IN THE
SUPREME COURT OF MISSOURI

No. SC96276

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

Plaintiffs/Respondents/Cross-Appellants,

v.

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

Defendants/Appellants/Cross-Respondents.

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

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ARGUMENT

I. The "grandfathered political subdivisions" exemption of §67.1846 is a facially special law that is severable from the remainder of the statute.

CenturyLink raised the unconstitutionality of §67.1846.1 multiple times, early on, and the trial court squarely ruled on the issue. LF-1208-1213, 1806-1807, 2238, 2359-2362, 1716-1719, 1720. The constitutional issue was not the proverbial "afterthought," as in the cases cited by the Cities. As an issue of law, the standard of review on appeal is *de novo* by this Court (Rule 84.04(e)).

A. The date restriction in §67.1846.1 creates an unconstitutional closed class.

Cameron raises three arguments on constitutionality: (1) the class is not closed because members can ***leave*** the class, (2) grandfathering is sometimes legal, and (3) §67.1846.1 "affects too many" cities to be a special law. Each argument fails.

The vice of special laws is not that the privileged members can leave the class, but rather that no one can join the class and obtain the class's special benefits. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. 2006). Cameron raises the irrelevant suggestion that grandfathered cities could leave the class, but misses the crucial point that no other city can ever enter the class because the date restriction made it impossible. S.B. 369 (May 1, 2001 date restriction predates legislation's August 2001 effective date) (Def-Apdx-A44-A50). The special exemption suffers precisely the same vice as the exemption in *Springfield* and likewise is a presumptively unconstitutional special law.

Cameron next argues that grandfathering is sometimes permissible. Response Br.-60. What Cameron fails to recognize is that its cited cases stand for the unremarkable proposition that grandfathering is permitted ***so long as other parties can gain the same benefits as the grandfathered parties***, albeit by meeting new or different requirements. That cannot happen here.

Last, this Court rejects numerosity arguments about special laws: "***The focus is not on the size of the class comprehended by the legislation***…the issue is the nature of the factors used in arriving at that class." *Springfield*, 203 S.W.3d at 186 (emphasis added). Cameron's unsubstantiated assertion that the special class "is believed to include at least a dozen other political subdivisions" is irrelevant.

B. Cameron failed to offer any evidence of substantial justification.

The proponent of a special law must demonstrate "substantial justification" based on ***evidence***. *City of Normandy v. Greitens*, 518 S.W.3d 183, 196 (Mo. 2017). Cameron offered no such evidence to the trial court and is thus unable to point to any evidence on appeal.

C. The "grandfathered political subdivision" exemption is severable.

Under the guise of upholding the statute to the "fullest extent possible," Cameron posits that only §67.1846.1's date restriction should be severed. Response Br.-64. But severing only the date restriction would allow ***all*** cities to charge linear foot fees and result in statutory gibberish about "grandfathered political subdivisions" where no grandfathering exists. This result eviscerates the legislature's express intent to prohibit

charging of rent such as linear foot fees for use of rights-of-way. *See* §§67.1830(5), 67.1842.1(4).

Next, Cameron argues that the Court should invalidate S.B. 369 in its entirety. Response Br.-65-68. Cameron's urging the Court to apply the common law "beyond a reasonable doubt" standard fails because that applies to bills passed through improper legislative procedures. *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348, 353-354 (Mo. 2013). Unlike a procedural challenge, in which the Court necessarily engages in a review of legislative history, a substantive challenge under §1.140 reviews the plain text of the enactment. *Id.* Under §1.140, "[t]he provisions of every statute are severable[]" and "the remaining provisions of the statute are valid ***unless***" the "valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provisions that it cannot be presumed the legislature would have enacted the valid provisions without the void one," or "the valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent." (Emphasis added).

Severance of the "grandfathered political subdivision" exemption would leave a statutory scheme that is perfectly "complete and workable" and would not "'affect the viability or workability' of any other provision." *SSM Cardinal Glennon Children's Hosp. v. State*, 68 S.W.3d 412, 418 (Mo. 2002).

II. Cameron and Wentzville's right-of-way agreements are illegal mandatory "franchises" under §67.1842.1(4), and Cameron's Code demonstrates its fees violate §§67.1830(5) and 67.1840.2(1).

This issue was raised in CenturyLink's answer and in response to the Cities' first summary judgment motion (L.F.-1204-1213, 2338-2340). The standard of review of these issues is *de novo* by this Court. Rule 84.04(e).[1]

A. Cameron and Wentzville's right-of-way agreements constitute illegal mandatory "franchises."

Under these cities' ROW codes, the mandatory contracts are substantively indistinguishable from this Court's well-settled definition of a "franchise" and Wentzville's own franchise requirements. *See* Appellants' Br.-54-55; LF-1017-1025-Wentzville Code §655.285.A (defining the two nearly identically) and §§655.280-655.430 (imposing identical requirements for "franchises" and "agreements"). These mandatory contracts also constitute "unreasonable requirement[s] for entry to the public right-of-way," violating §67.1842.1(3), and impose a contractual obligation to pay taxes in a surreptitious attempt to expand the statute of limitations from three years (§71.625.1) to ten years (§516.110(1)).

The term "franchise" is not defined in the statute, and the Cities provide no argument that this Court's oft-repeated definition of "franchise" does not fit in the statutory context. Missouri courts have applied the ordinary definition of "franchise" in

[1] For clarity, the First Summary Judgment was entered prior to the effective date of the amendments to §67.1842, which, among other things, added sub-part (6) to §67.1842.1, which also precludes Cameron from requiring an ROW agreement.

many contexts. *See, e.g., State ex rel. Hagerman v. St. Louis & E.S.L.E.R. Co.*, 216 S.W. 263, 265 (Mo. 1919) (railroad tax assessment); *Poplar Bluff v. Poplar Bluff Loan & Bldg. Assoc.*, 369 S.W.2d 764, 766 (Mo.App. 1963) (municipal license tax).

The Cities' argument that the Missouri courts' definition of "franchise" would "encompass ***any*** person or entity-specific transaction entered into with a government, potentially including leases, contracts, or business licenses[]" (Response Br.-71) is wrong because it ignores that §67.1842.1's prohibition on mandatory franchises only applies to "telecommunications compan[ies]." Likewise, *Poplar Bluff* used the very definition to which the Cities object to distinguish between a "license" and a "franchise:" "[T]he occupation license fee ***on a business which does not use public facilities and which the city has no power to regulate*** is in reality a tax, and the so-called 'privilege' which is common to anyone who can qualify as being within that class of persons ***is not such a special privilege as to constitute a city franchise***." 369 S.W.2d at 767 (emphasis added) (footnote omitted).

Further, CenturyLink does not argue that the coercive imposition of Cameron's and Wentzville's ROW agreements is what makes them "franchises." Rather, they are illegal under §67.1842.1(4) because the Cities ***require*** CenturyLink to obtain a franchise as a mandatory condition of providing services.

Under the Cities' strained statutory interpretation, "franchise" would be meaningless. The prohibition on "franchises" in subsection (4) applies to telecommunications companies, while "contract or any other agreement for exclusive use or occupation" in subsection (5) applies to all ROW users. §67.1842.1(4), (5).

Moreover, the Cities' argument that "SB 369 [only prohibits] exclusive and discriminatory agreements," would render the separate ban on "franchises" in §67.1842.1(4) meaningless, a construction this Court should reject. *Am. Nat'l Prop. & Cas. Co. v. Ensz & Jester, P.C.*, 358 S.W.3d 75, 85 (Mo.App. 2011).

The Cities also wrongly rely on *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801 (Mo.App. 2004); *State ex rel. Peach v. Melhar Corp.*, 650 S.W.2d 633, 636 (Mo.App. 1983); and *State ex rel. McKittrick v. Springfield City Water Co.*, 131 S.W.2d 525 (Mo. 1939). *Ogg* did not involve any question about a public right-of-way, and drew no distinction between "a franchise that authorized a cable company to sell and provide its service" and a "license to use the ROW," as the Cities incorrectly suggest. *Peach*'s definition of "franchise" includes an agreement that authorizes access to the right-of-way for purposes other than provision of services, such as "construction" of facilities. 650 S.W.2d at 636. In *Springfield City Water*, the court held that a franchise is the only way a municipality can confer the right to place equipment in the rights-of-way. 131 S.W.2d. at 530. An agreement "to make special uses of public streets" is a "franchise," regardless of whether it authorizes the provision of services. *Id.*

B. That other entities have ROW user agreements does not excuse Cameron's and Wentzville's illegal franchise requirement.

The Cities argue that two other CenturyLink-affiliated entities—Embarq and non-party Qwest Communications—have entered into ROW user agreements with Harrisonville and Wentzville, which estops Spectra and CenturyTel from insisting that Cameron and Wentzville comply with §67.1842.1(4). This argument fails because: (1)

estoppel does not apply on the basis of illegal transactions, such as other cities' franchise requirement in violation of §67.1842.1(4), *Watkins v. Floyd*, 492 S.W.2d 865, 872 (Mo.App. 1973); (2) estoppel could not apply unless Cameron and Wentzville had "been misled or deceived" by Embarq's or Qwest's acquiescence, *Bresnahan v. Bass*, 562 S.W.2d 385, 390 (Mo.App. 1978); and (3) the parties cannot be estopped on the basis of actions taken by non-parties.

C. Section 67.1842.1(4)'s prohibition on mandatory franchises is constitutional.

The Cities' are wrong that §67.1842.1(4)'s prohibition on mandatory franchises is an unconstitutional special law. The prohibition on franchises does not draw any distinctions or confer any special privileges based on "historical facts" or similar "immutable characteristics." *Springfield*, 203 S.W.3d at 184. Numerous laws impose regulations on "telecommunications companies" as a general class. *See, e.g.*, 4 U.S.C. §§116-126; Cameron Code §10.5-151 (Def-Apdx-A60); Wentzville Code §655.100 (Def-Apdx-A62). Dating back to 1909, Chapter 392 has regulated "Telephone and Telegraph Companies." *See* §§392.010-392.611. By the Cities' logic, that entire Chapter is an unconstitutional special law.

For open-ended classifications, a "rational basis" justifies legislative distinctions. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832 (Mo. 1991). Missouri's prohibition on mandatory franchises for telecommunications companies reflects the same policies embodied in the Federal Telecommunications Act—"accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans," in part by "limiting local regulation" of

telecommunications facilities. *Sprint Spectrum, L.P. v. County of St. Charles*, 2005 U.S. Dist. LEXIS 43590, at *7 (E.D. Mo. July 6, 2005).

D. Missouri law prohibits Cameron's linear foot fees.

Because the provision under which Cameron imposes linear foot fees (§67.1846.1) is an unconstitutional special law, Cameron may only impose: (a) ROW permit fees that are "[b]ased on the actual, substantiated costs reasonably incurred…in managing the public right-of-way." §67.1840.2(1) (Def-Apdx-A15); and (b) other ROW "management costs" that are the "actual costs [it] incurs in managing its public rights-of way." §67.1830(5) (Def-Apdx-A10). However, those "costs shall not include payment...for the use or rent" of the ROW, or "attorneys' fees and costs in connection with issuing, processing, or verifying" ROW permits or applications, among others. *Id.* Cameron failed to submit any evidence that its linear foot fees, or for that matter its $2,500 ROW permit application fee (*see* LF-630-636; Cameron Code §10.5-204; LF-972), satisfy these conditions.

III. The Cities failed to prove that CenturyLink should pay license taxes on revenues beyond what the Cities have always taxed as "telephone service" and "exchange telephone service."

The interpretation of the ordinances was heavily litigated and raised, among other places, in summary judgment briefing on both motions for partial summary judgment of the Cities (L.F.-1192-1200). As a ruling on a motion for summary judgment, the standard of review is essentially *de novo. ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993); Rule 84.04 (e).

A. CenturyLink complied with Rule 84.04.

The Cities contend that CenturyLink was required to list all 29 disputed revenue streams in the section heading for this Point Relied On and again in the Conclusion of CenturyLink's brief. But Rule 84.04(d)(1) requires a Point Relied On to "state ***concisely*** the legal reasons" of reversible error and "explain in a ***summary*** fashion" why those legal reasons establish reversible error, while Rule 84.04(a)(6) requires a "***short*** conclusion stating the precise relief sought." CenturyLink complied with these rules. Appellants' Br.-57, 127.

Further, contrary to the Cities' feigned confusion that CenturyLink's brief only identifies "three revenues," CenturyLink's Statement of Facts spends several pages exploring the record evidence, including three different experts attesting that these 29 revenue streams are not "exchange telephone service" or "telephone service." CenturyLink then points out the Cities' failure to carry their burden of proof and reiterates that expert evidence with specific citations to the record, providing these three revenue streams as examples "among numerous others." Appellants' Br.-61-62 (citing LF-394-1039, 1199, 7175-7196, 7198-7204, 8618-8619, 11003-11027). Indeed, the Cities' second amended petition specifically identifies the revenue streams they asserted were subject to tax that was not being paid. L.F.-208-210.

B. The only evidence submitted on summary judgment demonstrated that the services at issue are not subject to tax.

The thrust of CenturyLink's Third Point Relied On is twofold: (1) the Cities offered no evidence to support why these 29 services are "exchange telephone service" or

"telephone service"; while (2) CenturyLink ***did*** offer evidence to support why these services did not qualify as either "exchange telephone service" or "telephone service." Therefore, summary judgment should have been entered in favor of CenturyLink.

Because of their failure to adduce evidence, the Cities are forced to contend that, even as plaintiffs, they somehow bore no burden of proof. Response Br.-78. This is wrong. *See Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. 1994) ("The party asserting the positive of a proposition bears the burden of proving that proposition"). The Cities filed this lawsuit seeking to tax all 29 of these services, and therefore the burden was on the Cities to prove that each of these revenue streams qualified as taxable "exchange telephone service" or "telephone service," as applicable. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 30 (Mo. 1991).

The Cities did not meet their burden. Instead, they adopted the erroneous legal position that the license tax ordinances reach all gross receipts, regardless of what the ordinances actually say. Having chosen the path of least resistance, which coincidentally would maximize their recovery, the Cities necessarily take the position that municipalities may file tax lawsuits seeking damages and penalties based upon unsubstantiated allegations, automatically shift a burden of "clear and unequivocal proof" onto the defendant taxpayer to account for every cent of payment, and then ride out the litigation to collect their alleged damages and penalties if the taxpayer fails.

The Cities continue to misconstrue cases concerning the applicability of tax *exemptions*. The scope of a tax exemption is a different issue from the scope of the tax base itself, and the Cities' cases prove CenturyLink's point. In *TracFone Wireless, Inc.*

v. Director of Revenue, 514 S.W.3d 18 (Mo. 2017), the Court affirmed an agency determination that certain transactions fell within the sales tax base set forth in §144.020.1(4), and that, having established this fact, the taxpayer then failed to establish that an exemption under a different statute, §144.030.1, applied to *remove* those transactions from the established sales tax base. This analysis of an exemption follows the familiar burden-shifting framework in civil cases. *See Anchor Centre*, 803 S.W.2d at 30.

Exemptions are carve-outs that serve as affirmative defenses in disputes over tax payments. *See, e.g.*, *State ex rel. Spillers v. Johnston*, 113 S.W. 1083 (Mo. 1908). The tax base itself is not an affirmative defense. The government, including the Cities, must carry the burden of proving that a taxpayer' gross receipts included payments that were not included in the general tax base, and then—and only then—the burden of going forward with the evidence may shift to CenturyLink and other taxpayers to justify that a tax exemption applies. *Anchor Centre*, 803 S.W.2d at 30.

In moving for summary judgment, the Cities did not meet their burden. CenturyLink, however, furnished evidence that negated this element of the Cities' affirmative case with respect to every single revenue stream. *ITT*, 854 S.W.2d at 381. Because the parties submitted cross-motions for summary judgment on the issue of liability, CenturyLink was entitled to partial summary judgment as to all 29 revenue streams.

C. The Cities continue to ignore the actual language of the ordinances.

The Cities are wrong that every business license tax ordinance, regardless of what the ordinance actually says, taxes all of a company's gross receipts. As CenturyLink has already explained, each City's ordinance taxes gross receipts "derived ***from*** the furnishing of such [exchange telephone] service" (Aurora and Cameron); "all revenues received by Grantee ***for*** the provision of basic local exchange telecommunications service" (Oak Grove); and gross receipts "***from***" the "business of supplying … telephone service" (Wentzville). Appellants' Br.-60. Strikingly, the Cities never address the limiting language in each ordinance that limits the tax base to receipts or revenues "from" or "for" these services.

The Cities continue to offer inexplicable citations to Missouri cases that do not shed any contrary light on the meaning of these ordinances. In *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960), the court found it "clear" that a tax adjustment provision in a rate schedule only covered that "a license or occupation tax imposed on company … as a per cent of company's revenue ***from steam sales*** to its customers," which steam was only 2% of the company's revenue. *Id.* at 77, 83-84 (emphasis added). The Cities adopt the opposite position and would ask the Court's blessing to tax the other 98% of revenues as well.

The Cities also wrongly rely upon a passage from *Kansas City v. Graybar Elec. Co., Inc.*, 485 S.W.2d 38, 42 (Mo. 1972), in which the court merely defined a license tax as a tax on the "privilege of doing business." The point the court was making was that license taxes are conceptually distinct from property taxes or income taxes, which may be

assessed on revenues associated with the same transactions. Additionally, *Graybar* is of questionable constitutionality in light of the later-decided *Complete Auto Transit* and *Mobil-Teria* cases.

D. The evidence submitted by CenturyLink on summary judgment was proper.

When a statute or ordinance employs an industry term of art, courts should receive expert testimony to explain the meaning. *Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 514 n.5 (Mo.App. 2007). Although the Cities attempt to recast CenturyLink's argument as one of "ambiguity," that is not what CenturyLink has argued. Just as a court might not grasp an unambiguous medical term, it is appropriate for courts to consult experts on such terms, including an understanding of the nuances of "exchange telephone service" and "telephone service." *See* Appellants Br.-61 n.6 (collecting cases).

The Cities attempt to compare this case to *City of Jefferson v. Cingular Wireless*, 2005 WL 1384062, at *3 (W.D. Mo. June 9, 2005), in which the court considered whether wireless telephone service, in general, constituted "telephone service." The federal district court did not address the issue of whether expert evidence would be informative about a technical term of art. Rather, the court refused to consider evidence of the legislative drafters' intent. Unlike *Cingular*, which confronted a less complex question, the Cities in this case sought to tax 29 unique revenue streams from various activities that should not be classified as "telephone service," let alone "exchange telephone service." Further, almost no person plucked off the street would recognize or understand the meaning of "exchange telephone service" without some assistance. CenturyLink therefore presented three expert affidavits explaining the services behind

these 29 revenue streams, and setting forth why the revenue streams do not fall within the meaning of the ordinance terms. (L.F.-7123-7124, 7184-7185, 7198-7204, 7214-7216, 7219-7221).

The Cities failed to muster any evidence to explain why CenturyLink is wrong. Instead, the Cities raised conclusory objections, casting these experts' descriptions of technology and services as "legal conclusions" even though the experts' explanations were grounded in the technical expertise of each witness. Response Br.-82. The Cities also attempted to compile purported "admissions" for a small number of revenue streams. *Id.* at 83-84. Those documents, however, were not created in connection with determining the tax base under these ordinances and, at most, make reference to "local exchange service," not "*telephone* service" or "exchange *telephone* service." Finally, the Cities reference CenturyLink's discovery responses listing its revenues for each of the 29 revenue streams (*id.* at 84), but CenturyLink's court-compelled discovery responses are not an admission that the court's discovery order was correctly tailored when it required this information to be provided and are certainly not a concession that these revenue streams were subject to taxation.

IV. The Cities did not carry their burden of proof at trial that disputed services occurred "in" or "within" the Cities.

The Court reviews a trial court judgment for substantial evidence, to see if it is against the weight of the evidence, or if it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976); Rule 84.04(e).

A. The Cities failed to carry their burden of proof.

The Cities contend that they also did not bear the burden of proof to establish whether revenue was taxable because it was "in" the Cities. For the reasons already described, this is wrong. *See Anchor Centre*, 803 S.W.2d at 30.

The Cities cannot shift the burden onto CenturyLink because of facts "peculiarly within the knowledge of" CenturyLink. Response Br.-87. All of the Cities' cited cases either describe the burden of proof as resting with the plaintiff, or describe the typical burden-shifting framework in which a defendant may bear the burden of establishing an affirmative defense after the plaintiff makes out a prima facie case. *See id.* at 87-88. There is nothing about this dispute that places the underlying facts "peculiarly" within CenturyLink's knowledge.

The Cities claim they merely needed to present CenturyLink's revenue data produced under a discovery order. But the fact that an item was "attributable to" a City under a discovery order is not the same as proving that all of the revenue arose in or, more importantly, wholly within, a City.

B. The trial court failed to fairly apportion the taxes.

It is undisputed that, to avoid violating the Commerce Clause, a tax must be "fairly apportioned." Response Br.-91. The Cities' argument is well-summarized by a single non sequitur: "The license taxes are fairly apportioned as they are imposed on CenturyLink for the privilege of engaging in business in the Cities." Response Br.-92. This is not fair apportionment; this is no apportionment at all. There is, by definition, ***no***

apportionment when every jurisdiction may tax every penny of every revenue stream that may have fleetingly touched the jurisdiction or did not touch the jurisdiction at all.

In the context of business license taxes in particular, state supreme courts have struck down license taxes that purport to tax 100% of a company's relevant receipts. *See Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 573 Pa. 189 (2003) (striking down business privilege tax on 100% of broadcast royalties); *City of Winchester v. American Woodmark Corp.*, 252 Va. 98 (1996) (striking down license tax based upon 100% of company's revenues despite involvement of locations in other states).

The Cities have backed themselves into a corner related to interstate services, as their improperly expansive interpretation of the ordinances at issue demands an automatic violation of the Commerce Clause. They cite no Commerce Clause cases approving the 100% tax base they propose, but rather cases in which the tax ***was*** apportioned relative to the activity within Missouri, in which tax credits were available, or in which apportionment was not even contested. Response Br.-92-93.

The Court must not only define the correct tax base, but ensure that the Cities may only tax: (1) all properly taxed revenues if they occurred wholly within the City; or otherwise, (2) a portion of properly taxed revenues, subject to apportionment restrictions required by the Commerce Clause. The trial evidence does not reflect this analysis. Therefore, the judgment should be reversed.

V. CenturyLink properly accepted the Oak Grove Franchise Agreement, which controls.

Oak Grove does not dispute that an interlocutory order is always under the control of the court making it. Instead, Oak Grove argues "waiver," relying on the same inapposite cases—rejected by the trial court— in which a party raised arguments for the first time on appeal or after remand. Response Br.-95; LF-9847-9848. CenturyLink raised the Oak Grove Franchise Agreement before trial, and the trial court properly considered the issue on the merits. LF-9948-9949.

A. CenturyLink accepted the Franchise Agreement.

Oak Grove claims the Franchise Agreement requires a "***separate*** acceptance." But the Agreement only requires an "acceptance" to be filed, and does not say "separate" at all. Def-Apdx-A57. Oak Grove's argument renders the signature block and signature "without function or sense," and also defies common sense. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003). Oak Grove would have this Court accord absolutely no legal effect whatsoever to: the presence of a signature block, CenturyLink's having signed on that block, or the City's having a signed copy in its files. Instead, Oak Grove posits that a city clerk with no personal knowledge of the transaction can render a legal conclusion that signing the Franchise Agreement and delivering it to the city did not constitute "acceptance."[2]

[2] While Oak Grove might contest "delivery," it concedes possession of the Agreement *signed by CenturyLink*, making the manner of delivery irrelevant. LF-9796.

Notwithstanding the lack of any "separate acceptance" language in the Agreement, Oak Grove asks the Court to adopt a rule that signing a *separate* document—but not the contract itself—is the only way to "accept" the contract. Oak Grove cites nothing to support this dubious proposition. It is difficult to imagine a more clear manifestation of intent to accept and be bound by a contract than the time-honored method of signing the contract on the proverbial "dotted line." *See, e.g.*, §432.070 (contracts with municipalities "shall be subscribed by the parties thereto…").

B. CenturyLink properly paid tax on "local service revenues."

The undisputed evidence demonstrates that CenturyLink paid Oak Grove a 5% tax on "local service revenues" as defined by the Agreement. Tr.-286-288; Ex.-U. Oak Grove's evidence of "failure to comply" is that CenturyLink did not pay taxes on revenue streams excluded by the express terms of the Franchise Agreement. *See* Response Br.-98-99; Def-Apdx-A56; LF-9800. Thus, its argument rests on the same faulty premise—that despite the limiting language, the Franchise Agreement taxes "all gross receipts."

The Franchise Agreement remains in effect to this day because CenturyLink complied with its terms and the parties continued to operate under it. *City of Bridgeton v. Missouri-Am. Water Co.*, 219 S.W.3d 226, 231-32 (Mo. 2007). Namely, Oak Grove continued to accept CenturyLink's tax payments and has never given notice of termination of the franchise relationship. *Id.* Thus, the Franchise Agreement terms control.

VI. The three-year limitation period applies pursuant to §71.625.2.

CenturyLink raised the applicability of §71.625.2 in summary judgment briefing (LF-1214-1215, 3113-3116, 7099-7104, 8543-8554), on the record at trial (LF-37, 584-585), and in pre-trial and post-trial briefing (LF-9971-9972, 10459-10469). The standard of review is *de novo*. Rule 84.04(e).

A. Section 71.625.2 applies retrospectively and prospectively against political subdivisions.

The Cities effectively concede that statutes of limitation are procedural, and they make no mention of *Missouri Municipal League v. State* (*MML*), 489 S.W.3d 765, 768 (Mo. 2016) (the legislature may "waive or impair the vested rights of political subdivisions, such as cities, without violating the prohibition on retrospective laws."). As *MML* explained, because the constitution's retrospective law prohibition protects citizens and not the state, the legislature may pass retrospective laws that waive the rights of the state. *Id.*

Moreover, "[a] statute which affects only procedure or remedy applies to all actions which fall within its terms, whether commenced before or after the enactment, ***unless the statute expresses a contrary intention or retrospective application will impair a substantive right vested by the prior statute***." *State ex rel. Research Med. Ctr. v. Peters*, 631 S.W.2d 938, 946 (Mo.App. 1982) (internal citations omitted; emphasis added). Like the statutes at issue in *MML* and *Peters*, §71.625.2 does not express an intention to apply prospectively only, and, as this Court held in *MML*, the legislature may waive even the vested rights of political subdivisions such as the Cities.

The Cities' "savings clause" cases are irrelevant, because they involved retrospective application of statutes of limitation to natural-person plaintiffs—who have protectable vested rights under Art. I, §13—and where doing so would completely extinguish their claims. Here, §71.625.2 retrospectively applies to the Cities as creatures of the legislature—which have ***no*** protectable vested rights under Art. I, §13—and where doing so would ***not*** completely extinguish their claims. *MML*, 489 S.W.3d at 768; *Peters*, 631 S.W.2d at 946.

B. A three-year limitations period applies.

Section 71.625.2 incorporates the three-year limitation under §144.220.3. Other statutes likewise impose a three-year limitation on enforcement of municipal license taxes by third-class cities, including Aurora and Cameron, and fourth-class cities, including Wentzville and Oak Grove. §94.150, §94.310, §140.160, §140.730.3, §141.080, §147.120.6, and §148.070.1.

The five-year-limitation cases the Cities cite relying upon §516.120 (Response Br.-99) all predate §71.625.2 (2012)—and are irrelevant because they are either non-tax cases or apply to charter cities. While the Cities concede this Court identifies §144.220 as a "statute of limitations," they nevertheless assert that it somehow does not operate as such because the Petition they filed in this case is not a "mailed" "notice" of assessment for purposes of §144.220. Response Br.-100-101. But if that were so, the statute would limit the Cities' claims to three years from whenever they do "mail" such a "notice" (if ever), and the Cities did not mail any notice of assessment to CenturyLink before filing

this case or since. LF-11058. Therefore, under the Cities' interpretation, their claims are barred altogether.

Further, and contrary to the Cities' assertion, the self-reporting nature of the Cities' taxes—*i.e.*, they become due without City assessment—does not change the analysis. Chapter 144 expressly applies to self-reporting taxes; the taxpayer self-reports and submits them "with the return." §144.080.1.

C. No "fraud" or failure-to-file exception applies.

No exception to the three-year limitation under §144.220.3 applies. Relying on *Excel Drug Co., Inc. v. Missouri Dept. of Rev.*, 609 S.W.2d 404, 410 (Mo. 1980), the Cities assert that the five-year limitation under Chapter 516 governs (Response Br.-100, 104). But *Excel* itself recognized that a two-year limitation (since amended to three years) under §144.220 applied, absent a finding of fraud. *Id.* Here, unlike in *Excel*, the trial court made no finding—and there is no basis for a finding—of fraud. LF-1716-1719, 9133-9137, 10815-10820 (Pl-Apdx-A1-A11, A17-A20).

Moreover, CenturyLink's periodic tax returns stated the amount of revenues CenturyLink believed and understood was taxable and the tax rates. LF-7751-7752, 7771-7772, 7779-7780, 7785-7789, 8993, 9017; Tr. 263-93. As this Court held in *Odorite of Am., Inc. v. Dir. of Revenue*, 713 S.W.2d 833, 839 (Mo. 1986)—a case upon which the Cities rely—"[a] misrepresentation as to a question of law is not fraud" for purposes of §144.220. The question of what is taxable telephone service is a "question of law"; fraud cannot be predicated on CenturyLink's understanding that additional

revenues were not taxable. *See also Lora v. Dir. of Revenue*, 618 S.W.2d 630, 634 (Mo. 1981).

Grasping for evidence of "fraud," the Cities mischaracterize customer bills that list, as "local exchange services", a couple tax-disputed revenues (Response Br.-104). Nothing on the bills identifies those revenues as "***telephone*** services," "exchange ***telephone*** services," as services provided in or within the city, or as otherwise taxable. LF-8598-99; *see also* Section III.

CenturyLink regularly filed its returns, making the failure-to-file exceptions inapplicable. LF-8993, 9017. The Cities now complain that CenturyLink's returns were not "sworn" (Response Br.-105), but Chapter 144 contains no such requirement. Moreover, the Cities accepted CenturyLink's payments for decades without objection. LF-11058.

VII. The pre-judgment interest rates apply pursuant to §71.625.2.

CenturyLink presented these arguments on the record at trial (Tr.-33, 218-220, 578-580) and in pre-trial and post-trial briefing (LF-9972, 10459-10469). The Court's standard of review is *de novo*. Rule 84.04(e).

A. Aurora, Cameron, and Oak Grove

The specific yearly interest rates pursuant to §71.625.2 and 12 C.S.R. 10-41.010 apply retrospectively and prospectively against the Cities, just as the three-year statute of limitations applies retrospectively and prospectively.[3]

"A statute which affects only the procedure or remedy"—such as a statute limiting interest—"***will be applied retrospectively unless the legislature expressly states otherwise***." *Croffoot v. Max German, Inc.*, 857 S.W.2d 435, 436 (Mo.App. 1993) (emphasis added). Because the legislature did not state otherwise, §71.625.2 applies retrospectively. *Id.*

Without support, the Cities claim that "interest statutes" as a rule are "substantive, not procedural" and as such do not apply retrospectively (Response Br.-102 n.15). This is incorrect. *See Croffoot*, 857 S.W.2d at 436 (retrospective application of interest statute). The Cities mistakenly rely on *Utilicorp United, Inc. v. Dir. of Rev.*, 785 S.W.2d 277 (Mo. 1990). In that case—which also predates *Croffoot* and *MML*—the Court prohibited retrospective "***allowance*** of interest when the same is ***forbidden*** in the absence of legislation." *Id.* at 278 (emphasis added). Here, by contrast, the Cities contend §71.625.2 improperly ***limits*** interest where the same is allegedly ***permitted*** under §408.020. Also, in *Utilicorp* the taxpayer alleged a tax overpayment against the State—the opposite of the situation here.

[3] CenturyLink's opening brief mistakenly stated in one place that §71.625.2 was enacted in 2014 (p. 77) and that the trial court applied compound interest (p. 78), but §71.625.2 was enacted in 2012, and the trial court applied simple interest.

Notably, the Cities would otherwise be entitled to ***no*** interest in the absence of the §71.625.2 retrospective legislation because, by its own terms, §408.020 does not apply. Where no other rate is agreed upon, §408.020 by its terms permits 9% interest on claims "for all moneys after they become due and payable, on written contracts" among three other inapplicable types of claims. The Cities simply ignore the "on written contracts" qualification; they know this is not a contracts case.

The Cities assert alternatively that their claims are somehow "on accounts" for purposes of §408.020. The Cities do not and cannot cite any authority that a tax-collection claim is a claim "on accounts"—or otherwise subject to §408.020. In short, §71.625.2 and 12 C.S.R. 10-41.010 control.

B. Wentzville

Section 71.625.2 also trumps Wentzville's conflicting ordinance. *City of St. Peters v. Roeder*, 466 S.W.3d 538, 543 (Mo. 2015). Namely, §71.625.2 provides for interest at specific yearly rates, while Wentzville Code §140.120 purports to provide interest at 2% per month up to 18% per year.

Wentzville cites *City of Lexington v. Seaton*, 819 S.W.2d 753, 760 (Mo.App. 1991), but in that case the court, with little discussion (and no discussion at all of statutes trumping ordinances), applied an ordinance interest rate to claims on sewer accounts in light of a statute stating that sewer charges "shall bear interest…until paid," but without specifying a rate. The ordinance then specified the missing rate. There was no conflict as there is here.

VIII. The 9% post-judgment interest rate under §408.040 applies.

CenturyLink raised the issue of interest rates at trial. Tr.-33, 218-220. CenturyLink did not need to dispute the amount of post-judgment interest by post-trial motion under Rule 78.07(c) because it did not relate to the "form or language" of the judgment. The Court's standard of review is *de novo*. Rule 84.04(e).

As discussed above, §408.040 trumps the conflicting ordinance, Wentzville Code §140.120. *Roeder*, 466 S.W.3d at 543. Section 408.040 provides for post-judgment interest at a specific rate (9% per year), while the ordinance purports to provide post-judgment interest at a higher rate: 2% per month up to 18% per year. The ordinance does not establish an "additional" interest rate (Response Br.-109)—rather, the ordinance purports to establish a higher, directly conflicting one. *Id.* Therefore, the statute controls.

IX. The trial court erred in awarding attorneys' fees under Chapter 392, which is not applicable to this case, or under equitable considerations.

CenturyLink repeatedly challenged the applicability of Chapter 392 in summary judgment briefing and also the availability of attorneys' fees as a matter of discretion in pre-trial and post-trial briefing (LF-1216-1221, 1707-1714, 7104-7113). The Court's standard of review is *de novo* with respect to the statutory interpretation issues and abuse of discretion as a matter of equity. Rule 84.04(e).

A. The PSC has primary jurisdiction.

The Public Service Commission ("PSC") must adjudicate violations of Chapter 392 in the first instance under the doctrine of primary jurisdiction. The PSC is uniquely

situated to determine whether specific actions or omissions are "prohibited, forbidden or declared to be unlawful" under Chapter 392, as required for an award of attorneys' fees under §§392.350 and 488.472.

Instead of placing jurisdiction in the circuit courts, these statutes create a two-tiered structure. *See Overman v. Sw. Bell Tel. Co.*, 706 S.W.2d 244, 251-252 (Mo.App. 1986). First, the PSC must determine whether a violation has occurred. *Id.* If so, the complainant may then turn to a circuit court for relief, including a determination of whether the violation was "willful," and then the court may determine damages. *Id.*; §392.350. The Cities skipped the first step.

It is nothing short of ironic that the Cities attempt to distinguish CenturyLink's cases by dismissively arguing that these cases, brought under Chapter 392, concerned utility rates. Response Br.-112-113. The Cities' trivializing arguments about rate-making and dearth of supporting authority only prove CenturyLink's point that these statutes do not apply to a governmental tax dispute. *See* Section IX.C.

B. The Cities are not "persons" or "corporations"

The Cities lack statutory standing to pursue these attorneys' fees because they are not in the class of "persons" or "corporations" entitled to relief under §§392.350 and 488.472. Appellants' Br.-82-83.

The Cities concede that the definitions in §386.020 apply to §392.350. Response Br.-114. The Cities nevertheless argue that, instead of applying the definition of "person" and "corporation" found in §386.020(11) and (40), the Court should instead apply the default definition of "person" in §1.020(12), which applies to other statutes

"unless otherwise specially provided." But §392.180 states that the definitions in §386.020 "***shall apply to and determine the meaning of all such words, phrases and terms*** as used in sections 392.190 to 392.530." The legislature could not be more specific.

C. Municipal license tax disputes do not fall under Chapter 392.

The deeper problem lurking in the award of attorneys' fees is that municipal license tax disputes simply have no business being pursued under Chapter 392. The Cities apparently believe that §392.200 has limitless applicability because it states that "***any*** undue or unreasonable prejudice or disadvantage ***in any respect whatsoever***" is a violation of the statute, regardless of context. Response Br.-116. But even when language is broadly worded, a court must consider the context in which the language of a statute is used, the problem the legislature sought to address with the statute's enactment, and construe the statute in light of the purposes the legislature intended to accomplish. *Dungan v. Fuqua Homes, Inc.*, 437 S.W.3d 807, 813 (Mo.App. 2014). None of these issues weigh in favor of the Cities' interpretation. The Cities make no attempt to understand the purpose of the statutory scheme. There is no indication anywhere in Chapter 392 that the legislature wished to regulate municipal license tax disputes with utilities, which are already regulated by other legislative chapters and the Cities' own ordinances.

D. The Cities failed to establish willfulness on summary judgment.

The Cities fell far short of establishing CenturyLink's "willful" state of mind to obtain summary judgment. Indeed, the weakness of those arguments is demonstrated by

the fact that, on appeal, the Cities have abandoned the very arguments that they made to the trial court. *See* LF-401. CenturyLink explained in its opening brief how the trial court erred (Appellants' Br.-88-89), and the Cities have offered no response to defend their arguments below. Instead, the Cities seek to cobble together new arguments that were not contained in their motion papers to create the illusion that the trial court considered and accepted these arguments. It did not. The Cities faced a high burden, and the record is rife with factual disputes supporting an inference that CenturyLink did not "willfully" violate these ordinances. L.F.-1709-1713.

E. The award of fees was not equitable.

The Cities cite no authority holding that an award of attorneys' fees is appropriate because here is nothing "unusual" about this case to warrant a departure from the American Rule. *See David Ranken, Jr. Tech. Inst. v. Boykins,* 816 S.W.2d 189 (Mo. 1991) (reversing award of attorneys' fees in license tax dispute). The Cities attempt to claim that the attorneys' fees are justified based upon CenturyLink's "behavior." But the trial court ***never remotely*** singled out CenturyLink as conducting itself in an inappropriate manner. This should be clear based on the fact that, in support of this argument, the Cities cite their own briefing and cannot identify any point in the 10,000-plus-page record when the trial court ever said so. *See* Response Br.-125. The fact that

the trial court misunderstood the law and believed the Cities were entitled to attorneys' fees is not an excuse to uphold those fees.[4]

CONCLUSION

The Court should grant relief as set forth in the Conclusion of CenturyLink's opening brief.

[4] The Cities argue that the existence of Wentzville City Code §655.070 is somehow "fatal" to this Point Relied On. Response Br.-111. That ordinance does not authorize an award of attorneys' fees to the other Cities.

Respectfully submitted,

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April 13, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Reply Brief of Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 7,665 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ Mark B. Leadlove

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Mark B. Leadlove

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