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Association of Communications Enterprises
January 18, 2001
City of Montgomery, Alabama

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of:)
)
ASSOCIATION OF COMMUNICATIONS)
ENTERPRISES)
)
Petition for Preemption Pursuant to Section)
253 of the Communications Act of 1934)
of Actions of the City of Montgomery,)
Alabama)

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PETITION FOR PREEMPTION AND DECLARATORY RULING

Association of Communications Enterprises

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Dated: January 18, 2001

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PETITION FOR PREEMPTION AND DECLARATORY RULING

The Association of Communications Enterprises (“ASCENT”, f/k/a the Telecommunications Resellers Association), on behalf of its members, respectfully submits this Petition for Preemption and Declaratory Ruling pursuant to Sections 1.1 and 1.2 of the Commission’s Rules, §§ 1.1 and 1.2 (1999), Section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub L. No. 104-104, § 101(a), 47 U.S.C. § 253 (1999) (the “Act”), and the Commission’s *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, FCC 98-295, rel. November 17, 1998

SUMMARY

ASCENT is an international industry organization representing the interests of providers of telecommunications service nationwide. ASCENT's more than 800 company and individual members provide a variety of voice and data services including local and long distance phone service, advanced services, Internet access, high-speed transport, application services, and wireless products. ASCENT's mission is to open all communications markets to full and fair competition and to help member companies

design and implement successful business plans. ASCENT strives to assure that all service providers, particularly entrepreneurial firms, have the opportunity to compete in the communications arena equitably and have access to critical business resources.

The City of Montgomery, Alabama (“City of Montgomery” or “City”) is a local municipality that maintains authority to impose a license and privilege tax on providers of local and long distance telecommunications service, pursuant to City of Montgomery Ordinance 48-91 § 19C-21 (“the “City of Montgomery Ordinance”). Such authority is derived from Ala. Code § 11-51-128 (1975) (“Alabama Code”) which *inter alia* establishes the basis under which municipalities in the State of Alabama may levy taxes on local telephone exchanges and long distance telephone lines. Alabama Code establishes the maximum annual license tax that may be imposed on telecommunications service providers by Alabama municipalities. The maximum annual tax amount that may be imposed by each municipality is a direct function of the number of inhabitants residing within the municipality’s jurisdictional boundaries. Alabama Code is silent, however, on how municipalities, such as the City of Montgomery, may elect to levy taxes on telecommunications service providers. Such discretion for the manner in which telecommunications taxes are imposed is left exclusively with each municipal government, so long as the maximum statutory tax amount is not exceeded.

The City of Montgomery Ordinance imposes an annual license and privilege tax on “each person, firm or corporation which operates a telephone exchange or exchanges or long distance telephone lines within the City of Montgomery.”¹ The City of Montgomery has relied on its statutory discretion by electing to impose an annual tax on

¹ City of Montgomery Ordinance 48-91 § 19C-21(i).

all telecommunications companies who serve subscribers located within its jurisdictional boundaries at a level equal to the maximum amount of tax that may be imposed by cities of similar population, those having more than 175,000 inhabitants, under Alabama Code, or \$12,000.00 *per annum*, per provider. Its telecommunications license and privilege tax is imposed as a flat tax on all telecommunications providers, without regard to the number of subscribers served, the revenues derived from subscribers in the City of Montgomery by each provider, or any other distinguishing factor reflective of the extent of the provider's Montgomery operations. Further, the City of Montgomery's telecommunications license and privilege tax bears no relationship to a provider's use of municipal rights of way, burdens on City of Montgomery resources, or benefits derived by the service provider accrued from serving City residents and business.

Because of the City of Montgomery's election to impose a flat annual license and privilege tax on telecommunications service providers, a competitive telecommunications provider who serves ten Montgomery subscribers assumes the same tax liability as a provider who serves ten thousand Montgomery subscribers. These competitive service providers also assume a tax liability equal to that assumed by the incumbent local exchange carrier, who is estimated to serve in excess of one hundred seventy five thousand (175,000) Montgomery subscribers.

The flat annual license and privilege tax imposed by the City of Montgomery, coupled with the sizable amount of the tax, imposes a material, and insurmountable, economic and competitive barrier to entry for telecommunications service providers who serve a limited number of Montgomery subscribers. The manner in which the City of Montgomery has elected to apply Alabama Code undermines competition by preventing

all but the largest and longest standing providers, who are capable of distributing the financial impact of the City of Montgomery's telecommunications tax over a vast Montgomery (or statewide) subscriber base, from providing service. Should other Alabama municipalities elect to follow the City of Montgomery's lead, the Alabama Code could generate an annual tax liability approaching \$150,000.00 per company, for those companies providing service throughout the State of Alabama. Moreover, such a taxation policy represents a significant and discriminatory economic impediment to entry and development of local, long distance, and advanced services competition throughout the State of Alabama, regardless of the method of entry. Competitive entities stand to be precluded not only from serving in the City of Montgomery, but from serving virtually all cities in the State of Alabama, and potentially in other areas outside the State, to the detriment of the public.

Three ASCENT members are headquartered in the State of Alabama. It is estimated that no less than one quarter of ASCENT's 535 company (service provider) members provide either or both local and interexchange telecommunications services in the State of Alabama, under authorization of the Public Service Commission of the State of Alabama, and specifically within the jurisdictional boundaries of the City of Montgomery. These ASCENT members are being economically precluded from providing local exchange and interexchange in the City of Montgomery, and in similarly situated municipalities, as a result of the City of Montgomery's application of Alabama Code, in violation of section 253(a) of the Act.

ASCENT respectfully requests that the Commission issue a declaratory ruling on an expedited basis, preempting enforcement of the City of Montgomery's flat

telecommunications license and privilege tax under Section 253(d) of the Act, as long as this tax does not reasonable account for the level of a service provider's operations and continues to represent an economic impediment to market entry.

BACKGROUND

I. Alabama Municipalities Derive License Taxing Authority From Alabama Code.

Alabama municipalities derive their licensing tax ordinances for operators of telephone exchanges and long distance lines from the provisions of Ala. Code § 11-51-128 (1975).² Alabama Code mandates the *maximum* amount of privilege or license tax municipalities may impose upon persons operating said business. The maximum amount of the tax is to be determined by the population of each municipality, based on U.S. Census records. According to Alabama Code,

[T]he maximum amount of privilege or license tax which the several municipalities within the state may collect of persons operating telephone exchanges and long distance telephone lines in [Alabama] for the privilege doing intrastate business within the limits of such municipalities ... is fixed as follows ...

The highest amount of telecommunications tax that may be imposed by Alabama's largest cities under Alabama Code is established as follows:

(23) In municipalities having a population of more than 175,000, exchange license \$12,000, long distance, \$3,000.

Alabama's major cities, Birmingham, Mobile, and Montgomery, are therefore authorized to impose up to the highest telecommunications license tax amount in the

² ASCENT understands, but has no evidence to support, that Ala. Code § 11-51-128 was enacted as a result of BellSouth's desire not to be subject to the utility tax imposed on utility assets that at the time applied equally to Alabama Power Company and BellSouth. The statute was enacted to accommodate BellSouth. The "telephone exchanges" language appearing in Ala. Code § 11-51-128 applied exclusively to BellSouth exchanges as BellSouth was at the time the sole telecommunications service provider in Alabama.

state, as their population densities exceed the 175,000 population threshold. In instances where service providers offer both exchange and interexchange services, the combined fee in these cities is \$15,000.00 per provider, per year, per city (\$12,000 applicable to local exchange service and \$3,000 applicable to interexchange service). Those providing local exchange and interexchange services to subscribers in all three cities assume a cumulative tax liability of \$45,000.00 per year (\$15,000 multiplied by 3 cities) for the privilege of serving Alabama's most densely populated cities. Companies serving statewide,³ face a combined Alabama annual tax bill nearing \$150,000.00 per company, based on the maximum tax amount authorized under Alabama Code.

While Alabama Code establishes the maximum amount of tax that may be imposed by municipalities, the statute does not require municipalities to impose the maximum amount, nor does it mandate how the municipalities are to determine the amount of tax to impose; it merely places a limit or cap on the amount of tax which the municipalities may charge for this purpose. Otherwise Alabama Code is silent. Each municipality retains the full and complete statutory discretion to establish the tax amount and methodology to be followed in imposing a municipal telecommunications tax on telecommunications providers, subject to the statutory caps.

II. The City of Montgomery Telecommunications Taxation Obligation Is Established in City of Montgomery City Ordinance 48-91 § 19C-21(i).

The City of Montgomery's telecommunications tax obligation is established in its City Ordinance 48-91 § 19C-21(i). In pertinent part, section 19C-21(i) imposes an obligation on each person, firm, or corporation which operates **a telephone exchange** or exchanges within the City of Montgomery to

³ Companies serving Alabama municipalities of 5,000 residents or more for illustrative purposes.

[p]ay an annual license of privilege tax for the privilege of doing business within the City of Montgomery in the sum of \$1,100.00 for the first 20,000 inhabitants, and \$60.00 for each additional 1,000 inhabitants or major fraction thereof up to 175,000. *For a population of over 175,000, the license fee will be \$12,000.*[Emphasis supplied.]

Similarly, section 19C-21(i) further imposes and obligation on each person, firm, or corporation operating **long distance telephone lines** within the limits of the City of Montgomery to

[p]ay an annual license fee of \$288.00 for the first 20,000 inhabitants and \$15.00 for each additional 1,000 inhabitants of major fraction thereof up to 175,000. *For a population of over 175,000, the license fee will be \$3,000.*[Emphasis supplied.]

The City of Montgomery clearly interprets section 19C-21(i) and Ala. Code § 11-51-128 as authorizing the City to impose the maximum tax assessment authorized by Alabama law, based on no other articulated criterion but whether a company is providing local exchange or interexchange telecommunications services within the City's geographic boundaries. Such interpretation that it may levy the maximum amount of tax allowed by Alabama law is further evident in demand letters sent by the City to affected telecommunications companies. According to the City of Montgomery's demand letters, if a company 1) operates telephone exchanges and/or long distance lines within the limits of the City of Montgomery, 2) is listed as a local service provider in the "Bell South Telephone Directory;" and 3) is regulated by the Alabama Public Service Commission, the maximum tax is assessed. No other factor is considered.

The City of Montgomery's taxation ordinance and policy definitively establish telecommunication provider license and privilege tax liability at the maximum level allowed by Alabama Code, without deference to the number of City of Montgomery subscribers served, revenues generated from City of Montgomery subscribers, or any

other factor which reflects the extent of a service provider's operations in the municipality. As a result, section 19C-21(i), although lawful with respect to Alabama Code, imposes a significant economic barrier to entry and competition for new entrant telecommunications service providers, and for smaller companies with a negligible number of Montgomery subscribers in particular, such as many of ASCENT's members. Coupled with similar statutory interpretations by other Alabama cities, the combined effect is a municipal taxation obligation that virtually no new competitive entrant can meet, resulting in an inability of competitive service providers to provide telecommunications services in Montgomery, much less enter Alabama's interexchange and local markets altogether.

III. The Courts Have Not Addressed the Discriminatory and Anti-Competitive Nature of City of Montgomery City Ordinance 48-91 § 19C-21(i) In Violation of Section 253 of the Act Through the Course of Appeals.

Despite appeals of the City of Montgomery's Ordinance,⁴ in no instance has the pivotal discriminatory, anti-competitive and unlawful application of the City of Montgomery telecommunications tax that is the instant Petition been considered. Efforts by ASCENT to communicate concerns directly with the City of Montgomery have been met with total silence on the part of the City.

That the City of Montgomery Ordinance impedes competition, is discriminatory, and is violative of the Act has not been squarely addressed by any adjudicatory body. The chilling effect of the City of Montgomery's taxation policy on competition should

⁴ See, Montgomery County Circuit Court, CV-98-1665, (July 16, 1998); Court of Civil Appeals of Alabama, Case Number 2981052, (June 17, 1999); Supreme Court of the State of Alabama, Case No. 1990856 (February 4, 2000).

now be considered by the Commission within the context of City of Montgomery's violation section 253 of the Act.

ARGUMENT

IV. Section 253 of the Act Establishes the Statutory Framework Under Which the Effects of City of Montgomery Application of Ordinance 48-91 § 19C-21(i) Must be Considered.

To ensure that state and municipal statutes, regulations, and requirements would not result in actions inconsistent with the Act's pro-competitive policies and direction, section 253 of the Act established explicit provisions intended to remove technical and economic barriers to competitive entry in instances where state or local statute or regulation came in direct opposition to the Act's intent.

In pertinent part, section 253(a) of the Act provides that

[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

To the extent that the Commission determines that a State or local statute, regulation or legal requirement is violative of section 253(a), it must then consider whether such regulation or requirement is permissible under sections 253(b) or 253(c). Upon a finding that the regulation or requirement is impermissible under sections 253(b) or (c), the Commission is to preempt enforcement of the regulation or requirement pursuant to section 253(d).

Section 253(a) obligates the Commission to preempt enforcement when a State or local statute, regulation, or requirement prohibits or has the effect of prohibiting the ability of a provider from providing any interstate or intrastate telecommunications service. When evaluating whether local requirements have the effect of prohibiting an

entity from providing service, the Commission is to consider whether the requirements “materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁵ Preemption of the City of Montgomery’s Ordinance 48-91 § 19C-21(i) under section 253 is ripe for consideration by the Commission on this basis.

In its Texas Preemption Order, the Commission stressed that

... section 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that "prohibit[s] or has the effect of prohibiting" a firm from providing any interstate or intrastate telecommunications service. We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.⁶

The Commission further underscored the financial challenges facing new market entrants in the context of the importance for expeditious Commission treatment of preemption petitions, noting

[E]ntering local exchange markets can involve considerable advance planning and substantial investments of human and financial capital. To require competing LECs to take steps to enter local exchange markets ... without allowing them to challenge the validity of key, local competition provisions ... would cause undue delay and difficulty. Furthermore, if Petitioners are correct that the challenged provisions ... hinder competition in local exchange markets, delayed resolution would frustrate one of the primary purposes of the 1996 Act.⁷

⁵ *The Public Utility of Texas et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, (rel. October 1, 1997) [“Texas Preemption Order”] ¶ 42).

⁶ *Id.* at 22.

⁷ *In the Matter of American Communications Services, Inc., MCI Telecommunications Corp., Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997*

The Commission has considered the financial impact of compliance costs imposed on new market entrants by state and local statute and regulation when determining whether such costs constitute the economic barriers to entry posed by provisions that may warrant preemption under section 253(a). Again, in its Texas Preemption Order, the Commission found that Certificate of Authority build out costs represented an economic burden on competitive entrants that would prevent them from competing in a “fair and balanced environment.”⁸ The City of Montgomery Ordinance constitutes the very type of economic limitation that impedes competitors from competing in a “fair and balanced environment,” for which section 253 was intended, and which the Commission has previously considered in its Texas Preemption Order and elsewhere.

Only two provisions exist in section 253 which could exempt a state or local governmental body law or regulation from preemption; 1) the ability of the state to impose competitively neutral requirements necessary to preserve and promote universal service consistent with section 254 of the Act; and 2) the authority of States and local government to manage public rights-of-way. The City’s ordinance fails to qualify for either exemption. Application of the City of Montgomery’s telecommunications tax, fully meets the tests for federal preemption under section 253(d).

Pursuant to Sections 251, 252, and 253 of the Communications Act as amended. CC Docket No. 97-100, Memorandum Opinion and Order (rel. December 23, 1999), at ¶22.

⁸ [o]ur experience with industry investment patterns by other CLECs and the data supplied by AT&T, lead us to conclude that the COA build-out requirements are prohibitively expensive and would clearly prevent COA holders from competing in a fair and balanced environment. We also conclude that the economic impact of the build-out requirements are great enough to have the effect of prohibiting entities subject to these requirements from providing competitive local exchange service in Texas. Texas Preemption Order at ¶81.

V. City of Montgomery Ordinance 48-91 § 19C-21(i) Imposes an Untenable Economic Burden That Prevents Competitive Companies from Providing Telecommunications Services In Violation of Section 253(a).

The City of Montgomery's Ordinance, institutes a flat license and privilege tax on telecommunications providers that frustrates and undermines the pro-competitive foundation of the Act by creating an economic burden that will reduce competition and increase service costs for any remaining providers serving residents in the City of Montgomery. This flat license and privilege tax is neither competitively neutral nor non-discriminatory. In that the City of Montgomery's license and privilege tax requirements precludes companies, such as ASCENT's members, from providing competitive services, enforcement of City of Montgomery Ordinance 48-91 § 19C-21(i) should be subject to preemption under section 253(d).

A. The City of Montgomery is a Local Governmental Body Subject to Section 253.

The City of Montgomery is a governmental body under well-established law and precedence. The Commission has applied section 253 to local governmental bodies, in recognition that municipalities are indeed the type of "local government" contemplated in section 253.⁹ The City of Montgomery, for example, like the City of Huntington Park, maintains statutory authority for establishing rules and regulations governing the City's operations and conduct, and should be similarly considered by the Commission as a "local government" for purposes of evaluating section 253 preemption.

⁹ See, *California Payphone Association, Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, CA Pursuant to Section 253(d) of the Communications Act*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (1997).

B. City of Montgomery Ordinance 48-91 § 19C-21(i) is a “Local Statute or Regulation” Subject to Section 253

Section 253(a) establishes that no “state or local statute or regulation” or other “state or local legal requirement” may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications service. City of Montgomery Ordinance 48-91 § 19C-21(i) qualifies as a “local statute or regulation” or “local legal requirement” promulgated by a local governmental body, pursuant to section 253(a). As a local regulation or local legal requirement, the City of Montgomery’s Ordinance is binding on companies doing business within the City’s jurisdictional boundaries. Failure to comply with the City of Montgomery’s Ordinance will subject service providers to City enforcement action including imposition of fines, and ultimately a prohibition against operating in the City of Montgomery altogether. In that City Ordinance 48-91 § 19C-21(i) constitutes a local statute or regulation, it may not prohibit or have the effect of prohibiting any entity from providing intrastate telecommunications services under section 253(a). Otherwise, City Ordinance 48-91 § 19C-21(i) is subject to preemption.

C. City of Montgomery Ordinance 48-91 § 19C-21(i) Has the Effect of Prohibiting Entities From Providing Telecommunications Services and is Violative of Section 253(a).

To determine whether preemption is warranted under section 253, the Commission must first evaluate whether section 253(a) has been violated. The Commission has stated that in making such analysis, “we must remain mindful of the fundamental purpose of the Act: to promote competition and reduce regulation in order to secure lower prices and higher quality of service for American telecommunications consumers and encourage the rapid deployment of new telecommunications

technologies.’¹⁰ The City of Montgomery’s application of its flat license and privilege tax on all telecommunications providers without regard for the extent of a provider’s operations in the City or demands on City rights-of-way, if any, has the effect of economically precluding all but the largest companies who maintain extensive customer bases from providing local exchange and interexchange telecommunications services to City residents, in violation of section 253(a).

A simple calculation of the financial impact of the City of Montgomery’s telecommunications license and privilege tax policy on smaller companies quickly reveals the extensive and discriminatory economic barrier to entry that the City’s taxation policy represents, in clear violation of section 253(a). NOW Communications, Inc. (“NOW”), an ASCENT member, is a Colorado-based provider of pre-paid competitive local exchange services who had recently entered the Alabama market was doing business in the City of Montgomery in the beginning of 2000. At the time of the City of Montgomery’s initial tax assessment in 2000, NOW served forty (40) residential subscribers. The City’s assessment of the maximum \$12,000.00 *per annum* tax on local exchange service providers equated to a license and privilege tax of \$300.00 per NOW subscriber, per year (\$12,000.00/40 subscribers). Monthly service fees for prepaid local exchange service providers, such as NOW, are typically \$49.95.¹¹ Presuming that NOW similarly charged its customers \$49.95 per month for local service, NOW would have realized gross annual revenues from its forty City of Montgomery subscribers of

¹⁰ *TCI Cablevision of Oakland County, Inc. Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §541, 544(e), and 253*, Memorandum Opinion and Order, FCC 97-331 (1997) [“TCI Preemption Order”] at ¶100.

¹¹ Please refer to Montgomery Municipal Court Affidavit/Complaint, Exhibit 7.

\$23,976.00 (40 subscribers multiplied by \$49.95/month multiplied by 12 months).¹² The City's license and privilege tax, then, equated to more than fifty percent (50%) of NOW's gross annual Montgomery revenues, and a significantly greater percentage of the Company's net revenues derived from its 40 Montgomery subscribers. For providers of post-paid local services, the tax impact would represent a significantly greater percentage of revenues in light of the generally lower post-paid monthly local service rates.

By comparison, the financial impact of the City of Montgomery's telecommunications tax on the incumbent is negligible. Assuming *arguendo* that the BellSouth serves no less than 186,000 subscribers located in the City of Montgomery, approximately 95% of the City's 195,690 residents,¹³ the financial impact of the City's annual telecommunications tax on BellSouth is estimated at \$0.065 (rounded) per subscriber, per year (\$12,000.00 per year/186,000 subscribers). BellSouth's annual 6.5 cent per customer tax in Montgomery represents little more than an incidental cost that can be easily passed through and borne by BellSouth's subscribers, virtually unnoticed by its subscriber base.

BellSouth's Montgomery per subscriber tax liability pales in comparison to the per subscriber tax liability assumed by smaller companies such as NOW. Companies like NOW assume a per subscriber tax liability which may be more than four thousand percent (4000%) the liability incurred by the incumbent. For new entrant companies like NOW who are building their customer bases, the City telecommunications tax represents the difference between life and death. No customer could justify, let alone accept, a major tax pass through of \$300.00 per year assessment from a competitive provider.

¹² Excluding connection fees and bad debt.

Smaller competitive companies could not in any event hope to pass through even a portion of such a significant pass through and hope to remain in business, let alone remain competitive. And certainly no regulator would authorize smaller companies like NOW to pass-through a portion of its tax liabilities onto subscribers, even if such pass throughs could be justified.

The economic impact of the City of Montgomery's tax policies cannot be viewed in strict isolation. City of Montgomery taxation policy must also be considered in conjunction with the cumulative financial effect that the City of Montgomery's taxation policy, coupled with similar taxation policies of other Alabama cities, will have on impeding competition and preventing the provision of telecommunications services in Alabama and possibly elsewhere. NOW's local annual City of Montgomery license and privilege tax liability alone, when multiplied by the more than 160 similarly situated competitive local companies estimated to be doing business in the City of Montgomery,¹⁴ raises the financial anti to in excess of \$1,900,000.00 in Montgomery tax revenues alone for competitors (The City of Montgomery's \$12,000.00 local telephone exchange tax multiplied by 160 companies). This is \$1,900,000.00 that competitors will be unable to apply to service expansion, improvement, and growth, severely limiting the ability to increase customer bases, presuming competitors can continue meeting their Alabama municipal tax burden.

When faced with similar taxes in each of Alabama's major cities, the economic impact becomes untenable. Each company offering local exchange and interexchange

¹³ U.S. Census bureau estimate as of July 1, 1999.

¹⁴ Alabama Public Service Commission listing of competitive local exchange carriers (October 20, 2000) <http://www.psc.state.al.us/Telecomm/Telelist/L-Comp.LocalExc..doc>.

telecommunications services who concentrate on Alabama's major cities of Montgomery, Birmingham and Mobile would incur cumulative annual license taxes under the authority of Alabama Code § 11-51-128 of \$45,000.00 (\$15,000.00 per city multiplied by 3). Yet many companies would not wish to restrict themselves to Alabama's three major cities alone, but would, at a minimum, wish to serve surrounding municipalities whose license and privilege tax would add considerably to a provider's \$45,000.00 annual municipal tax liability in the State. Companies seeking to serve throughout the state would assume an annual municipal tax liability approximating \$150,000.00 per service provider depending on the extent of a provider's geographic "foot print," when calculating the maximum municipal tax liability allowed under Alabama Code in relation to the number of Alabama municipalities with a population exceeding 5000 inhabitants. The economic impact is of such magnitude that few companies would consider expanding into less densely populated areas, given the added tax burdens that smaller cities would only contribute to, let alone serving all or any one of Alabama's major cities. Barring federal preemption, the possibility for municipalities in other states to adopt flat taxes such as those instituted in Alabama raises the specter of municipal taxation policies run amuck that would cripple competition in far beyond Alabama's borders.

Notwithstanding the economic barrier represented by the City of Montgomery's license and privilege tax regulations, the City's license and privilege tax regulation is highly discriminatory in favor of the incumbent carrier. Implementation of the City of Montgomery's tax ordinance is not competitively neutral, imparting, however unintended, a significant competitive advantage to BellSouth. While the operation of Alabama statute would cause BellSouth to also incur license taxes for those three cities

in the total amount of \$45,000, the relative impact of the City's license and privilege tax is much greater on competitive providers than on BellSouth, who serves hundreds of thousands of subscribers in those cities, as demonstrated *supra*.

That impact may prohibit an entity from providing telecommunications service in Alabama's major cities, further to BellSouth's definitive advantage. If so, the application of § 11-51-128 in such a manner by municipalities is in violation of § 253 of the 1996 Act by placing a very concrete and anti-competitive barrier between Alabama local and interexchange marketplaces and small telecommunications providers, which barrier is not present for BellSouth. This impact means that BellSouth has an absolute competitive advantage, due in large part to its monopolistic history, over other telecommunications providers, which competitive providers may never overcome.

The Commission has addressed the economic barrier to entry faced by a competitor when its primary competitor, the incumbent, receives substantial governmental support that is unavailable to the competitor in its Western Wireless Preemption Order.¹⁵ Although the Commission's discussion in Western Wireless pertained to the receipt of universal service support, the concept of unrivaled governmental support is entirely analogous, in consideration of the impact of the City of Montgomery and other Alabama city tax policies on competitors *vis a vis* BellSouth. In its Western Wireless Preemption Order, the Commission opined that

A new entrant faces a substantial barrier to entry if its main competitor is receiving substantial support from the state government that is not available to the new entrant. A mechanism that makes only ILECs eligible for explicit support would effectively lower the price of ILEC-

¹⁵ *Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, FCC-00-309, (August 28, 2000) ["Western Wireless Preemption Order"].

provided service relative to competitor-provided service by an amount equivalent to the amount of the support provided to ILECs that was not available to their competitors. Thus, non-ILECs would be left with two choices -- match the ILEC's price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the unsubsidized cost of providing such service. A mechanism that provides support to ILECs while denying funds to eligible prospective competitors thus may give customers a strong incentive to choose service from ILECs rather than competitors... a [competitive] carrier maybe unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage. Consequently, such a program may well have the effect of prohibiting such competitors from providing telecommunications service, in violation of section 253¹⁶

Such is the situation now facing competitive service providers in Montgomery and elsewhere. Saddled with a significant tax liability that cannot be reasonably passed on to consumers, and which cannot be reasonably subsidized from other sources,¹⁷ smaller companies have no alternative but to exit the market, as NOW did when the City of Montgomery initiated enforcement of its City of Montgomery Ordinance 48-91 § 19C-21(i) in mid-2000.

The City of Montgomery Ordinance has a chilling effect on telecommunications competition in violation of the 1996 Act by placing a disproportionate financial burden on new and smaller entrants into local telecommunications markets than it does on incumbent local exchange carriers. In fact, however, unintentionally, the City of Montgomery may be receiving a windfall from this imposition of a flat tax to all providers, regardless of volume of business, number of telephone lines, or demands on City resources or rights of way. That NOW and other ASCENT member companies like

¹⁶ *Id.* at ¶8.

¹⁷ Even if companies like NOW could subsidize their tax burden from other sources, protracted assumption of such significant tax liabilities until the company could build its customer base to any meaningful size

it are economically precluded from providing telecommunications services in the City of Montgomery, in other larger Alabama cities, and, therefore, effectively throughout the State of Alabama, the City of Montgomery's flat telecommunications license and privilege tax has "the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service" in clear violation of section 253(a).

VI. City of Montgomery Ordinance 48-91 § 19C-21(i) Does Not Meet the Commission's Criteria for Exemption Under Section 253(b).

Having determined that section 253(a) has been violated, the Commission must next turn to the matter of whether a State or local statute, regulation or legal requirement is permissible under section 253(b).¹⁸ Section 253(b) allows states to "impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The Commission has maintained that to fall within the "safe harbor" of section 253(b) exemption, programs must be 1) "competitively neutral"; 2) "consistent with section 254"; and 3) "necessary to preserve and advance universal service".¹⁹ According to the Commission,

We have preempted state regulations for failure to satisfy even one of the three criteria. Even if a requirement violates section 253(a) and does not fall within the safe harbor of section 253(b), the Commission must preempt the enforcement of the requirement in accordance with section 253(d).²⁰

would impede company growth to such an extent that it would hardly constitute a sound business practice or strategy.

¹⁸ Western Wireless Preemption Order at ¶9.

¹⁹ *Id.*

²⁰ *Id.*

City of Montgomery Ordinance 48-91 § 19C-21(i), does not qualify for exemption under any and all of the Commission's criteria. City of Montgomery Ordinance 48-91 § 19C-21(i) is not competitively neutral in that it accords the incumbent a competitive advantage currently available to no other competitor as argued *supra*. The City of Montgomery's Ordinance bears no relationship to the Universal Service procedures established in section 254. And the City of Montgomery Ordinance is not necessary to preserve and advance universal service. Its failure to meet the Commission's established criteria for section 253(b) preemption renders the City of Montgomery's Ordinance impermissible under section 253(b).

VII. Assessments Under City of Montgomery Ordinance 48-91 § 19C-21(i) Do Not Pertain to the Management of Rights-of-Way and Do Not Qualify for Exemption Under Section 253(c).

The third and final test for federal preemption rests upon a determination of whether a State or local statute, regulation or legal requirement enables a State or local authority to manage public rights-of-way or require "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of rights of way on a non-discriminatory basis, if the compensation required is publicly disclosed by such government."²¹ City of Montgomery Ordinance 48-91 § 19C-21(i) constitutes a Telecommunications license and privilege tax. The City of Montgomery Ordinance does not affect the City of Montgomery's ability to manage rights-of-way nor does it constitute any form of compensation for City rights-of-way, rendering the City's telecommunication tax impermissible under section 253(c).

²¹ 47 U.S.C. 253(c).

The Commission has recognized that 253(c) preserves the authority of local government to manage public rights-of-way.²² Included in such authority is the performance of a

range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way... includ[ing] coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.²³

Yet the City of Montgomery Ordinance bears no direct or indirect relationship to the ability of the City to perform those functions necessary to manage and preserve City rights-of-way. Pursuant City of Montgomery Ordinance 48-91 § 19C-21(i), an entity which operates a telephone exchange or exchanges within the City of Montgomery, “shall pay an annual license or privilege tax for the privilege of doing intrastate business within the City of Montgomery...” Section 19C-21(i) concludes that “[t]he license herein required from the telephone companies *shall be for doing business in the City of Montgomery* and the receiving messages and conversation in the City ...[emphasis supplied]” This language explicitly establishes that assessments made to telecommunications providers constitute a license or privilege *tax*. Nowhere does this section suggest that such payments are in any way connected to the City’s management or collection of fees necessary to manage public rights-of-way.

Even assuming *arguendo* that the City of Montgomery were now to argue that such a tax is indeed intended to compensate the City for rights-of-way, the City’s

²² TCI Preemption Order at ¶103

²³ *Id.*

Ordinance would nevertheless be impermissible under section 253(c) in that the City's public disclosure is misleading as to the intended nature of its tax assessment. Section 253(c) requires that "fair and reasonable compensation from telecommunications providers", if required, be "publicly disclosed" by such government. The language of City of Montgomery Ordinance 48-91 § 19C-21(i), offers no indication that its assessments are anything but a license and privilege tax, not in any way connected to rights-of-way or their management by the City of Montgomery. Even if the City were to prevail on this point, which it cannot, its tax would still fail as unfair and unreasonable compensation applied on a discriminatory basis, as argued *supra*.

City of Montgomery Ordinance 48-91 § 19C-21(i) violates section 253(a), and is impermissible under sections 253(b) and (c). The Commission must then, preempt enforcement as directed by section 253(d).

VIII. City of Montgomery Ordinance 48-91 § 19C-21(i) Constitutes an Unlawful and Inequitable Economic Entry Barrier That Prevents Competitive Companies, Such As ASCENT Members, From Providing Service the State of Alabama.

As the Commission has previously recognized, companies entering local telephone markets have significant hurdles to overcome with respect to the competition provided by incumbent local exchange carriers ("ILECs") because of the entrenched position such ILECs enjoy due to their long monopolistic history in local markets. Such hurdles have slowed the introduction of competitive local exchange carriers in local markets in the State of Alabama and in most other parts of the United States.²⁴ Costs of

²⁴ "Policymakers need to create a telecommunications tax structure that more accurately reflects the new economic realities of the market and to ensure that current state tax policy does not inhibit economic growth in telecommunications industry. It is essential that future tax laws have enough flexibility to respond to the changes occurring in the industry ... while not stifling economic growth with outdated and

doing business, such as the license tax imposed under the City of Montgomery Ordinance, which are disproportionate to the revenues to be gained by those providers serving City residents, have the effect of further stifling competition with the ILECs in local markets. Section 253 of the Act was intended to promote and support the development of market competition for the benefit of consumers, and included the preemption provisions of section 253 to “ensure that State and local governments implement the 1996 Act in a manner consistent with those goals.”²⁵

Section 253 of the Act does not require that the barrier created by State or local governments to competitors’ entry be an absolute or complete bar to competition.²⁶ It is sufficient that the State or local government action “may prohibit” or “have the effect of prohibiting” the abilities to provide telecommunications service.²⁷

The imposition of equal fees or charges is not required by section 253.²⁸ In drafting the Act, an attempt was made to have the fees and charges for rights-of-way use be in parity, or equal for all telecommunications providers. That attempt was rejected in favor of State and local governments being able to distinguish between providers based their use of the rights-of-way because, as was pointed out by U.S. Representative Stupak, in offering the Stupak-Burton amendment to replace the proffered parity amendment:

burdensome requirements. Telecommunications tax reform can be an important component of states’ overall economic development strategy for the new economy and can help them meet the demands of the digital age.” *Telecommunications Tax Policies: Implications for the Digital Age*, Scott Palladino and Stacy Mazer, National Governors’ Association (February 2, 2000),

http://www.nga.org/Pubs/IssueBriefs/2000/000202TeleCom.asp#_Toc473343207

²⁵ *AT&T Communications of the Southwest v. City of Austin*, 975 F. Supp. 928, 942 (W.D. Tex. 1997), citing *In re Classic Telephone*, 11 F.C.C.R. 13082, 13096 (1996). See also *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) [“RT Communications”].

²⁶ The Act does not require an entry barrier to “be insurmountable before the FCC must preempt it”) *RT Communications*.

²⁷ *Id.*; 47 U.S.C. § 253(a).

²⁸ *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 792 (E.D. Mich. 1998).

For example, if a company plans to run 100 miles of trenching in our streets and wires to all parts of the cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.²⁹

The Stupak-Barton amendment became subsection (c) of section 253 of the 1996 Act. The debate surrounding the Stupak-Barton amendment does not evidence any intention by the drafters of section 253 that local authorities be forced to charge exactly the same fees to all providers. To the contrary, such a parity provision was rejected.

Although the Stupak-Barton amendment debate centered on compensation for use of rights-of-way under section 253(c) of the Act, it is instructive as well for interpreting the provisions of section 253(a) of said Act. As shown by the foregoing example, the disproportionate economic effect of a flat license tax in the amounts imposed by municipalities the size of Montgomery, Birmingham and Mobile may prohibit competition in violation of section 253(a) of the 1996 Act.

The City of Montgomery itself has admitted that changes need to be made in its Ordinance to make the license tax more equitable to resellers of telephone services. This admission occurred after a July 29, 1998, inquiry to the City of Montgomery by a reseller of telephone services as to alternative tax guidelines for Montgomery due to the “tremendous financial burden” the tax imposed by the City of Montgomery Ordinance placed on the reseller. In its response letter dated August 11, 1998, the City of Montgomery admitted that the Ordinance in question in this case is less “equitable” than

²⁹ *Id.*

a gross receipts license would be to a reseller.³⁰ There is no evidence to indicate that the City ever attempted to amend its taxing policy.

Thus, a common sense reading of the City of Montgomery Ordinance and the City's own admission as to the Ordinance's inequitability show the effect of the City Ordinance may prohibit or have the effect of prohibiting provision of telecommunications service in violation of 47 U.S.C. section 253(a). As a result, enforcement of the City of Montgomery Ordinance should be preempted.

REQUEST FOR EXPEDITIOUS TREATMENT

ASCENT respectfully requests that the Commission conduct an expedited review of the instant petition in accordance with the Commission's stated intent to act expeditiously on controversial matters that impact competition.

CONCLUSION

Municipalities are not excused from responsibility for exercising proper discretion as to the assessment of taxes or fees on telecommunications providers which remain consistent with section 253(a), even in the absence of clear statutory directives. The City of Montgomery's failure to exercise such proper discretion and impose a tax having the effect of prohibiting an entity from providing telecommunications services contrary to section 253(a), cannot be excused by an absence of specific statutory guidance in Alabama Code. Its tax assessment policies are inconsistent with the principles of equity, reasonableness, competitive neutrality, and non-discrimination that are at the underpinnings of section 253(a).

³⁰ See August 11, 1998 correspondence between City of Montgomery and 1-800-Reconex attached hereto as Exhibit 7.

The City of Montgomery's telecommunications tax assessment policy, as implemented in City of Montgomery Ordinance 48-91 § 19C-21 imposes an inequitable, unreasonable, discriminatory, and anti-competitive burden on competitive local exchange and interexchange carriers, including ASCENT members, which has the effect of economically precluding competitive telecommunications service providers from offering services in Montgomery. In so doing, City of Montgomery Ordinance 48-91 § 19C-21 is violative of section 253(a) of the Act. City of Montgomery Ordinance 48-91 § 19C-21 is not entitled to the exemptions of sections 253(b) and (c) and its enforcement must be preempted by the Commission under 47 U.S.C. §253(d).

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS
ENTERPRISES

By: _____



Andrew O. Isar
Director – State Affairs
1401 K Street, N.W.
Suite 600
Washington, D.C. 20005
202.835.9898

Dated: January 18, 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of:)
)
ASSOCIATION OF COMMUNICATIONS)
ENTERPRISES)
)
Petition for Preemption Pursuant to Section)
253 of the Communications Act of 1934)
of Actions of the City of Montgomery,)
Alabama)

EXHIBITS

- Exhibit 1 Alabama Code § 11-51-128 (1975)
- Exhibit 2 City of Montgomery City Ordinance 48-91 § 19C-21(i)
- Exhibit 3 City of Montgomery Demand Letter
- Exhibit 4 ASCENT Letter to the City of Montgomery (August 3, 2000)
- Exhibit 5 Montgomery Municipal Court Affidavit/Complaint (July 21, 2000)
- Exhibit 6 NOW Communications, Inc. Letter to the City of Montgomery (August 9, 2000)
- Exhibit 7 City of Montgomery Letter to 1-800-Reconex (August 11, 1998)

Association of Communications Enterprises
January 18, 2001
City of Montgomery, Alabama

EXHIBIT 1

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7, No. 355, p.

Cross references. — As to municipal regu- occupational or business license or permit as
lation of telegraph companies, see § 11-43-62. affecting validity or enforceability of contract.
Collateral references. — Failure to procure 30 ALR 834, 42 ALR 1226, 118 ALR 646.

§ 11-51-128. Telephone companies.

(a) The maximum amount of privilege or license tax which the several municipalities within this state may annually assess and collect of persons operating telephone exchanges and long distance telephone lines in this state for the privilege of doing intrastate business within the limits of such municipalities, whether such persons are incorporated under the laws of this state or any other state, is fixed as follows:

(1) In municipalities having not exceeding 500 inhabitants, exchange license, \$15.00, long distance license, \$8.00;

(2) In municipalities having a population of more than 500 and not exceeding 1,000, exchange license, \$30.00, long distance license, \$8.00;

(3) In municipalities having a population of more than 1,000 and not exceeding 2,000, exchange license, \$60.00, long distance license, \$15.00;

(4) In municipalities having a population of more than 2,000 and not exceeding 3,000, exchange license, \$105.00, long distance license, \$27.00;

(5) In municipalities having a population of more than 3,000 and not exceeding 4,000, exchange license, \$150.00, long distance license, \$38.00;

(6) In municipalities having a population of more than 4,000 and not exceeding 5,000, exchange license, \$210.00, long distance license, \$53.00;

(7) In municipalities having a population of more than 5,000 and not exceeding 6,000, exchange license, \$270.00, long distance license, \$68.00;

(8) In municipalities having a population of more than 6,000 and not exceeding 7,000, exchange license, \$330.00, long distance license, \$83.00;

(9) In municipalities having a population of more than 7,000 and not exceeding 8,000, exchange license, \$390.00, long distance license, \$98.00;

(10) In municipalities having a population of more than 8,000 and not exceeding 9,000, exchange license, \$450.00, long distance license, \$113.00;

(11) In municipalities having a population of more than 9,000 and not exceeding 10,000, exchange license, \$510.00, long distance license, \$128.00;

(12) In municipalities having a population of more than 10,000 and not exceeding 11,000, exchange license, \$570.00, long distance license, \$143.00;

(13) In municipalities having a population of more than 11,000 and not exceeding 12,000, exchange license, \$630.00, long distance license, \$158.00;

(14) In municipalities having a population of more than 12,000 and not exceeding 13,000, exchange license, \$690.00, long distance license, \$173.00;

(15) In municipalities having a population of more than 13,000 and not exceeding 14,000, exchange license, \$750.00, long distance license, \$188.00;

(16) In municipalities having a population of more than 14,000 and not exceeding 15,000, exchange license, \$800.00, long distance license, \$203.00;

(17) In municipalities having a population of more than 15,000 and not exceeding 16,000, exchange license, \$870.00, long distance license, \$210.00;

(18) In municipalities having a population of more than 16,000 and not exceeding 17,000, exchange license, \$920.00, long distance license, \$233.00;

(19) In municipalities having a population of more than 17,000 and not exceeding 18,000, exchange license, \$990.00, long distance license, \$248.00;

(20) In municipalities having a population of more than 18,000 and not exceeding 19,000, exchange license, \$1,050.00, long distance license, \$263.00;

(21) In municipalities having a population of more than 19,000 and not exceeding 20,000, exchange license, \$1,110.00, long distance license, \$278.00;

(22) In municipalities having a population of more than 20,000 and less than 175,000, exchange license, \$1,110.00 for the first 20,000 inhabitants and \$60.00 for each additional 1,000 inhabitants or majority fraction thereof, up to 175,000 population; long distance license, \$278.00 for the first 20,000, and \$15.00 for each additional 1,000, or majority fraction thereof, up to 175,000 population; and

(23) In municipalities having a population of more than 175,000, exchange license, \$12,000, long distance license, \$3,000.00.

(b) In arriving at the assessment of privilege or license tax which may be assessed and collected under subsection (a) of this section, the population of the several cities and towns shall be computed and based on the federal census next preceding the year for which such license tax is assessed from year to year; provided, that if a municipality should be incorporated subsequent to any federal census the population shown in the charter of incorporation shall determine the amount of license due until the next federal census shall find and declare such population. (Code 1923, § 2161; Acts 1935, No. 194, p. 256; Code 1940, T. 37, § 744; Acts 1947, No. 355, p. 238, § 2.)

Collateral references. — Failure to procure affecting validity or enforceability of contract. occupational or business license or permit as 30 ALR 834, 42 ALR 1226, 118 ALR 646.

§ 11-51-129. Street railroads, electric, gas and waterworks companies, etc.

The maximum amount of privilege or license tax which the several municipalities within the state may annually assess and collect of persons operating electric or hydroelectric street railroads, electric light and power companies, gas companies, waterworks companies, pipe line companies for transporting or carrying gas, oil, gasoline, water or other commodities, gas distributing companies, whether by means of pipe lines or by tanks, drums, tubes, cylinders or otherwise, heating companies or other public utilities, incorporated under the laws of this state or any other state or whether incorporated at all or not, except telephone and telegraph companies, railroad and sleeping car companies and express companies which are otherwise licensed shall not exceed three percent of the gross receipts of the business done by the utility in the municipality during the preceding year; and, for the first year's business when an existing utility is taken over, the amount of the

license shall operators plu shall not aff public utility relate to the on such utili 37, § 745; A

Cross refer street railroads licenses for el utilities and n hydroelectric p 40-21-56.

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Association of Communications Enterprises
January 18, 2001
City of Montgomery, Alabama

EXHIBIT 2

expiration of the year of such license according to the schedule hereinabove specified.

(3) Each person, firm, or corporation doing an insurance business shall within 60 days furnish the Director of Finance of the City of Montgomery, in writing, a certified statement showing the full and true amount of gross premium, including renewals on Fire and Marine insurance, received during the preceding calendar year.

(4) Mutual Aid Association - Same as Fire and Marine Insurance.

(5) Persons, firms, or corporations writing own insurance shall pay same license as other agents or agencies.

(6) Burial Insurance - Same rates as Life Insurance.

h. Transients or Itinerants: Each person, firm, or corporation doing business in the City of Montgomery whereby said person, firm, or corporation does not have a permanent location within the City and whereby said business is transient or itinerant, the license is fixed as follows:

(1) \$300.00 per year or any part thereof to cover merchandise or services under Schedule 13.

(2) Licenses issued under this section shall be for a period not to exceed 180 calendar days and must specify dates the business is to operate.

(3) License will be issued on a one-time basis and will cover only one sale.

(4) Licenses must indicate location of business, which must be approved by both the Housing Inspections Division and the Fire Department. If licensee is operating from a truck, off-loading from the truck is not permitted, except for sales, unless the off-loading is to place merchandise in a building that has been approved for occupancy by the Housing Inspections Division and the Fire Department.

➤ i. Telephone Companies: Each person, firm, or corporation which operates a telephone exchange or exchanges within the City of Montgomery, shall pay an annual license or privilege tax for the privilege of doing intrastate business within the City of Montgomery in the sum of \$1,100.00 for the first 20,000 inhabitants, and

\$60.00 for each additional 1,000 inhabitants or major fraction thereof up to 175,000. For a population of over 175,000, the license fee will be \$12,000.

Each person, firm or corporation operating long distance telephone lines within this state and doing intrastate business within the limits of the City of Montgomery, shall pay a license fee of \$288.00 for the first 20,000 inhabitants and \$15.00 for each additional 1,000 inhabitants or major fraction thereof up to 175,000. For a population of over 175,000, the license fee will be \$3,000.00.

In arriving at the assessment privilege or license tax which may be assessed and collected under this ordinance, population shall be computed and based on the Federal census for the next preceding year of which such license tax is assessed.

The license herein required from the telephone companies shall be for doing business in the City of Montgomery and the receiving of messages and conversation in the City, and not charges upon interstate business.

j. License Based on Community Standards Criteria: Any license determined to be based on community standards criteria will require City Council approval before issuance.

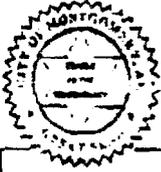
19C-22 --- ABRIDGEMENT OF COUNCIL'S RIGHTS

The adoption of this code, or the fixing of any license fee, shall not abridge the rights of the Council of the City of Montgomery, Alabama, to change, alter, increase or decrease, or revoke or suspend for cause, any of the license herein or otherwise fixed and prescribed, at any time; and when any increase is made, unless the same is paid within 30 days, the license shall be revoked, and no further business carried on thereunder; nor shall it abridge the right of the Council of the City of Montgomery, Alabama, to require a license for any exhibition, trade, business, occupation, vocation, calling or profession not included in this schedule.

19C-23 --- EXEMPTIONS

a. Disabled military veterans, with at least 25% disability, and whose property

EXHIBIT 3



**City of
Montgomery, Alabama**

BOBBY N. BRIGHT
Mayor

MONTGOMERY CITY COUNCIL
MRS. ALICE D. REYNOLDS-Price
JAMES A. NUCKLES-Price, Pro Tem
WILLIE COOK
TERANCE D. DAWSON
CHARLES W. JINRIGHT

TRACY LARKIN
B. J. (BEN) MCNEILL
P.E. (PEP) PILGREEN
CHARLES W. SMITH

*TO: Dom
From: J02*

SECOND NOTICE

9-26-2000

June 30, 2000

**EZ Talk Communications LLC
Attn: Mr James Brown, Gen Manager
4727 South Main
Stafford TX 77477**

Dear Mr Brown:

The Alabama State Legislature under State Code Title 11-51-128 gives municipalities the authority to assess and collect an annual license fee from persons operating telephone exchanges and/or long distance lines in Alabama for the privilege of doing intrastate business within the limits of each municipality. You are listed as a local service provider in the Bell South Telephone Directory, and are regulated by the Alabama Public Service Commission.

Based on the above facts, we feel a business license is required in order to provide these services to Montgomery citizens. We are, therefore, including an application which you are requested to complete and return along with your check for \$12,005.00.

Should you have any question, please contact me at 334-241-2085.

Your prompt attention is appreciated.

Sincerely,

**Georgia Wise
Revenue Examiner**

Enc

cc: **Mrs Carolyn Mazingo
Chief Revenue & License Officer**

EXHIBIT 4



Andrew Isar, Director — State Affairs
aisar@millerisar.com

Via Priority Mail

August 3, 2000

Mrs. Carolyn R. Mozingo
Chief Revenue and License Officer
City of Montgomery, Alabama
Department of Finance
Post Office Box 1111
Montgomery, AL 36101-1111

RE: Montgomery License Ordinance 48-91

Dear Ms. Mozingo:

The Association of Communications Enterprises (ASCENT), on behalf of its members and in anticipation of the City of Montgomery's (City) pending review of Fast Phones, Inc.'s City business license ordinance appeal, hereby urges the City to reconsider its policy governing the City's assessment of a flat annual exchange license fee assessment on competitive local service providers, without regard to the extent of the company's operations in Montgomery. Despite the City's apparent statutory authority to impose a flat exchange license fee on all service providers, the City's current assessment policy is not a matter of statutory obligation, remains harshly inequitable, will surely cause an exodus of current providers, and will preclude new companies from serving Montgomery residents. Moreover, the City's fee assessment policy will deprive residents from realizing the benefits of competition, contrary to pro-competitive federal and state policies.

Although ASCENT recognizes that statutory authority to impose a *maximum* annual \$12,000 exchange license fee resides in Ala. Code §11-51-128, Alabama law *does not mandate* that municipalities with a population in excess of 175,000 impose the maximum exchange license fee on all local exchange service providers. Clearly, Alabama municipalities, including the City, maintain full discretion as to the application of its exchange license fee. Regrettably, the City has elected a "one size fits all" approach which fails to distinguish between the operations of BellSouth, a dominant carrier which serves tens of thousands of Montgomery residents, utilizing a physical network which occupies City rights of way, and the operations of new small entrant providers, such as

Mrs. Carolyn R. Mozingo
August 3, 2000

Page 2

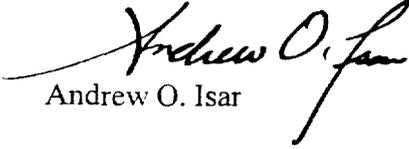
many Association members, who serve perhaps a few dozen subscribers, typically without their own networks or use of City rights of way.¹

Inflexibility in the application of a flat exchange license fee serves no one, save BellSouth. Service providers will choose not to provide service Montgomery, finding that the cost of serving customers will easily exceed the revenues obtained from Montgomery subscribers. Their departure will guarantee that the City ultimately receives no exchange license fees from those entity and other companies who will elect not to serve City residents, where a more tempered approach would guarantee that the City would receive reasonable license fees from numerous serving carriers. Ultimately, City residents will have few, if any, realistic local service alternatives to BellSouth, creating little incentive for BellSouth to lower rates and improve service, while perpetuating BellSouth's former monopoly dominance and control over captive subscribers. It is inconceivable that the City would wish to promote such a scenario.

We strongly urge the City to impose an equitable exchange fee that is based on the extent of a service provider's operations and use of City rights of way. For example, assessments could be based on a percentage of company revenues derived from City residents served by the provider, tempered by whether the provider relies on city rights of way to serve subscribers. In no instance should companies face what currently is an \$80.00, \$100.00, or higher per subscriber assessment, simply for the right to provide competitive services to the public under the City's current policy, particularly when no City rights of way are involved. A more flexible approach, as proposed herein, will result in healthy long-term financial benefits for the City, and innovative, lower cost service alternatives for consumers, and the promotion of competition. If the City nevertheless remains adamant in upholding its current assessment policies, we would appreciate an understanding of the rationale behind the City's current policy.

Sincerely,

Association of Communications Enterprises


Andrew O. Isar

¹ Presuming that BellSouth serves 150,000 Montgomery subscribers, the current exchange access fee would equate to \$0.08 per subscriber *per annum*, an amount that pales in comparison to the \$80.00 per subscriber *per annum* that would apply to the local exchange provider serving 150 Montgomery subscribers.

EXHIBIT 5

DEFENDANT'S COPY

MONTGOMERY MUNICIPAL COURT
AFFIDAVIT/COMPLAINT

Warrant Number
241-5427
Case Number

OFFENSE: Engaging In Business Without a License
DEFENDANT'S NAME: Richard Keeshan (First Choice Communications)
Director of Reg. Affairs
DATE AND TIME OF OFFENSE: June 5, 2000 AT 10:00 A.M. P.M.
PLACE OF OCCURRENCE: 500 S Richardson Rd
PERSON OR PROPERTY ATTACKED: City of Montgomery
HOW ATTACKED:
DAMAGE DONE OR INJURIES RECEIVED:
VALUE OF PROPERTY: \$12,005.00

DETAILS: (PLEASE BE SPECIFIC) The First of June 2000 I received a notice in the mail at my residence from First Choice Communications advertising as a local phone service alternative, selling through all Quik Pawn Shops. June 5, 2000, I wrote a letter to the Company address at 500 S Richardson Rd advising them of the City license requirements and providing the license application to be completed (CONTINUE ON BACK IF NECESSARY)

I make this affidavit for the purpose of securing a warrant against the said defendant, and I understand that I am instituting a criminal proceeding and cannot drop the charges. I further understand that if any of the foregoing facts are untrue, I may, in addition to the other punishment provided by law, be taxed with court costs in this proceeding.

COMPLAINANT INFORMATION

Name of Complainant: Georgia Wise, Revenue Examiner Telephone Number: 241-2085
Address: 59 Monroe St. (City Hall) City: Montgomery State: Al Zip Code: 36104
Name of Employer: City of Montgomery Finance Dept Employer's Telephone Number: 241-2036
Address: same as above City: State: Zip Code:

Georgia Wise
COMPLAINANT'S SIGNATURE

Sworn to and subscribed before me this 21 day of July 2000

[Signature]
MAGISTRATE, MONTGOMERY MUNICIPAL COURT

DEFENDANT IN CUSTODY: YES NO

And returned. I received no response.

I stopped at the Quik Pawn on Norman Bridge Road in June and the Manager gave me a brochure on the phone service. He also made a phone call to the main office, stating that I was there regarding license. His response was that they were looking into it.

June 28, 2000, I mailed a certified citation requesting they appear at City Hall by July 14, 2000 to show cause why they should not pay such license fee, at the same time advising that failure to comply would result in further legal action.

On Friday July 14, 2000 I saw a commercial on Channel 14 advertising this company.

On July 20, 2000 I called the Quik Pawn Shop at 1857 Mt Meigs Rd and spoke with Ron Walker. Mr. Walker told me the phone service in question was \$69.95 for connection and \$49.95 per month. He was not aware that I was with the City.

First Choice Communications is permitted by Ala Public Service Commission and is listed in the Bell South Telephone Book as a local telephone service provider.

To date I have had no response from this company.

WITNESSES - LIST ADDITIONAL WITNESSES ON THE WARRANT OF ARREST

Name		Telephone Number	
Address	City	State	Zip Code
Name of Employer		Employer's Telephone Number	
Address	City	State	Zip Code
Name		Telephone Number	
Address	City	State	Zip Code
Name of Employer		Employer's Telephone Number	
Address	City	State	Zip Code

Association of Communications Enterprises
January 18, 2001
City of Montgomery, Alabama

EXHIBIT 6

NOW COMMUNICATIONS, INC.

R. Scott Seab ~ Vice President, Regulatory Affairs
Legal Office Phone: 719.633.3059

August 9, 2000

City of Montgomery
Ms. Georgia Wise
P.O. Box 1111
Montgomery, AL 36101-1111

Re: Annual License Fee

Dear Ms. Wise:

NOW Communications, Inc. (NOW) is a certified competitive local exchange carrier in the State of Alabama. This letter is regarding your letter dated June 20, 2000, which indicated that the City of Montgomery imposes an annual license fee of \$12,000 upon local exchange carriers. NOW has determined that it has 40 residential customers within the city limits of Montgomery. NOW understands that, without regard to the size of the company or the number of customers served in the city, the \$12,000 annual fee is required to be paid. Both BellSouth, with its millions of customers and billions in profits each year, and NOW, which struggles daily for its existence, have to pay the same fee. It takes less than even common sense to see the unfairness with that fee.

NOW is a small (less than 100 employees) company dedicated to serving those residential customers who cannot obtain basic local phone service from the incumbent carrier (BellSouth) due to past or current credit problems. Without NOW and companies like NOW, those customers would have no ability to stay in touch with friends, family, employers, or to access police and fire emergency services (without having to find a public payphone or friend's phone).

This annual fee, if not subject to modification or negotiation, will serve to further impede those customers' ability to enjoy home telephone service as companies such as NOW leave your city. NOW is willing to pay its fair share of taxes and fees, but it simply makes no business sense to pay \$12,000 to Montgomery for the "privilege" to market to and serve its very few customers. Accordingly, this letter serves as notice that NOW is ceasing to operate its local exchange services in the City of Montgomery.

Sincerely,

CC:
Larry W. Seab, CEO
Robin Laurie, Esq.

711 South Tejon Street, Suite 201
Colorado Springs, Colorado 80903
Email: rss@nowcommunications.com
eFax.com: 719 623 0287

EXHIBIT 7



City of
Montgomery, Alabama

EMORY FOLGAR
Mayor

MONTGOMERY CITY COUNCIL

S. ALICE D. REYNOLDS-Prod.
BILLY M. TURNER-Prod. Pro Tem
MARK GILMORE, JR.
LEU HAMMONDS
CHARLES W. TOWRIGHT

B. J. GREN MCNEILL
P. E. (Pete) PELGREEN
ICE L. REED
SIDNEY T. WILLIAMS

August 11, 1998

Ms. Jennifer E. Sikes
Paralegal
1-800-Reconex
2500 Industrial Avenue
Hubbard, OR 97032

Dear Ms. Sikes:

Thank you for your letter of July 29th regarding City of Montgomery business license. I apologize for my delay in responding.

Since our initial communication, I have discussed your situation, as well as others, with our Legal Department and City Finance Director. It is their consensus that a gross receipts license would be more equitable for service re-sellers.

At the present time, our attorneys are drafting possible additions to our license ordinance that would apply to the licensing of re-sellers. I will contact you when this becomes official. In the meantime, 1-800-Reconex can continue to operate as usual.

Again, I appreciate your cooperation in this matter.

Sincerely,

Mrs. Carolyn R. Mazingo
Chief Revenue and License Officer

CRM/rnh

EXHIBIT A
PAGE 1 OF 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of:)
)
ASSOCIATION OF COMMUNICATIONS)
ENTERPRISES)
)
Petition for Preemption Pursuant to Section)
253 of the Communications Act of 1934)
of Actions of the City of Montgomery,)
Alabama)

CERTIFICATE OF SERVICE

I, Andrew O. Isar, hereby certify that I have caused to be filed with the Secretary, Federal Communications Commission the Petition for Preemption Pursuant to Section 253 of the Communications Act of 1934 of Actions of the City of Montgomery, Alabama of the Association of Communications Enterprises and caused a copy of the foregoing to be served upon the following parties by United States mail, first class postage prepaid, on this 18th day of January, 2001.

Mr. Bobby N. Bright
Mayor
City of Montgomery, Alabama
Post Office 1111
Montgomery, Alabama 36101-1111

Mr. Bill Pryor
Attorney General
Office of the Attorney General
Alabama State House
11 South Union Street, Third Floor
Montgomery, Alabama 36130

Commissioner Jim Sullivan
President
Alabama Public Service Commission
100 North Union Street, Suite 800
Montgomery, Alabama 36104

International Transcription Service
1231 20th Street, NW
Washington, D.C. 20036


Andrew O. Isar