

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

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Petition of the Association of
Communications Enterprises
for Preemption of Montgomery,
Alabama Tax Policy

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CC Docket No. 01-40

COMMENTS OF THE CITY OF MONTGOMERY

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March 19, 2001

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SUMMARY OF COMMENTS

The Association of Communications Enterprises (“ASCENT”) has filed a Petition for Preemption and Declaratory Ruling (“Petition”) before the Commission in an effort to prevent the enforcement of Section 19C-21(i) of the municipal code (“the Ordinance”) of the City of Montgomery (“the City”), which assesses an annual license tax on telecommunications companies operating on an intrastate basis within the City. The Ordinance was promulgated by the City pursuant to authority delegated it by the Alabama State Legislature in Section 11-51-128 of the Alabama State Code, and is used to fund, in part, the annual operating budget of the City.

In its Petition, the ASCENT contests the legality of the Ordinance, arguing that it is an “economic barrier” that impedes competitive market entry in violation of Section 253 of the Communications Act of 1934, as amended (“the Act”). As clearly shown herein, the Commission must deny ASCENT’s Petition.

First, Section 601(c)(2) of the Act (the State Tax Savings Provision) clearly prohibits the Commission from preempting state or local regulations pertaining to taxation, with limited exceptions. Those limited exceptions relate to state or local regulations purporting to tax “direct-to-home satellite services” (Section 602), cable franchise fees (Section 622), or cable “open video systems (Section 653(c)), none of which are implicated in the City’s Ordinance. Thus, the Commission has no choice but to deny ASCENT’s Petition based upon Section 601(c)(2).

Second, contrary to ASCENT’s misleading declarations, two legal proceedings regarding the subject matter of ASCENT’s Petition and specifically addressing Section 253 preemption are currently ongoing before an Alabama state court of competent jurisdiction. These two legal proceedings were initiated by a member of ASCENT, whose rights ASCENT claims to represent in

the instant proceeding. In the interests of judicial finality and general respect for notions of federalism, the Commission should deny the Petition based upon the fact that the issues enumerated in the instant proceeding are already pending before an Alabama State court.

The Commission is also justified in denying the Petition for lack of ripeness as the Section 601(c)(2) State Tax Savings Provision is the subject of a Notice of Inquiry currently pending before the Commission.

Finally, ASCENT has failed to meet its burden in establishing the legal basis for Commission preemption. Contrary to ASCENT's allegations, the Ordinance, taken in isolation, does not facially prohibit or have the effect of prohibiting competition in the City in violation of Section 253(a) of the Act. In the alternative, the Ordinance is assessed on a competitively neutral basis as a necessary requirement for the protection of public safety and welfare of the City's citizens and thus fits as a Section 253(b) exception to Section 253(a).

For the foregoing reasons, the Commission must deny ASCENT's Petition.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Petition of the Association of)
Communications Enterprises) CC Docket No. 01-40
for Preemption of Montgomery,)
Alabama Tax Policy)

**COMMENTS OF THE CITY OF MONTGOMERY IN OPPOSITION
TO PETITION FOR PREEMPTION AND DECLARATORY RULING**

The City of Montgomery (“the City”), by its attorneys, respectfully submits the following comments in response to the Commission’s *Public Notice* released on February 16, 2001, in the above captioned matter.¹ As demonstrated below, the Petition for Preemption and Declaratory Ruling (“Petition”) of the Association of Communications Enterprises (“ASCENT”) must be denied.

I. INTRODUCTION

In its Petition, ASCENT challenges the legality of the City’s taxing authority, denoting it an “economic barrier” that impedes competitive market entry in violation of Section 253 of the Communications Act of 1934, as amended (“the Act”).² As clearly shown below, the Commission must deny ASCENT’s Petition for the following reasons: (1) Section 601(c)(2) of the Act, the State Tax Savings Provision, clearly prohibits the Commission from preempting state, local and municipal tax authority; (2) ongoing proceedings impacting issues raised in this docket are currently pending

¹ *In re* Petition of ASCENT for Preemption of Montgomery, Alabama Tax Policy, *Public Notice*, CC Dkt. No. 01-40, DA 01-460 (Feb. 16, 2001).

² 47 U.S.C. § 253 (2000).

before both an Alabama State court and this Commission; and (3) ASCENT has failed to meet its burden in establishing the legal basis for Commission preemption.

With a population of approximately 200,000, the City is the capital of Alabama and is located in the south-central part of the State. As a partial funding mechanism of the City's operational budget, the City assesses an annual license tax of \$12,000 on telecommunications companies operating a telephone exchange or exchanges within the City, and an annual license tax of \$3,000 on long distance companies offering intrastate long distance telecommunications services within the City.³ The City's license tax was promulgated in compliance with Section 11-51-128 of the Alabama State Code⁴ and is a proper exercise of the City's constitutional taxing authority over telecommunications carriers for the privilege of conducting intrastate business within the City.

II. SECTION 601(C)(2) CLEARLY PROHIBITS THE COMMISSION FROM PREEMPTING THE CITY'S TAX LICENSING ORDINANCE

The Act's State Tax Savings Provision, Section 601(c)(2),⁵ clearly precludes the Commission from preempting the City's license tax.

Section 11-51-128(a)(23) of the Alabama State Code expressly grants each municipality in the State of Alabama with a population of 175,000 people or more the authority to tax, on an annual basis, local exchange licensees a sum of \$12,000, and long distance licensees a sum of \$3,000 for the privilege of conducting local and intrastate business with the municipality. As a municipality with almost 200,000 inhabitants, the City is clearly within its legal authority and in compliance with state

³ MONTGOMERY, ALA., CODE § 19C-21(i) (1991).

⁴ ALA. CODE § 11-51-128 (1975).

⁵ 47 U.S.C. § 601(c)(2) (2000).

law in its promulgation and enforcement of Section 19C-21(i) of the Montgomery City Code (“the Ordinance”), which does nothing more than simply restate the Alabama State Code provision. While ASCENT unjustifiably and inaccurately avers that the City has “abused its discretion” by imposing a license tax regime clearly permissible under Alabama State law, it compounds its error by requesting the Commission micro-manage the City’s tax regime by preempting the Ordinance under Section 253 of the Act. This is an action which is conclusively prohibited by Section 601(c)(2) of the Act.

Section 601(c)(2) states:

State tax savings provision - Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supercede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation . . .⁶

Thus, the Act clearly prohibits Commission preemption of state or local tax regulations such as the Ordinance. The Commission itself has recognized the importance of tax matters to state and local governments and the considerable constraints which Section 601(c)(2) has imposed upon it.

According to the Commission:

The assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments’ other functions. Virtually all businesses are subject to a wide array of State and local taxes, and there is no reason that telecommunications businesses should be any exception Indeed, we note that our legal authority to preempt State and local tax policies is extremely limited.⁷

⁶ *Id.*

⁷ *In re 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 Rulemaking and Amendment of the Commission’s Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Local Taxes and Assessments, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice*

Thus, while the Commission has voiced concern over the potential anti-competitive effects of state or local taxation of telecommunications enterprises,⁸ the Act expressly prohibits it from preempting regulations implementing state or local tax regimes except in the case of limited exceptions which have no application here.⁹

In addition, the granting of ASCENT's Petition would not only violate the Act, it would also have severe repercussions on every state, local and municipal tax mechanism in the United States. By inviting the Commission to rule on the appropriateness of the application of the Alabama State Code *vis-a-vis* the Ordinance, ASCENT is really requesting that the Commission establish itself as the ultimate arbiter of the properness of every state or local tax regulation in the United States that assesses a fee upon telecommunications carriers. ASCENT erroneously refers to the Ordinance as an "economic barrier" to competition. A license tax is not an economic barrier, it is a legal obligation to fund the common good. If the Commission allows ASCENT to succeed in branding the Ordinance as an "economic barrier" under Section 253, the Commission will in effect be opening the door to the claim that virtually all state and local taxes are "economic barriers". This is a path that Section 601(c)(2) has forbidden the Commission, and for good reason.

of Proposed Rulemaking and Notice of Inquiry in WT Dkt. No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Dkt. No. 96-98, WT Dkt. No. 99-217 and CC Dkt. No. 96-98, ¶¶ 81-84 (July 7, 1999) ("NOP").

⁸ *Id.* at ¶¶ 81 and 84.

⁹ Section 601(c)(2) identifies three limited exceptions where the Commission may preempt state or local tax regulations. Those limited exceptions relate to state or local regulations purporting to specifically tax "direct-to-home satellite services" (Section 602), cable franchise fees (Section 622), or cable "open video systems (Section 653(c)), none of which are implicated in the City's Ordinance. None of these exceptions apply to the case at hand. Moreover, beyond these three exceptions, the Commission has no authority whatsoever to preempt state or local tax regulations.

Since preemption by the Commission of state or local tax regulations is expressly forbidden by Section 601(c)(2) of the Act - subject to specifically enumerated exceptions which do not apply here - the Petition must be denied.

III. THE COMMISSION SHOULD DENY THE PETITION UNDER FEDERAL ABSTENTION AND RIPENESS DOCTRINES

Alternatively, the Commission should deny the Petition as a result of ongoing proceedings before both an Alabama State court and the Commission itself which are likely to impact the important issues present in this docket. Specifically, the Commission should dismiss the Petition on the basis of general federal abstention principles because an Alabama State court of competent jurisdiction is currently hearing both an appeal of a decision regarding the Ordinance rendered by the City of Montgomery Revenue and License Appeal Board (“City Board”) as well as a substantially similar complaint, both of which raise Section 253 preemption issues in significant part. In addition, the Commission should dismiss the Petition as unripe for decision, based upon the fact that the Commission itself is still collecting information relating to state and local taxation pursuant to the *NOI*.

A. The Commission Should Abstain From Reviewing the Petition Until Ongoing State Proceedings are Fully Adjudicated

In a statement that is erroneous at best and misleading at worst, ASCENT declares in its Petition:

Despite appeals of the City of Montgomery’s Ordinance, *in no instance* has the pivotal discriminatory, anti-competitive and unlawful application of the City of Montgomery’s telecommunications tax that is the instant Petition been considered.¹⁰

¹⁰ Petition at 8 (italics added).

As a point of fact, an ASCENT member, Fast Phones, Inc. (“Fast Phones”), not only challenged enforcement of the Ordinance before the City Board based upon Section 253 of the Act in which the City Board considered and rejected Fast Phones’ Section 253 argument, but Fast Phones has appealed that verdict to the Circuit Court for Montgomery County (“Circuit Court”).¹¹ In its appeal, Fast Phones has again raised the Section 253 preemption argument, but the case is currently pending and arguments have not been made as of the date of this filing. In addition, in a separate proceeding before the Circuit Court, Fast Phones has also filed a complaint requesting declaratory relief based in significant part upon Section 253 preemption.¹² As with the appeal, no arguments have been heard regarding the complaint as of the date of this filing. Therefore, in view of efficiency and conserving the Commission’s limited resources, the Commission should observe the federal abstention doctrine (discussed below) and allow the Circuit Court to complete its ongoing proceeding and resolve the matters pending before it.

The City urges the Commission to recognize and observe the principle of federal abstention as articulated in *Younger v. Harris* (“*Younger Abstention*”).¹³ According to the *Younger Abstention*, a federal court must abstain and dismiss a federal action if, (1) there is an ongoing state judicial

¹¹ See *Fast Phones, Inc. v. City of Montgomery Revenue and License Department, Final Judgment and Order*, City of Montgomery Revenue and License Appeal Board (Aug. 21, 2000) (attached as Exhibit A); *appeal docketed*, *Fast Phones, Inc. v. The City of Montgomery, Alabama*, Case No. CV-00-2507-MC (in the Circuit Court of Montgomery County) (filed Sept. 26, 2000) (attached as Exhibit B).

¹² See *Fast Phones, Inc. v. The City of Montgomery, Alabama*, Case No. CV-00-2508-PR (in the Circuit Court of Montgomery County) (filed Sept. 26, 2000) (attached as Exhibit C).

¹³ See 401 U.S. 37 (1971). While the *Younger Abstention* originally applied to federal courts abstaining to pending state criminal prosecutions, it has been extended to civil matters, including pending state administrative matters. See, e.g., *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986).

proceeding, (2) the state judicial proceeding implicates important state interests, and (3) the state judicial proceeding affords the federal plaintiff an adequate opportunity to raise federal questions.¹⁴

In the instant case, all three prongs of the *Younger Abstention* are satisfied. As indicated above, two separate cases directly invoking Section 253 are currently pending before the Circuit Court. As such, the first prong of the *Younger Abstention*, an ongoing state judicial proceeding, is satisfied.

As the Ordinance implicates an important state interest, *i.e.*, a local government's authority to tax its citizens for the common good, the second prong of the *Younger Abstention* is also satisfied. The Ordinance derives from Section 11-51-128 of the Alabama State Code, by which the State of Alabama has delegated authority to collect privilege and license taxes on telecommunications carriers to Alabama municipalities to fund their operations in the public interest.¹⁵ Thus, the Ordinance clearly serves an important state interest and satisfies the second prong of the *Younger Abstention* by assisting in the critical funding of the City's daily operations (*e.g.*, funding of such institutions as the police, fire department, schools, *etc.*).

As to the third prong, Fast Phones has not only raised its Section 253 preemption argument in its appeal of the City Board ruling, it has filed a complaint in a separate proceeding before the Circuit Court requesting declaratory relief under Section 253 as well. Clearly, the Circuit Court is providing an appropriate forum for the adjudication of Fast Phones' federal claim.

¹⁴ See *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 223 (9th Cir. 1994).

¹⁵ ALA. CODE § 11-51-128 (1975).

As evidenced above, the instant case satisfies the three prongs of the *Younger Abstention*. Thus, the City urges the Commission to recognize and follow the federal abstention doctrine and abstain from considering the Petition until the Circuit Court proceeding is completed.

B. The Petition is Not Yet Ripe for Commission Review Due to Its Ongoing NOI

The City also urges denial of the Petition as it is not yet ripe for review due to ongoing Commission proceedings pertaining to the Act's State Tax Savings Provision discussed above. Previously, the Commission indicated that while it was concerned about the potential anti-competitive effects of state or local taxation on market entry, its legal authority to preempt state and local tax policies is extremely limited.¹⁶ As a result, the Commission initiated the *NOI*, requesting comments on the nature and prevalence of State and local tax burdens on telecommunications service providers.¹⁷ As such, the claims asserted in the Petition are not ripe for review by the Commission because the Commission has not yet been able to assess the scope of the specific exemptions from the State Tax Savings Provision.¹⁸ At the very least, until the Commission has concluded the ongoing *NOI* proceeding, the instant Petition is not yet ripe for review and should be denied.

**IV. ASCENT HAS NOT ESTABLISHED A LEGAL BASIS
FOR PREEMPTION UNDER SECTION 253 OF THE ACT**

Notwithstanding that Section 601(c)(2) of the Act definitively proscribes the Commission from preempting state or local tax laws, the Commission should also deny ASCENT's Petition based

¹⁶ See *NOI* at ¶ 84. As previously indicated the three exceptions which would permit Commission preemption of state or local tax regulations are not relevant in the instant proceeding in any event. See *supra* at 3-4 and n. 9.

¹⁷ See *NOI* at ¶ 84.

¹⁸ See *supra* at 3-4 and n. 9.

upon the fact that ASCENT has not established a legal basis for preemption of the Ordinance under Section 253 of the Act. ASCENT does not offer a single shred of probative evidence that the Ordinance, in fact, is stifling competition in the City or that it has forced carriers to leave the market. Rather, as discussed below, ASCENT's Petition is rife with presumptions and accusations unsupported by any factual evidence.

A. Commission Preemption Analysis

The Commission established the basis of its analysis for determining whether to preempt state or local laws under Section 253 of the Act in the *Texas Preemption Order*.¹⁹ In that proceeding, the Commission stated:

Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone. If we find that it violates section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under section 253(b). If a law, regulation or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with section 253(d). If, however, the challenged law, regulation or legal requirement satisfies subsection (b), we may not preempt it under section 253, even if it otherwise would violate subsection (a) considered in isolation. This is consistent with the approach taken in prior Commission orders addressing section 253.²⁰

Thus, the Commission must first determine whether the Ordinance on its face and standing in isolation prohibits or has the effect of prohibiting “the ability of any entity to provide any interstate or intrastate

¹⁹ See *In re* The Public Utility Commission of Texas, The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, CCBPol 96-13, CCBPol 96-14, CCBPol 96-16 and CCBPol 96-19, ¶¶ 41-45 (Oct. 1, 1997) (“*Texas Preemption Order*”).

²⁰ *Id.* at ¶ 42 (citations omitted).

telecommunications service.”²¹ If the Commission determines that the Ordinance is facially valid, then the Petition for preemption will fail. If, however, the Commission rules that the Ordinance is facially invalid, then the Commission will determine whether application of the Ordinance satisfies one of the exceptions to Section 253(a) enumerated in Section 253(b) of the Act. If the Ordinance fits into one of the exceptions set forth in Section 253(b), then the Commission will deny preemption. As demonstrated below, ASCENT’s Petition fails in every aspect to set forth the legal basis for Commission preemption of the Ordinance.

B. The Ordinance is Facially Valid Under Section 253(a) of the Act

As previously discussed, the Ordinance is simply a codification at the local level of a delegation of Alabama State authority to collect and enforce a license tax on telecommunications companies operating on an intrastate basis in the City. The Ordinance sets forth two, clear, annual flat license taxes, one on local exchange companies and one on long distance companies. The companies pay their taxes and in return they obtain licenses to provide telecommunications services in the City. The companies are not required to complete any kind of onerous application, attend hearings, or provide burdensome supporting financial, technical or managerial documentation, or do anything else but simply write a check. Quite simply, there is nothing about the Ordinance that facially prohibits carrier entry into the City’s telecommunications marketplace.

ASCENT alleges that the Ordinance has “the effect of economically precluding all but the largest companies” from the City’s market, but ASCENT offers nothing in the way of proof except a host of presumptions and hyperbole. For example, ASCENT proffers the vignette of NOW Communications, Inc. (“NOW”) - the ONLY “concrete” example that ASCENT offers in support

²¹ 47 U.S.C. § 253(a).

of its allegations - a competitive local exchange carrier operating in the City. In offering NOW as an example, ASCENT supplies no financial documentation in support of its position, but rather “presumes” that NOW charged only \$49.95 per month per subscriber and only for prepaid local services (conveniently ignoring possible set-up charges as well as charges for a potentially wide range of other telecommunications services that the company might additionally offer).²² ASCENT is asking the Commission to presume, without any supporting documentation, that one company may or may not have made a certain amount of profit from a given number of consumers in the City, and the Ordinance may or may not have added to that company’s financial burden, and on that basis take the extraordinary step of preempting the Ordinance as a violation of Section 253(a). Such a request must fail for lack of evidence.

Contrary to ASCENT’s unfounded averments, the City’s telecommunications marketplace is quite vibrant for a municipality of its size. According to the City’s Chief Revenue and License officer, there are currently 15 providers of telecommunications services operating in the City that are properly licensed, and one more provider is currently entering the market (*see* Exhibit D). The actual number of competitors is actually larger when delinquent carriers such as Fast Phones and NOW are included in the count. In any event, sixteen telecommunications companies competing against each other for customers in a city of only 200,000 people presents, contrary to ASCENT’s unsupported accusations, a dynamic competitive milieu.

Therefore, as ASCENT has made no showing that, taken in isolation, the Ordinance facially prohibits or has the effect of prohibiting competition in the City, the Petition fails the first prong of the *Texas Preemption Order* and must be denied.

²² Petition at 15.

C. The Ordinance Constitutes a Competitively Neutral License Tax Regime Under Section 253(b) Necessary to Protect the Public Safety and Welfare

Even assuming *arguendo* that the Ordinance violates Section 253(a) standing in isolation - the City vehemently argues that it does not - the Ordinance still passes the second prong of the *Texas Preemption Order* because the Ordinance is assessed on a competitively neutral basis to safeguard the public safety and welfare of the City's citizens. Thus, the Ordinance satisfies an exception to Section 253(a) enumerated in Section 253(b) of the Act.

The Ordinance is competitively neutral in that it is assessed on a flat tax basis. All local exchange carriers pay the exact same amount as their competitors, and all intrastate long distance companies pay the same amount as their competitors. The City views this flat tax approach as the simplest, fairest mechanism for collecting the annual license tax, a mechanism approved by the Alabama State Legislature and legally delegated to the City by statute.²³

The Ordinance was established for the singular purpose of funding, in part, the City's annual operating budget. The operating budget is utilized by the City to fund essential government functions, including but not limited to the police department, fire department and schools. It is obvious that the City's funding of law enforcement, fire safety and the educational system easily fits within Section 253(b)'s exemption to Section 253(a) for requirements necessary to preserve "public safety and welfare". ASCENT is requesting in its Petition that the Commission substitute its judgment for that of the City and determine from afar how the City can best fund its unique, local

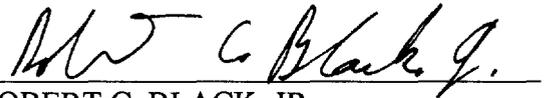
²³ If the Ordinance is deemed to constitute an entry barrier subject to preemption by virtue of its "flat" nature, then the flat filing fees of a wide number of states would be subject to preemption. Even the Commission's own filing fee system (47 C.F.R. § 1.1101 *et. seq.*) would constitute an unfair barrier to entry under such an analysis.

municipal needs. Such a request must fail as a clear violation of the principles of federalism in addition to the public safety and welfare exemption of Section 253(b).

V. **CONCLUSION**

For the reasons demonstrated above, the Commission must deny ASCENT's Petition.

Respectfully submitted,



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Dated: March 19, 2001

EXHIBIT A

**BEFORE THE REVENUE AND LICENSE APPEAL BOARD
OF THE CITY OF MONTGOMERY, ALABAMA**

FAST PHONES, INC.,
Petitioner,

v.

**CITY OF MONTGOMERY REVENUE
AND LICENSE DEPARTMENT,**
Respondent.

FINAL JUDGMENT AND ORDER

The Revenue and License Appeal Board of the Revenue and License Department of the City of Montgomery, Alabama, after having been presented with the Petitioner's appeal, after having conducted an evidentiary Hearing with respect to such appeal whereby testimony, exhibits, and argument were presented by the Petitioner as well as by the Respondent, and after having duly considered all of the same, find that the appeal by Fast Phones, Inc. is due to be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Fast Phones, Inc. (hereinafter "Fast Phones") has appealed the assessment of its City of Montgomery business license tax under License Ordinance 48-91, § 19C-21i. This section imposes a license tax on entities which "operate a telephone exchange or exchanges within the City of Montgomery." *Id.* The purpose of the statute is to license telephone exchanges for the privilege of doing intrastate business within the limits of the municipality, based upon set fees according to the municipality's population.

2. At issue here is whether Fast Phones, for purposes of the statute, operates a telephone exchange within the city. Fast Phones claims that it does not, and thus the assessment of the license tax under § 19C-21i is improper. However, this question has been definitively settled by both the Alabama Court of Civil Appeals and the Alabama Supreme Court in the case of *Dial Tone, Inc., v. The City of Montgomery*, [Ms. 2985102, December 17, 1999, cert denied, Ms. 1990856, June 16, 2000], ___ So.2d ___ (1999). Moreover, because the undisputed evidence shows that Fast Phones does in fact operate a telephone exchange, the license tax assessment is proper and is due to be upheld by this Board.

3. Fast Phones leases local telephone lines from Bellsouth and provides local phone service to customers in competition with other providers, including Bellsouth itself. The thrust of the company's argument appears to be that because it leases existing lines and resells them to customers, it should not be considered as an operator of a telephone exchange. The company contends that the term "telephone exchange" denotes merely the physical equipment involved in connecting customers; it also argues that it does not "operate" a telephone exchange as defined under the revenue statute, contending that it does not cause the telephone equipment it uses to function, i.e., repair the equipment, and does not direct or manage the equipment.

4. On Thursday, August 13, 1998, proceedings were taken before the Alabama Public Service Commission regarding Fast Phones's application for a certificate of public convenience and necessity to provide local exchange communication services in the State of Alabama; Fast Phones attended this proceeding. At this proceeding Thomas Adair, President and Secretary of Fast Phones, was asked what type of service Fast Phones proposed to offer the people of Alabama, and he responded, "competitive local exchange service." (See, APSC Proceedings, p. 5). Adair testified that Fast Phones maintains a central office at 4341 Virginia loop Road in Montgomery, Alabama. (Proceedings, pp. 3, 4 and 6). Fast Phones will have sales offices at five (5) locations of the Fast Cash Title Exchange Offices in Montgomery. (Proceedings, p. 7).

5. Adair also testified that, like other phone companies, Fast Phones provides support mechanisms for its customers in Alabama. He stated that Fast Phones would have a 1-800 number that customers could call 24 hours a day if they have problems, or the customers could also walk into the office between 9:00 and 6:00 if they had a problem or to pay their bill or to discuss their bill. (Proceedings, p. 9).

6. The report and order issued by the APSC contains evidence that the company is an operator of a telephone exchange. As noted on p. 1 of the report:

"IT IS THEREFORE ORDERED BY THE COMMISSION, That a Certificate of Public Convenience and Necessity is hereby issued to Fast Phones, Inc. . . . authorizing operations as a provider of Resold Local Exchange telecommunications services in all areas of the state of Alabama...."

It is apparent that Fast Phones is considered an operator of a telephone exchange by the Alabama Public Service Commission, and the City of Montgomery did not err in assessing a license tax as a result.

7. Fast Phones contends it should not be considered an operator of a telephone exchange because it has no plans to build its own switching network. However, Fast Phones neglects to mention that it has ownership interests in the switching systems it uses, which are built by other phone companies such as Bellsouth. In the Letter of Transmittal to the APSC dated July 6, 1998, Ashley Allen, as representative for Fast Phones, Inc., represented to the APSC that lines would be

"purchased" from Bellsouth for resale.¹ (See APSC Transmittal Letter dated July 6, 1988). Therefore, while Fast Phones argues that it does not "own" any equipment, it is undisputed that Fast Phones does, in fact, have a leasehold ownership interest in the equipment. It is also undisputed from Adair's own testimony that Fast Phones manages or conducts the use and/or repair of those leased facilities through both its offers of service and its service contract with Bellsouth. This argument is not agreed with by this body.

8. Moreover, after the APSC granted Fast Phones a certificate of public convenience and necessity, it further ordered that the services therein authorized could be commenced only after the company had filed its final tariff with the Public Service Commission. A review of the tariff filed by Fast Phones to operate in the state, provides further support for the position that Fast Phones is an exchange operator. Section 3 therein discusses Fast Phones's service description. As Fast Phones says of itself:

"3.1 Local Exchange Services

Fast Phones provides local touch tone local exchange service on a pre-paid, flat rate basis only"

This means that Fast Phones is in the business to allow the customer to:

- place or receive calls to any calling station in the local calling area
- access basic 911 emergency service is available in the customer's area
- places or receive calls to 800 telephone numbers.
- Local line provides the customer with a single, voice grade communications channel. Each local line will include a telephone number.
- Each local line customer is provided with only basic local telephone service.
- Optional Features:

Call Forwarding (ESM);
Customer control of call Forwarding don't answer (GJC);
Call Return (NSS);
Call Waiting (ESX);
Three-way calling (ECS);
Call Block (NOB);
Call Selector (NSK);

¹It is expected that what she meant to say is that the lines would be leased from Bellsouth, as opposed to purchased.

Call Tracing (NST);
Repeat Dialing (NSQ)
Memory Call (MBBRX)
Caller ID Deluxe (NXM)
Non-Published Number;
Inside Wire Maintenance

(See, Section 4.3 of Tariff)

9. It is clear from both the authority granted by the Alabama Public Service Commission and the tariff filed by Fast Phones itself that Fast Phones is offering telephone exchange services. Fast Phones has the ability to both provide and terminate phone service to its customers. Therefore, it is clear that Fast Phones must direct the operation of and/or use of the lines that connect its customers to telephone service. It is difficult to see how Fast Phones could not be considered an operator, as the company offers the same basic services as any other local telephone company, all of whom are paying license taxes.

10. Fast Phones argues that the license tax is unconstitutional because it is based upon the population of the City, rather than an element inherent in the business being taxed. The reason for this is simple: the population of the city represents all potential customers for the business being taxed, and the business is being issued a license to serve these customers, up to and including the entire population of the City if the business is that successful. Although Fast Phones has argued that their rates are higher than Bellsouth and that they take customers that Bellsouth does not want, a Montgomery citizen still has the option to choose either or any company. The statute's classification by population size is thus rationally based and constitutional.

11. Lastly, Fast Phones argues that the business license ordinance is invalid as an economic barrier to entry in violation of the Federal Telecommunications Act of 1996 (FTA). There is ample case law to support the position that the City of Montgomery's license ordinance is a permitted exercise of regulatory action allowed under the FTA safe harbor provision found in § 253(b).

12. Congress passed the FTA in 1996 "to end the monopolies in local telephone services and to benefit consumers by fostering competition between telephone companies in cities throughout the United States." See *AT & T Communications, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 585 (N.D. Tex. 1998). The portion of the FTA at issue here is § 253, entitled "Removal of Barriers to Entry," which states:

(a) In general

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 any interstate or intrastate telecommunications service.

(b) State Regulatory Authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers.

(c) State and Local Government Authority

Nothing in this section affects the authority of a 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 publicly disclosed by such government.

13. Section 253 thus preempts any state or local regulations that "prohibit or have the effect of prohibiting" any entity from providing telecommunications services, unless the regulations come within one of the two safe harbor provisions contained in §253 (b) or (c). Section 253(b) allows states to adopt, on a competitively neutral basis, regulations designed to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service, and safeguard the rights of consumers. While § 253(b) provides states with a broader grant of authority to regulate within the telecommunications industry, § 253(c) allows municipalities to regulate on a more limited basis. Specifically, municipalities may regulate under §253(c), in a competitively neutral basis, to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers.

14. Normally, the broader grant of regulatory authority in §253(b) is applicable only to states. However, municipalities are allowed to enjoy the authority of § 253(b) when a state has specifically delegated their state authority to the local government. It appears that every court examining the interplay of § 253 has come to this conclusion. See *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 1999 U.S. Dist. Lexis 16904, at 5 (S.D. Fla. 1999) ("In Section 253, Congress made a distinction between the authority of states in subsection (b) and local governments in subsection (c). While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, *unless of course a state specifically delegated the state authority to its local governments.*") (emphasis added); *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 814 n.23 (D. Md. 1999) ("Section 253(b) permits states to adopt 'competitively neutral' regulations 'necessary

to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.' This provision only applies to states, however, 'unless of course a state specifically delegated the state authority to its local governments.'" (emphasis added); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999); *AT & T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 582, 590 (N.D. Tex. 1998); *BellSouth Telecommunications v. City of Orangeburg*, 522 S.E. 2d 804, 807 (1999) ("Moreover, BellSouth's reliance on *AT & T Communications of the Southwest, Inc. v. City of Dallas*, for the proposition that a local governments power under § 253 (c) is strictly limited to managing the right of way is misplaced. In that case, the federal district court interpreted § 253 (c) and found municipalities 'absent explicit delegation by the state legislature...do not have the more general authority to regulate to protect public safety and welfare.'" (emphasis in the original).

15. This issue was addressed by the South Carolina Supreme Court in *BellSouth Telecommunications v. City of Orangeburg*. See 522 S.E. 2d 804. (1999). There, BellSouth contested the validity of the City's 1993 franchise ordinance, arguing that it exceed the locality's authority under 253(c) of the FTA. See *Id.* at 805. Under the South Carolina Code, municipalities were authorized to grant franchises, charging for the use of the public streets. See *Id.* at 806. The Court concluded that, because of the specific grant of authority given to the municipality under the Code, the franchise fee was proper. See *Id.* at 807.

"South Carolina has delegated to municipalities the power to enact ordinances 'necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it.' This power includes the ability to ensure that the grant of franchise privileges operates to the benefit of the public. City's ordinances merely requires BellSouth, as its franchisee, to make reasonable efforts to provide the service that is the subject of the franchise." See *Id.*

16. Similarly, the state of Alabama has delegated to municipalities the power to license business via Alabama Code § 11-51-90. This statute specifically authorizes municipalities to "license any exhibition, trade, business, vocation, occupation or profession not prohibited by the Constitution or the laws of the state which may be engaged in or carried on in the city or town." The power to license "may be used in the exercise of police power as well as for the purposes of raising revenue, or both." Because the state has specifically delegated the more general authority to regulate to protect public safety and welfare to municipalities, the City of Montgomery's licensing fee is governed by the broader grant of regulatory authority found in § 253(b).

17. The licensing fee is fully consistent with § 253(b). By imposing the same \$12,000 fee on any telecommunications provider, it is competitively neutral. This fee also ensures the fiscal responsibility and financial stability of any telecommunications provider seeking the privilege of

is it?
subject
to
interpretation

doing business within the City of Montgomery. As such, it preserves and advances universal service, protects the public safety and welfare, ensures the continued quality of telecommunications providers, and safeguards the rights of consumers. Through the FTA, Congress sought to ensure competition among telecommunications providers. However, Congress also recognized the needs of states to ensure that such competition did not come at the expense of a quality service being provided to its citizens. The City of Montgomery, in exercising the authority delegated to it by the state of Alabama, imposes a license fee upon telecommunications providers merely to ensure that.

CONCLUSION

A review of the undisputed evidence, most of which is from Fast Phones itself, shows that Fast Phones does in fact conduct, direct, or manage its lease hold ownership interest equipment necessary to connect its customers' telephones to function. Fast Phones has always held itself out to be a telephone exchange service provider, and it has applied for and received authority as such from the Alabama Public Service Commission. Therefore, it is clear that the City properly assessed a license tax under § 19C-21i, and Fast Phones's appeal is due to be dismissed.

As such, the Revenue and License Appeal Board does hereby **ORDER, ADJUDGE, and DECREE** that the Petitioner's appeal is due to be and is hereby denied.

DONE THIS the 21st Day of August, 2000.



Billy L. Carter, Esq.
Hearing Officer



D. Clynton Hart, Jr., C.P.A.
Hearing Officer

CC: Robert C. Black, Jr., Esq.
Doy Leale McCall, III, Esq.
HILL, HILL, CARTER,
FRANCO, COLE & BLACK, P.C.
425 S. Perry St.
P.O. Box 116
Montgomery, Alabama 36101-0116

Thomas R. Debray, Esq.
Carla Cole Gilmore, Esq.
KAUFMAN & ROTHFEDER, P.C.
2740 Zelda Road, 3rd Floor
Post Officer Drawer 4540
Montgomery, Alabama 36103-4540

EXHIBIT B

**IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA**

**FAST PHONES, INC., an Alabama
corporation,**)

Plaintiff,)

**THE CITY OF MONTGOMERY,
ALABAMA, a municipal corporation,**)

Defendant.)

CASE NO. CV-00-2507-MC

00 SEP 21 12:30
MONTGOMERY COUNTY

COMPLAINT AND APPEAL TO CIRCUIT COURT

COMES NOW Plaintiff Fast Phones, Inc., by and through counsel, and hereby appeals the decision and order of the Board of Revenue Appeals of the City of Montgomery, Alabama dated August 21, 2000, and states as follows:

FACTUAL ALLEGATIONS

1. Plaintiff Fast Phones, Inc. is an Alabama corporation with its principal place of business in the City of Montgomery, Montgomery County, Alabama.
2. Defendant City of Montgomery is a municipal corporation which imposes business license fees as a condition to conduct business within its corporate limits.
3. Plaintiff Fast Phones, Inc. is a "CLEC" (competitive local exchange carrier), an entity created pursuant to the authority of the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*
4. The business of Plaintiff Fast Phones, Inc. is that of a reseller of local telephone service/telecommunications.
5. Plaintiff Fast Phones, Inc. is properly authorized by the Alabama Public Service

Commission. to engage in operations as a provider of resold local exchange telecommunications service.

6. Pursuant to an agreement entered into by and between Plaintiff Fast Phones, Inc. and BellSouth created under the authority the Federal Telecommunications Act of 1996 and in accordance with the Rules and Regulations of Plaintiff Fast Phones, Inc.'s Alabama Telecommunications Tariff filed with the Alabama Public Service Commission, Plaintiff Fast Phones, Inc. is authorized to provide local exchange service communications in BellSouth's local exchange areas in the State of Alabama, including the City of Montgomery.

7. City of Montgomery License Ordinance 48-91, § 19C-21i, entitled "Special and Privilege License—Telephone Companies." imposes an annual business license fee in the amount of \$12,000.00 on each person, firm, or corporation which operates a telephone exchange or exchanges within the City of Montgomery.

8. City of Montgomery License Ordinance 48-91, § 19C-21i does not define the term "telephone exchange."

9. Plaintiff Fast Phones, Inc. does not operate a telephone exchange.

10. Plaintiff Fast Phones, Inc. is not and does not operate a "telephone exchange" as defined under the Telephone Rules of the Alabama Public Service Commission.

11. Plaintiff Fast Phones, Inc. is not and does not operate a "central office" as defined under the Telephone Rules of the Alabama Public Service Commission.

12. Plaintiff Fast Phones, Inc. does not own switching equipment, telephone lines, telephone wires, or any other device or facilities by which telephones may be connected.

13. Plaintiff Fast Phones, Inc. does not own a telephone plant by which to furnish local

telephone service.

14. City of Montgomery License Ordinance 48-91 was adopted by the City Council of the City of Montgomery on October 29, 1991, some five years before the enactment of the Federal Telecommunications Act of 1996.

15. Plaintiff Fast Phones, Inc. was assessed the annual business license fee imposed under City of Montgomery License Ordinance 48-91, §19C-21i for the years 1999 and 2000.

16. Plaintiff Fast Phones, Inc. was notified by Defendant City of Montgomery, Alabama that its business license would be revoked if it did not pay the annual business license fee imposed under City of Montgomery License Ordinance 48-91.

17. Under protest, Plaintiff Fast Phones, Inc. paid the annual business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i for the years 1999 and 2000.

18. Pursuant to City of Montgomery Ordinance 19-93, Plaintiff Fast Phones, Inc. timely and properly obtained a review of its business license liability by the City of Montgomery Board of Revenue Appeals.

19. The City of Montgomery Board of Revenue Appeals denied relief to Plaintiff Fast Phones, Inc. by order dated August 21, 2000.

COUNT ONE APPEAL

20. Plaintiff Fast Phones, Inc. realleges and incorporates Paragraphs 1 through 19 above as if fully set forth herein.

21. Plaintiff Fast Phones, Inc. appeals the assessment of the business license tax

against it to this Court for a trial de novo pursuant to City of Montgomery Ordinance 19-93, § VII (G).

WHEREFORE, Plaintiff Fast Phones, Inc. prays that this Court will after de novo review, determine that Plaintiff Fast Phones, Inc. is not subject to the business license fee imposed under City of Montgomery License Ordinance 48-91, §19C-21i, reverse the assessment entered against Plaintiff Fast Phones, Inc., and order that Plaintiff Fast Phones, Inc. is due a refund for the business license fees paid under protest.

Thomas R. DeBray
THOMAS R. DEBRAY (DEB004)

Carla Cole Gilmore
CARLA COLE GILMORE (COL096)
Attorneys for Fast Phones, Inc.

OF COUNSEL:
KAUFMAN & ROTHFEDER, P.C.
Post Office Drawer 4540
Montgomery, Alabama 36103-4540
Telephone (334) 244-1111

EXHIBIT C

**IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA**

**FAST PHONES, INC., an Alabama
corporation,**)

Plaintiff,)

**THE CITY OF MONTGOMERY,
ALABAMA, a municipal corporation,**)

Defendant.)

CASE NO. CV-00-2508-PR

00 SEP 21 PM 3:30
OFFICE OF THE CLERK
MONTGOMERY COUNTY, ALABAMA

COMPLAINT

COMES NOW Plaintiff Fast Phones, Inc., by and through counsel, and for its Complaint against Defendant the City of Montgomery, Alabama states as follows:

FACTUAL ALLEGATIONS

1. Plaintiff Fast Phones, Inc. is an Alabama corporation with its principal place of business in the City of Montgomery, Montgomery County, Alabama.
2. Defendant City of Montgomery, Alabama is a municipal corporation which imposes business license fees as a condition to conduct business within its corporate limits.
3. Plaintiff Fast Phones, Inc. was incorporated on July 9, 1998. It is a "CLEC" (competitive local exchange carrier), an entity created pursuant to the authority of the Federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("the 1996 Act").
4. The business of Plaintiff Fast Phones, Inc. is that of a reseller of local telephone service/telecommunications.
5. Plaintiff Fast Phones, Inc. is properly authorized by the Alabama Public Service Commission to engage in operations as a provider of resold local exchange telecommunications

service.

6. Pursuant to an agreement entered into by and between Plaintiff Fast Phones, Inc. and BellSouth created under the authority the 1996 Act and in accordance with the Rules and Regulations of Fast Phones, Inc.'s Alabama Telecommunications Tariff filed with the Alabama Public Service Commission, Plaintiff Fast Phones, Inc. is authorized to provide local exchange service communications in BellSouth's local exchange areas in the State of Alabama, including the City of Montgomery.

7. City of Montgomery License Ordinance 48-91 was adopted by the City Council of the City of Montgomery on October 29, 1991, some five years prior to the enactment of the 1996 Act.

8. City of Montgomery License Ordinance 48-91, § 19C-21i, entitled "Special and Privilege License-Telephone Companies," imposes an annual business license fee in the amount of \$12,000.00 on each person, firm, or corporation which operates a telephone exchange or exchanges within the City of Montgomery.

9. City of Montgomery License Ordinance 48-91, § 19C-21i does not define the term "telephone exchange."

10. Plaintiff Fast Phones, Inc. is not and does not operate a "telephone exchange" as defined under the Telephone Rules of the Alabama Public Service Commission.

11. Plaintiff Fast Phones, Inc. is not and does not operate a "central office" as defined under the Telephone Rules of the Alabama Public Service Commission.

12. Plaintiff Fast Phones, Inc. does not own switching equipment, telephone lines, telephone wires, or any other device or facilities by which telephones may be connected.

13. Plaintiff Fast Phones, Inc. does not own a telephone plant by which to furnish

telephone service.

14. Plaintiff Fast Phones, Inc. does not use any rights-of-way belonging to Defendant City of Montgomery, Alabama.

15. Plaintiff Fast Phones, Inc. was assessed the annual business license fee imposed under City of Montgomery License Ordinance 48-91, §19C-21i for the years 1999 and 2000.

16. Plaintiff Fast Phones, Inc. was notified by Defendant City of Montgomery, Alabama that its business license would be revoked if it did not pay the annual business license fee imposed under City of Montgomery License Ordinance 48-91.

17. Under protest, Plaintiff Fast Phones, Inc paid the annual business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i for the years 1999 and 2000.

18. As a result of its payment of the annual business license fee at issue for the years 1999 and 2000, Plaintiff Fast Phones, Inc. has been caused to lose use of \$24,000 and has consequently been placed at a competitive disadvantage among other marketplace providers of resold local exchange telecommunications service.

19. Pursuant to City of Montgomery Ordinance 19-93, Plaintiff Fast Phones, Inc. timely and properly obtained a review of its business license liability by the City of Montgomery Board of Revenue Appeals.

20. The City of Montgomery Board of Revenue Appeals denied relief to Plaintiff Fast Phones, Inc. by order dated August 21, 2000.

21. Upon information and belief, Defendant City of Montgomery, Alabama has not assessed the business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i against all other resellers of local exchange telecommunications service doing business

within its corporate limits.

**COUNT ONE
COMPLAINT FOR DECLARATORY RELIEF**

22. Plaintiff Fast Phones, Inc. realleges and incorporates Paragraphs 1 through 21 above as if fully set forth herein.

23. The 1996 Act was enacted by Congress to foster rapid competition in the telecommunications industry and to end the monopolies of local telephone service providers. It is entitled: "[a]n Act to promote competition and reduce regulation in order secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

24. Section 253 (a) of the 1996 Act prohibits the enforcement of any state or local statute, regulation, or requirement that "may prohibit or have the effect of prohibiting" the ability of any entity to provide any interstate or intrastate telecommunications service.

25. City of Montgomery License Ordinance 48-91, § 19C-21i violates § 253 (a) of the 1996 Act as it prohibits or has the effect of prohibiting the ability of Plaintiff Fast Phones, Inc. to compete in the telecommunications market as a provider of local telephone exchange service or access in the City of Montgomery, Alabama.

WHEREFORE, Plaintiff Fast Phones, Inc. prays that this Court will declare that:

- a. Plaintiff Fast Phones, Inc. does not own or operate a telephone exchange or exchanges within the City of Montgomery;
- b. Plaintiff Fast Phones, Inc. is not subject to the business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i;
- c. City of Montgomery License Ordinance 48-91, § 19C-21i does not apply to

Plaintiff Fast Phones, Inc. and/or other entities created pursuant to the Federal Telecommunications Act of 1996;

d. City of Montgomery License Ordinance 48-91, § 19C-21i violates § 253 (a) of the 1996 Act;

e. The decision and order of the City of Montgomery Board of Revenue Appeal dated August 21, 2000 is to be reversed;

f. Plaintiff Fast Phones, Inc. is entitled to a refund of the business license fees paid for the years 1999 and 2000 under protest, plus interest; and

g. and order such further and different relief which the Court may deem appropriate.

COUNT TWO DENIAL OF EQUAL PROTECTION OF THE LAWS

26. Plaintiff Fast Phones, Inc. realleges and incorporates Paragraphs 1 through 25 above as if fully set forth herein.

27. Defendant City of Montgomery, Alabama's failure to assess the business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i from all other resellers of local exchange telecommunications service doing business within the corporate limits of the City of Montgomery deprives Plaintiff Fast Phones, Inc. of equal protection of the laws as guaranteed under the Fourteenth Amendment of the United States Constitution.

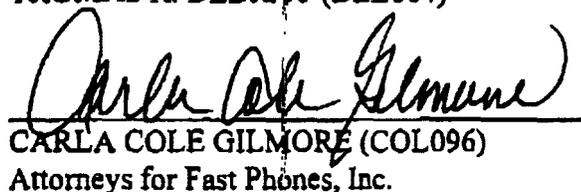
28. Plaintiff Fast Phones, Inc. brings this action pursuant to the provision of 42 U.S.C. § 1983 to recover damages suffered as a result of its denial of equal protection of the laws.

29. As a proximate result of Defendant City of Montgomery, Alabama's failure to assess the business license fee imposed under City of Montgomery License Ordinance 48-91, § 19C-21i from all other resellers of local exchange telecommunications service doing business

within the corporate limits of the City of Montgomery, Plaintiff Fast Phones, Inc. has been caused to lose use of \$24,000; has been caused to incur legal expenses to defend against Defendant City of Montgomery, Alabama's assessment; has been placed at a competitive disadvantage among other marketplace providers of resold local exchange telecommunications service; and has otherwise suffered damages and been harmed.

WHEREFORE, Plaintiff Fast Phones, Inc. prays that this Court will enter judgment against Defendant City of Montgomery, Alabama and award damages in an amount to be determined by the jury, interest, attorneys' fees, costs of this action, and such other relief as the Court finds proper.


THOMAS R. DEBRAY (DEB004)


CARLA COLE GILMORE (COL096)
Attorneys for Fast Phones, Inc.

OF COUNSEL:

KAUFMAN & ROTHFEDER, P.C.
Post Office Drawer 4540
Montgomery, Alabama 36103-4540
Telephone (334) 244-1111

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY ON ALL ISSUES SO TRIABLE.

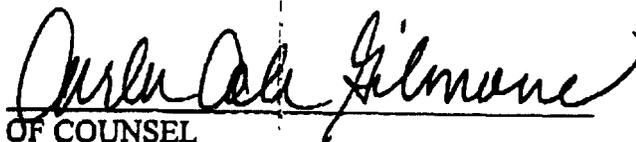

OF COUNSEL

EXHIBIT D



City of Montgomery, Alabama

BOBBY N. BRIGHT
Mayor

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

TRACY LARSON
B. J. (BEN) MCNEILL
P. F. (PEP) PILGRIM
CHARLES W. SMITH

MARCH 16, 2001

Mr. Robert Black, Jr.
Hill, Hill, Carter, Franco, Cole and Black
Attorneys at Law
P. O. Box 116
Montgomery, AL 36101-0116

Dear Mr. Black:

As of this date, there are fifteen telecommunication companies licensed to do business within the City of Montgomery. Application is pending for an additional telecommunications company.

Should additional information be required, please feel free to contact this office.

Sincerely,

Carolyn R. Moringo
Mrs. Carolyn R. Moringo
Chief Revenue and License Officer

CRM/rnh

CERTIFICATE OF SERVICE

I, Robert C. Black, Jr., hereby certify that on March 19, 2001, a copy of the foregoing Comments in Opposition to Petition for Preemption and Declaratory Ruling was served by first class U.S. mail, postage paid, or by hand delivery, upon the parties listed below:

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commission Harold W. Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

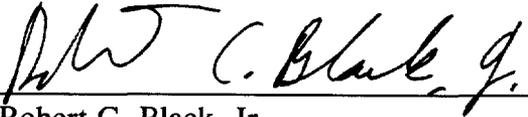
Mr. Bobby N. Bright
Mayor
City of Montgomery, Alabama
P.O. Box 1111
Montgomery, AL 36101-1111

Mr. Bill Pryor
Attorney General
Office of the Attorney General
Alabama State House
11 South Union Street, 3rd Floor
Montgomery, AL 36130

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

Andrew Isar
Director of State Affairs
Association of Communications Enterprises
1401 K Street, N.W., Suite 600
Washington, DC 20005

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington, DC 20554


Robert C. Black, Jr.