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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

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October 7, 1999

VIA OVERNIGHT DELIVERY
Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, DC 20554

RE: Comments on NOI in FCC 99-141, Docket No. 99-217

Dear Secretary Salas:

Please find enclosed the original and seven copies of the Comments of the Attorney General of South Carolina on the Notices of Inquiry in WT Docket No. 99-217. I am enclosing a stamped self-addressed envelope and would appreciate your returning a clocked copy to me.

By copy of this letter, I am forwarding to the Commission's copy contractor a copy of these Comments. If you have any questions or find any problems, I would appreciate your calling me at 803-734-3736 so that I may correct any problems before the deadline of October 12, 1999.

With kind regards, I am

Very Truly Yours,

A handwritten signature in cursive script that reads "Christie Newman Barrett".

Christie Newman Barrett
Assistant Attorney General

cc: International Transcription Services, Inc.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of:)

Promotion of Competitive Networks in Local)
Telecommunications Markets)
)
Wireless Communications Association)
International, Inc. Petition for Rulemaking to)
Amend Section 1.4000 of the Commission's Rules)
to Preempt Restrictions on Subscriber Premises)
Reception or Transmission Antennas Designed To)
Provide Fixed Wireless Services)

Cellular Telecommunications Industry Association)
Petition for Rule Making and Amendment of the)
Commission's Rules to Preempt State and Local)
Imposition of Discriminatory And/Or Excessive)
Taxes and Assessments)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act of 1996)
_____)

WT Docket No. 99-217

CC Docket No. 96-98

**SOUTH CAROLINA ATTORNEY GENERAL'S COMMENTS ON
NOTICES OF INQUIRY**

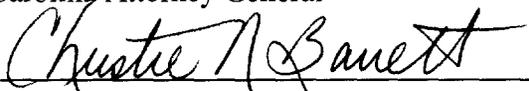
Charlie Condon, in his capacity as the Attorney General of South Carolina, hereby submits these Comments to the Notice of Inquiry on Access to Public Rights of Way and Franchise Fees and Notice of Inquiry on State and Local Taxes in WT Docket No. 99-217. Attorney General Condon continues to support and emphasize the concept of States' Rights with regard to these issues and opposes any federal preemption with regard to these issues. In support of his position, Attorney General Condon submits, as his Comments on these Notices of Inquiry, a Formal Opinion of the

Office of the Attorney General, 1998 WL 993679, issued Dec. 21, 1998, attached hereto and incorporated herein as Exhibit A. Following the issuance of this Opinion, the South Carolina Legislature enacted legislation on "Municipal Charges to Telecommunications Providers," to be codified at S.C. Code Ann. § 58-9-2200, et seq., attached hereto and incorporated herein as Exhibit B.

In summary, South Carolina law recognizes the authority of state or local governments to manage the public rights-of-way in a nondiscriminatory manner and to require fair and reasonable compensation from telecommunications providers for the use of public rights-of-way, insures that any charges to telecommunications providers are imposed on a competitively neutral and nondiscriminatory basis, and limits or restricts the imposition of certain other fees and taxes on telecommunications companies by municipalities.

WHEREFORE, Attorney General Condon submits these Comments for use by the FCC in its inquiry into Access to Public Rights-of-Way and Franchise Fees and into State and Local Taxes on telecommunications businesses.

CHARLES M. CONDON
South Carolina Attorney General

By: 
Christie Newman Barrett
Assistant Attorney General
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Columbia, South Carolina 29211
(803) 734-3736

Columbia, South Carolina
October 7, 1999.



STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

December 21, 1998

The Honorable James S. Klauber
Member, House of Representatives
406 E. Henrietta Avenue
Greenwood, South Carolina 29649

Dear Representative Klauber:

In a letter to this Office, you state that "over 200 municipalities have adopted a 'model' business license tax ordinance which was drafted, distributed, and recommended by the Municipal Association of South Carolina (MASC) to its members." You indicate that you are considering legislation which would address this issue on a statewide basis. By way of background, you further note that

[t]his model ordinance, passed by over 200 municipalities, imposes a tax of 3% of gross receipts on all telecommunications companies doing business within the municipality. The model ordinance imposes the 3% gross receipts rate on telecommunications services and also imposes a penalty of 5% per month on delinquent payments. This rate is substantially in excess of and disproportionate to the rate for other business license classifications.

In addition, you advise that

[t]he model ordinance is a vital part of the MASC's "Telecommunication Tax Collection Program." Under this program, known as "TTCP," each municipality enters into an agreement with the MASC, under which the municipality delegates to the Municipal Association virtually all powers regarding adminis-

tration, collection and enforcement of the tax, including the power to institute suits on behalf of the municipality without further approval. In addition, the agreement provides that the Municipal Association will retain 4% of all tax funds collected by it as compensation for services rendered.

Based upon this background, you have posed the following questions:

1. Does a municipality's adoption of a disproportionate license tax rate on a segregated classification of industry, such as the telecommunications industry, with no underlying reasoning or any basis for the disparate treatment of such classification in that particular municipality violate the Constitution or laws of South Carolina?
2. If the answer to Question 2 above is "yes," is the language of the model ordinance which attempts to assess a tax of "3% of gross receipts from all communications activities conducted in the municipality and for communication services billed to customers located in the municipality on which a business license tax has not been paid to another municipality" a disproportionate business license tax rate on a segregated classification of industry?

Law / Analysis

We start with the proposition that an ordinance of a municipality will be presumed valid in the same way that a statute enacted by the General Assembly is entitled to a presumption of correctness. As this Office stated in an Opinion dated May 23, 1995,

[a]ny municipal ordinance adopted pursuant to Section 5-7-30 [of the Code] is presumed to be valid. Town of Scranton v. Willoughby, ___ S.C. ___, 412 S.E.2d 424 (1991). Within the limits of a municipality, an ordinance has the same local force as does a statute. McCormick v. Cola. Elec. St. Ry. Light and Power Co., 85 S.C. 455, 675 S.E. 562 (1910). Any ordinance must be demonstrated to be unconstitutional beyond all reason-

able doubt. Southern Bell Tel. and Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985). The presumption of validity especially applies to legislation relating to a city or a town's police powers. Town of Hilton Head v. Fine Liquors, Ltd., 302 S.C. 550, 397 S.E. 662 (1990).

In Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802 (1993), our Supreme Court reaffirmed the considerable degree of autonomy that municipalities now enjoy. The Court held in Williams that the so-called "Dillon's Rule," long-recognized in previous cases to limit substantially the power of municipalities to specific statutory authorization for fair implication therefrom was, in keeping with the Home Rule amendments and their implementing statutory authority, no longer valid. Recognizing that Home Rule meant just that, the Court left no doubt as to the intent of the General Assembly:

This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10 et seq. (1976), the legislature, intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services, deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long [as] . . . such regulations are not inconsistent with the Constitution and general law of the state.

429 S.E.2d at 805.

This same standard was enunciated by the Supreme Court in Hospitality Assoc. v. Town of Hilton Head, 320 S.C. 219, 464 S.E.2d 113 (1995). There the Court articulated the analysis necessary for determining the validity of a municipal ordinance:

[d]etermining if a local ordinance is valid is essentially a two-step process. The first step is to ascertain whether the county or municipality that enacted the ordinance had the power to do so. If no such power existed, the ordinance is

invalid and the inquiry ends. However, if the local government had the power to enact the ordinance, **the next step is to ascertain whether the ordinance is inconsistent with the Constitution or general law of this State. . . .** (Emphasis added).

Id.

Applying the Williams and Hospitality Assn. test, this Office has not hesitated to so advise where we are of the opinion that a particular municipal ordinance crosses the constitutional line. Only recently, we concluded that a municipal ordinance which authorizes a municipal traffic court pretrial program was constitutionally suspect and that a statewide statute was necessary to correct such deficiency. Referencing Article VIII, § 14 of the State Constitution which provides that the structure for the State's judicial system and state services not be set aside by local ordinance, we concluded:

[t]o summarize, . . . no statute appears to directly authorize a pretrial program at the instigation of a municipal judge. While it can be argued that a municipal ordinance serves that same purpose, our Court, in the Brittian case, indicates that the contrary is true, and that a state statute is necessary to empower a judge to dismiss a criminal case where such overrides the wishes of the prosecutor. Moreover, state policy, as expressed in the state pretrial statutes, forbids pretrial diversion for traffic offenses. Thus, the present statutory scheme may well preempt further action by a municipal council. Then too, is the requirement in Article V of the State Constitution, requiring a unified judicial system. While a local prosecutor is probably able to divert offenders as part of his prosecutorial discretion, at the very least, a state statute authorizing the municipal judge to do so is necessary, particularly where the municipal judge generally hears traffic offenses established by state criminal statutes. Finally, the Tootle case [State v. Tootle, 330 S.C. 512, 506 S.E.2d 481 (1998)] recognizes that the power to dismiss a case prior to the impanelment of the jury generally lies with the prosecutor and that such decision is not reviewable by a court. See, State v. Ridge, . . . [269 S.C. 61, 236 S.E.2d 405 (1977)]

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. . . State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) [judicial department cannot infringe upon unfettered prosecutorial discretion]. In short, absent a ruling from our courts to the contrary, for the foregoing reasons, I believe such an Ordinance would be legally suspect.

Op. Attv. Gen., (Informal Opinion) (August 19, 1998).

Over the years, the Supreme Court of South Carolina has been sensitive to the constitutional requirement of equal protection of the law. The Court has frequently noted that the equal treatment required by the Equal Protection Clause [of the 14th Amendment and Art. I § 3 of the South Carolina Constitution] must extend to both the privileges conferred and liabilities imposed. Samson v. Greenville Hosp. System, 295 S.C. 359, 368 S.E.2d 665 (1988). The Court has stressed that equal protection requires that the classification in question not be arbitrary and that there be a reasonable relationship between the classification and proper legislative purpose. Robinson v. Richland County, 293 S.C. 27, 358 S.E.2d 392 (1987).

Our Supreme Court has been particularly cognizant of unequal and disparate treatment at the local level. Recently, in Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996), the Court concluded that a statute providing for a “local option” referendum concerning the legality of video poker payouts was unconstitutional because “[g]aming and betting are activities subject to statewide criminal laws” and, therefore “local governments may not criminalize conduct that is legal under a statewide criminal law.” The Court found that the statute violated Art. III, § 34 of the Constitution (special legislation), which it deemed similar to the Equal Protection Clause, advising that

[t]he local option law before us in this case, § 12-21-2806, allows the counties to opt out of the exemption provided in § 16-19-60 for these non-machine cash payouts. . . . In the counties that voted for the elimination of this exception, the effect is to criminalize conduct that remains legal elsewhere under State law.

Id. See also, State v. Hammond, 66 S.C. 219, 44 S.E. 797 (1903); Ruggles v. Padgett, 240 S.C. 494, 126 S.E.2d 553; Thompson v. S. C. Comm. on Alcohol and Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976); Daniel v. Cruz, 268 S.C. 11, 231 S.E.2d 293 (1977).

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In addition, the Due Process and Equal Protection Clauses of the Fourteenth Amendment prohibit the delegation of legislative functions to private persons or associations. Prudential Property and Gas. Co. v. Insurance Comm. of S. C. Dept. of Ins., 534 F.Supp. 571, affirmed 699 F.2d 690 (4th Cir. 1983). As our Supreme Court recognized in Ashmore v. Greater Grville. Sewer Dist., 211 S. C. 77, 44 S.E.2d 88, 96 (1947), an improper delegation to a private group or association is discriminatory to the degree of violation of the State Constitution, Art. I, Sec. 5 which contain our 'equal protection' and 'due process' clauses. This Office likewise has concluded that a governmental agency may not delegate its functions to private entities without specific legislative authority. See, Op. Atty. Gen., April 4, 1996 [MUSC may not delegate operation of its hospital to private, for profit corporation.]

Turning now to the specific issue of an instance where a business license tax has been held to violate the Equal Protection Clause, the case of United States Fidelity and Guaranty Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d 239 (1972) is important to note. There, the plaintiff was engaged in writing fire and casualty insurance in the City of Newberry. The City imposed a 2% business license tax upon U.S.F. & G.'s gross receipts earned in the City of Newberry. The record demonstrated that the license tax rate charged U.S.F. & G. and other property insurers in its class was "nearly seven times as great as that charged the two next highest categories and approximately twenty or more times as much as charged all other categories or classifications."

The Court noted that "[i]t is conceded that the city had the right to classify for the purpose of license taxes and considerable discretion as to the rate to be imposed upon the respective classifications. . . ." However, the "cardinal issue here is whether the city had any rational basis for such a gross disparity and differentiation between the rate charged property insurers, such as the plaintiff, and those charged to the various other business and professional licensees." In the Court's view, while differences in organization, management and type of business might justify a particular classification, "' . . . acts or ordinances which arbitrarily impose different rates of taxation or different occupations or privileges, without any reasonable basis for such distinction are void as a denial or equal protection of the law.'" In order to pass constitutional muster, a classification must not be "arbitrary and [must] bear a reasonable relation to the legislative purpose sought to be effected, and . . . all members of each class must be treated alike under similar circumstances." Id. at 241.

The Newberry tax, concluded the Court, did not meet the constitutional Equal Protection test. Based upon the facts before it, the business license tax upon U.S.F. & G. unlawfully discriminated against the company. The Court reasoned:

[i]n addition to the admitted facts tending to prove that there was no rational basis for the imposition of a grossly disproportionate tax upon plaintiff's classification, counsel for plaintiff sought to elicit through the depositions of key city officials the existence or nonexistence of any factual basis known to them, which would rationally justify the classification and grossly disproportionate rate of taxation. Such officials relied, largely, upon Code Sec. 37-133, which provides that the license fee charged to a fire insurer by a city the size of Newberry shall not exceed 2% of the premiums. Such Code provision was first enacted in 1917. 31 Stat. 361. It is argued that the license tax here imposed upon plaintiff's classification is reasonable and valid since it does not exceed the foregoing statutory limitation. The fact, however, that the tax rate here does not exceed such limitation with respect to fire insurers does not form a rational basis for charging these particular taxpayers at a rate twenty times as much for a business license as most other business enterprises pay. Moreover, more than 93% of plaintiff's premiums were received on casualty insurance business, rather than fire insurance, and the statute relied on makes no mention of such casualty insurance. Indeed, the casualty insurance business as we know it today was in its virtual infancy in 1917 when the particular statute was first enacted.

Id. at 242-243.

The U.S.F. & G. rationale and analysis was followed by the Court in Southern Bell Tel. and Tel. v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983) and Southern Bell Tel. and Tel. Co. v. City of Sptg., 285 S.C. 495, 331 S.E.2d 333 (1985). In Aiken, the Court clearly recognized that a municipality's power to impose a license tax "implies a power to classify business and differentiate as to rates of taxation." Such authority to make "distinctions between different trades" by imposing a reasonable license fee, said the Court, "must depend largely upon the sound discretion of the city council." [quoting Hill

v. City Council of Abbeville, 59 S.C. 396, 427, 38 S.E.11]. Neither the South Carolina Constitution, nor § 5-7-30, barred a municipality “from imposing a graduated license tax. . . .”

The real issue, in the Court’s mind, was whether the graduated tax was imposed and applied at “an unreasonable and discriminatory rate” with respect to Southern Bell. Indeed, it was, concluded the Court:

[t]he record reveals that the City of Aiken in 1979 adopted a revised licensing ordinance. Seven classifications of business were designated and rates of taxation established for each category. This portion of the ordinance was drafted for the City of Aiken by a consulting firm. An eighth category was thereafter created which, in the words of the trial court, presented a "hodge podge" assortment of occupations and businesses. We are struck by the fact that at no point does the trial court find any rational basis for this residual classification nor does the record, in our view, support it. Even more striking is the undisputed fact that the appellant was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance. The trial judge finds the tax "high and potentially disproportionate" and yet nowhere articulates a finding that such discrimination rests upon any rational basis. . . .

The Aiken Court found the U.S.F. & G. case controlling:

[a] comparable situation was presented to this Court in United States Fidelity and Guaranty Company v. City of Newberry, supra, 257 S.C. 433, 441, 186 S.E.2d 239, in that we found a "grossly disproportionate" rate of taxation where the respondent insurers paid taxes at a rate twenty times that paid by other enterprises. While the appellant here raises a number of objections to the Aiken ordinance, we look no further than the disproportionality just noted and the lack of any rational basis therefor in concluding that a denial of equal protection has here occurred.

306 S.E.2d at 222.

The Spartanburg case likewise involved an instance where our Supreme Court deemed a business license tax ordinance to violate the Equal Protection Clause. In that instance, the City of Spartanburg required electric power companies to pay 3% of gross receipts for supplying electrical power in municipal limits. Gas companies were taxed at a rate of 1% of gross receipts for “supplying gas within city limits”, and telephone companies, 1% of gross receipts for “intrastate and local business done in whole or in part in the city.”

The lower court had concluded that the city lacked power to tax revenues earned from intrastate long distance calls which were made from the city or which were charged to a local number. Rejecting the City’s argument to the contrary, the Supreme Court referenced Aiken and concluded that “there is no rational basis for including intrastate calls in gross income for license tax purposes.” In response to the City’s contention that all revenues earned from serving customers in the Spartanburg exchange must be taxed, the Court held that “[t]he city lacked power to tax revenues from services the company rendered to customers residing outside the city limits. See, City of Spartanburg v. Public Service Commission, 281 S.C. 223, 314 S.E.2d 599 (1984).”

Next, the Court addressed Southern Bell’s Equal Protection argument. Applying the rule that an ordinance is a legislative enactment and is presumed to be constitutional, the Court reaffirmed its holding in U.S.F. & G., requiring the need for a “reasonable basis” for disparate treatment. Concluded the Court:

[t]he gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts (\$238,875 in 1981 and \$267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of \$725. . . . The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefited more from city services than did other businesses. United States Fidelity and Guaranty Co. v. City of Spartanburg, 263 S.C. 169, 209 S.E.2d 36 (1974). Moreover, since Southern Bell is the highest ad valorem taxpayer in the

city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell's taxes should be increased.

We conclude that the rate disparity between Southern Bell and other companies not parties to contracts with the city is palpably unreasonable and violative of equal protection of the laws.

285 S.C. at 496.

Opinions of this Office are in accord. In Op. Atty. Gen., Op. No. 89-26 (March 3, 1989), we concluded that "the business license ordinance of Jasper County is highly suspect because of the disparity between the tax rates of the different classifications, which in all probability denies equal protection of the laws to all businesses within the county." Referencing the U.S.F. & G., Aiken and Spartanburg cases, we noted that, in Spartanburg, "[t]he court went on to hold the business license tax upon South Bell to be invalid because of the gross disparity in the license tax rate." Commenting further, we advised

Such a problem exists in this ordinance. In example, the tax on class one businesses that includes, among others, abattoirs and grocery stores, the tax on gross income of \$50,000 would be \$19.50. The tax on timber tracts from the \$50,000 in sales of timber is \$1,050.00. On sales of \$300,000, the tax on class one businesses is still \$19.50, while on timber sales of the same amount, the tax is \$11,050.00. From such, it is apparent that the constitutionality of the ordinance is highly suspect. The disparity in rates between the classes is quite large and we have no factual information that would justify the disparity.

And, in Op. Atty. Gen., Op. No. 4376 (June 22, 1976), this Office stated that whether or not an ordinance imposing business license taxes on insurance companies going business in the City of Allendale is constitutional depends upon "whether there was a rational basis for the differentiation."

I am advised that the South Carolina Municipal Association had previously recommended to its members, through the MASC Business Licensing Handbook (1997 Revised), a sample business license ordinance. Such Model Ordinance establishes various classes thusly:

[a] sample ordinance using the classification system based on SIC code groups assembled according to indexes of ability to pay is included in Appendix A. The sample ordinance is based on 1987 SIC Manual codes and 1991 IRS statistics. Use of this sample ordinance requires a basic understanding of the concept and necessity for maintaining the integrity of the system.

The following steps used to develop the classification system based on indexes of ability to pay explain the basis for the system:

1. Businesses were grouped according to major groups in the Standard Industrial Classification (SIC) Manual, 1987, published by the United States Office of Management and Budget. Each business is required to indicate the appropriate SIC number on federal tax returns.
2. IRS statistics on nationwide business income through the Government Printing Office were used to calculate a ratio or index of ability to make a profit for each SIC group to be included in the business license ordinance.

Handbook, at p. 48.

As we understand it, municipalities, which have adopted the Model Ordinance, define a "classification" as

. . . that division of businesses by major groups subject to the same license rate as determined by a calculated index of ability to pay based on national averages, benefits, equalization of tax

burden, relationships of services, or other basis deemed appropriate by Town Council.

Typically, telecommunications would be placed in Class 4 by the uniform objective standard of calculated index of ability to pay, as follows:

RATE CLASS 4

SIC	BUSINESS GROUP
27	Printing, Publishing & Allied Products
28	Chemicals and Allied Products
35	Machinery, except Electrical
48	Communication (Except Telephone)
76	Miscellaneous Repair Services

Pursuant to the Model Ordinance, a town (e.g. Whitmire) imposes a business license tax on a Class 4 business at the rate of \$40.00 for the first \$2,000 of gross income and \$1.15 per \$1,000 for each additional 1,000. Declining rates apply where income exceeds \$1,000,000. In other words, only 75% of the normal rate is payable on amounts in excess of \$9,000,000. Assuming a Class 4 business earns 1,000,000 of gross income, it would pay a license tax of \$1,147.70 under the Model Ordinance formula.

Strikingly, however, we are advised that many municipalities are now departing from this procedure, singling telephone and telecommunications companies out for reclassification at the rate of 3% of gross receipts, with no provision for declining rates, as a condition for continuing to do business in that municipality. It is our information that the business license tax is being increased on the telecommunications industry by as much as 2700%. We are informed that tax rates are not being raised upon other businesses in this manner. It is our information that a municipality following this procedure is imposing a business tax of \$30,000 upon a telephone company which earns \$1,000,000 of gross income. This is approximately 30 times the amount of business license tax which the telecommunications company would pay under the Class 4 classification pursuant to the Model Ordinance, discussed above.

Such disparate treatment of the telecommunications industry is remarkably similar to what was done by the City of Aiken in the Southern Bell case, referenced above. As noted previously, the Court, in striking down the application of the business license tax to

Southern Bell as unconstitutional, said that “we look no further than the [disproportionality] . . . just noted and the lack of a rational basis therefore in concluding that a denial of equal protection has here occurred.” 306 S.E.2d at 221.

In Aiken, the Court did approve the use of the uniform objective ability to pay standard which was used to form the first seven classes in the Model Ordinance. Placing telecommunications companies in Class 4 by that standard would, in other words, pass constitutional muster. What the Aiken Court rejected as unconstitutional was applying an entirely different standard to telecommunications companies. The Court’s language bears repetition here:

[t]he record reveals that the City of Aiken in 1979 adopted a revised licensing ordinance. Seven classifications of business were designated and rates of taxation established for each category. This portion of the ordinance was drafted for the City of Aiken by a consulting firm. An eighth category was thereafter created which, in the words of the trial court, presented a “hodge podge” assortment of occupations and businesses. We are struck by the fact that at no point does the trial court find any rational basis for this residual classification nor does the record, in our view, support it. Even more striking is the undisputed fact that the appellant was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance.

Id.

Thus, in our opinion, the Spartanburg and Aiken cases are controlling here. Based upon the information provided, the business license tax imposed upon telecommunications referenced in your letter is virtually indistinguishable from that struck down by our Supreme Court in Aiken and Spartanburg. While our Court has upheld other applications of the business license tax against an Equal Protection assault in cases such as Hospitality Assn., supra, these cases are not controlling here. In Hospitality Assn., the Equal Protection issue was addressed by the Court in a single paragraph, with the Court making the conclusory statement that “the classification under each ordinance bears a reasonable relation to the legislative purpose to be effected.” 320 S.C. at 229. By contrast, the Court in both Aiken and Spartanburg carefully detailed precisely the manner in which the city’s treatment of

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Southern Bell operated disparately. The Court documented how in Aiken, Southern Bell was taxed at "24 times the average rate imposed upon other businesses" and concluded: "We look no further than the [disproportionality] ... just noted and the lack of any rational basis therefore in concluding that a denial of equal protection has here occurred." Similarly, in Spartanburg, the Court compared Southern Bell's license tax payment of over \$200,000 upon its gross receipts while "a textile mill or manufacturing plant with the same revenue pays a maximum of \$725." In a footnote, the Court further found that "the record reveal[ed] a great disparity between the tax rate imposed on Southern Bell and the rate imposed on retail businesses, hospitals, and others." 331 S.E.2d at 334 n. 3.

Moreover, both Aiken and Spartanburg stress that the Constitution of South Carolina requires that taxes on businesses must be fairly apportioned so as to fairly reflect that proportion of the taxed activity which is being conducted within the municipality. In Spartanburg, for example, the Court stated that "[t]he appellant [municipality] contends that the trial court erred in holding that the city lacked power to tax revenues earned from intrastate long-distance calls made from Spartanburg or charged to a Spartanburg number. We disagree and hold there is no rational basis for including intrastate calls in gross income for license tax purposes." 331 S.E.2d at 334. Aiken and Spartanburg also conclude that due process requires that a municipality may not tax income earned from business activity conducted beyond the city limits. In order to be taxed, the income must be fairly attributable to activity which was conducted in the corporate limits. Accordingly, it is our opinion that the model ordinance referenced in your letter which imposes a 3% business license tax upon the proceeds earned by telecommunications companies is constitutionally suspect and a court would strike down such ordinances as unconstitutionally depriving telecommunications companies of Equal Protection of the Laws and Due Process of Law.

There are other constitutional concerns apparent here as well. The most troublesome is the issue of whether municipalities have unlawfully delegated their taxing and tax collection authority to a private organization, the Municipal Association. The Municipal Association of South Carolina possesses no statutory status. It certainly has not been authorized by the General Assembly to either levy, assess, impose or collect taxes. As we understand it, each of the municipalities which have adopted the referenced Ordinance has delegated to the Municipal Association the authority to audit, determine and assess the tax as well as to sue in the City's name. The Ordinance specifies that if the 3% tax on gross proceeds is not paid by December 31, 1998 a penalty of 5% per month will be added. It is our information that the Municipal Association will retain 4% of all taxes and penalties collected.

In addition to the Model Ordinance, which applies to all telecommunications providers, we understand that on July 17, 1998, the Municipal Association announced its Telecommunications Tax Collection Program (TTCP) which dealt with long distance providers. Long distance providers have been informed as follows:

You will receive a single billing from MASC (Municipal Association) on behalf of the participating municipalities. Then MASC will distribute the taxes collected to each municipality.

It is our information that each of the municipalities has entered into a 10 year agreement with the Municipal Association. Pursuant to the agreement, municipalities have adopted "uniform rates and, delinquent penalties . . . and a uniform due date of December 31."

Under the agreement, the Municipal Association is to carry out a number of functions on behalf of the municipalities. Among them are:

1. make necessary investigations;
2. establish procedures for determining amount of business license tax due.
3. communicate with the establishments subject to the tax;
4. collect all current and delinquent taxes due;
5. serve as exclusive agent of the municipality for assessment and collection using all procedures authorized by law in the name of the municipality without its further approval.

Pursuant to the agreement, the taxes may not be accepted, waived or compromised by the municipality.

This Office has repeatedly emphasized in its opinions that neither the State nor its agencies or subdivisions may contract away essential powers. As we stated in Op. Atty. Gen., Op. No. 85-81 (August 8, 1985),

"[t]he State's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty and its governmental powers."

(Quoting 81 C.J.S. States s 155). In essence, no governmental agency can by contract or otherwise suspend its governmental functions.

And, we opined in an Opinion of March 6, 1980, a municipality “. . . is powerless to contract with a private security agency for law enforcement purposes . . . [N]o municipality may by contract part with the authority delegated it by the State to exercise the police power. Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153.” While we have noted that a governmental entity may subdelegate purely administrative or ministerial duties to a private entity by contract, such must be based upon specific statutory authority. Op. No. 85-81, supra. As we concluded in the Opinion of April 4, 1996,

[a] state agency . . . derives its power solely from the statutes enacted by the Legislature. State officers, therefore, cannot with the stroke of a pen unilaterally turn over the operation of a state institution to a private corporation. They may not with the vote of a board delegate their legal authority to sell and lease away their responsibilities.

Clearly, the taxing authority is not one which may simply be delegated away to a private entity. As our Supreme Court held in Watson v. City of Orangeburg, 229 S.C. 367, 93 S.E.2d 20 (1956),

[t]he power of taxation, being an attribute of sovereignty vested in the legislature subject to constitutional restrictions, taxes can be assessed and collected only under statutory authority. 51 Am.Jur., Taxation, Section 44, p. 74. Grier v. City Council of City of Spartanburg, 203 S.C. 203, 26 S.E.2d 690. It follows that in the absence of statute so providing, the power to collect taxes due to the municipality may not be delegated by it without express statutory authority . . . and a fortiori cannot be exercised by a private citizen.

93 S.E.2d at 24.

While it may be argued that § 5-7-300 provides statutory authorization [“a municipality may by ordinance contract with an individual, firm or organization to assist . . .

in collecting property or business license taxes”], this Office has heretofore read this provision as relating to the collection of delinquent taxes. See, Op. Atty. Gen., Op. No. 92-50 (September 3, 1992); Op. No. 89-126 (November 8, 1989). Of course, in any event, the statute does not relate to levying or determining the tax. For municipalities to simply delegate this sovereign function to the Municipal Association - a private entity - is itself constitutionally suspect.

By contrast, § 12-54-227 authorizes the Department of Revenue to contract with a collection agency to collect delinquent taxes owed by persons residing outside South Carolina. This statute, however, specifies a number of guidelines to prevent misuse or abuse. For example, the taxpayer must be given at least three notices including at least one by certified or registered mail. Delinquency must be for more than six months. Further, it is a criminal offense for any person to breach the confidentiality of a tax return. In the case of a collection agency, termination of the state contract is required. See, § 12-54-240. In addition, § 12-54-227 also permits the collecting agent to initiate a suit in the agency’s name and at the agency’s expense. Such authority is not expressly mentioned in § 5-7-300 even if applicable.

Accordingly, the municipalities’ delegation of the foregoing tax assessment, levy and collection functions to the Municipal Association is likewise constitutionally suspect. Such delegation may well be deemed by a court to constitute an unlawful delegation of the municipalities’ sovereign governmental taxing functions and, thus, constitutionally invalid.

Conclusion

It is our opinion that the referenced Model Ordinance requiring a 3% business license tax on gross proceeds on all telecommunications companies doing business within the municipality is constitutionally suspect and would likely be declared unconstitutional by a court as violative of Equal Protection and Due Process. Like the Ordinance which we concluded was constitutionally defective in Op. No. 89-26, this Model Ordinance is highly suspect for the same reason - there is no factual basis to justify the disparity in business license taxes. Moreover, it is also our opinion that the Telecommunications Tax Communications Program (TTCP) is constitutionally defective in that a court would likely conclude that the TTCP unlawfully delegates governmental powers such as the administration, collection and enforcement of the business license tax to a private entity - the Municipal Association.

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In response to your two specific questions, therefore, the answer to your Question #1 is "yes." The answer to your question #2 is also "yes." In other words, a municipality's adoption of a disproportionate business license tax rate on a segregated classification of industry, such as the telecommunications industry, with no underlying reason or any basis for the disparate treatment of such classification in that particular municipality, violates the Constitution and laws of South Carolina. No rational basis for discriminatory treatment is apparent. Also, the language of the Model Ordinance which attempts to assess a tax of "3% of gross receipts from all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not been paid to another municipality" is a disproportionate license tax rate on a segregated classification of industry.

Our Supreme Court has consistently recognized that it is the duty of the Attorney General to enforce the Constitution. As the Court stated in State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982),

[t]he Attorney General has heretofore, without contest, litigated similar issues in this Court using similar proceedings. State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977) and State ex rel. McLeod v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). While it is true that his right to bring the action was not directly attacked in these cases, the precedents established and our rulings are persuasive for the conclusion that the Attorney General does have a right to bring an action and that a controversy ripe for decision does exist. The Attorney General, by bringing the action in the name of the State, speaks for all of its citizens and may, on their behalf, bring to the Court's attention for adjudication charges that there is an infringement in the separation-of-powers area.

295 S.E.2d at 634.

At the same time, legislation to provide guidelines for the amounts which may be charged by municipalities with respect to telecommunications providers for business license taxes could be enacted. Such legislation by the elected representatives of South Carolina would insure that such charges are fair and reasonable and imposed on a competitively neutral and non-discriminatory basis. This Office is of the opinion that legislation could

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establish guidelines which would eliminate the excessive and discriminatory taxes which have been imposed by municipalities upon the telecommunications providers of South Carolina and prevent such an action in the future. Moreover, such legislation could prevent the delegation of taxing powers to a private entity such as the Municipal Association. Legislation, through elected representatives, rather than litigation, decided by unelected courts, is the best way to solve this problem.

However, if legislation is not forthcoming, this Office will not stand by and allow an unconstitutional and discriminatory tax to stand. This tax is projected to cost taxpayers more than 40 million dollars with no new services provided as part of its imposition. The high price of the tax will obviously be passed on to the average citizen who will feel the pinch. Telephone bills cannot help but rise when telecommunications providers' license tax rates skyrocket by as much as 2700%. Moreover, the 4% being taken off the top by the Municipal Association at taxpayer expense subsidizes a private entity to levy and collect a tax - a clearly governmental, rather than private, function. This amounts to nothing more than the taxpayers being required to pay a private association to administer upon them an unconstitutional tax. That system is unconstitutional going and coming.

Low taxes are the engine for economic development driving a healthy business climate in South Carolina. Excessive and discriminatory taxes stifle and choke off a thriving economy. The framers of our Constitution did not envision that a single industry could have imposed upon it a tax thirty times that of comparable businesses for the privilege of operating within a city's limits. This Office favors economic development, particularly where a state-of-the-art communications network is so integral to a 21st century business environment.

Accordingly, if no corrective legislation establishing guidelines and limitations upon municipalities in this area is forthcoming within a reasonable period of time, this Office will defend and enforce the Constitution by initiating litigation to have this excessive, unfair and discriminatory tax declared unconstitutional and set aside.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles M. Condon". The signature is fluid and cursive, with the first name "Charles" being the most prominent part.

Charles M. Condon
Attorney General

**SOUTH CAROLINA 1999 SESSION LAWS
REGULAR SESSION**

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Additions and deletions are not identified in this document.
Vetoed provisions within tabular material are not displayed.

Act 112

H.B. No. 3276

**LICENSE, TAXES AND FEES FOR USE OF PUBLIC RIGHT-OF-WAY BY TELECOMMUNICATIONS
COMPANIES**

AN ACT TO AMEND CHAPTER 9 OF TITLE 58, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO TELEPHONE, TELEGRAPH, AND EXPRESS COMPANIES, BY ADDING ARTICLE 20 SOAS TO PROVIDE FOR THE MANNER IN WHICH AND CONDITIONS UNDER WHICH AMOUNTS MAY BECHARGED BY MUNICIPALITIES TO TELECOMMUNICATIONS COMPANIES FOR THE USE OF THE PUBLIC RIGHTS-OF-WAY AND FOR BUSINESS LICENSE TAXES IN ORDER TO ENSURE THAT SUCH CHARGES ARE IMPOSED ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS, TO LIMIT OR RESTRICT THE IMPOSITION OF CERTAIN OTHER FEES AND TAXES ON TELECOMMUNICATIONS COMPANIES BY MUNICIPALITIES; TO PROVIDE A MAXIMUM RATE OF BUSINESS LICENSE TAX THAT MAY BE IMPOSED ON RETAIL TELECOMMUNICATION SERVICES BY A MUNICIPALITY AFTER 2003 AND THE METHOD OF DETERMINING THAT MAXIMUM RATE; TO PROHIBIT A MUNICIPALITY FROM USING ITS AUTHORITY OVER THE PUBLIC STREETS AND PUBLIC PROPERTY AS A BASIS FOR ASSERTING OR EXERCISING CERTAIN REGULATORY CONTROL OVER TELECOMMUNICATIONS COMPANIES REGARDING MATTERS WITH THE JURISDICTION OF THE PUBLIC SERVICE COMMISSION OR THE FEDERAL COMMUNICATIONS COMMISSION; TO ALLOW A COMMUNICATIONS COMPANY THAT IS OCCUPYING THE PUBLIC STREETS AND PUBLIC PROPERTY OF A MUNICIPALITY WITH ITS PERMISSION ON THE EFFECTIVE DATE OF THIS ARTICLE TO CONTINUE USING THE PUBLIC STREETS AND PUBLIC PROPERTY WITHOUT OBTAINING ADDITIONAL CONSENT; TO PROVIDE CONDITIONS UNDER WHICH A MUNICIPALITY MAY ENFORCE AN ORDINANCE OR PRACTICE INCONSISTENT WITH THE PROVISIONS OF THIS ARTICLE; TO AUTHORIZE A TELECOMMUNICATIONS COMPANY TO INCLUDE A STATEMENT IN A MUNICIPAL CUSTOMER'S BILL THAT THE CUSTOMER'S MUNICIPALITY CHARGES A BUSINESS LICENSE TAX TO THE COMPANY; AND TO PROVIDE FOR RELATED PROCEDURAL AND OTHER MATTERS.

Whereas, Congress enacted the Telecommunications Act of 1996 to open local telephone markets to competition, and the telecommunications industry is in a state of transition; and

Whereas, in addition to new competitors in traditional local exchange telecommunications markets, a number of new technologies has developed and is developing at a rapid pace, expanding the array of telecommunications providers and services available to consumers; and

Whereas, since the passage of the Telecommunications Act of 1996, competition in telecommunications services and the number of competitors in the telecommunications industry in South Carolina has grown and continues to grow, as evidenced by the hundreds of new entrants into the industry. In South Carolina, over four hundred companies have been authorized to provide long distance service and over seventy companies have been authorized to provide local telephone service. South Carolina now has over one thousand authorized pay phone service providers and numerous digital and analog wireless and paging providers. Telephony may also now be provided over Internet protocol and cable modems; and

Whereas, the citizens of municipalities in South Carolina have long enjoyed the public benefit of dependable local exchange and long distance telecommunications service provided to them by telecommunications carriers that have constructed, operated, and maintained telecommunications facilities to serve those citizens, and that currently occupy the municipal rights-of-way in the State; and

Whereas, Congress has stated that nothing in Section 253 of the Telecommunications Act of 1996 affects the authority of the state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is disclosed by such government. The General Assembly finds that shifting of current taxation and fees from a franchise fee basis to the basis outlined in the attached article is necessary and appropriate due to the transition of the telecommunications industry and is fair and reasonable, and taxes and fees exceeding such amount, except upon extraordinary circumstances, would be unreasonable. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Municipal charges to telecommunications providers

SECTION 1. Chapter 9 of Title 58 of the 1976 Code is amended by adding:

Article 20
Municipal Charges to Telecommunications Providers

< < SC ST § 58-9-2200 > >

Section 58-9-2200. As used in this article:

(1) "Telecommunications service" means the provision, transmission, conveyance, or routing for a consideration of voice, data, video, or any other information or signals of the purchaser's choosing to a point, or between or among points, specified by the purchaser, by or through any electronic, radio, or similar medium or method now in existence or hereafter devised. The term "telecommunications service" includes, but is not limited to, local telephone services, toll telephone services, telegraph services, teletypewriter services, teleconferencing services, private line services, channel services, Internet protocol telephony, and mobile telecommunications services and to the extent not already provided herein, those services described in Standard Industrial Classification (SIC) 481 and North American Industry Classification System (NAICS) 5133, except satellite services exempted by law.

(2) "Retail telecommunications service" includes telecommunications services as defined in item (1) of this section but shall not include:

(a) telecommunications services which are used as a component part of a telecommunications service, are integrated into a telecommunications service, or are otherwise resold by another provider to the ultimate retail purchaser who originates or terminates the end-to-end communication including, but not limited to, the following:

(i) carrier access charges;

(ii) right of access charges;

(iii) interconnection charges paid by the providers of mobile telecommunications services or other telecommunications services;

(iv) charges paid by cable service providers for the transmission by another telecommunications provider of video or other programming;

- (v) charges for the sale of unbundled network elements;
 - (vi) charges for the use of intercompany facilities; and
 - (vii) charges for services provided by shared, not-for-profit public safety radio systems approved by the FCC;
- (b) information and data services including the storage of data or information for subsequent retrieval, the retrieval of data or information, or the processing, or reception and processing, of data or information intended to change its form or content;
- (c) cable services that are subject to franchise fees defined and regulated under 47 U.S.C. Section 542;
- (d) satellite television broadcast services.
- (3) "Telecommunications company" means a provider of one or more telecommunications services.
- (4) "Cable service" includes, but is not limited to, the provision of video programming or other programming service to purchasers, and the purchaser interaction, if any, required for the selection or use of the video programming or other programming service, regardless of whether the programming is transmitted over facilities owned or operated by the cable service provider or over facilities owned or operated by one or more other telecommunications service providers.
- (5) "Mobile telecommunications service" includes, but is not limited to, any one-way or two-way radio communication service carried on between mobile stations or receivers and land stations and by mobile stations communicating among themselves, through cellular telecommunications services, personal communications services, paging services, specialized mobile radio services, and any other form of mobile one-way or two-way communications service.
- (6) "Service address" means the location of the telecommunications equipment from which telecommunications services are originated or at which telecommunications services are received by a retail customer. If this is not a defined location, as in the case of mobile phones, paging systems, maritime systems, and the like, "service address" means the location of the retail customer's primary use of the telecommunications equipment or the billing address as provided by the customer to the service provider, provided that the billing address is within the licensed service area of the service provider.
- (7) "Bad debt" means any portion of a debt that is related to a sale of telecommunications services and which has become worthless or uncollectible, as determined under applicable federal income tax standards.

< < SC ST § 58-9-2210 > >

Section 58-9-2210. Nothing in this article shall limit a municipality's authority to enter into and charge for franchise agreements with respect to cable services as governed by 47 U.S.C. Section 542.

< < SC ST § 59-9-2220 > >

Section 58-9-2220. Notwithstanding any provision of law to the contrary:

- (1) A business license tax levied by a municipality upon retail telecommunications services for the years 1999 through the year 2003 shall not exceed three-tenths of one percent of the gross income derived from the sale of retail telecommunications services for the preceding calendar or fiscal year which either originate or terminate in the municipality and which are charged to a service address within the municipality regardless of where these amounts are billed or paid and on which a business license tax has not been paid to another municipality. The business license tax levied by a municipality upon retail telecommunications services for the year 2004 and every

year thereafter shall not exceed the business license tax rate as established in Section 58-9- 2220(2). For a business in operation for less than one year, the amount of business license tax authorized by this section must be computed based on a twelve-month projected income.

(2)(a) The maximum business license tax that may be levied by a municipality on the gross income derived from the sale of retail telecommunications services for the preceding calendar or fiscal year which either originate or terminate in the municipality and which are charged to a service address within the municipality regardless of where these amounts are billed or paid and on which a business license tax has not been paid to another municipality for a business license tax year beginning after 2003 is the lesser of seventy-five one hundredths of one percent of gross income derived from the sale of retail telecommunication services or the maximum business license tax rate as calculated by the Board of Economic Advisors pursuant to subsection (b). For a business in operation for less than one year, the amount of business license tax authorized by this section must be computed based on a twelve-month projected income.

(b) The Board of Economic Advisors from the appropriate municipal records shall determine actual total municipal revenues from business license taxes, franchise fees, and other fees contractually imposed on the sale of telecommunications services and received from telecommunications companies in 1998, and actual total revenues received by municipalities in 1999, 2000, 2001, 2002, and 2003 from such taxes and fees imposed on the gross income derived from the sale of retail telecommunications services. The board shall determine an annual average growth rate applicable to such revenues by averaging the annual growth rates applicable to these revenues for 1999-2000, 2000-2001, 2001-2002, and 2002-2003 and shall apply that average growth rate to the 1998 actual revenues compounded annually to derive an estimated 2004 total revenue. The tax rate to be calculated by the board is the fraction produced by dividing the 2004 estimated revenue as determined above by gross income in 2003 derived from the sale of retail telecommunications services in municipalities in this State.

(c) If the maximum business license tax rate that may be levied by a municipality on retail telecommunications services, as determined by the Board of Economic Advisors, is calculated or determined to exceed seventy-five one hundredths of one percent of gross income derived from the sale of retail telecommunication services a joint telecommunications study committee shall review the maximum business license tax calculation, as determined by the Board of Economic Advisors, and verify the maximum business license tax calculation. Upon verification of the maximum business license tax calculation, the joint telecommunications study committee must sponsor a joint resolution to allow a municipality to levy the maximum business license tax rate greater than seventy-five one hundredths of one percent of gross income derived from the sale of retail telecommunications services.

(d) The joint telecommunications study committee shall consist of six members of the General Assembly: three Senators appointed by the President Pro Tempore of the Senate and three Representatives appointed by the Speaker of the House. The joint telecommunications study committee shall utilize the staff and resources of the Labor, Commerce and Industry Committee of the House of Representatives and the Judiciary Committee of the Senate. The joint telecommunications study committee is authorized to verify the maximum business license tax rate determined by the Board of Economic Advisors.

(3) A business license tax levied by a municipality upon the retail telecommunications services provided by a telecommunications company must be levied in a competitively neutral and nondiscriminatory manner upon all providers of retail telecommunications services.

(4) The measurement of the amounts derived from the retail sale of telecommunications services does not include:

(a) an excise tax, sales tax, or similar tax, fee, or assessment levied by the United States or any state or local government including, but not limited to, emergency telephone surcharges, upon the purchase, sale, use, or consumption of a telecommunications service, which is permitted or required to be added to the purchase price of the service; and

(b) bad debts.

(5) A business license tax levied by a municipality upon a telecommunications company must be reported and remitted on an annual basis. The municipality may inspect the records of the telecommunications company as they relate to payments under this article.

(6) The measurement of the amounts derived from the retail sale of mobile telecommunications services shall include only revenues from the fixed monthly recurring charge of customers whose service address is within the boundaries of the municipality.

< < SC ST § 58-9-2230 > >

Section 58-9-2230. (A) A municipality must manage its public rights-of-way on a competitively neutral and nondiscriminatory basis and may impose a fair and reasonable franchise or consent fee on a telecommunications company for use of the public streets and public property to provide telecommunications service unless the telecommunications company has an existing contractual, constitutional, statutory, or other right to construct or operate in the public streets and public property including, but not limited to, consent previously granted by a municipality. Any such fair and reasonable franchise or consent fee which may be imposed upon a telecommunications company shall not exceed the annual sum as set forth in the following schedule based on population:

Tier I--1--1,000--\$ 100.00

Tier II--1,001--3,000--\$ 200.00

Tier III--3,001--5,000--\$ 300.00

Tier IV--5,001--10,000--\$ 500.00

Tier V--10,001--25,000--\$ 750.00

Tier VI--Over 25,000--\$1,000.00

(B) A municipality must manage its public rights-of-way on a competitively neutral and nondiscriminatory basis and may impose an administrative fee upon a telecommunications company which is not subject to subsection (A) in this section that constructs or installs or has previously constructed or installed facilities in the public streets and public property to provide telecommunications service. Any such fee which may be imposed on a telecommunications company shall not exceed the annual sum as set forth in the following schedule based on population:

Tier I--1--1,000--\$ 100.00

Tier II--1,001--3,000--\$ 200.00

Tier III--3,001--5,000--\$ 300.00

Tier IV--5,001--10,000--\$ 500.00

Tier V--10,001--25,000--\$ 750.00

Tier VI--Over 25,000--\$1,000.00

(C) No municipality shall levy any tax, license, fee, or other assessment on, with respect to, or measured by the

receipts from any telecommunications service, other than (a) the business license tax authorized by this article, and (b) franchise fees as defined and regulated under 47 U.S.C. Section 542; provided, however, that nothing herein shall restrict the right of any municipality to impose ad valorem taxes, service fees, sales taxes, or other taxes and fees lawfully imposed on other businesses within the municipalities.

(D) A telecommunications company, including a mobile telecommunications company providing mobile telecommunications services, shall not be deemed to be using public streets or public property unless it has constructed or installed physical facilities in public streets or on public property, provided that the use of public streets or public property under lease, site license, or other similar contractual arrangement between a municipality and a telecommunications company shall not constitute the use of public streets or public property under this article. Without limiting the generality of the foregoing, a telecommunications company shall not be deemed to be using public streets or public property under this article solely because of its use of airwaves within a municipality. Should any telecommunications company, including a telecommunications company providing mobile telecommunications services, request of a municipality permission to construct or install physical facilities in public streets or on public property, such request shall be considered by such municipality in a manner that is competitively neutral and nondiscriminatory as amongst all telecommunications companies.

< < SC ST § 58-9-2240 > >

Section 58-9-2240. A municipality may not use its authority over the public streets and public property as a basis for asserting or exercising regulatory control over telecommunications companies regarding matters within the jurisdiction of the Public Service Commission or the Federal Communications Commission including, but not limited to, the operations, systems, service quality, service territory, and prices of a telecommunications company. Nothing in this section shall be construed to limit the authority of a local governmental entity over a cable television company providing cable service as permitted by 47 U.S.C. Section 542.

< < SC ST § 58-9-2250 > >

Section 58-9-2250. A telecommunications company, its successors or assigns, that is occupying the public streets and public property of a municipality on the effective date of this article with the consent of the municipality to use such public streets and public property shall not be required to obtain additional consent to continue the occupation of those public streets and public property.

< < SC ST § 58-9-2260 > >

Section 58-9-2260. (A) No municipality may enforce an ordinance or practice which is inconsistent or in conflict with the provisions of this article, except that:

(1) As of the time of the effective date of this article, any municipality which had entered into a franchise agreement or other contractual agreement with a telecommunications provider prior to December 31, 1997, may continue to collect fees under the franchise agreement or other contractual agreement through December 31, 2003, regardless of whether the franchise agreement or contractual agreement expires prior to December 31, 2003.

(2) Nothing in this article shall be interpreted to interfere with continuing obligations of any franchise or other contractual agreement in the event that the franchise agreement or other contractual agreement should expire after December 31, 2003.

(3) In the event that a municipality collects these fees under a franchise agreement or other contractual agreement herein, the fees shall be in lieu of fees or taxes that might otherwise be authorized by this article.

(4) Any municipality that, as of the effective date of this article, has in effect a business license tax ordinance, adopted prior to December 31, 1997, under which the municipality has been imposing and a telecommunications company has been paying a business license tax higher than that permitted under this article but less than five percent may continue to collect the tax under the ordinance through December 31, 2003, instead of the business license tax permitted under this article.

(5) Any municipality which, by ordinance adopted prior to December 31, 1997, has imposed a business license tax and/or franchise fee on telecommunications companies of five percent or higher of gross income derived from the sale of telecommunications services in the municipality, to which tax and/or fee a telecommunications company has objected, failed to accept, filed suit to oppose, failed to pay any license taxes or franchise fees required thereunder, or paid license taxes or franchise fees under protest, may enforce the ordinance and the ordinance shall continue in full force and effect until December 31, 2003, unless a court of competent jurisdiction declares the ordinance unlawful or invalid. In this event, the municipality is authorized until December 31, 2003, to collect business license taxes and/or franchise fees thereunder, not exceeding three percent of gross income derived from the sale of telecommunications services for the preceding calendar or fiscal year which either originate or terminate in the municipality instead of the business license tax permitted under this article; however, this proviso applies to any business license ordinance and/or telecommunications franchise ordinance notwithstanding that same is amended or has been amended subsequent to December 31, 1997.

(B) The exception to this article described in subsection (A)(5) no longer applies after December 31, 2003.

< < SC ST § 58-9-2270 > >

Section 58-9-2270. A telecommunications company may include the following statement or substantially similar language in any municipal customer's bill when that customer's municipality charges a business license tax to the telecommunications company under this chapter: "Please note that included in this bill there may be a line-item charge for a business license tax assessed by your municipality".

Severability clause

SECTION 2. If a section, paragraph, provision, or portion of this article is held to be unconstitutional or invalid by a court of competent jurisdiction, this holding shall not affect the constitutionality or validity of the remaining portions of this article, and the General Assembly for this purpose hereby declares that the provisions of this article are severable from each other.

Time effective

SECTION 3. This act takes effect upon approval by the Governor.

Ratified the 24th day of June, 1999.

Approved the 30th day of June, 1999.

SC LEGIS 112 (1999)

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