taxes because penalties were mandatory in that Defendants' failure to comply with the Cities' license taxes was declared unlawful and a violation of the Cities' ordinances.

Courts should "give effect" to a City's intent to "deter delinquent payments" by honoring a City's decision to impose penalties. *Seaton v. City of Lexington*, 97 S.W.3d 72, 77 (Mo. App. 2002) (upholding City's imposition of penalty). Defendants were adjudged – three times here – to be in violation of City ordinances, for more than a decade. LF 1716-19, 9133, 10817. Defendants' violations were extensive, prolonged, and exacerbated by Defendants' intentional misstatements to the Cities. LF 1716-19. Penalties were required.

a. Imposition of penalties was mandatory, not discretionary.

The applicable ordinances required imposition of penalties in *some* amount (even if they could not exceed $500 per day in Aurora, Cameron, and Oak Grove), and it was error to award no penalties whatsoever. Trial Exhibits 10-13; *Westrope & Associates v. Director of Revenue*, 57 S.W.3d 880, 883 (Mo. App. 2001) (where penalty provides that it "shall" be imposed, penalty is mandatory); *City of Kansas City, Missouri v. Garnett*, 482 S.W.3d 829, 832 (Mo. App. 2016) ("shall" in ordinance is not discretionary). CenturyLink's sole

attempt to distinguish this authority is to argue that in those cases there was a specific amount of penalty named. CenturyLink Br., p.125. This distinction is of no importance. Here, a penalty of at least more than zero was required, because the ordinances are mandatory. Trial Exhibits 10-13. That the amount of penalty for each violation was not specifically provided for in Aurora, Cameron, and Oak Grove does not change that some penalty was required.

The mechanism to determine the amount of the mandatory penalty in Wentzville was specifically provided for in Wentzville's Code: "all unpaid City taxes….shall also be subject to the same…penalties…as provided by law of the State of Missouri for delinquent State and County taxes…." Trial Exhibit 13. Section 144.157.1 provides a penalty for "delinquent State…taxes," and thus is applicable, despite CenturyLink's arguments to the contrary. That statute provides for a "penalty equal to the total amount of the tax evaded," in addition to other penalties provided by law, which include a five percent penalty pursuant to §144.250 RSMo. §144.157 RSMo. Thus, Wentzville's ordinance incorporates a mandatory penalty of the amount of the entire tax evaded, plus five percent, and the court erred in refusing to award such penalties.

b. Penalties can be imposed in this civil action.

CenturyLink cherry-picks words appearing in Aurora and Cameron's penalty ordinances –"offenses" and "imprisonment"– and claims that the appearance of such words makes the penalty ordinances criminal and inapplicable. CenturyLink Br., p.125. Use of the word "offense" does not mean that an ordinance is necessarily "criminal in nature," and CenturyLink cites no authority for that proposition.

The ordinances provide that where an act "is prohibited, **or** is made **or** declared to be unlawful **or** an offense…" Trial Exhibits 10-11 (emphasis added). The language of the penalty does not require the illegal behavior to be specifically deemed an "offense," only that it be "prohibited" or "declared to be unlawful," which CenturyLink's behavior was. LF 1719, 9135, 10815. The same is true for the use of the word "imprisonment." Unlawful behavior may be punished by *either* a "fine or imprisonment." Trial Exhibits 10-11.

Inconsistently, CenturyLink points the Court to what it calls an "on-point" penalty ordinance, which states that a penalty shall be imposed "upon conviction," and chastises the Cities for not utilizing that ordinance. CenturyLink Br., n.16. The Cities, recognizing there was no "conviction" here, applied the general penalty ordinances. CenturyLink cannot have it both ways. CenturyLink cannot claim that *all* penalties are necessarily criminal in nature and inapplicable, while at the same time arguing that a penalty applicable "upon conviction" is "on-point." The Cities are authorized to impose penalties on unpaid taxes, and they offered the applicable, mandatory, penalty provisions for the violations proven. It was error not to award them. *See City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W.3d 54, 60 (Mo. App. 1999) (municipal fine and penalty affirmed); *Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 873 (Mo. App. 2001).

c. Section 71.625.2 RSMo. penalties are inapplicable.

CenturyLink spends much of its response focusing on a law that does not apply. Section 71.625.2, which incorporates penalties from §144.250, went into effect after the Cities filed this suit, and does not operate retrospectively. *See* Cities' Response to CenturyLink Point VI, below (incorporated herein).

CenturyLink argues that if §71.625 applies, it demonstrated that it acted "reasonable" in the payment of taxes and therefore penalties are not warranted. CenturyLink Br., p.122. This is incorrect. It was undisputed that CenturyLink failed to file the required returns (LF 7752, 8620-21, admitting that it fails to file proper sworn tax returns), CenturyLink failed to "pay the full amount of tax" owed, (LF 1717, 10817), and CenturyLink failed to "pay the full amount of tax required…due to…intentional disregard of rules..." (*Id.*). §144.250 RSMo. The testimony presented at trial regarding CenturyLink's payments, which solely amounted to improper legal conclusions regarding the application of the Cities' ordinances, does not negate any of the above behavior or CenturyLink's numerous, duplicitous misstatements to the Cities regarding CenturyLink's services.

VIII. The trial court erred in failing to impose penalties for Defendants' violations of the City of Cameron's Rights-of-Way Code because penalties were mandatory in that Defendants refused to comply with the City's Rights-of-Way Code, including by paying the required user fee, and those actions were declared unlawful.

The court erred in failing to impose penalties for Defendants' violations of Cameron's Rights-of-Way ("ROW") Code. Defendants concede that the $500-per-day fine in Cameron Code §10.5-59 is mandatory, regardless of mindset. Trial Exhibit 15. However, Defendants assert that the penalty should not be applied because it was contained in a "criminal ordinance," rather than a "civil infraction." CenturyLink Br., pp.126-27. Defendants assert, without support, that the fact that the penalty section uses the word "guilty" and is "mandatory…regardless of the severity of the offense," indicates it is

criminal rather than civil. A fine in the nature of strict liability, imposed without regard to mindset, is not limited to criminal actions. *See, e.g.*, §407.110 RSMo. (imposing mandatory "civil penalty" for violations of law). Nor is use of the word "guilty" indicative that a penalty is solely criminal in nature.

The penalty applies not only to those adjudged "guilty," but also, separately, any person "refusing to comply" with the ROW Code. Trial Exhibit 15. The court determined that Defendants refused to comply with the ROW Code, and thus, a $500-per-day fine should have been imposed. LF 1718, 10817. Defendants cite only two cases, neither of which relieve it of the obligation to pay a penalty, and neither of which address the propriety of penalties for violations of municipal ordinances. *See City of Kansas City v. Oxley*, 579 S.W.2d 113 (Mo. banc 1979) (violation of municipal speed limit, no penalties discussed); *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. 2013).

Penalty ordinances mandating that one who refuses to comply "shall be" "subject to a fine," are not required to be enforced in criminal proceedings. *See State ex rel Jones v. Howe Scale Co. of Illinois*, 166 S.W. 328, 330 (Mo. App. 1914). While the word "fine" "implies punishment," "it is not true that this fact excludes every remedy other than a criminal prosecution to recover it…it is competent to pursue and recover the penalty by a civil suit…." *Id.* Therefore, there was nothing to prohibit a civil suit for recovery here. The ROW Code itself confirms this. LF 958; Appendix A13, (§10.5-60 ("Nothing…shall be construed as limiting any judicial remedies that the city may have, at law or in equity, for enforcement….")). Penalties were mandatory, and the court's refusal to impose penalties should be reversed.

RESPONSE BRIEF

STATEMENT OF FACTS

Defendants' Refusal to Comply with Cameron and Wentzville's ROW Codes

Cameron and Wentzville have ordinances regulating the rights-of-way. LF 1422, 1426. Both Cities' ROW Codes require ROW users to obtain an agreement from the Cities authorizing use and occupation of the ROW and allowing ROW users to install and maintain facilities in the ROW. LF 965, 993. Cameron also imposes a linear foot user fee on ROW users that occupy a certain amount of the ROW. Cities' Initial Br., p.27.

Defendants use and occupy Cameron and Wentzville's public ROW. LF 1423-26. Spectra has poles, piers, wires, and other fixtures in Cameron's ROW, as CenturyTel does in Wentzville's ROW. *Id.* Despite its use and occupation of Cameron's ROW, Spectra has failed to obtain a Public Ways Use Permit Agreement from Cameron. *Id.* Despite CenturyTel's use and occupation of Wentzville's ROW, CenturyTel has failed to obtain a Rights-of-Way Use Agreement from Wentzville. *Id.*

CenturyLink and its subsidiaries have entered into ROW agreements with other Cities and admitted such agreements are lawful. LF 647, 1421, 1443; Supplemental Legal File ("Supp.LF"), 53, 68, 72. Now, however, CenturyLink inconsistently denies such lawfulness and refuses to obtain the required agreements in Cameron and Wentzville. LF 1423-26.

The Cities sought, in Counts XVII and XIX of the Second Amended Petition, declaratory judgments and injunctive relief for Defendants' failure to abide by the Cities' ROW Codes. LF 231-41. The Cities also alleged, in Counts XXIV and XXI, that

Defendants' refusal to obtain such consent from the Cities violated §§392.350 and 392.080. LF 238-40. The Cities moved for summary judgment on these claims in December 2013. LF 383-92. Defendants failed to controvert a single fact. LF 1389-1445. Defendants state that they had been in the ROW for years and the Cities never told Defendants they needed an agreement. CenturyLink Br., p.24 (citing LF 1296-1303 (testimony regarding construction permits, not ROW agreements, and no testimony that there was never a request for ROW agreement)). This fact is unsupported. LF 1423-25, 7304-09.

The court granted summary judgment for the Cities on these claims in April 2014. LF 1716-19. The summary judgment included a determination that CenturyLink is required to pay Cameron's linear foot fee, and a calculation of the damages through that point in time. LF 1718. At trial, the City presented an updated, current calculation of the remaining damages, interest, and penalties on user fees. Trial Exhibits 9, 15-16. The final judgment improperly failed to award the proper amount of user fee damages, interest, and penalties. LF 10817.

PRESERVATION AND STANDARD OF REVIEW

Several of CenturyLink's arguments on appeal are abandoned and not preserved. "[E]ven in a court-tried case…appellant must make some effort to bring the alleged error to the trial court's attention." *Bank of America, N.A. v. Duff*, 422 S.W.3d 515, 518-19 (Mo. App. 2014) (internal citations omitted); Rule 78.07(c).

CenturyLink challenges the summary judgments. Consideration of those rulings is "limited to the summary judgment record made on [the Cities'] motions." *Holzhausen v. Bi-State Development Agency*, 414 S.W.3d 488, 493 (Mo. App. 2013). CenturyLink's

challenges must be rejected "if the record shows that summary judgment was appropriate either on the basis it was granted…or on an entirely different basis, if supported by the record." *Brehm v. Bacon Tp.*, 426 S.W.3d 1, 4 (Mo. banc 2014).

"The adage that the record is viewed 'in the light most favorable to the non-movant,' does not mean that [this Court] disregard[s] facts favorable to the movant…." *Holzhausen*, 414 S.W.3d at 493. "A party confronted by a proper motion for summary judgment may not rest upon mere allegations or denials in his or her pleadings…." *Id.*; Rule 74.04(e). "[A] denial must be supported 'with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Rule 74.04(c)(2)). "The failure to submit any evidence to support a denial constitutes an admission." *Id.* "In addition, if evidence is cited to support a denial, but that evidence does not expressly support a denial, we deem the statement admitted." *Id.*; Rule 74.04(c)(2). Only admissible evidence supports a denial. *United Petroleum Serv., Inc. v. Piatchek*, 218 S.W.3d 477, 481 (Mo. App. 2007).

I. The court did not err in awarding Cameron damages for unpaid linear foot fees or in granting judgment on the pleadings on Counterclaim Count IV, because §67.1846.1 RSMo. is not an impermissible special law, but even if it were, it is substantially justified, and CenturyLink waived that argument.

The court properly determined CenturyLink must pay the linear foot user fee. Cameron established a right to judgment that it was entitled to damages, because Defendants admittedly refuse to pay the fee and there is no dispute they are subject to it. The grandfathering provision of §67.1846.1 RSMo., which provides authority for the fee,

is not unconstitutional. Even if it were, the rules of severance would apply and leave intact Cameron's authority to impose the fee.

a. CenturyLink's Point I was waived.

Point I challenges the grant of "judgment on the pleadings on Count IV of the Counterclaim," because the grandfathering provision of §67.1846.1 is allegedly an unconstitutional special law. CenturyLink Br., p.45.

Counterclaim Count IV sought a writ of mandamus that would require Cameron to issue CenturyLink a construction permit. LF 2263-64. It did not address Cameron's linear foot fee or the grandfathering provision. *Id.* CenturyLink's argument under Point I does not address its request for a writ of mandamus, and fails to even mention the judgment on the pleadings or explain why that judgment was improperly entered, including on CenturyLink's request for a construction permit. To the extent that CenturyLink was attempting to raise these issues on appeal, they are abandoned. Rule 84.13(a); *Luft v. Schoenhoff*, 935 S.W.2d 685, 687 (Mo. App. 1996) ("Arguments raised in the points relied on which are not supported by argument in the argument portion of the brief are deemed abandoned and present nothing for appellate review"). The City only responds to the issues addressed in CenturyLink's argument.

Point I also violates Rule 84.04(e), because it fails to state whether the issue "was preserved for appellate review" and "if so, how."[4] CenturyLink's claim that the grandfathering provision of §67.1846.1 is a special law is not preserved, and this Court

[4] None of CenturyLink's points include this requirement. They are appropriately stricken or denied.

need not reach the issue. *See State ex rel. SLAH, L.L.C. v. City of Woodson Terrace*, 378 S.W.3d 357, 361 (Mo. banc 2012) ("[T]his Court will avoid deciding a constitutional question if the case can be resolved fully without reaching it.").

CenturyLink waived its constitutional challenge by failing to raise it at "the earliest possible opportunity." *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. banc 1996). Where a party files a pre-answer "motion to dismiss," that motion is "the earliest possible moment," to raise a constitutional claim and avoid waiver. *State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975). CenturyLink did not raise this challenge in its two pre-answer motions to dismiss. LF 184-87, 356-60. Thus, it is waived and not preserved for appeal. *See Kersting v. City of Ferguson*, 388 S.W.2d 794, 797 (Mo. 1965) (where "it does not affirmatively appear from the record that the court decided or passed on the constitutionality…no constitutional question is preserved for review…."). Even if this claim were preserved, it is meritless.

b. CenturyLink is subject to the authorized linear foot fee.

Section 67.1842.1(4) provides that cities may not "require a public utility right-of-way user to pay for the use of the public right-of-way, except as provided in sections 67.1830 to 67.1846[.]" Section 67.1846 authorizes Cameron to impose such a fee:

> Nothing in sections 67.1830 to 67.1846 shall prevent a grandfathered political subdivision from…enforcing or renewing existing linear foot ordinances for use of the right-of-way, provided that the public utility right-of-way user either: (1) Is entitled under the ordinance to a credit for any amounts paid as business license taxes or gross receipts taxes….
>
> …a "grandfathered political subdivision" is any political subdivision which has, prior to May 1, 2001, enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user….

§67.1846 RSMo.; *Level 3 Commc'ns, LLC v. City of St. Louis*, 405 F. Supp. 2d 1047, 1063 (E.D. Mo. 2005), *rev'd in part on other grounds*, 477 F.3d 528 (8th Cir. 2007) (linear foot fees imposed by "grandfathered political subdivision…by virtue of §67.1846.1…are not invalid under state law"). Although CenturyLink now claims that linear foot fees are unconstitutional, CenturyLink has agreed (even during the course of this lawsuit) to pay them in other cities and has admitted that payment of such fees is "lawful." *See* Supp.LF 63, 68, 72, 76.[5]

Cameron Code §10.5-207, enacted prior to May 1, 2001, requires that "each public ways use permittee shall pay to the city as monthly compensation for the use of the public way a public ways user fee as follows:…Fifteen cents ($0.15) per linear foot up to a maximum monthly charge of four thousand dollars ($4,000.00)." *See* LF 973. It permits a "credit against the user fee due…for the gross receipts tax" paid. *Id*. Thus, Cameron is an authorized "grandfathered political subdivision" as its ordinance fulfills the statutory requirements. §67.1846.1 RSMo.

It is undisputed that CenturyLink has well over the minimum linear feet of facilities in the City's ROW to reach the maximum monthly fee of $4,000. LF 973, 1425. It is also undisputed that CenturyLink refuses to and has never paid the fee. LF 627, 1425; TR 137-38. Therefore, the court properly entered judgment and awarded damages (although erroneously low) for unpaid user fees.

[5] CenturyTel Fiber Company and Qwest are CenturyLink entities. LF 1443.

c. The grandfathering provision is not an impermissible special law.

Cameron's user fee ordinance is "presumed to be valid." *Great Rivers Habitat Alliance* v. *City of St. Peters*, 384 S.W.3d 279, 296 (Mo. App. 2012). Linear foot fees and the grandfathering provision of §67.1846 have even been in place and upheld for 18 years. *See Level 3 Commc'ns, LLC*, 405 F. Supp. 2d at 1063 (grandfathered political subdivision could enforce linear foot fee and it is "not invalid under state law").[6]

CenturyLink contends that the grandfathering provision is an unconstitutional special law because it is "based on closed-ended (non-changing) characteristics…." CenturyLink Br., p.46. The Missouri Constitution, Article III, Section 40, provides that the legislature shall not pass a "special law…where a general law can be made applicable…." MO. CONST. ART. III, §40(30). The grandfathering provision is not such a special law.

"The determination whether a statute is a special law under § 40(30) rests on whether it is 'open-ended.'" *Harris v. Missouri Gaming Com'n*, 869 S.W.2d 58, 65 (Mo. banc 1994). This Court has held that "[c]lassifications are open-ended if it is possible that the status of members of the class could change." *Glossip v. Missouri Dept. of Transp. And Highway Patrol Employees' Retirement System*, 411 S.W.3d 796, 808 (Mo. banc 2013); *City of Normandy v. Greitens*, 518 S.W.3d 183, 191 (Mo. banc 2017) (statute creates an open class where "some current members may leave it"); *Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 334 (Mo. banc 2015) ("Classifications are open-ended if it is possible that

[6] While the "special law" issue was not argued, a challenge to the grandfathering provision was nevertheless rejected. That it was not challenged as special law, only a few years after being adopted shows that no party seriously thought the statute to have constitutional deficiencies.

the status of members of the class could change…."). Here, §67.1846 creates an open-ended class because "it is possible that the status of the class could change." *Harris*, 869 S.W.2d at 65. There are a variety of ways members' "status…could change." For instance, a city could repeal its user fee ordinance. It could also eliminate the required tax credit from its ordinance or it could eliminate the alternative provision permitting no user fee where a ROW user pays gross receipts taxes. *See* §67.1846.1(1)-(2) RSMo. In either instance, it would no longer fit within the exemption. *Id.* Accordingly, the law creates an open-ended class.

CenturyLink argues that the grandfathering provision suffers from the same alleged defect found in *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. banc 2006). CenturyLink Br., pp.46-48. This is not so. Section 67.1846 seeks to minimize the impact of SB 369[7] on the existing rights of cities, whereas the offending statute in *Sprint Spectrum* sought to create *new* rights for a special class of cities and create a new subclass defined on the affirmative actions of grandfathered cities. *Sprint Spectrum*, 203 S.W.3d 177.

The statute in *Sprint Spectrum* impermissibly excluded from a "grandfathered" class cities that had not sought to affirmatively *enforce* a tax. This Court framed the question before it: "does the exception set out in this statute for those cities that *enforced* a wireless telephone service ordinance prior to January 15, 2005, constitute a 'special law[?]'" *Id*. at 184 (emphasis added). The Court particularly focused on the fact that the cities had to take

[7] Passed in 2001 without a title, §§67.1830-.1846 RSMo. are commonly referred to as "SB 369." Supp.LF 86-87.

affirmative enforcement action to fall within the class, and held that because of the additional enforcement requirement, the statute was a special law. *Id.* at 184-85 ("[T]he sections require a municipality to *both adopt and enforce* such an ordinance…") (emphasis in original). Here, there is no affirmative enforcement requirement.

The legislature often enacts and Missouri courts often uphold and enforce statutes that "grandfather" rights by permitting persons to retain certain authority although a new law might otherwise curtail it. *See, e.g., State ex rel. Safety Ambulance Serv., Inc. v. Kinder*, 557 S.W.2d 242, 247 (Mo. banc 1977) (ambulance providers operating when new act went into effect were exempt from new public hearing requirements to renew license); *State ex rel. Vossbrink v. Carpenter*, 388 S.W.2d 823, 829 (Mo. banc 1965) (school superintendents who served as such were grandfathered from being required to obtain teaching certificate under new act); *Union Elec. Co., v. Cuivre River Elec. Co-op., Inc.*, 726 S.W.2d 415, 418 (Mo. App. 1987) (upholding electric cooperative's right to continue to provide service in same manner "as of the date specified in [Act's] first sentence" under "'grandfather clause'") This is precisely what the grandfathering provision of §67.1846 does. It allows cities who adopted the lawful authority to impose linear-foot based fees on public utility right-of-way users to retain such authority even though it may have been otherwise restricted under SB 369.

The statute in *Sprint Spectrum*, by contrast, did much more than this common and accepted practice. It drew the classification based on whether a city affirmatively sought to enforce its previously lawfully enacted tax. It is this second statutory limitation that rendered the statute an unconstitutional special law, according to the Court. *Sprint*

Spectrum, 203 S.W.3d at 187 (no "substantial justification" for statutory requirement for cities to have "taken affirmative action to collect such tax from wireless telecommunications providers prior to January 15, 2005.").

Furthermore, the grandfathering provision here applies to and affects too many political subdivisions to be deemed an impermissible special law. The cases cited by CenturyLink in which special laws were struck down only affected one or two political subdivisions. *See Sprint Spectrum,* 203 S.W.3d at 185 (law applied to only two cities); *Tillis v. City of Branson,* 945 S.W.2d 447, 448 (Mo. banc 1997) (one city); *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993) (one municipality); *Jefferson County Fire Protection Dist. Ass'n v. Blunt*, 205 S.W.3d 866, 867 (Mo. banc 2006) (one municipality). This Court has identified that "special" "legislation…typically singles out *one or a few* political subdivisions by permanent characteristics…." *O'Reilly*, 850 S.W.2d at 99 (emphasis added). This case is distinguishable in that the alleged closed-classification encompasses many more than just "one or a few" cities. While Cameron is unaware of any effort to identify every "grandfathered political subdivision," it is believed to include at least a dozen political subdivisions in Missouri.

d. Even if §67.1846 is a special law, it is substantially justified.

Even if the grandfathering provision is a special law, there is substantial justification to allow Cities that previously enacted linear foot fee authority to continue to be authorized to collect such fees, and therefore it is permissible. *Sprint Spectrum*, 203 S.W.3d at 182 (special laws will be upheld where there is "substantial justification"). The purpose of the grandfather clause was to avoid eliminating a source of relied-upon municipal funding. By

enacting linear foot fees, cities likely had forborne pursuing revenue from other sources, like taxes and other user fees. Because existing sources of revenue would be lost without the grandfathering provision, there is substantial justification to preserve existing revenue sources for local governments and only prohibit *new* reliance on linear foot fees.

Promoting the "general welfare of the City," and balancing the preservation of "sound municipal revenue" with economic interests of businesses constitute substantial justification for a special law. *See, e.g.*, *Neuner v. City of St. Louis*, 536 S.W.3d 750, 769-70 (Mo. App. 2017) (ordinance was substantially justified where it would "promote the general welfare of the City…"); *Union Elec. Co. v. Mexico Plastic Co.*, 973 S.W.2d 170, 174 (Mo. App. 1998). In *Union Elec. Co.*, the court analyzed a license tax that created an exemption for certain entities and was allegedly a special law. 973 S.W.2d at 173-74. The court held that even if it was special, it was substantially justified because it "generally benefit[ed] the community at large," and balanced the "economic enticements offered to prospective business with sound municipal revenue." *Id.* Here, the legislature sought to balance the interests of public rights-of-way users with the interest of existing municipal revenue streams. Furthermore, the linear foot fee promotes the general welfare of the City through an increased revenue fund. In *City of Sullivan v. Sites*, 329 S.W.3d 691, 694-95 (Mo. banc 2010), the Court held that an ordinance imposing higher fees on a class of new sewer connections was substantially justified and not an illegal special law because it "contemplated an important government function" in that it was "an important component of the City's overall efforts to implement its sewer improvement project…." Here, the fee also satisfies an important government function as a component of the Cities' existing

revenue streams and ROW Code regulations. If SB 369's prohibition on charging for use of the right-of-way affected all cities, including ones that previously adopted linear foot fees, such cities would have been faced with the elimination of a source of revenue, and likely would have had to impose some other source of funding to make up lost revenues; mostly by seeking to enact new taxation. That would not "promote the general welfare of the City." *Neuner*, 536 S.W.3d at 769. Allowing grandfathered political subdivisions to continue to rely on linear foot fees and avoid potential enactment of new taxation on the public is certainly an important government function.

CenturyLink's argument that the grandfathering provision is illegal because it allows cities to "enforce, renew, and extend linear foot fee ordinances and *to enact an unlimited number of new linear foot fee ordinances in the future*" misses the point. *See* CenturyLink Br., p.49. The legislature created a system in which grandfathered political subdivisions can continue to impose and rely on linear foot fees as part of their revenue makeup indefinitely. The ability to enforce, renew, and enact new linear foot fee ordinances is inherently necessary to accomplish this goal. For example, Cameron's fee is currently $0.15 per linear foot with a maximum monthly charge of $4,000. LF 973. Eventually, that amount will not have the same financial impact it does today. Section 67.1846's authority to enact new fee ordinances will allow Cameron to adjust its fee upward in keeping with inflation and increasing costs. In this way, Cameron can continue to rely on these revenues and avoid future tax increases.

e. Even if it is not substantially justified, any offending language must be narrowly severed and Cameron's fee would still be valid.

If the Court agrees with CenturyLink's waived argument that the "May 1" date creates a closed class and an unconstitutional special law without justification, the law would be reformed only to sever the allegedly-offensive date, as follows: "[A] 'grandfathered political subdivision' is any political subdivision which has~~, prior to May 1, 2001,~~ enacted one or more ordinances reflecting a policy of imposing any linear foot fees on any public utility right-of-way user…" *See* §1.140 RSMo. This would leave Cameron's fee authority intact.

Restraint in striking out language found to be invalid is required. "[A]ll statutes...should be upheld to the fullest extent possible." *National Solid Waste Mgmt. Ass'n v. Dir. of Dep't of Natural Res.*, 964 S.W.2d 818, 822 (Mo. banc 1998) (refusing to strike out more than necessary to make statute apply constitutionally). Severing the offensive date *only* would preserve any legislative intent of limiting linear foot fees, because §67.1846.1(1) would still require cities to provide for a credit in gross receipts taxes paid or provide that a fee is not required where the taxes are paid. This would eliminate the requirement that cities enact such a fee before May 1, 2001, and allow linear foot fees for all political subdivisions, but only on a limited basis, consistent with the intent of the legislature.

Minimal severance was the approach taken in *School Dist. of Riverview Gardens v. St. Louis Cnty.*, 816 S.W.2d 219, 223, Appendix (Mo. banc 1991), which found §137.115.1(2) to be an unconstitutional special law. Applying §1.140, the court severed

only those provisions that limited application of the statute to two municipalities. In doing so, the Court left in place the provisions of the statute that had previously only applied to the closed class, and made them applicable to all Missouri political subdivisions. *See id.* at 223-224 (explaining that the law "now appl[ies] to *all* political subdivisions in the state.") (emphasis added).

Severing only "prior to May 1, 2001," §67.1846.1 leaves a statute that is "complete and capable of being executed…." *Id.* It follows the mandate that statutes "should be upheld to the fullest extent possible." *National Solid Waste Mgmt. Ass'n*, 964 S.W.2d at 822.

1. If language cannot be narrowly excised, the entire SB 369 must be struck.

If the grandfathering provision of §67.1846.1 cannot be limited by severing *only* the May 1, 2001 date, then the entirety of SB 369 (§§67.1830-67.1846 RSMo.) must be struck down. Section 1.140 provides:

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

§1.140 RSMo.

Striking the entire grandfathering provision in §67.1846 as suggested by CenturyLink, but not all of SB 369, is prohibited under §1.140. To do so would leave SB

369 incomplete and incapable of being executed in accordance with the legislative intent, because §67.1842.1(4) provides:

> [N]o political subdivision shall…Require a telecommunications company to obtain a franchise *or require a public utility right-of-way user to pay for the use of the public right-of-way, except as provided in sections 67.1830 to 67.1846*…

§67.1842.1(4) RSMo. (emphasis added).

Linear foot fees in §67.1846.1 are the only provisions within §§67.1830 to 67.1846 that provide a means to require ROW users to pay for use of the ROW (this provision cannot refer to recovery of "right-of-way management costs," because §67.1830(5) expressly mandates that right-of way management costs do not include payment for use of the rights-of-way). If the grandfathering provision is completely struck, there would be no other provision in SB 369 that allows cities to "[r]equire a public utility right-of-way user to pay for the use of the public right-of-way," leaving §67.1842.1(4) meaningless. This would impact operation of the entire bill and eliminate a right guaranteed by law.

This is not a mere "cross-reference" as suggested by CenturyLink, but is evidence that the legislature intended SB 369 to operate as a unit. CenturyLink argues that where this Court has found provisions not severable, those provisions have been "more tightly bound up" with the valid provisions. CenturyLink Br., p.51. This is incorrect. In *Conseco Fin. Servicing Corp. v. Mo. Dep't of Revenue*, the Court found it could not sever the invalid provision because if it did so, the other provisions in the statute would "never come into play." 98 S.W.3d 540, 546 (Mo. banc 2003). The same is true here. If the grandfathering provision is severed, then portions of §67.1842.1(4) would never come into play and would

be meaningless. *See State ex rel. Union Electric Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. banc 1979) (courts "should not assume the legislature intended these words to have no meaning").

Furthermore, it cannot be presumed the legislature would have enacted the valid provisions without the grandfathering provision. If there is even "reasonable doubt" that the bill would have passed without the provision, it cannot be severed. *Missouri Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 354 (Mo. banc 2013) (section could not be severed because this Court was not "convinced beyond reasonable doubt that the legislature would have passed the bill without" the section, where prior versions of the bill without the section had failed to pass). The grandfathering provision did not appear in SB 369 until the Truly Agreed and Finally Passed version of the bill. That version was drafted in conference after the Senate refused to concur with House Committee Substitute for SB 369, which did not include the grandfathering provision. Supp.LF 86.[8] It is clear, therefore, that the grandfathering provision was not included in SB 369 as an afterthought or in an ad hoc manner, but instead was the result of a compromise to get the entire bill enacted. The fact that the grandfathering provision was adopted as part of a Conference Committee between the House and Senate is proof that the legislature would *not* have enacted the rest of the bill without the grandfathering provision. But for the grandfathering provision, it cannot be presumed that *any* provision of SB 369 would have become law.

If SB 369, or at least §67.1842.1(4) with which the grandfathering provision is

[8] *State ex rel. Snip v. Thatch*, 195 S.W.2d 106, 107 (Mo. 1946) ("The courts take judicial notice of the records of the general assembly.").

"inseparably connected," is struck down, there would be no statutory prohibition on such fees. Cameron would also be left with its longstanding, pre-SB 369 authority to impose fees for use of the rights-of-way. *See, e.g., St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) (The "charge…imposed for the privilege of using the streets, alleys, and public places…graduated by the amount of such use…It is more in the nature of a charge for the use of property belonging to the city,–that which may properly be called rental.") "The revenues of a municipality may come from rentals as legitimately and as properly as from taxes." *Id.*

Therefore, while CenturyLink's constitutional claim was waived, it fails even if this Court addresses it. The court's judgment holding CenturyLink liable for that fee was not erroneous. Point I must be denied.

II. The court did not err in entering summary judgment or judgment on the pleadings regarding Cameron and Wentzville's rights-of-way agreements because the ordinances are valid, the rights-of-way agreements are not prohibited "franchises," and Cameron was entitled to damages for unpaid user fees.

CenturyLink challenges the grant of summary judgment on the Cities' counts XVII-XIX and the grant of judgment on the pleadings in favor of the Cities on Counterclaims I through VII.[9] The grant of judgment on those claims in favor of the Cities was proper. The

[9] Counterclaim Counts I-VII included various claims, many that CenturyLink does not present in its argument. The Cities only respond to the arguments that CenturyLink has not abandoned.

Cities presented undisputed evidence that CenturyLink was in violation of City ordinances, CenturyLink failed to dispute that evidence, and the Cities established a right to judgment as a matter of law.

CenturyLink also separately challenges those rulings on the ground that Cameron did not present any evidence that the "costs" it seeks to impose are based on the actual, substantiated costs reasonably incurred in managing the ROW.[10] CenturyLink never identifies what "costs" it claims are unsubstantiated. To the extent this point can be construed to challenge the linear foot fee, which is the only monetary charge addressed in CenturyLink's counterclaims (LF 2340-75), the point is meritless.

a. The ROW Agreements are not prohibited "franchises."

Cameron and Wentzville's ordinances require ROW users to comply with certain procedures in order to install and maintain facilities in the ROW, including obtaining ROW agreements. LF 965, 993.

There was no dispute that (1) CenturyLink is operating and maintains facilities in Cameron and Wentzville's ROW, (2) the Cities' ordinances require ROW agreements in such circumstances, and (3) CenturyLink does not have and refuses to obtain ROW agreements with either City. *Id.*; LF 1423-27, 2313-14, 2323. The court properly entered judgment holding CenturyLink in violation of City ordinances. LF 1718-19.

Despite having entered into similar agreements with other Missouri cities and admitting that the agreements are "lawful," CenturyLink claims the court's judgments were

[10] This point is multifarious, fails to "clearly state the contention on appeal," and should be stricken and denied. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978).

erroneous because the ROW agreements are unlawful "franchises" in violation of §67.1842. LF 647; Supp.LF 53, 68, 72.

With some exceptions, cities cannot "[r]equire a telecommunications company to obtain a franchise…." Section 67.1842.1(4). Section 67.1842 does not define "franchise," and "[t]here are many definitions of the word[] 'franchise….'" *Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo. App. 1963).

Here, a "franchise" is distinguishable from a permissible contract or other agreement to use or occupy the ROW. Subsection 67.1842.1(5) goes on to limit otherwise-authorized-agreements by precluding only such "contract or any other agreement for providing for an ***exclusive use***, occupancy or access to any public right-of-way[.]" (emphasis added). The ROW Agreements grant authority to occupy and maintain facilities in the ROW. They are not franchises, but rather are lawful "contracts" or "other agreement[s]," contemplated by §67.1842.1(5) and §67.1846.1. That there is a distinction between a "franchise" and a "contract" or "other agreement" is clear when examining the entirety of SB 369, which distinguishes a "franchise" and a "contract or any other agreement" in that it limits franchises but retains authority for Cities to enter into *contracts and agreements,* providing only that they cannot be for "exclusive" use of the rights-of-way. §67.1842.1(5); §67.1846.1 ("Nothing in sections 67.1830 to 67.1846 shall be deemed to relieve a public utility right-of-way user of the provisions of an existing franchise, franchise fees, license or other agreement or permit in effect on May 1, 2001.").

CenturyLink argues that the term "franchise" should encompass all transactions in which a "government grants a privilege or authorization to an individual entity that is not

common to the citizens generally." CenturyLink Br., p.54. The practical effect of such a broad definition would improperly encompass *any* person or entity-specific transaction entered into with a government, potentially including leases, contracts, or business licenses. This is not supported by the law. *State ex rel. McKittrick v. Murphy*, 148 S.W.2d 527, 530 (Mo. banc 1941), and *Poplar Bluff*, on which CenturyLink relies, do not analyze the term "franchise" in light of SB 369. *Murphy* analyzes "[w]hat is meant by the term 'franchise' *as used in connection with the writ of quo* warranto[]," and defined it as "[a] royal privilege or branch of the king's prerogative subsisting in the hands of a subject," which is inapplicable here. *Murphy*, 148 S.W.2d at 490 (citations omitted). *Poplar Bluff*, meanwhile, recognized that there are "many definitions" of franchise. 369 S.W.2d at 766. Here, "franchise" must be analyzed in light of SB 369 and similar contexts.

Missouri Courts have provided a description of "franchise" in a similar context. "A franchise is a statute or ordinance that specifically authorizes a company such as Mediacom to sell cable programming or other services to the residents of a particular area." *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 805 n.4 (Mo. App. 2004); *State ex rel. Peach v. Melhar Corp.*, 650 S.W.2d 633, 636 (Mo. App. 1983) (a franchise grants *contractual* rights to do business in a municipality). A "franchise," therefore, is an agreement or license from a city that authorizes the provision of services. *Ogg* even distinguished a franchise issued in neighboring municipalities, for instance, from the mere license to use the ROW, recognizing that a license to use and occupy the ROW was not a franchise that authorized a cable company to sell and provide its service in that area. 142 S.W.2d at 805-809. The ROW Agreements here grant permission for the non-exclusive use of the Cities' rights-of-

way, not authorization to *provide services*, and, therefore, are not "franchises."

This Court has distinguished a franchise, authorizing the provision of services, which requires a vote and other statutory procedures[11], from instruments that only grant authorization to use the ROW, which do not have such statutory requirements. *See State ex rel. McKittrick v. Springfield City Water Co.*, 131 S.W.2d 525, 531 (Mo. banc 1939) (only the portion of franchise authorizing business to provide service in city was subject to franchise-related requirements like voter approval; portion that was only an agreement granting consent to use street was a "mere granting of street easement," not a franchise requiring voter approval). Thus, irrespective of the name, a license to occupy and use the ROW does not serve as the legal authority to do business in a jurisdiction, is not required to be approved by a vote of the people, and is not a "franchise" for the purpose of §67.1842.1(4).

Furthermore, while there may be several prerequisites to CenturyLink's lawful provision of service, not every prerequisite is individually a franchise. As the court recognized in *Springfield City Water Co.*, the use of rights-of-way might be a *component* of a franchise, but that is not in and of itself a franchise or subject to franchise requirements or procedures. 131 S.W.2d at 531. The ROW Agreements here do not purport to grant exclusive use or occupation of the ROW, to authorize the provision of any services in those respective Cities, or to regulate a provider's conduct of business, the rates it charges its

[11] Authorization to supply service in cities only upon a vote of the people is reflected throughout Missouri statutes. *See* §§71.530 (gas, electric, water), 88.613 (street lighting), 88.770, 88.773 (waterworks) RSMo.

customers, or any other technical requirements. Therefore, they do not violate §67.1842. Moreover, the Cities' ordinances specifically state that ROW Agreements "shall not be subject to [the] procedures applicable to franchises." *See* LF 965; Appendix A20 (§10.5-151(1)), 1017-18 (§655.285.A.2).

CenturyLink argues any agreement that is "coercively imposed" is a franchise. CenturyLink Br., pp.53-54. CenturyLink contends the agreements are "coercively imposed," "*[b]ecause* CenturyLink cannot provide telephone service in either City without these mandatory contracts," and they are therefore "'franchises' under Missouri law." CenturyLink Br., pp.54-55 (emphasis added). Even if that definition were supported by law, the agreements are not coercively imposed. CenturyLink *can* provide service in the Cities without obtaining a ROW agreement, by using non-ROW property like private easements or fee-owned land. CenturyLink cites to no evidence in the record (and there is none) that it is unable to use non-ROW property.

1. SB 369 only prohibits exclusive or discriminatory agreements.

SB 369 only prohibits exclusive or discriminatory agreements or franchises, and the ROW agreements are neither. *See* 67.1842.1(5) (limiting "exclusive" agreements). Section 67.1842.1(4) states that cities shall not "require a telecommunications company to obtain a franchise…except as provided in sections 67.1830 to 67.1846." (emphasis added). Chapter 67 then specifies "[n]othing in sections 67.1830 to 67.1846 shall prohibit a political subdivision or public utility right-of-way user from renewing or entering into a new or existing franchise, *as long as all other public utility right-of-way users have use of*

the public right-of-way on a nondiscriminatory basis." §67.1846.1 RSMo. (emphasis added). Reading Chapter 67 *in pari materia*, the intent was to prohibit *exclusive or discriminatory* agreements. It does not call for a total ban on agreements. Cameron's and Wentzville's Codes explicitly state that the ROW agreements are non-discriminatory, and are *not* for exclusive use of the ROW. LF 968; Appendix A23 (§10.5-154 (no ROW agreement shall "confer any exclusive right…"); 1018 (§655.285.B (authority granted in "any agreement…shall be for non-exclusive use of the rights-of-way…on a non-discriminatory basis….")); 965 (§10.5-151.C).

Although not raised in its appeal, in the trial court CenturyLink relied on 2014 amendments to §67.1842.1(6), which prohibited cities from requiring "any public utility that has been legally granted access" to the ROW to "enter into an agreement or obtain a permit for general access to" the ROW. It was undisputed this did not apply to CenturyLink, who had not been "legally granted access," and was not legally in the ROW. LF 1718-19, 2313-14, 2323.

2. Section 67.1842.1(4) cannot be interpreted unconstitutionally.

If §67.1842.1(4) were interpreted, as CenturyLink requests, to exempt telecommunications companies from all non-exclusive agreements to use the ROW, and not just "franchises," it would operate as an unconstitutional special law giving telecommunications companies special rights not provided to other similarly-situated rights-of-way users. MO. CONST. ART. III, §40(28). This was rejected in *Planned Industrial Expansion Authority v. Southwestern Bell Tel. Co.*, 612 S.W.2d 772 (Mo. banc 1981),

where this Court struck down an amendment to §392.080 granting "a special privilege and benefit upon telecommunications companies," in the form of a property right in the ROW, but did not give the same rights to "all companies," such as "electric, water or other utilit[ies]" using the ROW. *Id*. at 777. Here, CenturyLink argues that it is only telecommunications companies that are free from ROW agreements. This is an unconstitutional interpretation that must be rejected. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-839 (Mo. banc 1991) ("[I]f one interpretation…results in the statute being constitutional while another…would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended.").

b. Cameron was not required to establish that the linear foot fees are based on "actual, substantiated costs reasonably incurred by the city in managing its rights-of-way."

Cameron was not required to present evidence that its linear foot fee is based on "actual, substantiated costs reasonably incurred by the city in managing its rights-of-way." CenturyLink cites no law that requires such a showing.

CenturyLink conflates three unique concepts (1) "rights-of-way management costs," defined in §67.1830(5) to specifically "*not* include payment…for the use or rent of the public right-of-way," (2) "right-of-way permit fees," explained in §67.1840.2, and (3) the separate "linear foot fee," allowed in §67.1846. CenturyLink Br., pp.45-47. The requirement that fees be "based on the actual, substantiated costs" only applies to right-of-way *permit* fees, not linear foot fees. *See* §67.1840.2(1) ("Right-of-way permit fees…shall be…[b]ased on the actual, substantiated costs…").

Point II must be denied.

III. The court did not err in entering summary judgment on liability nor in awarding damages for unpaid taxes because CenturyLink is engaged in the telephone business in the Cities and is required to pay license taxes on all revenue attributable to its business in the Cities.

The court did not err in granting the Cities' summary judgment motions or awarding damages for unpaid taxes (although the damages award was erroneously low, as explained in the Cities' appeal).

a. CenturyLink's Point III violates Rule 84.04.

Point III claims that the court erroneously entered judgment holding that "numerous categories of revenue" should be included in CenturyLink's gross receipts for the purposes of the license taxes. CenturyLink Br., p.57. CenturyLink does not name, in its point relied on or even its argument, the "numerous categories of revenue" that it claims were erroneously included. Point III accordingly violates Rule 84.04. It is impossible for the Cities to respond when the exact claim of error and requested relief are not articulated, and it is impossible for the Court to review and grant this point without taking on the role of advocate. *See Nicolson v. Transamerica Occidental Life Ins. Co.*, 144 S.W.3d 302, 305 (Mo. App. 2004) (dismissing appeal for violating Rule 84.04, including by failing to state "the precise relief sought," recognizing "[a]ppellate courts require compliance with Rule 84 to ensure they do not become advocates by speculating on facts and arguments that have not been asserted."); *Missouri Dental Bd. v. Alexander*, 628 S.W.2d 646, 649 (Mo. banc 1982) (Rule 84.04 requires an appellant to "state[] precisely" the challenged rulings and reasoning).

Even CenturyLink's conclusion does not state the "precise relief" sought under Point III. *See* Rule 84.04. The conclusion requests the Court "reverse taxation on *other revenues* as either not being 'exchange telephone service' or 'telephone service,' or not arising 'in' or 'within' the Cities," but there is no statement of the unnamed "other revenues" CenturyLink challenges. CenturyLink Br., p.127 (emphasis added).

The closest CenturyLink comes to articulating the "numerous categories of revenue" mentioned in Point III is a brief naming of three revenues it does not consider "exchange telephone service" and part of the gross receipts base: "carrier access, extended area service (EAS), inside wire maintenance." CenturyLink Br., p.62. This is legally incorrect as to all of the Cities, as explained below, and particularly incorrect as to Wentzville and Oak Grove, whose taxes do not use the words "exchange telephone service." LF 439-443. CenturyLink cannot challenge the final ruling on carrier access, which was in its favor.

b. The taxes require payment of a percentage of Defendants' total gross receipts attributable to business in the Cities.

At the outset, CenturyLink misconstrues the court's order. The court did not hold that "'all revenue,' regardless of source, is subject to tax…." CenturyLink Br., pp.58, 63. The court held *CenturyLink* is subject to the tax as a telephone company doing business in the Cities. LF 9135. The "source" triggering the tax is the business, not any particular type of revenue.

The license taxes are not transaction taxes. They are privilege and occupation taxes, imposed "on the person for the privilege of engaging in the business or occupation

designated," not on specific sales. *Graybar Elec. Co., Inc.*, 485 S.W.2d at 42; *City of Bridgeton*, 37 S.W.3d at 872 (Bridgeton's license tax is a valid "tax for the privilege of doing business in Bridgeton"). The "company must pay the tax, whatever the total…that total is a fixed and unchangeable…operating expense." *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 82 (Mo. 1960).

The taxes are imposed on companies "engaged in the business" of "furnishing" or "supplying" "exchange telephone service" or "telephone service" in the Cities. LF 424-443. Defendants are engaged in such business, and only that business, in the Cities. LF 1391-92, 9135, 9175, 1397-1407, 10327-10331, 11079-11082, 11090-11111. Accordingly, Defendants must pay on their *gross* receipts received as a result of their business in the Cities, because that is their only business in the Cities. *See City of Bridgeton*, 37 S.W.3d at 872 ("[g]ross receipts are merely a means to calculate the occupational license tax; what is being taxed is the privilege of doing business in [the municipality]"); *Ludwigs*, 487 S.W.2d at 522; *Maury E. Bettis*, 488 S.W.2d at 305 (once it is determined that a company is the type regulated in a privilege and occupation tax, "there is thus no necessity to pursue" an analysis of the various streams of revenue).

Defendants did not establish by "clear and unequivocal proof," that any of its revenue was subject to an exemption. *Tracfone Wireless, Inc.*, 514 S.W.3d at 21-22 ("The burden is on the taxpayer to prove an exemption applies by 'clear and unequivocal proof,' and 'all doubts are resolved against the taxpayer.'"). Accordingly, the summary judgment properly determined Defendants must pay the license tax on all revenue received from doing business in the Cities.

c. Extrinsic evidence and expert testimony is not admissible to interpret the taxes.

CenturyLink's primary argument is that "exchange telephone service," (appearing in Aurora and Cameron's taxes, LF 424-28), and "telephone service," (appearing Oak Grove and Wentzville's license taxes, LF 439-43) are industry terms of art that require extrinsic evidence to interpret. CenturyLink Br., p.60.[12] CenturyLink puts forth what it claims to be "the industry's understanding of these terms," and uses such understandings to construe the meaning of the ordinances. *Id.* at 62. A taxpayer cannot, however, simply claim an ordinance is ambiguous, that a word within it is a "term of art," and then come up with its own definition of the "industry's understanding" of plain terms as a basis to avoid taxation. *Ludwigs*, 487 S.W.2d at 522 ("To say that the…ordinances…are ambiguous as to their meaning does not demonstrate that they are; nor does it raise a fact issue.").

The court properly held the taxes are unambiguous. LF 9135. Therefore, their "construction and meaning" is a "question of law for the court," and the court must review only "the plain and ordinary meaning of the ordinance's language…." *Ludwigs*, 487 S.W.2d at 522; *Tupper v. City of St. Louis*, 468 S.W.3d 360, 371 (Mo. banc 2015). "Extrinsic aids" "cannot be used" to interpret an unambiguous ordinance. *State ex rel. Laidlaw Waste Systems, Inc. v. City of Kansas City*, 858 S.W.2d 753, 755 (Mo. App. 1993); *City of Jefferson v. Cingular Wireless*, No. 04-4099-CV-C-NKL, 2005 WL 1384062 at *3, 8 (W.D. Mo. June 9, 2005) (rejecting argument that "'telephone service' is ambiguous" in

[12] CenturyLink relies on the wrong ordinance for Oak Grove, instead of what CenturyLink has admitted to be the "relevant" license tax ordinance. LF 8545, 1191-92; Cities' Response to CenturyLink Point V.

license tax, refusing to consider telephone company's extrinsic evidence, and recognizing that even though historically the term "telephone" involved a signal sent by wire, "[p]eople understand that if you put it up to your ear and you speak into a microphone and someone some distance away is able to hear you, you are using a telephone.").

CenturyLink's argument that "exchange telephone service" is an industry term of art is also defeated by its own sources. Newton's Telecom Dictionary, which CenturyLink claims is the "authoritative dictionary in the telecommunications industry," does not contain a definition or entry for "exchange telephone service." *See* NEWTON'S TELECOM DICTIONARY (27th ed. 2013). If "exchange telephone service" had a precise, specialized meaning in the telecom industry, one would expect it to appear in the so-called "authoritative" industry dictionary.

CenturyLink cites three Missouri cases supposedly supporting its position that expert testimony was required. All are inapposite. One held that expert testimony was *not* required. *City of Sullivan v. Truckstop Restaurants, Inc.*, 142 S.W.3d 181, 196 (Mo. App. 2004). Another just addressed whether expert testimony was admissible in that circumstance. *UMB Bank, NA v. City of Kansas City*, 238 S.W.3d 228, 233 (Mo. App. 2007). The third has been overruled in part, *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 514 n.5 (Mo. App. 2007), and is unhelpful. *Strong* involved pharmaceutical products liability and negligent manufacture claims, and held that a party should offer expert testimony when a jury is presented with "*highly* technical statutes and regulations…." *Id.* (emphasis added). The license tax ordinances are not "highly technical" regulations.

CenturyLink's complaints that the Cities did not introduce evidence to "ascertain

the meaning of 'exchange telephone service,' or 'telephone service'" are therefore unfounded, because extrinsic evidence is inadmissible in Missouri to interpret an unambiguous ordinance. CenturyLink Br., p.61. The non-Missouri authority cited by CenturyLink is inapposite. In *North Carolina Utilities Commission v. FCC*, 522 F.2d 1036, 1045 (4th Cir. 1977), the court cited one definition of telephone exchange service provided in a federal statute not at issue here and ignored a second statutory definition. Similarly, a Michigan court's description of exchange service in a case analyzing a Michigan use tax law is inapplicable. *GTE Sprint Comm's Corp. v. Dep't of Treasury*, 445 N.W.2d 476, 478-79 (Mich. App. 1989).

Courts do not permit telephone companies to evade their taxes by hiding behind the technicalities of rapidly-changing technology, and that is what CenturyLink attempts here. *See City of Jefferson City, Mo.*, 531 F.3d at 607-608 ("Applying Missouri's rules of statutory construction…the plain language of the tax ordinance makes it clear that the ordinance was intended to cover all telephonic services, regardless of the type of technology used to provide the services…nothing about the term 'telephonic'…is limited to the technology generally used to operate telephones in 1944."). "In fact, cases dating back to pre–1944 which discuss telephones and telephone systems describe them in terms of their *purpose* and *not with regard to the type of technology* used to operate them." *Id.* at 608 (emphasis added).

A city is not "required to update its Code for the purpose of recognizing the advent of each new form of technology used to provide telephonic services." *Id.* at 608. The Missouri Court of Appeals rejected similar arguments from Southwestern Bell, who sought

to evade a license tax by claiming that it was in the business of "telecommunications antennae" and that its business fell outside an authorized tax on "telephone companies." *City of Sunset Hills*, 14 S.W.3d at 59. The court refused to accept such a "narrow reading" of the phrase "telephone," and held that Southwestern Bell "clearly fell within the definition or genus of a telephone company." *Id.*

d. Defendants admitted the revenue resulted from their business in the Cities and that their services constitute exchange service.

CenturyLink's challenge to the summary judgment also fails because CenturyLink failed to establish a genuine issue of material fact, and admitted that the revenue identified was attributable to CenturyLink's business in the Cities.

In response to summary judgment, CenturyLink offered several affidavits and a declaration. All were inadmissible. *See* LF 11076-77 (explaining CenturyLink's failure to controvert the Cities' facts). The affidavits were riddled with hearsay, violated Rule 74.04(e), and averred self-serving legal conclusions about the meanings of the terms in the Cities' ordinances, which does not defeat a motion for summary judgment. *Ludwigs*, 487 S.W.2d at 521-522; *J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp.*, 881 S.W.2d 638, 645-646 (Mo. App. 1994) (conclusory, self-serving, and inconsistent testimony cannot defeat a motion for summary judgment); *see* LF 8798-8804, 8916.

The affidavits and declaration, only one of which CenturyLink relies on in this point on appeal (the declaration of Harry Newton), also failed to establish a genuine issue of fact because they contradicted CenturyLink's prior admissions regarding the nature of its services. *Rustco Products Co. v. Food Corn, Inc.*, 925 S.W.2d 917, 923 (Mo. App. 1996)

("A party may not avoid summary judgment" with "inconsistent testimony"); *see* LF 8798-8804. For instance, Mr. Newton states a literal conclusion that he does not consider a list of items to be "exchange telephone service," and CenturyLink relies on that conclusion to argue that it does not have to pay tax on those revenues. LF 8619, ¶6. There is no explanation as to what those items are or how he arrived at such conclusion. *Id.* His conclusion that certain items, including "extended area service," universal service fund (USF), "subscriber line charge," "voicemail," and "carrier access," should not be considered "exchange telephone service" contradicts Defendants' prior admissions. LF 8619.

Defendants' tariffs filed with the PSC have described and regulated these services as exchange telephone service. *See* LF 8700-701 (collecting and explaining Defendants' numerous admissions); 1040-41, 1308-14, 3781, 3792, 3388, 6033. Defendants also admitted on customer bills that "Extended Area Service, EAS," the "subscriber line charge," and "universal service fund" are local "exchange service." LF 7692, 7699, 7713, 7720, 8768. These representations on customer bills are significant, because Missouri regulations required descriptions of charges to customers be "clear, full, and meaningful," and that charges "shall be identified on the customer's bill…in a manner consistent with their purpose or applicability." *See* 4 CSR 240-33.045 (Appendix A51). Moreover, Defendant Spectra has admitted to receiving revenue from *all* of the above, and has told the State of Missouri that Spectra's *sole* purpose is to "provide local telephone exchange services...." LF 8753; Trial Exhibits 1-8; Summary Judgment Exhibit 54. If Spectra's sole purpose is providing telephone exchange service, and it has received revenue from all of

the above services, there can be no question that those revenues result from exchange service. CenturyLink also concedes that each component of its access revenues result from local telephone business, and therefore it necessarily arises from CenturyLink's presence in the Cities. LF 7936, 7941; Cities' Initial Brief, p.89; TR 332-333 ("carrier access" "couldn't be completed without CenturyLink presence in [the] city.").

Having admitted these services are part of their local business and exchange service, Defendants cannot argue that the they do not have to pay taxes on revenue from those services because they are *not* derived from local exchange service. In short, Defendants attempted to create issues of fact by offering self-serving affidavits that relied on technicalities in describing telephone technology, but those attempts were thwarted by Defendants' own prior admissions. The court saw this for what it was – an improper effort to use extrinsic evidence to limit the scope of unambiguous ordinances – and accordingly granted summary judgment.

Aside from their admissions, Defendants produced revenue information from each of these categories and *attributed* the revenue *to each of the Plaintiff Cities. See* Trial Exhibits 1-8, Summary Judgment Exhibit 54; LF 3057; Trial Exhibits 2, 5 (stating Defendants' carrier access revenue and interstate telephone call revenue is attributable to each City); TR 55-56 (revenue exhibits "lists the city, and it says how much of that carrier access revenue is for each city."). At trial, Defendants acknowledged and admitted that "each revenue number is attributed to one of the plaintiff cities." TR 302:20-22. Defendants would not have received any of the revenue they disclosed to the Cities and the Court, including carrier access in each City and interstate telephone calls in Wentzville, but for

their business in the Cities. TR 332-333, 402-403. CenturyLink's argument therefore begs the question – if this revenue does *not* result from CenturyLink's business in the Cities, how was CenturyLink able to attribute it to each of the Cities?

The Court does not need to engage in an analysis of each separate receipt. Defendants' only business in the Cities is that which is subject to the taxes, and therefore, they are required to remit taxes on their total gross receipts resulting from engaging in that business in the Cities. Even if an analysis of each separate receipt of revenue was required, and even if extrinsic evidence construing the ordinances were admissible, there was ample evidence that Defendants' revenue results from its local exchange telephone business. Defendants wholly failed to satisfy their burden in opposing summary judgment, and the court properly granted judgment in favor of the Cities on liability. Point III must be denied.

IV. The court did not err in awarding damages on unpaid license taxes because the Cities carried their burden of proof and CenturyLink admitted that the revenue on which the Cities' damages were calculated was attributable to its business in the Cities.

Without citing a single case explaining the applicable burden of proof, CenturyLink claims that the court erred in awarding damages for unpaid license taxes because the Cities did not carry their burden of proof by establishing that the "disputed services occurred 'in' or 'within' the Cities." CenturyLink Br., pp.63-65. CenturyLink separately argues that the "Cities' powers" are limited by the Missouri and U.S. Constitutions, and the court failed to

recognize that. *Id.* p. 66.[13] The Cities satisfied their burden of establishing Defendants' underpayment, and the final judgment did not improperly fail to "acknowledge" constitutional limitations.

a. The Cities carried their burden.

The issues of what revenue is "taxable" or "in" the Cities were not in dispute at trial. The court had already properly ruled that CenturyLink was liable for gross receipts received as a result of CenturyLink's business in the Cities, and had specified particular revenue streams that were included in such liability. LF 9135, 2017; Cities' Reply in Support of Point II, above. The only task for trial was a calculation of damages based on the revenue CenturyLink disclosed in response to the June 2, 2014 Order. The only revenue information that was introduced at trial was CenturyLink's own revenue data, and every item of revenue included a designation by CenturyLink of which City the revenue was attributable to. Trial Exhibits 1-8, TR 302:20-22.

The Cities carried their burden to establish that their calculations of damages were correct and based on the information CenturyLink disclosed in response to the June 2, 2014 Order. TR 53, 57, 60-61, 68-69, 73, 76, 80, 83-84, 300-301, 302; LF 10301-302; Trial Exhibits 1-8. The Cities set out, in exhaustive detail, the numbers, evidence, and method they used to calculate damages. Trial Exhibit 9. The Cities properly introduced evidence of Defendants' underlying revenue information from *CenturyLink's own records*. LF 10300-302; Trial Exhibits 1-8. It was all identified *by CenturyLink* as resulting from

[13] This point is multifarious and should be stricken and denied.

CenturyLink's business in one of the Cities. *See, e.g.*, TR 53-61, 302:20-22; Trial Exhibits 1-8; LF 2017, 10300-302 (CenturyLink admitting the revenue information was "generated by, allocated to, collected as a result of, or were otherwise attributable to each defendant's business in each of the cities."). Therefore, even though it had been determined in summary judgment, the Cities *did* present evidence of CenturyLink's revenue "in" the Cities, in the form of revenue data designated by CenturyLink as such.

It was necessary to use CenturyLink's records because the facts and knowledge of *CenturyLink's* gross receipts are peculiarly within the knowledge of CenturyLink. Thus, the Cities have to rely on CenturyLink to disclose the amount. The Cities established that CenturyLink disclosed those amounts in response to Court Order, and that it was the amount of gross receipts that CenturyLink itself identified as attributable to each City. *Id.* Thus, the Cities presented overwhelming evidence and satisfied their burden that the revenue information was properly included in the damages calculation. *See City of Bridgeton*, 37 S.W.3d at 876 (City satisfied its burden of establishing damages on unpaid license taxes where the City "set out the numbers it used to calculate the tax," "supported the use of the numbers," and the damage calculations were based on the taxpayer's "own financial documents which contained the underlying figures on which the calculations where based").

Even so, it was not the Cities' burden to establish what was "in" or outside the Cities. *Kennedy*, 898 S.W.2d at 680 (burden of proof on issues "peculiarly within the knowledge" of a party is on that party). "Although plaintiff has the general burden of proof, the burden of producing evidence peculiarly within his own knowledge was upon the defendant."

Anderson, 437 S.W.2d at 711; *Lekander*, 345 S.W.3d at 289 ("[T]he party asserting the affirmative of an issue has the burden of proof on the issue unless the facts are peculiarly within the knowledge of the opposing party.") (internal quotations omitted). CenturyLink seeks to impermissibly shift the burden to the Cities to prove facts that are not within the Cities' knowledge and control. CenturyLink's gross receipts are "peculiarly within the knowledge" of CenturyLink, and the Cities therefore properly relied on CenturyLink's admissions that the revenue information was attributable to the Cities.

CenturyLink claims that its witnesses testified at trial that certain revenue streams were not generated "in" a City for various reasons and thus were not taxable. CenturyLink Br., p.64-65. This testimony generally mirrored CenturyLink's deficient summary judgment affidavits. It was fraught with errors, including impermissible and irrelevant legal conclusions about the applications of the Cities' ordinances. *See* LF 8798-8802. For instance, CenturyLink argues it offered testimony that because carrier access is not sold to retail customers, it cannot be revenue derived from CenturyLink's business in the Cities. *See* CenturyLink Br., p.65. CenturyLink cites no exclusion from taxation for wholesale business or business provided to customers other than retail "end users." CenturyLink Br., p.65. Here, there was unequivocal testimony from CenturyLink that it would not earn the disclosed revenue *but for* its business in the Cities, and therefore there is no question that such revenue should have been included in tax payments. *See, e.g.*, TR 332-33; LF 10301-302.

Despite the Cities carrying their burden and supporting their damages calculations, the court erroneously failed to use the Cities' calculations. The Court instead (erroneously)

used *CenturyLink's* unsupported calculations in awarding damages in the final judgment. LF 10815 (awarding "damages as set forth in Defendants' trial Exhibit U-2…"). CenturyLink cannot now genuinely complain that its own calculation of damages was incorrect.

b. The court did not unconstitutionally interpret the taxes.

CenturyLink additionally claims that the "Final Judgment…fails to acknowledge constitutional limitations on the Cities' powers." CenturyLink Br., p.66. This claim also fails.

Ordinances are presumed valid, and it was CenturyLink's burden to establish that the specific application of taxes here violated the Constitution. *Great Rivers Habitat Alliance*, 384 S.W.3d at 296; *Kunz v. City of St. Louis*, 602 S.W.2d 742, 748 (Mo. App. 1980) (rejecting commerce clause challenge to licensing ordinance where challenger failed to satisfy burden, including failure to "show how they are injured as a result of the licensing requirement…"). CenturyLink failed to do so. Neither in summary judgment, nor at trial, nor in its appeal brief does CenturyLink sufficiently demonstrate how the Cities' taxes are a burden on interstate commerce or how CenturyLink is injured by such alleged burden.

In summary judgment, the court had already rejected CenturyLink's constitutional arguments regarding the Cities' license taxes. *See, e.g.*, LF 1186-1225. There was no need to address them again in the final judgment.

CenturyLink bases this challenge on the faulty premises that the Cities' license taxes only apply to businesses "*wholly*" within the Cities and that the Cities are attempting to tax "without regard for their location." CenturyLink Br., p.67-70. The taxes are not limited (in

text or by operation of law) to business "wholly" within the Cities, and this Court cannot insert the word "wholly" into the ordinances. The summary judgments properly determined that CenturyLink is required to pay license tax on its gross receipts *attributable to CenturyLink's business in the Cities*, thus, taking into account the location where CenturyLink is engaged in business. LF 2017, 9135. Even the final judgment took this location into account and only imposed a tax on revenue CenturyLink receives from its business "in" the Cities. LF 10815-18.

The Cities do not seek to tax specific services that are entirely outside their boundaries. The taxes are not imposed on *services* at all, they are imposed on the *companies* for the privilege of doing business in the Cities. *See City of Bridgeton*, 37 S.W.3d at 872; *City of Eugene*, 35 P.3d at 328-29 ("The ordinance does not tax individual transactions. It is based instead on the provider's "*gross revenues derived from its telecommunication activities within the city*") (emphasis in original). This simply is not a matter of interstate commerce.

Even if the taxes were transaction taxes that implicated the commerce clause, a city's authority to impose a business license tax "upon a corporation or business conducted within the city limits, although a portion of the business is carried on or the transaction is factually completed outside such municipality, is generally recognized." *Graybar Elec. Co.*, 485 S.W.2d at 42; *Food Ctr. of St. Louis v. Village of Warson Woods*, 277 S.W.2d 573, 579 (Mo. 1955) ("[T]he liability of the plaintiff for the privilege of doing business as a merchant in Warson Woods was not affected by the fact that the gross sales on which the tax was measured were concluded outside the boundary line of Warson Woods."); *City of*

Carterville v. Blystone, 141 S.W. 701, 703 (Mo. App. 1911) (applying municipal license tax on vehicle for use of city's streets even though the use never occurred wholly within the city, and rejecting argument "that he is exempt from such taxation-only hauling for parties occasionally from points without to points within the city….").

CenturyLink's assertion that the Cities' license taxes are unconstitutional relies on law CenturyLink admits is no longer valid. *See Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 609 (1951), (overruled by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 288-89 (1977)). The Court must apply current law.

A tax does not violate the Commerce Clause where it (1) has a substantial nexus with the state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided. *Complete Auto Transit*, 430 U.S. at 279 (1977) (holding Commerce Clause is not violated by a tax on the privilege of doing business *even if* the tax is applied to an interstate activity). "When there is a substantial nexus with the taxing state, the commerce clause does not absolutely forbid local regulation of interstate commerce." *Beck v McNeill*, 782 S.W.2d 650, 652 (Mo. App. 1989). CenturyLink does not identify any specific receipts that it claims are unconstitutionally taxed under this factor or a single reason why the Cities' taxes might discriminate against interstate commerce.

The only true challenge made is to the "fair apportionment" factor. *See* CenturyLink Br., p.70. CenturyLink argues the taxes are not fairly apportioned because they do not have a "credit" wherein CenturyLink could prove that its revenue was subject to taxation in another state. CenturyLink Br., p.69. CenturyLink has not identified any revenue that is

subject to taxation in another state. "The *risk* of multiple taxation" is insufficient to establish a violation of the Commerce Clause, "actual multiple taxation" must be shown. *See Exxon Corporation v. Wisconsin Department of Revenue*, 447 U.S. 207, 228 (1980). Furthermore, a provision specifically denominated as a "credit" is not necessary. All that is required is that the resulting tax is apportioned. *See Director of Revenue v. Superior Aircraft Leasing Company, Inc.*, 734 S.W.2d 504, 507 (Mo. banc 1987) (constitutional problems "avoided by *either* allowing an offset or credit…*or* by a system of apportionment") (emphasis added). The license taxes are fairly apportioned as they are imposed on CenturyLink for the privilege of engaging in business *in the Cities*. Even CenturyLink acknowledges in its brief that use of the words "within the city" in a license tax would "eliminate any constitutional problems with the ordinance." CenturyLink Br., p.108.

Similar taxes have been found permissible. *See City of St. Louis v. Streckfus*, 505 S.W.2d 70, 75 (Mo. banc 1974) ("the license tax [on a passenger-carrying excursion vessel was] not an undue burden upon or interference with interstate commerce" even where the vessel crossed state lines during cruises); *Commercial Barge Line Co. v. Director of Revenue*, 431 S.W.3d 479, 484 (Mo. banc 2014) (tax did not violate commerce clause where the business "received the benefit of Missouri roads and docks," and the taxpayers received such benefits "by virtue of *their* presence in this state…"); *Beck*, 782 S.W.2d at 651 ("Purchasers are entitled to use the public roads and highways of Brentwood and St. Louis County…Local government incurs expenses, *inter alia*, in maintaining streets and roads for the use of purchasers. The disputed taxes are fairly related to the services

provided…"); *Hartley Marine Corp. v. Mierke*, 474 S.E.2d 599, 610 (W. Va. 1996) ("It is sufficient for the fairly related test that a taxpayer receives the customary services provided by a [taxing jurisdiction] in response to the expectations and demands of a civilized society, such as fire and police protection, opportunities to seek emergency hospital care, food and fuel sources, a trained work force, and judicial access."); *Mayor and City Council of Baltimore* v. *Vonage Am. Inc.*, 569 F.Supp. 2d 535, 536 (D. Md. 2008) (billing address is a "substantial" nexus because it indicates "a significant commercial connection" with the locality). The Cities' license taxes do not violate Missouri or Federal law. Point IV must be denied.

V. The court did not err in ruling on the claims of Oak Grove and did not rely on inapplicable law, because the United Telephone ordinance did not control, and CenturyLink waived any claims that it did.

CenturyLink next argues that the court "erred in ruling on the claims" of Oak Grove, by applying the wrong ordinance and failing to apply an ordinance containing the terms of a proposed agreement between Oak Grove and United Telephone. This point is not preserved and was waived. CenturyLink does not identify the specific ruling it challenges, how it was prejudiced, or the relief it seeks pursuant to this point.

The court applied the correct ordinance, and CenturyLink's arguments provide no grounds to disturb any of the court's rulings. There are many reasons why the United Telephone ordinance was inapplicable, and those reasons are not "diametrically opposed." *Cf.* CenturyLink Br., p.72. Although the ordinance may have been enacted, the agreement within did not become effective because there was no acceptance filed by United

Telephone, as required. LF 9851-59, 9923-24. Even if there had been, the agreement was forfeited by its plain terms. LF 9860. Furthermore, although aware of the ordinance for years, CenturyLink waived this argument by failing to raise it in *any* responsive pleadings, its own summary judgment motion, or even its 2014 interlocutory appeal to this Court. *See* SC94208; LF 184-95, 356-71, 1186-1225, 1734-1844, 2263-2375, 3074-3119, 7093-7120.

a. CenturyLink knew about the agreement and failed to assert it.

Although the case had been pending for years, a month before trial CenturyLink moved to set aside the summary judgments because CenturyLink, allegedly, suddenly "realized" a different ordinance controlled the tax dispute in Oak Grove. LF 9764-9778. CenturyLink's argument is disingenuous.

From the beginning, the City clearly represented the applicable tax ordinances for Oak Grove: those codified in Chapter 615. LF 44-45. CenturyLink agreed. LF 8545, 1191-92. CenturyLink admitted and represented to the court that the "relevant ordinance" was Chapter 615. *Id.*

CenturyLink knew of the existence of a different ordinance, 1145, which contains the terms of a proposed "franchise" with United Telephone Company. LF 9871. As early as August 2014, Defendant Embarq represented to a *different* court, in a *different* case, that the United Telephone ordinance might be (along with §615.020) applicable to tax issues. LF 9871-80. Yet Defendants did not raise the issue here. Defendants even attached the ordinance to 2014 summary judgment filings in this case, but did not argue that it controlled the tax base. LF 1255, 1352. The Cities do not believe Ordinance 1145 to be applicable, and saw no reason to bring it up. Until the final hour when Defendants had lost two

summary judgments on liability and were facing an imminent trial and damages in the millions, Defendants had never argued that Ordinance 1145 controlled.

A Defendant "must plead" any "defenses in his answer," including "a short and plain statement of facts showing [defendant] is entitled to the defense," "or they will be deemed waived." *Wilmes v. Consumers Oil Company of Maryville*, 473 S.W.3d 705, 716 (Mo. App. 2015). CenturyLink did not allege applicability of the United Telephone ordinance in its Answers. LF 1734-1844, 2256-2375. CenturyLink did not allege that it considered the United Telephone ordinance to be applicable in any of the summary judgment proceedings, or in its 2014 interlocutory appeal. LF 1186-1225, 1734-1844, 2263-2375, 3074-3119, 7093-7120. Accordingly, the argument is waived. *See Sheehan v. Northwestern Mut. Life Ins. Co.*, 103 S.W.3d 121, 130 (Mo. App. 2002) (arguments not raised in response to summary judgment motion are waived); *Burton v. SS Auto Inc.*, 426 S.W.3d 43, 47 (Mo. App. 2014) (arguments not raised in answer or summary judgment proceedings are waived).

b. The agreement never became effective.

Even if it were not waived, the court properly noted there was no evidence that United Telephone ever filed a timely acceptance, as required by the agreement, and therefore it never became effective. LF 9966-67, 9799-9801.[14] The ordinance describing the terms of a proposed agreement was passed on March 4, 1996. LF 9799-9801. It required United Telephone to file an "acceptance of this ordinance with the Clerk of the City within

[14] Even if effective, it would have expired in March 2016. LF 9799(¶1).

thirty (30) days after its passage and approval," or the agreement would not be "in effect." LF 98010 (¶¶12,16). This necessarily required a *separate* acceptance be filed. *See Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. banc 2003) ("A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense."). United Telephone never filed an acceptance with the City Clerk. LF 9851-59, 9923-24. Therefore, the agreement never became effective. LF 9801(¶¶12,16). Failure to comply with the terms and conditions of the agreement, including filing a timely acceptance with the City Clerk, "shall work a forfeiture." LF 9801(¶13).

There is no acceptance in the record, and CenturyLink cannot point to one. The City provided an affidavit establishing this. LF 9923-24. CenturyLink challenges the affidavit on the basis that it was not made on personal knowledge because the City Clerk was not in her position prior to 2000. The affidavit explicitly states not only that it was made on personal knowledge, but also that the City Clerk has knowledge of the City's "routine practice regarding filing and retention of its records, during *and before* the time I have been the City Clerk." LF 9923-24 (emphasis added). The Clerk testified that the "routine practice" was to note the date of receipt of records and file the document. *Id.* She testified that no acceptance was filed, because if "an acceptance of Ordinance 1145 had been filed" it "would be in the City's records," and it is not. *Id.*

CenturyLink offered two affidavits: one from the person who allegedly signed the ordinance, and one from a "Customer Relationship Manager" who "worked under" various franchises. CenturyLink Br., p.72; LF 9802-07. Neither of these affidavits state that United

Telephone filed a timely acceptance with the City Clerk. *Id.* Even on appeal, CenturyLink *still* does not claim that it filed a timely, separate acceptance. CenturyLink Br., pp.71-74.

Additionally, those affidavits are inadmissible. *See* LF 9854-59 (explaining the numerous deficiencies). This includes the affidavit from the person whose signature supposedly appears on the agreement, Richard Lawson. LF 9805-07. Mr. Lawson did not attest that he reviewed *or signed* the agreement, only that his signature appears on it. LF 9506. At some point, someone may have stamped his signature on it, which would explain why it is not witnessed or attested as required by the plain terms of the agreement. LF 9801. CenturyLink claims that Mr. Lawson's affidavit states that Mr. Lawson believes that he timely delivered the "signed and accepted Oak Grove franchise." CenturyLink Br., pp.73-74. However, Mr. Lawson actually states that he has "no reason to believe that the Company did not follow its custom or practice," not that he has personal knowledge that he timely filed an acceptance. LF 9806. Almost none of Mr. Lawson's affidavit is based on his personal knowledge and he offers no adequate foundation for his statements, including his speculative statements that Defendants hope to pass off as "custom and practice" of some unknown entity. *Id.* Having made up certain "customs and practices," Mr. Lawson's affidavit consists of his unfounded opinion that certain facts do or do not match the fictional customs and practices he has posited: that the United Telephone ordinance was timely delivered to Oak Grove and that "the Company" operated under the United Telephone ordinance and paid Oak Grove accordingly.

The affidavit of CenturyLink's "Customer Relationship Manager," is more of the same. LF 9802-04. She has no knowledge about the United Telephone ordinance. She

makes speculative statements about her employer's name changes. *Id.* She does not bother to say what she did in her position other than to state her responsibilities included "working under" franchise agreements. She gives a legal opinion, without any foundation, that the franchise agreements she "worked under" required her employer to accept those agreements and that was done by having someone like Richard Lawson sign them. *Id.* But, exactly like Mr. Lawson, she does not attach those franchise agreements or provide any description of their terms to know if acceptance was required and if so, in what form. *Id.* Therefore, whatever she may have done with other, unknown franchise agreements she "worked under," it has no relevance to the United Telephone ordinance. Finally, she also speculates, without foundation, that her employer operated under the United Telephone ordinance. *Id.* "[S]peculative testimony does not constitute substantial evidence…." *Bateman v. Rinehart*, 391 S.W.3d 441, 452 (Mo. banc 2013). There was no evidence that a timely acceptance was filed, and the court properly found the same.

c. Even if there were a timely filed acceptance, the agreement would have been forfeited.

Even if the agreement were ever effective and applied to CenturyLink, it would have been automatically forfeited upon Defendants' "failure to comply with the terms and conditions…" LF 9801.

One term requires payment of "five percent of local service revenues to the City." LF 9800. Defendants admit that they do not pay taxes on all "local service" revenues. LF 516 (CenturyLink "admits that it did not pay License Tax to the City of Oak Grove, Missouri on every dollar of revenue generated or collected by Defendant within the City"),

3093, 7781 (identifying *all* services as "local service"). For example, Defendants admit that voicemail is a "local telephone service," and that they do not pay tax on it. *See* LF 8761 (CenturyLink stating that "local telephone service (including the most popular features like Caller ID and voice mail)"), 1242, ¶46, 2981 (admitting refusal to pay on "optional" and "vertical charges") 2998 ("voice mail" is an "optional charge"). The court determined that Defendants had refused to pay license tax on local service revenues. *See* LF 1717, 9135. Therefore, even if the franchise became accepted, it was forfeited.

Point V must be denied.

VI. The court did not err in applying a five-year statute of limitations because §144.220.3 does not create an applicable statute of limitations for the Cities' claims.

The court, after extensive consideration, properly applied a five-year statute of limitations. LF 1214-15, 1474-75, 3113-15, 7102, 7223-25, 7256-63, 9115-9130; *cf.* CenturyLink Br., p.74. The statute of limitations to file suit on a municipal license tax collection action is at least five years. §516.120 RSMo.; *Kansas City*, 512 S.W.2d at 918 (five-year statute of limitations in §516.120 applied to municipal license tax case); *Stoner v. Dir. of Revenue*, 358 S.W.3d 514, 519, n.6 (Mo. App. 2011) ("[F]ive-year statute of limitations…not the three-year limit…applies to statutory tax collection actions."); *State Collector of Revenue of City of St. Louis v. Robertson*, 417 S.W.2d 699, 700 (Mo. App. 1967) ("five-year statute 516.120" is applicable to municipal tax action); *City of Chesterfield v. DeShelter Homes, Inc.*, 938 S.W.2d 671, 674 (Mo. App. 1997) (five-year statute of limitations applies to ordinance violation).

a. Sections 71.625 and 144.220 do not create a three-year statute of limitations.

CenturyLink contends that §71.625 incorporates §144.022.3, and operates to create a three-year statute of limitations. The plain language of the statutes do not do so.

Section 71.625.2 provides: "[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." §71.625.2 RSMo. There is no citation to §144.220 in §71.625. Nevertheless, Defendants assert that the reference to "sections 144.010 to 144.510" means that the following language in §144.220 applies to create a three-year statute of limitations:

> In the case of a fraudulent return or of neglect or refusal to make a return with respect to any tax under this chapter, there is no limitation on the period of time the director has to assess…In other cases, every notice of additional amount proposed to be assessed under this chapter shall be mailed to the person within three years after the return was filed or required to be filed….

§144.220.1,3 RSMo.

That language, however, is a limitation on the time "the director has to assess" and "mail" "notice of additional…assess[ment]." §144.220. It is not a statute of limitations for filing suit.

As this Court recognized when interpreting §144.220, "[t]he making of an assessment does not constitute the commencement of an action." *Excel Drug Co. v. Missouri Dept. of Revenue*, 609 S.W.2d 404, 410 (Mo. banc 1980). In §144.220, the legislature provided only the *former*, and the "statute[s] in Chapter 516" then "apply" as statute of limitations on filing suit. *Id.*

CenturyLink claims *Shelter Mut. Ins. Co. v. Director of Revenue*, 107 S.W.3d 919 (Mo. banc 2003), held that §144.220 provides a statute of limitations on filing suit. While

that case uses the words "statute of limitations," it does not say that there is a three-year statute of limitations on *filing suit*. *Id.* at 923. Rather, it says that "the director has…three years *to make any additional assessment*." *Id.* (emphasis added).

Section 71.625.2 does not establish or incorporate any requirements for mailing notice or making assessments, and therefore, this language is wholly inapplicable. Section 71.625 incorporated *only* the "limitation for bringing suit" from §§144.010-510. As the time for the "director…to assess" is not such a limitation, it was not made applicable to license taxes through §71.625.

Furthermore, municipal license taxes do not require an assessment, they become due without one. *State ex rel. Carleton Dry Goods Co. v. Alt*, 123 S.W. 882, 885 (Mo. banc 1909) ("When…a municipality by authority of the state, *imposes a license tax*, it fixes the amount, and *there is no assessment, or any need of one*; neither is there any necessity for notice or a hearing."); *State ex rel. SLAH, LLC*, 378 S.W.3d at 363-64 ("business license tax… is not based on an assessed value...") *Robertson*, 417 S.W.2d at 702 (municipal taxes are delinquent when not fully paid on due date, and "after that date, interest and penalties accrue"). CenturyLink does not contend an assessment was required. The requirement to mail notice of an assessment within a certain time is inapplicable, and §71.625 did not create a three-year statute of limitations on the Cities' claims.

b. Section 71.625.2 was enacted after the Cities filed suit and is inapplicable.

Even if §71.625.2 did contain a three-year statute of limitations, it would not apply to the Cities' claims here because the statute went into effect after the Cities filed suit. LF 1; 2012 HB 1504. It cannot operate retrospectively. MO. CONST. ART. I, §13

("[N]o..law…retrospective in its operation…can be enacted.").

CenturyLink frames this as an issue of procedural versus substantive statutes, but that distinction is irrelevant because §71.625 contains no savings clause, which is required when the legislature seeks to impact an existing statute of limitations. CenturyLink Br., p.75.[15] "Missouri courts will not apply a shortened limitations period to a pending claim…unless the statute has some 'saving language' in it providing for a reasonable time in which to file suits on existing claims." *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 826 n.1 (8th Cir. 2004). Where a statute does not include a savings clause, it is presumed the legislature intended the new limitations period to apply prospectively only. *Swartz v. Swartz*, 887 S.W.2d 644, 650-651 (Mo. App. 1994); *Goodman v. St. Louis Children's Hosp.*, 687 S.W.2d 889, 891-892 (Mo. banc 1985).

While Defendants contend that the Cities are entities of the state and the legislature may waive their rights retrospectively, even so, that did not happen here. CenturyLink Br., p.76. *Even* "[w]here retrospective application **against the state** is permitted, statutes are **construed to operate prospectively, *unless*** legislative intent that they be given retrospective or retroactive operation is expressed by the language of the act..." *Utilicorp United, Inc. v. Director of Revenue*, 785 S.W.2d 277, 278 (Mo. banc 1990) (emphasis added); *Wellner v. Director of Revenue*, 16 S.W.3d 352, 354-55 (Mo. App. 2000) ("[N]ewly enacted legislation is not applied retrospectively unless the legislature makes

[15] Furthermore, CenturyLink contends the interest provisions of §71.625 RSMo. are applicable in this case. Interest statutes are substantive, not procedural, and therefore even under CenturyLink's analysis, the statute would not operate retrospectively. *See Utilicorp United, Inc.*, 785 S.W.2d at 278.

clear its intention that a statute be applied retrospectively.").

The 109-year-old case CenturyLink cites even suggests the same: "the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law will stand unless an intention to the contrary is plainly manifested…." *Clark v. Kansas City, St. L. & C.R. Co.*, 118 S.W. 40, 43 (Mo. 1909); CenturyLink Br., p.75 (citing additionally, *State ex rel. Research Medical Center v. Peters*, which dealt with a statute of repose, not limitations, and held that courts should not consider "the very right itself…extinguished by the lapse of time unless such is the plain statutory intent…." 631 S.W.2d 938, 941 (Mo. App. 1982)). Section 71.625 "is silent on the issue of retrospective application," and therefore "cannot be applied retrospectively." *Wellner*, 16 S.W.3d at 355.

c. Even if §144.220 created an applicable statute of limitations, there would be applicable exceptions.

Even if Defendants' argument that the "notice of additional amount proposed to be assessed" required by §144.220 was properly considered a statute of limitations, there are three applicable exceptions contained in §144.220.1, which provides that there is "no limitation on the time" for assessments in the case of 1) fraudulent returns, 2) negligent failure to file a return, and 3) refusal to file a return. *Lora v. Director of Revenue*, 618 S.W.2d 630, 634 (Mo. 1981) (setting "all three exceptions" in §144.220). It was *CenturyLink's* burden to show that the exceptions *do not* apply. *Hewitt Well Drilling & Pump Service v. Director of Revenue*, 847 S.W.2d 795, 798 (Mo. App. 1993) ("[T]he burden of proof is not on the Director to show taxpayer neglect, it is on the taxpayer to

show the absence of neglect."). CenturyLink failed to satisfy that burden, and its actions made all three of the exceptions applicable.

Behavior is fraudulent under §144.220 if there is a positive, intentional deceit or "subtle device to escape" the tax. *Orodite of America v. Director of Revenue,* 713 S.W.2d 833, 839 (Mo. banc 1986). Here, Defendants' failure to pay the license taxes is the result of a company-wide policy whereby Defendants intentionally omit certain of their gross receipts from tax payments, claiming that such receipts are not from their provision of "local" "exchange" telephone service, which they argue is the only type of receipt that is taxable. LF 3079, 3085, 3093-95, 3099-3101. At the same time, Defendants have told the Cities, the State, and their customers that those receipts *do* represent receipts from the provision of "local" "exchange" service. LF 7692, 7729. This is more than a "subtle device[] to escape" the tax, it is intentional deceit designed to evade their taxes. Moreover, a "consistent pattern of under-reporting" is also fraudulent underpayment where the taxpayer is required to swear to the truth of its payments, as Defendants are here. *See Excel Drug Co.*, 609 S.W.2d at 404; LF 2959.

The second and third exceptions to the three-year limitation period, negligent or careless failure to file a return or conscious refusal to file returns, also apply here, and Defendants failed to meet their burden showing that those exceptions do not apply. *Hewitt Well Drilling & Pump Service*, 847 S.W.2d at 798. CenturyLink cited as an excuse for their underpayments only legal conclusions about the taxes, but "reliance on the advice of counsel" does not "overcome…neglect." *See Bridge Data Co. v. DOR*, 794 S.W.2d 204, 208 (Mo. banc 1990) (overruled on other grounds by *International Business Machines*

Corp. v. Director of Revenue, 958 S.W.2d 554 (Mo. banc 1998)).

Furthermore, it was undisputed that Defendants failed and refused to file proper returns. LF 8747-48. The Cities' license taxes require, in order for a proper return to be filed, a sworn statement of gross receipts. LF 2959, ¶¶12-16. Perhaps because they are aware that the statement of "gross receipts" on their returns was not actually their true "gross receipts," Defendants refuse to swear to the truth of those statements. LF 8747-48 (Defendants admitting refusal to file sworn statements).[16] Accordingly, this admitted failure to comply with the return requirements of the Cities' taxes demonstrates that Defendants have "failed" or "refused" to file returns, and thus, even if §144.220 applied, there would be "no limitation" period. §144.220.1 RSMo.

Point VI must be denied.

VII. The court did not err in awarding prejudgment interest at the rate of 9% to Aurora, Cameron, and Oak Grove, and 2% per month, not to exceed 18% per year to Wentzville, because §71.625 does not apply.

The court properly applied the pre-judgment interest statute, §408.020 RSMo., to underpayments owed to Aurora, Cameron, and Oak Grove, and properly applied the rate of 2% per month, not to exceed 18% per year to Wentzville.

a. Section 71.625 does not apply retrospectively, and therefore §144.170 and §32.065, setting the rate for interest on sales tax, do not apply.

CenturyLink concedes that the only way §144.170 and §32.065 could be applicable

[16] Failure to specifically deny summary judgment facts results in admission. *Holzhausen*, 414 S.W.3d at 493.

to this case were if §71.625 applied. Section 71.625 does not apply to this case, because it was enacted after the case was filed and does not operate retrospectively. *See* Response to Point VI.

b. §408.020 applies to underpayments owed to Aurora, Cameron, and Oak Grove.

Section 408.020 states that the prejudgment interest rate shall be 9% on "all moneys after they become due and payable," "when no other rate is agreed upon." §408.020 RSMo. (emphasis added). The Cities' license taxes contain a clear statement of the amount due and the date on which such amounts must be paid. LF 424, 428-29, 439-40, 443-46. Thus, the unpaid license taxes are "moneys…due and payable," and §408.020 is the appropriate statute under which to calculate interest in the absence of a City ordinance specifying otherwise. *See Robertson*, 417 S.W.2d at 702 (municipal taxes are delinquent when not paid in full on the due date, and "after that date, interest and penalties accrue").

CenturyLink claims that §408.020 applies to only four types of claims: written contracts, accounts, money recovered for the use of another, or "all other money due…for the forbearance of payment whereof an express promise to pay interest has been made." CenturyLink Br., p.77. While the statute applies to the above, it also broadly applies to "all moneys after they become due and payable," "when no other rate is agreed upon," which CenturyLink ignores. §408.020 RSMo. That this is a type of claim to which §408.020 applies is clear from the plain language and structure of the statute, which separates "all moneys after they become due and payable" from "written contracts" and "accounts." *Id.* The license taxes are due and payable, and thus, prejudgment interest under §408.020 is

applicable.

The unpaid taxes also constitute "accounts," for which payment is due and a demand was made. §408.020 RSMo. The phrase "accounts" in §408.020 is used "in a general sense…equivalent to 'claim' or 'demand.'" *Brink v. Kansas City*, 217 S.W.2d 507, 511 (Mo. banc 1949). The "meaning of accounts" in §408.020 includes claims "arising by operation of law…." *Id.* Here, the Cities' claims under their license tax ordinances arise by operation of law. The taxes contain a definitive demand as to the amount of payment required and time for payment. *See Rois v. H.C. Sharp Co.*, 203 S.W.3d 761, 767 (Mo. App. 2006) ("demand" under §408.020 "need not be in any certain form" it only requires an "amount and time"); *Hocker Oil Co., Inc. v. Barker-Phillips-Jackson, Inc.*, 997 S.W.2d 510, 521 (Mo. App. 1999) (winning party, pursuant to §408.020, is "entitled to prejudgment interest after moneys became due and payable" and "exact calculation of a claim is not necessary for a claim to be liquidated"). Accordingly, "the statute permits interest" on these claims. *Brink*, 217 S.W.2d at 511.

In a single unexplained conclusion, CenturyLink accuses the court of compounding interest under §408.020. CenturyLink Br., p.78. This alleged error was not preserved in the point relied on, and is incorrect. The court explicitly awarded only "simple interest." LF 10817; TR Feb. 14, 2017, 7:18.

c. Wentzville's specific interest ordinance applies.

CenturyLink challenges the use of Wentzville's specific interest ordinance. However, as CenturyLink recognizes, a specific law will prevail over the general. Wentzville's ordinance specifically provided that delinquent Wentzville taxes incur

"interest thereon at the rate of two percent (2%) per month from the time they become delinquent, not to exceed eighteen percent (18%) per year, until paid…." Trial Exhibit 13. Although §408.020 would normally apply to prejudgment interest on municipal fees or taxes, where a City "adopted an ordinance" with a specific interest charge, "the nine percent rate would not apply." *City of Lexington*, 819 S.W.2d at 760. Thus, this is not a matter of a City ordinance "permitting something that state law prohibits…" *See* CenturyLink Br., p.78. The City is statutorily authorized to regulate, license, levy, and collect a license tax on telephone companies, and that includes imposing interest on unpaid taxes. *See* §94.270 RSMo.; *City of Bridgeton*, 37 S.W.3d 867 (affirming imposition of both interest and penalties on unpaid municipal license taxes).

Point VII must be denied.

VIII. The court did not err in awarding post-judgment interest to Wentzville pursuant to its ordinance, and Point VIII is not preserved.

Point VIII challenges the award of post-judgment interest *only* with respect to Wentzville. This point is not preserved. CenturyLink did not argue in the trial court that the court's imposition of post-judgment interest pursuant to Wentzville Code Section 140.120 was erroneous, despite the fact that the City clearly stated prior to trial that it intended to ask the Court to award such interest. LF 9992; Rule 78.07(c) ("In *all* cases, allegations of error relating to the form or language of the judgment…must be raised in a motion to amend the judgment in order to be preserved for appellate review.") (emphasis added).

The court properly awarded post-judgment interest to Wentzville at the rate of 2%

per month, not to exceed 18% per year. As explained above, Wentzville's ordinance specifically provided such an interest rate to be imposed on city taxes "until paid." Code Sec. 140.120. The ordinance does not conflict with §408.040. It imposes a specific interest rate on Wentzville city taxes, whereas §408.040 imposes a general interest rate on judgments. This is permissible. *See City of Lexington*, 819 S.W.2d at 760; *see* Response to Point VII.

The authority cited by CenturyLink is inapposite because, there, the ordinance at issue directly conflicted with the state law and explicitly prohibited what state law required. *See City of St. Peters v. Roeder*, 466 S.W.3d 538, 546-47 (Mo. banc 2015) (ordinance prohibited assessment of points on drivers' license for certain conduct, whereas state law required assessment of points for the same conduct). Furthermore, even that case recognizes that "[a] municipal ordinance does not conflict with state law by making conduct that is a violation of state law also a violation of the ordinance," and that municipalities are permitted to enact "additional" regulations. *Id.* at 544. Therefore, the court did not err in imposing post-judgment interest pursuant to Wentzville Code.

Point VIII must be denied.

IX. The court did not err in awarding attorneys' fees to the Cities because CenturyLink willfully violated Chapter 392 RSMo., and fees were properly awarded pursuant to equity and City Code.

Point IX challenges the court's award of attorneys' fees to the Cities based on some, but not all, of the grounds on which the court awarded fees.[17] "Awards of attorney's fees are left to the broad discretion of the trial court and will not be overruled except for an abuse of discretion." *American Economy Ins. Co. v. Ledbetter*, 903 S.W.2d 272, 276-77 (Mo. App. 1995).

CenturyLink does not claim that the attorneys' fees were unreasonable in their amount. It only challenges certain of the legal authority pursuant to which fees were granted. This point is multifarious and should be stricken and denied.

a. CenturyLink fails to appeal all grounds on which attorneys' fees were awarded.

CenturyLink fails to appeal and does not challenge the award of attorneys' fees pursuant to City ordinance. *See* LF 1719, 10818 (awarding attorneys' fees pursuant to Wentzville Code §655.070). Wentzville City Code provides that the City shall be entitled to attorneys' fees in the event the City is required to enforce its Code. LF 986; Appendix

[17] CenturyLink failed to directly appeal the ruling on the Cities' Chapter 392 claims. It argues that "[i]f no taxes are found to be due, no liability under §392.350 can [be] found to be due..," so direct appeal was not required. CenturyLink Br., n.9. This is incorrect. The Court's ruling that CenturyLink violated §392.350 was not solely based on tax violations. *See* LF 1719 (granting judgment on Cities' Counts XX-XXIV). It was also based on CenturyLink's violation of §392.080, and failure to obtain consent of the Cities prior to occupying the ROW. *See* LF 1069. CenturyLink's failure to appeal the judgment on that aspect of the Cities' claims waived any appeal of that judgment.

A40. The court properly awarded attorneys' fees pursuant to that ordinance. LF 1719, 10818.[18] CenturyLink's failure to appeal this alternative and independent basis for attorneys' fees is fatal to Point IX.

Appellants "necessarily have to establish that all of the reasons that the circuit court articulated in its judgment were wrong." *City of Peculiar v. Hunt Martin Materials, LLC*, 274 S.W.3d 588, 590-91 (Mo. App. 2009) (appellants "failed to carry their burden on appeal," to reverse judgment because they "attack only two of the circuit court's five grounds"). "An appellant's failure to challenge a finding and ruling that would support the conclusion complained about is fatal to an appeal." *STRCUE, Inc. v. Potts*, 386 S.W.3d 214, 219 (Mo. App. 2012) (internal quotations and citations omitted) (dismissing appeal for failure to appeal all grounds on which judgment was entered).

b. The court had jurisdiction to determine the Cities' §392.350 claims.

The circuit court had jurisdiction to determine the Cities' claims that Defendants violated §392.200 and §392.080 and therefore to award fees for such violations. "The circuit courts shall have original jurisdiction over all cases and matters, civil and criminal." MO. CONST. ART. V, §14.

CenturyLink argues the "doctrine of primary jurisdiction," required the Cities to present these claims to the Missouri Public Service Commission ("PSC"). CenturyLink Br., p.81. This is incorrect. Section 392.350 requires that a "court" determine the question

[18] *Metropolitan St. Louis Sewer Dist. v. St. Ann Plaza, Inc.*, 371 S.W.3d 40, 46, n.4 (Mo. App. 2012) (exception to the American Rule when an ordinance provides for recovery of attorneys' fees).

of whether actions under §392.350 are willful. Further, an action to recover under Chapter 392 "may be brought in any court of competent jurisdiction." §392.350 RSMo.

While "questions of administrative expertise," may be within the competency of the PSC, where "[n]o element of administrative agency expertise is involved," the doctrine of primary jurisdiction is inapplicable, and claims are properly presented to the circuit court. *See Lamar v. Ford Motor Co.*, 409 S.W.2d 100, 107-108 (Mo. 1966) (cited in CenturyLink Br., p.82) (circuit court had jurisdiction to consider questions that did not involve administrative expertise); *Holland Industries, Inc. v. Division of Transp.*, 763 S.W.2d 666 (Mo. banc 1989) (agency has jurisdiction only over issues that are within the "special competence" of the agency); *State ex rel. and to Use of Cirese v. Ridge*, 138 S.W.2d 1012, 1101 (Mo. banc 1940) (public service commission passes upon the "rates" of public service corporations).

The Cities' claims here did not involve questions regarding rates, or other administrative expertise. Rather, they turned on simple questions of law: whether Defendants' refusal to comply with city tax and ROW ordinances constituted an imposition of "undue or unreasonable prejudice or disadvantage" and whether Defendants' refusal to obtain municipal consent to place their wires, poles, and fixtures in the City violated §392.200 and §392.080. These issues "fall within the conventional competency of the courts" and were not required to be presented to the PSC. *See Main Line Hauling Co., Inc. v. Public Service Comm'n*, 577 S.W.2d 50, 51 (Mo. App. 1978) (affirming court's exercise of jurisdiction in case that was not first presented to the PSC because it involved only a "pure question of law"); *Thermalcraft, Inc. v. U.S. Sprint Communications Co. Ltd.*

Partnership, 779 F.Supp. 1039, 1041 (W.D. Mo. 1991) (court had jurisdiction over claims for violations of §392.350 and §392.200).

Even authority the Defendants cite states that PSC jurisdiction is limited, and the PSC has no jurisdiction "to entertain or determine damages, compensatory or punitive…[those] are within the sole and exclusive jurisdiction of the courts in statutory actions brought pursuant to §392.350…." *Overman v. Southwestern Bell Telephone Co.*, 706 S.W.2d 244, 251 (Mo. App. 1986). This case being one in which damages were requested, it was properly brought to the circuit court. To the extent that *Overman* suggests that *all* cases involving a claim for violation of §392.200.3 must first be brought in the PSC, it must be pointed out that the case *Overman* relies on for this proposition states *only* that matters "regarding the rates and classification" are within the PSC's jurisdiction and so must first be brought there. *See DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674, 676 (Mo. App. 1978). That case therefore acknowledges that the Cities' action for damages pursuant to the statute must be brought in the circuit court and not the PSC. There is nothing in the text of Chapter 392 that requires this type of case that presents only questions of law outside of the traditional "rate and classification cases" to be brought before the PSC. The circuit court had jurisdiction.

c. The Cities have standing to bring Chapter 392 claims.

Defendants' next meritless assertion is that the Cities lacked standing to bring claims under Chapter 392 because they are not "persons" for purposes of that Chapter and therefore the award of attorneys' fees pursuant to §488.472 was erroneous. This point also fails. The court properly award attorneys' fees pursuant to §488.472 and §392.350, which

similarly provide that where a telecommunications company does "any act, matter or thing prohibited, forbidden or declared to be unlawful" by Chapter 392, and if "the court shall find that such an act or omission was willful," the court may award "attorney's fees." LF 1017, 10818.

Defendants do not cite a single case holding that cities are not "persons" under §488.472 or §392.350, or that cities do not have standing to sue for violations of Chapter 392. In fact, cities have sued telephone companies for violations of Chapter 392. *See State ex rel. City of Grain Valley v. Public Service Com'n of State of Mo.*, 778 S.W.2d 287, 287 (Mo. App. 1989) (city suing telephone company for violation of §392.200).

Section 1.020 RSMo., which is applicable to *all* statutes "unless otherwise specifically provided," provides that cities are considered "persons." Section 1.020 states: "[t]he word 'person' may extend and be applied to bodies politic and corporate." As nothing in §392.350 indicates that §1.020 does not apply, "the word 'person' may extend and be applied" to the cities in the context of §392.350.

Furthermore, while it is correct that the definitions in §386.020 apply to §392.350, there is no incorporation of those definitions into §488.472. Accordingly, there is no doubt that §1.020 and its statement that the word "person" includes "bodies politic and corporate" applies to §488.472.

Defendants rely on the fact that §386.020 does not expressly include the word "municipalities" in the list of entities that can be considered "persons." The definition of "person" in §386.020, however, does not provide an *exhaustive* list of the entities comprising that term. Section 386.020 states that "person" "*includes* an individual, firm or

co-partnership." §386.020(40) RSMo. (emphasis added). When a statutory definition uses the word "includes," it is "construed by Missouri courts as a term of enlargement, as providing an illustrative, nonexclusive, example, or as both." *Short v. S. Union Co.*, 372 S.W.3d 520, 532 (Mo. App. 2012) (collecting cases holding the term "includes" is one of enlargement). There is nothing in the §386.020 definition of "person" that excludes cities. Therefore, §386.020 does not prohibit cities from being considered "persons," as they are in other contexts and in §1.020. *See Shaw v. City of St. Louis*, 664 S.W.2d 572, 576 (Mo. App. 1983) ("municipalities are 'persons'" under 42 U.S.C. §1983).

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

Basic principles of statutory construction also indicate that cities may bring claims as persons under §392.350. Both "municipality" and "person" are open-ended definitions, and nothing in the text of the statute prohibits the interpretation that a "municipality" can be a "person" depending on the context. That a municipality is a "person" is not "plainly repugnant" to the intent of the legislature; it is perfectly in alignment with its intention that the law be "remedial." Moreover, if cities were not "persons" entitled to sue for

Defendants' unlawful behavior, then the Cities, even as customers of Defendants, would be unable to recover for violations of §392.350. That cannot be the intended result.

Section §392.350 plainly provides a broad remedy for *anyone* aggrieved by the conduct of a telephone company. It is a "remedial statute" and is "liberally construed." *De Paul Hosp. Sch. of Nursing, Inc. v. Sw. Bell Tel. Co.*, 539 S.W.2d 542, 548 (Mo. App. 1976); *see Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. 1999) ("[R]emedial statutes should be construed liberally…and all reasonable doubts should be construed in favor of applicability to the case.") (internal quotation and citation omitted).

d. Defendants' actions violated §392.350.

Again, Defendants' challenge to the attorneys' fees ruling is far from comprehensive, and this is fatal to its appeal. Defendants argue that their willful refusal to comply with the license tax ordinances cannot be considered "undue or unreasonable prejudice" under §392.200, because the purpose of Chapter 392 is not so broad. CenturyLink Br., p.84. Defendants ignore that the Cities also established violations of §392.080, separate and apart from the tax issue. LF 1069. Nevertheless, the argument that "license taxes are not the type of claim contemplated" by Chapter 392 is unsupported and incorrect.

Section 392.200.3's prohibition is expansive: no telecommunications company shall subject *any* person to "*any* undue or unreasonable prejudice or disadvantage *in any respect whatsoever*..." (emphasis added). There is no limitation in the language that a telecommunications company only violates this law if it subjects *certain customers* to

undue or unreasonable disadvantage, and courts "will not add exceptions or exclusions beyond those explicitly provided by the legislature." *State v. Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc.*, 97 S.W.3d 54, 61 (Mo. App. 2002). While the statute does not explicitly list every way a telephone company might subject others to prejudice or disadvantage, statutes rarely provide exhaustive lists of all of the ways they might be violated– that requirement would be unworkable. There is no limitation on §392.200.3 that would exclude knowing, purposeful, and repeated violations of a municipal ordinance from the prohibited behavior.

If the legislature intended that §392.200.3 be applied only to cases of rate discrimination, or only be applied to protect certain customers, as urged by CenturyLink, then it would have used such language, instead of broadly pronouncing that the section applies "in any respect whatsoever." *See Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 402 (Mo. 1986).

CenturyLink relies on the title of §392.200 and states that the title suggests that the sole purposes of the statute are to address concerns involving "adequate service," "just and reasonable charges," "unjust discrimination," and "unreasonable preference." CenturyLink Br., p.84. However, the content, not title, of the statute controls, and "[t]he title…should be liberally construed in support of the power sought to be exercised by the Legislature." *Willhite v. Rathburn*, 61 S.W.2d 708, 710 (Mo. 1933).

While *one* of the purposes of Chapter 392 might be to protect certain customers or to stop telephone companies from charging different rates for the same services, CenturyLink cites no authority stating that those are the *only* purposes of the statute. *See*

CenturyLink Br., pp.84-85. For instance, although *State ex rel. DePaul Hospital School of Nursing v. Public Service Commission*, 464 S.W.2d 737, 738 (Mo. App. 1970), states that §392.300 "forbids discrimination in charges for doing a like or contemporaneous service," the case does not say that such is the *only* action to violate that statute.

Section 392.350 is remedial in nature and must be construed liberally. *De Paul*, 539 S.W.2d at 548. The Cities have been unduly and unreasonably prejudiced and disadvantaged by CenturyLink's refusal to truthfully report its gross receipts and pay all amounts due under the ordinances, and by CenturyLink's refusal to obtain the required consent prior to locating its equipment in the Cities.

e. Defendants have not established the applicability of §392.611.

Chapter 392 applies to "any telecommunications company," including Defendants. §392.350 RSMo. Defendants cite an alleged exclusion, §392.611, which they claim became effective on August 28, 2014. Despite claiming that Defendants have been exempt from the regulations in Chapter 392 since August 2014 by virtue of §392.611, Defendants failed to raise this argument until more than two-and-a-half years after the statute took effect. LF10797-10803. When Defendants did belatedly assert this argument, it failed.

The alleged exemption in §392.611 does not relieve Defendants of liability under §392.350. Section 392.611 only exempts certain qualified telecommunications companies from "duties, obligations, conditions, or regulations on retail telecommunications services provided to end-user customers." Defendants have not established that they are a qualifying telecommunications company and §392.350 is not one of the described regulations.

Section 392.611 only applies to "a telecommunications company certified under this

chapter or holding a state charter authorizing it to engage in the telephone business." §392.611 RSMo. Defendants, claiming exemption, bear "a substantial burden to prove" that they fall within the exemption in §392.611. *See Bethesda Barclay House v. Ciarleglio*, 88 S.W.3d 85, 91 (Mo. App. 2002). Defendants provide the Court with one lone record citation as support for their assertion that CenturyLink is such a company and "CenturyLink did not elect to remain subject" to Chapter 392. *See* CenturyLink Br., p.86 (citing LF 3161). That page in the record – an affidavit from a CenturyLink employee – does not state that "CenturyLink did not elect to remain subject" to Chapter 392. *See* LF 3161. In fact, it does not mention Chapter 392, or any choice by CenturyLink to "remain subject" to regulations or to opt out of regulations. *Id.* It is no support for this proposition. Defendants have not established that they are a qualified company under §392.611.

Even if Defendants were a qualified company, §392.350 is not impacted by §392.611 because §392.350 does not "impose[] duties, obligations, conditions, or regulations on retail telecommunications services provided to end-user customers." §392.611.1 RSMo. The regulations at issue here require Defendants to refrain from acting to the disadvantage of the Cities or engaging in undue or unreasonable prejudicial behaviors, and to refrain from locating their equipment in any City without consent. *See* §§392.200, 392.080 RSMo. Those regulations do not necessarily or specifically relate to "retail telecommunications services provided to end-user customers," but instead prohibit *Defendants, in general* from undue and unreasonable action. Accordingly, Defendants are subject to those regulations even if they could establish that they are qualifying telecommunications companies under §392.611.

Furthermore, allowing Defendants to apply this exception would evade the spirit of the law. *See City of Mountain View v. Farmers' Telephone Exchange Co.*, 224 S.W. 155, 156 (Mo. App. 1920) (telephone company that was not organized under §§392.010-392.170 RSMo. could not escape the requirements of Chapter 392 just because it failed to organize, and recognizing that "the telephone company could not, by failure to organize under that statute, acquire any right to enter plaintiff city without its consent….").

Finally, Defendants do not contend that they were immune from the requirements of Chapter 392 prior to August 2014. Accordingly, even if §392.611 applied *now*, Defendants were indisputably subject to and in violation of §392.200 and §392.080 prior to August 2014.

f. Defendants acted willfully.

There was ample, undisputed evidence that Defendants acted willfully in violating the law, and the court properly awarded the Cities' attorneys' fees. LF 1719.

Defendants improperly rely on trial testimony in support of this argument. *See* CenturyLink Br., pp.86-87. The court did not "tak[e] evidence on willfulness at trial." *Id*. Willfulness was determined in the first summary judgment, after the court painstakingly considered the arguments and evidence, and even requested additional briefing on this topic specifically. LF 1700-1719. That ruling remained intact throughout the case. Defendants offered evidence regarding their state of mind for the *sole* purpose of contesting penalties, agreeing that the trial was on "damages only." TR 33-34; LF 9974-76. Thus, Defendants are confined to the summary judgment record to dispute the court's determination of willfulness. *In re Estate of Danforth*, 705 S.W.2d 609, 610 (Mo. App. 1986) ("When

evidence… is proffered…for one purpose only it may not be used for another and different purpose.").

Defendants ignore a plethora of summary judgment evidence supporting the willfulness determination, and argue that the Cities' only evidence of willfulness was that Defendants knew through prior notifications that their underpayments were unlawful. CenturyLink Br., pp.88-89. This was hardly the only evidence of willfulness.

"'Willful' as used in [§392.350] is not the level of intent needed for criminal liability or punitive damages in tort cases," the legislature did not "intend[] to apply that high standard." *De Paul*, 539 S.W.2d at 548-49. In *De Paul*, the court upheld attorneys' fees for a "willful" violation of §392.350 where a telephone company improperly classified a nursing school at a higher tariff classification, yet chose to classify other similar businesses with a different interpretation of the tariff. The court explained the §392.350 "willful" standard must be "liberally construed," as a remedial statute to protect the public. *Id*. at 548. The court expressly rejected the "wrongful" or "evil intent" definition used in the criminal context, and rejected the "closely related" standard for "punitive damages." *Id*. (noting that the "statute does not say 'willful and wanton'"). The court held that "willful" in §392.350 only requires a showing that a telecommunications company "had a conscious disregard" or acted "inconsistent[ly] and arbitrar[ily]." *Id*. at 548-52. The court held that in the context of rate discrimination (similar to Defendants' arbitrary and discriminatory tax payments here), the term "'willful' means either intentionally charging an incorrect rate knowing it was incorrect, or charging a rate when the utility has no reasonable basis…." *Id*. at 549.

Here, there was undisputed summary judgment evidence that Defendants acted inconsistently and arbitrarily. Defendants – even after the lawsuit – refused to pay subscriber line charges (LF 1411-16) and argue that such revenue is not taxable "exchange telephone service" (LF 1196-99), despite unequivocal statements to customers – even after this lawsuit – that such charges are local "exchange services." LF 1512, 7692. Similarly, Defendants affirmatively told their customers and the Cities that extended area service, "EAS," is a part of "local exchange services," (LF 7692, 7720) and yet, Defendants justify their failure to pay the same on the basis that it is *not* local "exchange service." LF 1196-99. Defendants do not pay on and asserted to the Cities that "optional services" (LF 1411-16, 1497), are not "exchange telephone service," even though Defendants' tariff expressly states that optional services <u>are included</u> within the services defined and regulated by the "General and *Local Exchange*" Tariffs. LF 1551, 1605, 1608. Defendants even asserted (although in an inadmissible affidavit) that optional services are specifically available as "add-ons" to "exchange telephone service," and therefore such revenue is received *because of* Defendants' engagement in the business of exchange telephone service in the Cities. LF 1497. By definition, continuing to assert these diametrically opposite statements to this Court and the public is "inconsistent and arbitrary" and lacks any reasonable basis. Defendants' numerous, repeated conflicting statements about their revenue and services cannot both be true, and this "inconsistent and arbitrary" behavior proves "willful" conduct under §392.350.

Defendants and their subsidiaries have also entered into agreements they expressly acknowledge as "lawful" with municipalities in numerous cities (LF 1516-18, 647;

Supp.LF 53, 68, 72) but inconsistently, discriminatorily, and without any reasonable explanation deny such lawfulness and refuse to comply with such rights-of-way requirements in Cameron and Wentzville. LF 1517-18.

To their customers, the PSC, and the State of Missouri, Defendants tell one story. To the Cities and this Court, Defendants tell another story. This behavior and the resulting repeated violations of the Cities' ordinances unreasonably and unduly disadvantaged the Cities, deprived them of significant revenue to which they are legally entitled, and endangered the public through Defendants' illegal occupation of the City's ROW. The court properly entered summary judgment on this issue.

Defendants' main defense that their behavior was not willful is that the Cities have only recently objected to Defendants' unlawful conduct. Essentially, they argue that one is not willful if one never gets caught. The Cities' lack of awareness of Defendants' unlawful conduct is irrelevant. Indeed, one of the Cities' principal objections is that Defendants failed to truthfully report their gross receipts. The Cities' knowledge of the timing or extent of Defendants' violations is irrelevant to Defendants' willful behavior.

Summary judgment on willfulness was appropriate, given the standard for "willful" under §392.350, compared to other intent or motive standards. None of the cases cited by CenturyLink to suggest that summary judgment on mindset is improper were cases applying *this* willfulness standard. *See, e.g.*, *Schroeder v. Duenke*, 265 S.W.3d 843, 848 (Mo. App. 2008) (summary judgment on specific "intent" on which an offer was made was in "genuine dispute"). They were also cases, unlike here, where the evidence was genuinely disputed. *See Amusement Centers, Inc. v. City of Lake Ozark*, 271 S.W.3d 18, 22 (Mo. App.

2008) ("there is a genuine issue of material fact concerning the parties' actual intentions…").

By contrast, while Defendants argue about the import of their contradictory statements and actions, there is no dispute of their existence. Therefore, there was nothing here that prevented summary judgment. "[S]ummary judgment is in order" on issues such as mind-set "where the non-movants have made such comprehensive and broad admissions by a failure to respond to requests for admissions and/or by a failure to contradict a movant's affidavit in support of the motion for summary judgment by opposing affidavits…" *Crow v. Crawford & Co.*, 259 S.W.3d 104, 113 (Mo. App. 2008). As demonstrated by the undisputed evidence, Defendants repeatedly and willfully made contradictory statements to the Cities, their customers, and the courts regarding their gross receipts, the nature of their services, and tax payments. There is no genuine dispute that Defendants' violations are based on the same kind of "inconsistent and arbitrary" conduct that the *De Paul* court considered "willful" under this remedial statute. The determination of willfulness was properly entered as a matter of law.

g. The court properly awarded fees pursuant to equity.

Aside from the authority in §392.350, §488.472, and City Code (which Defendants do not challenge), the court properly awarded attorneys' fees pursuant to its equitable powers. *See American Economy Ins. Co.*, 903 S.W.2d at 277 (court could award attorneys' fees pursuant to "equity"). In declaratory judgment actions under §527.100, as this was, "costs" "are to be awarded in a way that is equitable and just," and "costs has been interpreted to include attorney fees." *Id.* at 226 (internal quotations omitted). The award of

attorneys' fees pursuant to equity does not require "bad faith." *Id.*

Here, the court determined twice that attorneys' fees were warranted. *See* LF 1719, 10818. The court felt strongly that attorneys' fees were warranted, and awarded fees pursuant to its broad discretion. *See* TR. Feb. 14, 2017, p. 6:14-15 ("I want to make sure they get these attorney's fees."). CenturyLink cites no authority that would curtail discretion to award fees in this case, where the court deemed them to be equitable and just. §527.100; *see, e.g.*, *David Ranken, Jr. Technical Institute v. Boykins*, 816 S.W.2d 189, 193 (Mo. banc 1991) (overruled by *Alumnax Foils Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. banc 1997)) (*City's* assessment of taxes did not warrant attorneys' fees award *against City*); *Rental Co., LLC v. Carter Group, Inc.*, 399 S.W.3d 63, 68 (Mo. App. 2013) ("routine proceeding" for unjust enrichment did not warrant fees); *St. Louis Title, LLC v. Talent Plus Consultants, LLC*, 414 S.W.3d 24, 26 (Mo. App. 2013) (analyzing fee award pursuant to contract). CenturyLink's authority acknowledges that attorneys' fees can be awarded pursuant to the court's discretion. *See Smith v. City of St. Louis*, 395 S.W.3d 20, 26 (Mo. banc 2013).

This case presented "unusual circumstances," even by the standards illustrated in CenturyLink's authority, as evinced by the court's repeated orders that the Cities were entitled to fees. Defendants made blatantly inaccurate statements to the Cities and the court regarding the nature of their services. *See* Cities' Initial Br., pp.25-26. Defendants repeatedly violated the Court's orders to produce accurate revenue information *Id.* at 30-34. This litigation was complex and "extremely complicated," particularly because of Defendants' behavior. *See Birdsong v. Children's Division, Missouri Dept. of Social*

Services, 461 S.W.3d 454, 461 (Mo. App. 2015) (unusual circumstances warranting attorneys' fees exist where a party "blatantly disregards" court orders and in cases that are "unusual or extremely complicated"). Accordingly, the court did not abuse its discretion in awarding attorneys' fees to the Cities.

Point IX must be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 30,955 words, exclusive of sections exempted by Rule 84.06(b), based on the word count function of the Microsoft Word 2016 word-processing software.

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