A Constitutional and Statutory History of the Telephone Business in South Carolina

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A CONSTITUTIONAL AND STATUTORY HISTORY
OF THE TELEPHONE BUSINESS IN SOUTH
CAROLINA

WILLIAM J. QUIRK*
FRED A. WALTERS**

I. INTRODUCTION ............................................... 292

II. EARLY HISTORY OF THE TELECOMMUNICATIONS INDUSTRY ...... 299
   A. Patents, Competition, and the Rise of the Public Service
      Corporation (1876-1920) ........................................... 299
   B. Early Regulation of the Industry ................................. 302
      1. The Constitutional Background ............................... 302
      2. The Post Road Act of 1866: The National Franchise for the
         Telegraph System ............................................... 304
      3. Early Federal and State Regulatory Statutes: 1934
         and 1950 ....................................................... 309

III. LEGAL FRAMEWORK OF THE TELEPHONE BUSINESS IN SOUTH
     CAROLINA .......................................................... 312
    A. Levels of Jurisdiction .......................................... 313
       1. Local Jurisdiction ......................................... 313
       2. State Jurisdiction ......................................... 313
       3. National Jurisdiction ..................................... 314
       4. Summary ..................................................... 315
          a. Police Power ............................................. 315
          b. Property Tax ............................................ 315
          c. License Tax ............................................. 315
          d. Other Taxes ............................................. 315
          e. Municipal Consent .................................... 316
          f. State Franchise Contract .............................. 316
          g. The Telecommunications Act of 1996 ............... 317
    B. The Traditional Nineteenth-Century Local Franchise

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   School of Law. Opinions expressed by the authors are theirs alone and not necessarily those of
   BellSouth and its affiliated companies.

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Douglas J. Giorgio during the preparation of this Article.

290
IV. DEVELOPMENTS AFFECTING THE INDUSTRY: 1980S TO THE PRESENT

A. 1980s South Carolina Business License Tax Litigation
   1. Constitutional History
   2. Home Rule Amendment and Section 5-7-30
   3. The Aiken and Spartanburg Cases
   4. Settlement of the 1980s Litigation
   5. 1984 Divestiture

   1. The Removal of Barriers and the Prohibition of Discrimination Among New Entrants
   2. The First Reservation: State Regulation
   3. The Second Reservation: Cost Reimbursement
   4. The Third and Fourth Reservations

C. South Carolina Business License Tax Litigation II
   1. The 1997 and 1998 Municipal Association Ordinances and Ensuing Litigation
      a. Section 253 Preempts the Municipal Association Ordinances and Cayce
      b. Commerce Clause
      c. Equal Protection
         i. Gross Disparity
         ii. Special Tax
      d. Due Process Issues in Aiken and Spartanburg
      e. Delegation
   2. Federal Court Jurisdiction in Municipal License Cases

D. 1999 South Carolina Legislation

E. South Carolina Gross Receipts Tax
   1. Inclusion of Intrastate Access Charges in the Local Exchange Company’s Tax Base
      a. Inclusion by the Long Distance Carrier
      b. Exclusion by the Local Carrier
   2. Inclusion of Interstate Access Charges in Local Company’s Tax Base

V. CONCLUSION
I. INTRODUCTION

The telecommunications industry, more than any other part of our everyday lives, has been transformed in recent years—technically, legally, and culturally. The changes brought about by chips, transistors, microwaves, and satellites now provide a vast array of new services, including e-mail, paging, and portable phones. A business once characterized by poles every 100 feet and overhead copper wires now shoots messages and data through underground fiber-optic cable or bounces them off satellites high in the sky. People throughout the world talk with one another as if they were next door.¹

There is little sign that the pace of technological change that has swept the telecommunications industry will slacken anytime soon. For example, today's circuit-switched telephone network, known as the Public Switched Telephone Network (PSTN), may soon be partly replaced by a new technology known as Voice Over Internet Protocol (VOIP). In a VOIP system, the voice signal is converted into packets of data which are then sent over a network.² The new networks will be capable of handling two million bits per second—40 times faster than the fastest computer modems today. The new phones will transmit and receive video images and high quality music, and will also provide Internet access.³ Video phones and voice dialing can easily be added to an Internet telephone system. Marketing has also begun of “smart” phones, which are mobile phones that let you talk, surf the net, and pick up stock prices. These smart phones act as a bridge between communications and computing technologies, incorporating digital wireless communications as well as the data and storage functions of a personal computer.

¹. No matter where in the world the caller hails from. The Global Satellite System, available since November of 1998, enables a person in the middle of the Gobi desert to place a call on his satellite phone to anywhere in the world. The history of the satellite communications industry has been a troubled one, marked by high start-up costs, rocket failures, and national security controversies. Two companies, Iridium and ICO, have filed for protection from creditors under Chapter 11. A third company, Globalstar, backed by Loral Space and Communications, began service in September of 1999. Iridium spent $3 billion to place 72 satellites in low earth orbit to provide service anywhere in the world. The rapid advance of telecommunications technology, while making the satellite network feasible, also dramatically drove down the cost of terrestrial communications, putting the satellite system at a large cost disadvantage. Fiber optics have driven the true cost of long distance and transatlantic calls down to levels approaching zero. See David Barboza, Planet Earth Calling Iridium, Can the Satellite Phone Service Achieve a Soft Landing?, N.Y. TIMES, Sept. 7, 1999, at C1.


³. See Catherine Greenman, Too Many Phones, Too Little Service, N.Y. TIMES, Aug. 19, 1999, at G8. In just a few years, the Internet has become a powerful worldwide medium for the exchange of information and trading. The new generation of digital phones can support both limited web access and e-mail. Within four years, use of mobile Internet devices is expected to be “enormously popular” as Internet and mobile phone technologies merge into a new generation of portable devices. Roger Taylor, Phone.com Makes Wireless Purchase, FIN TIMES, Oct. 12, 1999, at 26.
Clearly the telephone industry, born on the night of March 10, 1876 when Alexander Graham Bell spoke into his laboratory telephone "Mr. Watson—come here—I want to see you," has come a long way. The law in the late nineteenth century developed quickly to encourage the widespread use of this new technology. Today the industry's legal framework is a mixture of late nineteenth-century law and recent federal legislation and judicial construction. The nineteenth-century laws were designed to accommodate the original technology, which required the use of land rights-of-way to place telephone poles and run telephone lines. States granted franchises over public and private lands to construct and operate telephone businesses. The statewide franchises were perpetual as long as the company used the rights-of-way for telephone purposes. After the grant of the statewide franchises, local governments could not exclude a telephone company, but they could enforce normal police power regulation over the industry. Because the companies that used city streets had a substantial local presence, they developed a custom of making substantial contributions of services and money to the local governments.

As communications technology has less and less physical connection with the city, however, there seems to remain little justification for any special contribution to local government beyond what other businesses pay. Nonetheless, in almost all cases in South Carolina, the local exchange telephone company is the city's highest personal property taxpayer and its highest business license taxpayer. In addition, these utilities often pay a "franchise fee" of 3% of their gross revenues to municipal governments. Moreover, today's local exchanges face competition for certain services from long distance carriers that may be able to avoid most local taxes. State and local governments should work to establish a level playing field. Unfortunately, the South Carolina legislature has addressed—but not resolved—this issue.

The recent South Carolina Supreme Court decision in BellSouth Telecommunications, Inc. v. City of Orangeburg has only exacerbated the problem. In Orangeburg, the court ratified the power of city governments to erode the competitiveness of local telephone companies through the imposition of excessive business taxes disguised as "franchise fees." As this Article will show, the Orangeburg decision is wholly at odds with (1) the franchise rights

6. See Lipartito, supra note 5, at 180.
7. Stehman, supra note 5, at 239.
8. Id. at 120.
9. The "franchise fee" rates were negotiated after the South Carolina Supreme Court struck down existing business license tax ordinances on constitutional grounds. See Southern Bell Tel. & Tel. Co. v. City of Spartanburg, 285 S.C. 495, 331 S.E.2d 333 (1985).
11. Id. at *4.
of local telephone companies, (2) the national trend towards striking down confiscatory franchise fees, and (3) federal law.

The federal law implicated by the Orangeburg decision is the Telecommunications Act of 1996.\(^{12}\) In passing the Telecommunications Act, Congress removed many of the barriers surviving from the old regulated monopoly days that were designed to prevent competition across local and long distance phone service. The new law opened the door for telecommunications companies to compete for each other's business. Consequently, the Act set off a period of telecommunications mergers and acquisitions comparable in scale to the deals of J.P. Morgan and John P. Rockefeller at the turn of the last century. For example, 1998 and 1999 saw the following merger negotiations:

<table>
<thead>
<tr>
<th>Companies</th>
<th>Approximate Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT&amp;T—MediaOne</td>
<td>$58 billion(^{13})</td>
</tr>
<tr>
<td>AT&amp;T—Tele-Communications Inc.</td>
<td>$45 billion(^{14})</td>
</tr>
<tr>
<td>Bell Atlantic—GTE</td>
<td>$52.9 billion(^{15})</td>
</tr>
<tr>
<td>Bell Atlantic—Nynex</td>
<td>$22 billion(^{16})</td>
</tr>
<tr>
<td>British Telecom AT&amp;T (joint venture)</td>
<td>$10 billion(^{17})</td>
</tr>
<tr>
<td>MCI WorldCom—Sprint</td>
<td>$108 billion(^{18})</td>
</tr>
<tr>
<td>Qwest Communications—U.S. West</td>
<td>$48.5 billion(^{19})</td>
</tr>
</tbody>
</table>

18. William Lewis & Richard Waters, MCI WorldCom Confirms $115 Billion Sprint Takeover, FIN. TIMES, Oct. 6, 1999, at 1. MCI is the number two long distance carrier; Sprint is number three. Together, MCI WorldCom and Sprint will control 35% of the United States long distance market, whereas AT&T controls 45%. See Laura M. Holson & Seth Schiesel, MCI to Buy Sprint in Swap of Stock for $108 Billion, N.Y. TIMES, Oct. 5, 1999, at A1.

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Additionally, two Baby-Bells—Nynex and Bell Atlantic—merged in 1997.\textsuperscript{22} On June 29, 1999 federal officials announced the approval of the merger of two more—SBC Communications and Ameritech.\textsuperscript{23} In sum, "[s]ince 1996, the seven original Baby Bells have agreed to become four."\textsuperscript{24} Telecommunications companies across the nation continue to test the boundaries of the 1996 Act by attempting to gain access to markets that were formerly off-limits following the 1984 breakup of the American Telephone and Telegraph Company (AT&T). In particular, the Baby-Bells, which had been precluded from the long distance telephone service market, are now knocking at the long distance door. However, the Federal Communications Commission (FCC) has three times turned down BellSouth’s applications to enter the long distance market.\textsuperscript{25} AT&T has likewise recently begun taking advantage of the industry’s deregulation by attempting to reenter local phone markets through the acquisition of large cable companies.\textsuperscript{26}

The proponents of deregulation argue that expanded competition will generate savings that may benefit consumers through lower prices and better products. Others argue that any savings may be drained off by heavy national, state, and local taxes, as well as the return of monopoly profits. Indeed, AT&T’s recent purchase of cable companies will allow it to return in the local

<table>
<thead>
<tr>
<th>SBC Communications—Ameritech Corp.</th>
<th>$72 billion\textsuperscript{20}</th>
</tr>
</thead>
<tbody>
<tr>
<td>WorldCom—MCI</td>
<td>$49 billion\textsuperscript{21}</td>
</tr>
</tbody>
</table>


\textsuperscript{21} Kanell, supra note 14, at F1.

\textsuperscript{22} \textit{Bell Atlantic, Nynex Merger OK’d}, CHI. TRIB., Aug. 15, 1997, § 3, at 3.


\textsuperscript{24} \textit{MCI, BellSouth Make Plays for Sprint}, OMAHA WORLD-HERALD, Oct. 4, 1999, at 16.

\textsuperscript{25} Schiesel, supra note 15, at C13.

\textsuperscript{26} \textit{See AT&T Chief Hits Restrictions to Local Phone Competition}, CHI. DAILY HERALD, May 22, 1999, at Bus. 1; \textit{Banding of the Giants}, FN. TIMES, May 7, 1999, at 17. AT&T, after its $58 billion acquisition of MediaOne, will reach into 57% of American homes, according to consumer groups. AT&T disputes the 57% figure but concedes it is over 50%. Stephen Labaton, \textit{AT&T Planned MediaOne Deal Poses Test for U.S. Cable Policy}, N.Y. TIMES, Aug. 18, 1999, at C1. AT&T’s General Counsel James W. Cicconi said “It’s an extreme stretch to suggest that there’s any antitrust issue here . . . the whole purpose is to provide local competition.” \textit{Id.} The 1996 Telecommunications Act requires local phone companies, but not cable operators like AT&T, to make their lines accessible to competitors. America Online and GTE have mounted a nationwide campaign on the state and local level to force AT&T to open its cable lines. Stephen Labaton, \textit{Fight for Internet Access Creates Unusual Alliances}, N.Y. TIMES, Aug. 13, 1999, at A1; Seth Schiesel, \textit{The Outlook for Cable Access}, N.Y. TIMES, Aug. 9, 1999, at Bus. 1.
phone market, but without the regulation that governed it until 1984.\textsuperscript{27} The wires now used only for cable television can easily become conduits for high-speed Internet access and both local and long distance telephone services.

Because telecommunications companies in South Carolina are currently attempting to open and expand the competitive market, South Carolina cities have sought to assure themselves a continuation of high telecommunications revenues in the face of the coming industry free-for-all. Cities have attempted to tax telecommunications companies on 3% of their gross receipts, with the City of Orangeburg actually succeeding in imposing a 5% of gross receipts tax on BellSouth, a tax Orangeburg calls a “franchise fee.”\textsuperscript{28} The most discussed recent piece of legislation involves the extent to which South Carolina cities can charge telecommunications firms for business license taxes and franchise fees.\textsuperscript{29} The Senate and House versions of this legislation outlaw city efforts to impose heavy new charges on telecommunications firms, while not raising the rate for other businesses. Mayors opposed the bill on the ground that it would cut the cities’ expected future revenues from the telephone business.\textsuperscript{30} However, the bill was signed into law on June 30, 1999.\textsuperscript{31}

The efforts by local governments to exact heavy taxes from the telecommunications industry runs counter to the historical right of the industry to freely use public rights-of-way for the provision of telephone service. Unfortunately, the\textit{Orangeburg} decision signals the South Carolina Supreme Court’s misunderstanding of this first principle. Because the history of the industry’s relationship to the State of South Carolina can aid courts and lawmakers in charting its future course, this Article traces the history of the telecommunications industry in South Carolina from its early days.\textsuperscript{32} In broad terms the industry has gone through four periods since 1876:

1. \textit{Monopoly—Bell Patents} (1876 to 1893 and 1894): The original Bell patents provided the company a legal patent monopoly for seventeen years, ending in 1893 and

\textsuperscript{27} Competition, of course, implicitly requires competitors and some diversity of ownership. Otherwise, the result is an unregulated monopoly. The recent mergers and financial consolidations raise the question of whether the competitive period will prove short-lived.\textsuperscript{28} See BellSouth Telecomms., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160, at *4 (S.C. Nov. 8, 1999) (upholding the fee).\textsuperscript{29} H.R. 3276, 113th Leg., 2d Sess. (S.C. 1999); S. 329, 113th Leg. (S.C. 1999). \textsuperscript{30} Dave L’Heureux, \textit{Cities Want Telecom Tax Bill Delayed}, THE STATE (Columbia, S.C.), April 24, 1999, at B6.\textsuperscript{31} See infra Part IV.D.\textsuperscript{32} This Article does not address 47 U.S.C. § 332 (governing wireless telephone service) or its recent interpretations. See, e.g., Town of Amherst v. Omnipoint Comms., 173 F.3d 9, 14 (1st Cir. 1999) (holding that the town’s denial of requested permits for building wireless communications facilities was not an effective ban on personal wireless services and was not a violation of § 332).
1894.33

2. *Competition I* (1893-1910): As the Bell patents expired, many independent competitors entered the field.34 In 1899 South Carolina law offered a statewide right-of-way to “any telegraph or telephone company.”35 By 1907 the Bell system had just slightly more phones in service (3,132,063) than competing companies (2,420,886).36

3. *Regulated Monopoly—The Public Service Corporation* (1910-1970s): In 1910 federal law was amended to include the telephone within the definition of “common carriers” due to its interstate traffic.37 This classification created an obligation to provide service on a nondiscriminatory basis38 and to charge just and reasonable rates. The federal government regulated long distance rates, but the states regulated intrastate rates. South Carolina regulated intrastate business and residential rates first through the Railroad Commission in 1904, and since 1951 through the Public Service Commission (PSC).39 During this period, the industry became a rich revenue source for state and local government. State and local governments singled-out the telephone business for special gross revenue, franchise and property taxes. These revenue devices were particularly attractive to governments because the general public was unaware it was being taxed when it paid its phone bill, and also because the phone company did not vote. Business expenses—including heavy local fees and taxes—became part of the rate base that could be passed on to the phone customer. In effect, the phone company acted as a tax collector. Universal service—the social and political goal that the cost of local calling should be low enough that all citizens could afford telephone service—was funded by a cross-subsidy that moved “excess” revenues from long distance and business services to finance below-cost local service.40

33. STEHMAN, supra note 5, at 20-50.
34. Id. at 51-76.
36. STEHMAN, supra note 5, at 77.
37. Id. at 167.
38. Id. at 250.
40. See LIPARTITO, supra note 5, at 161-65.
4. *Competition II* (1970s to the present): In the early 1970s federal policy turned against the concept of the tightly-regulated natural monopoly of telephone utilities and actively began to encourage competitors to Bell. Driven by the industry's desire to cut expenses, federal policy encouraged MCI to enter the long distance market, where it could offer much lower prices than Bell because it had no universal service obligation—a process Bell called "cream-skimming." The government later brought antitrust charges against AT&T, which led to its breakup in 1984. AT&T settled the suit by divesting the 22 local Bell operating companies, such as Southern Bell Telephone & Telegraph Company. However, AT&T was able to retain its lucrative Long Lines Division, its manufacturing arm (Western Electric), and most of the Bell Laboratories. Moreover, AT&T was now free to enter any line of business. The local Bell companies organized into seven regional holding companies to provide intrastate local exchange service, limited intrastate long distance services, and local access to long distance service. The regional companies were required to provide equal access to all interexchange carriers and were prohibited from offering long distance service.

The Telecommunications Act of 1996 changes the judicial system established in 1984, mandating competition at both local and long distance levels. The Act outlaws discriminatory state and local taxes aimed at a class of carriers or at the industry as a whole. Such discriminatory taxes could impact competition among carriers and would, in all cases, increase the cost to consumers. The funding for universal service and other social and political goals, which could be hidden in the rate base under the old system, now require express taxes—taxes that have already led to controversy.

Part II of this Article discusses the early history of the telecommunications

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42. Id. at 76.
43. Id. at 362.
44. BROOKS, supra note 4, at 17.
45. COLL, supra note 41, at 362.
industry on a national level, including early attempts at regulation by the federal and state governments. Part III specifically focuses on the development of regulatory tactics in South Carolina. Part IV addresses several important events that have shaped the industry both in South Carolina and the nation as a whole. The section begins with a discussion of the 1980s South Carolina litigation regarding business license taxes imposed by some municipalities, and moves on to address the 1984 breakup of AT&T. The Telecommunications Act of 1996 is then examined in detail with respect to both its national impact and its effect on the powers of South Carolina municipalities. The 1999 South Carolina legislation limiting the fees that cities may impose on telecommunications providers is next briefly discussed. Finally, the Article examines the South Carolina gross receipts tax and its disparate effects on local and long distance carriers.

II. EARLY HISTORY OF THE TELECOMMUNICATIONS INDUSTRY

A. Patents, Competition, and the Rise of the Public Service Corporation (1876-1920)

The public took to the telephone as soon as commercial service was offered in 1877. The Bell Telephone Company was formed in July of 1877. By June of 1878 there were 10,755 Bell telephones in service; by 1881 there were 132,692. The basic Bell System was established in the 1880s as a network of substantially owned licensees. The parent company supervised the licensees and emphasized theoretical and practical research.

Within 35 years the telephone network developed from a local convenience to a necessity for regional, national, and international communications. In that short time, it became possible for anyone in the United States to speak to anyone else in the populated world. The first long distance line for public use opened in 1881 between Boston and Providence, Rhode Island. Long distance was "almost immediately profitable" and has remained so, even though competition has driven rates to only pennies a minute. Bell strategy called for the development of an extensive long distance system to be in place when the Bell patents ran out in 1893 and 1894. In February of 1885 Bell formed a New York subsidiary named the American Telephone and Telegraph Company (AT&T) to build and operate these long distance lines. The first

48. BROOKS, supra note 4, at 59.
49. Id. at 55.
50. Id. at 69, 73.
51. STEHMAN, supra note 5, at 21-29.
52. Id.
53. BROOKS, supra note 4, at 89.
54. Id.
55. STEHMAN, supra note 5, at 32-36.
56. BROOKS, supra note 4, at 90, 91.
transcontinental line stretched from New York to San Francisco and was opened in 1915. The Atlantic Ocean was next conquered, first by radio in 1919, and then by a 2,000 mile transatlantic cable laid from 1955 to 1956 and stretching from Clarenville, Newfoundland to Oban, Scotland.

Intense competition followed the expiration of the Bell patents. Indeed, by 1903 the independent companies had substantially more customers (2,000,000) than Bell (1,278,000). Because the systems were not connected, a subscriber to both services had to have two phones. AT&T, which owned practically all the long distance lines, refused to interconnect with the independents. State laws requiring Bell to interconnect were struck down as takings of private property. Despite its new competitors, therefore, Bell continued to be profitable.

By 1907 Bell had regained a slight lead in subscribers—3,132,000 to 2,987,000. Moreover, Bell had established a vigorous policy of acquiring the independents. In 1911 AT&T acquired the telegraph giant, Western Union. The Attorney General at this point advised the company that he believed its acquisitions raised serious Sherman Act questions. In 1913, after substantial negotiation, AT&T responded with a letter that later became known as the Kingsbury Commitment. In this letter AT&T agreed (1) to give up Western Union; (2) to purchase independents only with Interstate Commerce Commission (ICC) approval; and (3) to make “arrangements . . . promptly under which all other telephone companies may secure for their subscribers toll service over the lines of the companies in the Bell system.” Thus AT&T, through the Kingsbury Commitment, allowed its long distance lines to be used by others.

57. Id. at 139.
58. Id. at 246-47.
59. STEHMAN, supra note 5, at 132.
60. BROOKS, supra note 4, at 111.
61. STEHMAN, supra note 5, at 65.
62. BROOKS, supra note 4, at 127.
63. Id. at 133.
64. Id.
65. Id. at 135.
66. Id. at 136.
67. Id.
68. Government pressure or mandates that require one company to construct lines or facilities to be used by others is an unusual feature of the telecommunications industry that continues to the present. The Telecommunications Act of 1996 requires local companies to make their facilities available to anyone. There is no express provision imposing a similar duty on local companies. However, a court has permitted the City of Portland to require AT&T to allow others to use its cable lines. AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999). Likewise, mobile phone companies in the United Kingdom have lost their challenge to government decisions to force four existing license holders to allow new entrants to “roam” across their network. The license holders argued they “were not against new entrants roaming on their networks but had been unable to reach agreement with the government about the prices they would be charged.” John Mason, Mobile Phone Operators' Court Victory is
By this time Bell had developed a unique theory which defined the company’s culture for almost a century.\textsuperscript{69} Traditionally, markets rely on competition to check an abuse of power. But telephone service, as a technical matter, was most efficiently provided without competition—otherwise multiple phone systems and multiple wires to every house and business would be required. Therefore, in the public interest, Bell asserted the business should be operated as a monopoly.\textsuperscript{70} The privilege, however, imposed a corresponding obligation to cooperate with federal and state regulation to assure the public interest was served.\textsuperscript{71} In a 1915 speech in San Francisco, Theodore N. Vail, then president of AT&T, outlined the theory of the natural monopoly and the public service corporation:

"Society has never allowed that which is necessary to existence to be controlled by private interest.... If there were no Bell system, only disassociated individual companies or groups of companies, no line over a few hundred miles long would have been built, or if built it could not be operated ... satisfactorily...." Regulatory bodies, state and federal, should be thought of and should think of themselves as juries charged with "protecting the individual member of the public against corporate aggression or extortion, and the corporate member of the community against public extortion and aggression." They should see it as their duty "to restrain and suppress... certain evils that have been ingrained in our commercial practices," and also "to restrain an indignant and excited public." [R]egulators should be men of the highest standard, appointed for life; ... and "their decisions, even if not entirely satisfactory, should not be subjected to captious criticism or objection."\textsuperscript{72}

Over time, however, some technical justifications for this theory have changed, inviting competition in the industry. For example, technologies such as fiber-optic lines and satellite transmissions have obviated the need for service providers to supply separate phone systems and wires to each subscriber. Nonetheless, the enormous capital investment required to construct entirely new, competing networks has allowed the system to retain some characteristics of the natural monopoly. During the oral argument of \textit{AT&T}

\textsuperscript{69} \textit{Brooks}, \textit{supra} note 4, at 143.
\textsuperscript{70} \textit{Id}.
\textsuperscript{71} \textit{Id}.
\textsuperscript{72} \textit{Id} at 144 (emphasis added) (quoting and paraphrasing Vail’s 1915 San Francisco speech before the National Association of Railway Commissioners).
Corp. v. Iowa Utilities Board, Justice Breyer touched on this point when he asked: "Do you think that's what — do you think that's what Congress meant by — by competition? We're going to have — just one single network, but we're going to have competing salesmen?" The lawyer's reply, of course, was no, Congress "wanted new entrants to build facilities." Justice Breyer's question correctly foretold that most new entrants would choose to resell services from existing local exchange facilities rather than spend the large amounts of capital needed to build competing local networks.

B. Early Regulation of the Industry

1. The Constitutional Background

The country's constitutional principles have played a major part in the development of the telephone business in both the United States and in South Carolina. The Commerce Clause served as the constitutional authority for the first federal regulation of telephones, the 1910 Mann-Elkins Act. The Commerce Clause is also the source of numerous Supreme Court opinions limiting the states' power to interfere with the industry. Indeed, until Complete Auto Transit, Inc. v. Brady, decided in 1977, states were prohibited from imposing any tax on interstate commerce. Two other federal protections include (1) the Contracts Clause of the United States Constitution, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts"; and (2) the Fourteenth Amendment to the United States Constitution, adopted in 1868, which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

In Fletcher v. Peck Chief Justice Marshall held that while any law can be repealed, a grant by a legislature is protected from impairment by the Contracts

75. Id.
76. U.S. CONST. art. I, § 8, cl. 3.
78. 430 U.S. 274, 288-89 (1977) ("[W]e now reject the rule of Spector Motor Service, Inc. v. O'Connor [340 U.S. 602 (1951)], that a state tax on 'the privilege of doing business is per se unconstitutional when it is applied to interstate commerce, and that case is overruled.'").
79. Today states may tax interstate telephone calls in accordance with Goldberg v. Sweet, 488 U.S. 252, 261 (1989) (holding that in order to be held "fairly apportioned," a tax must be "internally and externally consistent," i.e., "structured so that if every State were to impose an identical tax, no multiple taxation would result.").
80. U.S. CONST. art. I, § 10; see also S.C. CONST. art. I, § 4 ("No . . . law impairing the obligation of contracts . . . shall be passed.").
81. U.S. CONST. amend. XIV, § 1; see also S.C. CONST. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law . . .").
Clause. In Dartmouth College v. Woodward Justice Marshall held that the New Hampshire legislature could not amend the charter of the corporation of Dartmouth College because the charter was a contract between the incorporators and the state and, therefore, was protected against impairment. In his concurring opinion Justice Story found that a legislature that takes away any powers or franchises vested by a charter it granted unconditionally violates the obligation of that charter. Justice Story concluded that "[i]f the legislature mean [sic] to claim such an authority, it must be reserved in the grant."

After the Dartmouth College decision, many states adopted constitutional provisions reserving the right to amend, alter, and repeal corporate charters. New York's 1846 Constitution, for example, provides that "[a]ll general laws and special Acts passed pursuant to this section may be altered from time to time or repealed." Similarly, California adopted a version of an anti-Dartmouth College provision in 1879: "Privileges or immunities granted by the Legislature may be altered or revoked." However, even the retained legislative power to alter, amend, or repeal the corporate charter does not include the power to destroy vested property rights or force their escheat to the state. Therefore, courts have distinguished between the franchises and privileges that a corporation derives from its charter and the property and contract rights that accrue to the corporation in the course of its existence.

In 1910 the New York Court of Appeals determined that "[i]n exercising the reserved power to amend corporate charters, the Legislature may not deprive a corporation of property already acquired, or the proceeds of lawful contracts previously made, or destroy or substantially impair the purposes of the grant or rights which are vested in the corporation thereunder." Similarly, in Bank of Augusta v. Earle the United States Supreme Court held that franchises are special privileges conferred by government upon parties that "do not belong to the citizens of the country, generally, of common right." The Court defined a franchise as "a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state."

A telephone company in the United States cannot occupy or use public streets or highways without national or state legislative authority; it must secure, by government grant, a right-of-way over state roads and city streets to

82. 10 U.S. (6 Cranch) 87, 131 (1810).
83. 17 U.S. (4 Wheaton) 518, 636 (1819).
84. Id. at 712 (Story, J., concurring).
85. Id.
86. N.Y. Const. of 1846, art. VIII, § 1, amended and replaced by N.Y. Const. art. X, § 1.
90. 38 U.S. (13 Peters) 519, 595 (1839).
91. Id.
conduct its telephone business. Rights-of-way are property interests. Franchises such as those to lay tracks and run cars in a city have been "uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term."92 In 1909 the New York Court of Appeals defined a franchise as

the right, granted by the public, to use public property for a public use, but with private profit, such as the right to build and operate a railroad in the streets of a city. Such a franchise, when acted upon, becomes property and cannot be repealed, unless power to do so is reserved in the grant, although it may be condemned upon making compensation.93

In sum, a telephone franchise includes the right to use public property; when the franchise is acted upon, the right to use public property becomes property of the grantee. The franchise cannot be repealed unless the legislature reserves that power in the grant. In its 1899 statewide franchise contracts with telephone companies, South Carolina, like other states, did not reserve any power to alter or amend the contracts. Constitutional guarantees should therefore protect any telephone utility that secured franchise rights. Unfortunately, the South Carolina Supreme Court's recent decision in BellSouth Telecommunications, Inc. v. City of Orangeburg contradicts this well-established principle.94 Orangeburg notwithstanding, the universal rule has historically been that franchise rights could not lawfully be diminished without compensation. Current federal law, however, prohibits a state or municipality from interfering with a franchise even if compensation is paid.95

2. The Post Road Act of 1866: The National Franchise for the Telegraph System

The legal framework for the American telephone system was built on the country's experience with developing other internal improvements, such as canals, turnpikes, railroads, and, particularly, the national telegraph system. Familiarity with the history of the telegraph experience is necessary to understand what followed with the telephone industry.

At the close of the Civil War Congress acted to encourage competition in the national telegraph system, which had been operating under individual

94. No. 25009, 1999 WL 1037160, at *6 (S.C. Nov. 8, 1999) (upholding a yearly 5% of gross receipts franchise fee by denying that the 1899 franchise constituted a contract). But see infra notes 215-218 and accompanying text (discussing cases from other jurisdictions recognizing the contractual nature of such a franchise).
95. See infra Part IV.B.
federal charters for about 20 years. The Post Road Act of 1866, approved July 24, 1866, was entitled: “An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military and other Purposes.” Senator John Sherman of Ohio, a proponent of the bill, explained that since 1846 Congress had made several acts “granting [special] powers to different telegraph companies, all of which are now absorbed in this one company.” Senator Sherman said the purpose of his bill was “to enable new companies that may be organized by any of the States or by the United States to enter into a fair competition with one existing monopoly which now controls the telegraphing in the United States.” He added:

The bill, as proposed to be amended by the Senator from Iowa, will give to all telegraph companies organized under any State law the right to cross navigable rivers, to go wherever the United States has exclusive jurisdiction, to cross over the public lands, and to build telegraph lines along the postal routes of the United States. Now, there is not, as I said the other day—and I have looked at the legislation since—a single privilege conferred by this bill that has not been already conferred upon existing telegraph companies. . . .

Section 1 of the bill provided:

That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the

96. 14 Stat. 221, ch. 230 (1866).
97. CONG. GLOBE, 39th Cong., 1st Sess. 3481, 3482 (1866).
98. Id. at 3481.
99. Id. at 3481.
unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.\textsuperscript{100}

Consequently, any telegraph company that accepted the offer was authorized to conduct its business through and over the national domain and, critically, along the "post roads" that ran wherever the mail was delivered—in other words, accepting companies received a national franchise. When Massachusetts imposed an apportioned tax on its capital stock, Western Union argued that the tax was impermissible because its franchise was derived from the United States by virtue of the Post Road Act. However, the United States Supreme Court found that the Act was merely "permissive" and did not carry "with it any exemption from the ordinary burdens of taxation."\textsuperscript{101} Nonetheless, the Court held that states could not prevent the company from constructing its lines and operating over post roads within state borders\textsuperscript{102} even if the company failed to pay taxes owed, noting that:

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be.\textsuperscript{103}

States or cities could impose reasonable regulation for the use of the streets,\textsuperscript{104} and the company’s "'property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business.'\textsuperscript{105} A city could charge a reasonable rental for the use of its streets, but the federal courts would determine what was

\textsuperscript{100} 14 Stat. 221, ch. 230, § 1 (1866).
\textsuperscript{101} Western Union Tel. Co. v. Massachusetts, 125 U.S. 530, 548 (1888).
\textsuperscript{102} Id. at 547 (holding that a state statute authorizing an injunction against companies whose taxes were in arrears from operating was void as applied to a telegraph company that had accepted the provisions of the Post Road Act).
\textsuperscript{103} Id. at 548. See also Western Union v. Alabama, 132 U.S. 472 (1889), where an Alabama tax on gross receipts from messages carried into the state, or sent from the state—i.e., interstate commerce—was struck down. The company could be taxed only on intrastate income, which the Court described as "receipts arising from commerce wholly within the State." Id. at 477.
\textsuperscript{104} Western Union Tel. Co. v. Richmond, 224 U.S. 160, 171 (1912).
\textsuperscript{105} Massachusetts, 125 U.S. at 549 (quoting Telegraph Co. v. Texas, 105 U.S. 460, 464-65).
reasonable.\textsuperscript{106}

After passage of the Post Road Act of 1866, Florida conferred upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. The Supreme Court struck down the Florida law, holding that the Post Road Act "in effect, amounts to a prohibition of all State monopolies."\textsuperscript{107} The Court found that the Post Road Act substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place . . . that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations shall not be excluded . . . if they accept the terms proposed by the national government for this national privilege.\textsuperscript{108}

Against the will of the states, the Court consequently upheld the Post Road Act as a valid exercise of Congress’s commerce power. The Court found:

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.\textsuperscript{109}

In \textit{City of Richmond v. Southern Bell Telephone & Telegraph Co.}, Southern Bell argued that telephones were intended to be included within the

\textsuperscript{106} St. Louis v. Western Union Tel. Co., 148 U.S. 92, 97-98 (1893), \textit{on remand}, 63 Fed. 68, 73 (E.D. Mo. 1894) (rejecting as unreasonable a city ordinance charging $5 a pole).

\textsuperscript{107} Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 11 (1877).

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} \textit{Id.} at 9.
term “telegraph” under the Post Road Act of 1866.110 Had Southern Bell succeeded, the telephone industry would have been authorized by federal law to do business anywhere. However, the Supreme Court held that the Post Road Act provisions did not apply because Congress did not intend for the term “telegraph companies” to include telephone companies.111 The Court favored states’ prerogatives and was unwilling to extend the Act by implication, “particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and alleys within their respective jurisdictions.”112 A ruling in favor of Southern Bell would “subject to national control the use and occupancy of the streets and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State.”113

Because of Richmond telephone companies were obliged to secure their authority to do business from state corporation law and the state franchise contracts. With the Telecommunications Act of 1996, however, Congress accomplished what Southern Bell sought to do through litigation in 1899. The telephone industry is now franchised by federal law to do business anywhere in the country, subject only to the reasonable exercise of the police powers of the states.114 The Act denies states and cities the power to exclude telecommunications providers. Telecommunications providers, like telegraph companies under the Post Road Act, are not exempt “from the ordinary burdens of taxation,”115 but “no state may prohibit . . . the ability of any entity to provide any interstate or intrastate telecommunications service.”116

The Post Road Act of 1866 was the model for the state franchise statutes of the 1880s and 1890s that were designed to aid the construction of statewide telephone systems. The state franchise laws, like South Carolina’s, follow the language and form of the Post Road Act. They are all offers for unilateral contracts. An offer for a unilateral contract is accepted by the company’s performance. The state franchise laws, like the Post Road Act, grant the right to any company to construct, maintain, and operate lines along and over public highways, streets, lands, and waters without compensation. The state franchise laws, however, grant telephone companies far broader rights than the federal model granted to telegraph companies. For example, unlike the federal model, state laws authorize telephone companies to construct their lines over private

111. Id. at 777.
112. Id.
113. Id.
115. Western Union Tel. Co. v. Massachusetts, 125 U.S. 530, 548 (1888).
116. 47 U.S.C. § 253(a) (Supp. III 1997). This is not to say that telephone utilities’ intrastate services are exempt from scrutiny by the state’s regulatory agencies, like the Public Service Commission (PSC). The impact of the Telecommunications Act of 1996 on the powers of the South Carolina PSC is beyond the scope of this Article.
as well as public lands and waters.\textsuperscript{117} State laws create a special procedure to compensate private property owners.\textsuperscript{118} Further, companies can transfer the contract and property rights secured under the laws. Also, state laws do not reserve a power in the states similar to the federal government's power to buy out the companies after five years at an appraised price.\textsuperscript{119} State laws are designed to provide the security necessary to induce the private investment required to develop a state wide telephone network as expeditiously as possible. A company's rights continue as long as it uses the property for telephone purposes.

All the states passed similar laws in and around the 1890s recognizing that provision of a telephone system was a state, not a local, issue. The South Carolina state franchise law,\textsuperscript{120} like the federal model, is in the form of a statutory offer\textsuperscript{121} that authorizes any person or corporation to construct, maintain, and operate a statewide telephone network and grants the company the necessary right-of-way.\textsuperscript{122}

3. Early Federal and State Regulatory Statutes: 1934 and 1950

Companies offering telephone service are subject to a complex and comprehensive federal regulatory scheme that began with the 1910 Mann-
Elkins Act. This Act established the telephone business as a common carrier and made interstate rates subject to federal regulation by the Interstate Commerce Commission.\textsuperscript{123} Despite the Mann-Elkins Act, however, the federal government made no serious effort to regulate interstate rates until the Federal Communications Commission (FCC) was created by the Communications Act of 1934 (1934 Act). In creating the FCC, Congress established a specialized agency to enforce a more detailed statute. The 1934 Act both continued and elaborated upon the Mann-Elkins Act's provisions.

The 1934 Act was promulgated "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."\textsuperscript{124} The 1934 Act provides that "[i]t shall be the duty of every common carrier . . . to furnish such communication service upon reasonable request therefor"\textsuperscript{125} and that "[a]ll charges . . . shall be just and reasonable."\textsuperscript{126} The 1934 Act also requires a filing with the FCC showing all interstate and foreign charges,\textsuperscript{127} provides for hearings on new charges,\textsuperscript{128} and authorizes the FCC, after a hearing, to prescribe a "just and reasonable charge."\textsuperscript{129}

Under the 1934 Act a carrier cannot construct a new telephone line unless it obtains a certificate from the Commission verifying that "the present or future public convenience and necessity require or will require" the service.\textsuperscript{130} Likewise, a company cannot discontinue service unless it first receives from the FCC a certificate that the public convenience will not be adversely affected.\textsuperscript{131}

The 1934 Act expressly permits the states to regulate practices and intrastate rates.\textsuperscript{132} Thus in 1950 South Carolina created the state Public Service Commission (PSC) to assume power over intrastate regulation.\textsuperscript{133} The Act creating the state PSC was entitled "AN ACT Regulating Persons, Firms And Corporations Engaged In Business As A Telephone Utility, Prescribing The Duties Of The Public Service Commission In Relation Thereto, And

\textsuperscript{124} Id. § 201(a).
\textsuperscript{125} Id. § 201(b).
\textsuperscript{126} Id. § 203(a).
\textsuperscript{127} Id. § 204(a)(1).
\textsuperscript{128} Id. § 204(a)(a).
\textsuperscript{129} Id. § 214(a).
\textsuperscript{130} Id.
\textsuperscript{131} See id. § 152(b) (Supp. III 1997).
Prescribing Penalties For Violation Of The Provisions Thereof.\textsuperscript{134} The law specifically provided that it was not to be construed to apply to interstate commerce "except insofar as the same may be permitted under the provisions of the Constitution of the United States" and federal law.\textsuperscript{135}

The current South Carolina Code provides that the 1950 PSC Act does not preempt the cities from enforcing reasonable police regulations that are "in the interest of public safety, morals, convenience, health and good order."\textsuperscript{136} The Code also provides that the PSC Act must not be construed to impair the cities' municipal rights or powers.\textsuperscript{137} Furthermore, the Code requires that rates shall be just and reasonable,\textsuperscript{138} and that telephone companies must file with the PSC tariffs showing all rates, rules, and regulations.\textsuperscript{139} The PSC determines if any rate or service is "unjust, unreasonable, insufficient, [or] unreasonably discriminatory"\textsuperscript{140} and may order a telephone company "to provide reasonable, adequate and efficient service."\textsuperscript{141} South Carolina's 1899 state franchise law is incorporated in the Code at Section 58-9-2020.\textsuperscript{142}

The 1950 South Carolina Act also requires companies to "provide and maintain facilities and equipment to furnish reasonably adequate and efficient telephone service to its customers in this State,"\textsuperscript{143} and no company can begin construction or operation "without first obtaining ... a certificate that public convenience and necessity" are required or will be required.\textsuperscript{144} In addition to its restrictions on commencing service, South Carolina's 1950 Act also prohibits utilities from abandoning service.\textsuperscript{145}

State regulatory statutes such as South Carolina's 1950 Act thus combined with the federal structure to complete the traditional legal framework for the telephone system in America. Under this regulatory scheme, Bell met the universal service goal by pricing long distance rates above cost in order to

\textsuperscript{134} Id. at 2466.
\textsuperscript{135} Id. § 7(e), at 2485 (codified as amended at S.C. CODE ANN. § 58-9-50 (Law. Co-op. 1976)).
\textsuperscript{137} Id. § 58-9-30.
\textsuperscript{138} Id. § 58-9-210.
\textsuperscript{139} Id. § 58-9-220.
\textsuperscript{140} Id. § 58-9-510.
\textsuperscript{141} Id. § 58-9-710.
\textsuperscript{142} Id. § 58-9-2020. The 1950 drafters carefully limited the new law's applicability to ensure that it would not interfere with existing or future state franchise contracts by expressly providing that state regulation will prevail over local rules. See id. § 58-9-40.
\textsuperscript{143} Id. § 58-9-260.
\textsuperscript{144} Id. § 58-9-280. Companies in existence before passage of the Act were grandfathered in any municipalities of districts in which they had lawfully commenced operations. Id.
\textsuperscript{145} Id. § 58-9-300 ("No telephone utility shall abandon all or any portion of its service to the public, except for ordinary discontinuance of service for nonpayment of a lawful charge or for violation of rules and regulations approved by the Commission, unless written application is first made to the Commission for the issuance of a certificate authorizing such abandonment, nor until the Commission in its discretion issues such certificate.").
defray the cost of connecting customers to the local company’s switching centers. This pricing system was possible because the Bell System was a monopoly. Businesses and other large users of long distance service subsidized the small and rural users. This was accomplished through the Bell System’s nationwide system of pooling, which redistributed long distance revenue to local companies based on each company’s costs. Of course, the monopoly had to be maintained for the system to work. When the federal government began eroding the monopoly by allowing competition in long distance, the competitors had a large advantage over the Bell companies and other “local” telephone companies because they did not need to price long distance to include a subsidy to the local system. Even the regulatory concepts of access charges for the use of the local network and the establishment of “universal service funds” failed to shift the subsidy burden to all entrants in the competitive market.

Before the breakup of the Bell system in 1984, an intrastate long distance call (e.g., Greenville to Charleston) was accomplished solely by Southern Bell, which was then a wholly owned subsidiary of AT&T. Southern Bell carried the call from its beginning in Greenville to its end in Charleston. An interstate long distance call (e.g., Columbia to Chicago) was carried jointly by Southern Bell, AT&T’s Long Lines Division, and Illinois Bell. Southern Bell carried the call from its beginning to the Long Lines system of AT&T, which carried it to Chicago. Once in Chicago, Illinois Bell took the call to its end. The three carriers divided the revenue pro rata according to the Bell System Division of Revenue Agreement. Unfortunately, the fairly simple manner in which long distance calls were handled before the breakup of the Bell System has changed dramatically, and the revenue that was easily provided to support universal service now requires a separate tax. Indeed, new controversies arise as the FCC expands the traditional understanding of universal service to include, for example, the cost of wiring the nation’s schools for the Internet.

III. LEGAL FRAMEWORK OF THE TELEPHONE BUSINESS IN SOUTH CAROLINA

The telephone business has been subject to different stages of legal control as the country has sought to derive the greatest public benefit from the remarkable invention of Alexander Graham Bell. As this Article has mentioned, the governing law includes the Telecommunications Act of 1996 as well as principles that originated in the nineteenth century. Legal control of

146. Bell System Division of Revenue Agreement (on file with authors).
147. JEREMY TUNSTALL, COMMUNICATIONS Deregulation: The Unleashing of America’s Communications Industry 95 (1986).
148. BellSouth Division of Revenue Agreement (on file with authors).
149. Donna N. Lampert et al., Overview of Internet Legal and Regulatory Issues, 16 ANN. INST. ON TELECOMMS. POL’Y AND REG. 179, 186-87 (1998).
the telephone business over the past 100 years has evolved in stages from the local level to the state level to the national level. The following sections describe these three major historical periods with respect to South Carolina.

A. Levels of Jurisdiction

1. Local Jurisdiction

The South Carolina General Assembly originally created cities as an administrative convenience to better regulate the use of streets in developed areas. The legislative delegation of the power to regulate the streets included the power to franchise, which is the power to grant a special privilege to use public property for a public purpose, but with private profit. Franchises were well established for water companies, electric companies, and street transportation when Bell invented the telephone in 1876. Consequently, as the telephone came into commercial use in the late 1870s, a municipality could include or exclude a telephone company through its legal power to control its rights-of-way. These franchises still exist in a number of cities (e.g., Aiken, Orangeburg, and Seneca). To induce the required investment, early franchises granted the company the right to use the streets as long as they were used for the telephone business. In addition to constructing the telephone system, the company usually provided other consideration to the city, including free phone service, the use of space on the cross-bar and later in the underground conduit, and police and fire department wires.\(^\text{151}\) However, such city-by-city negotiations discouraged the development of a statewide telephone network.

2. State Jurisdiction

During the 1880s and 1890s the states recognized the inefficiency of city-by-city negotiations and consequently withdrew from their cities the power to franchise telephone companies. After 1899 South Carolina cities continued to franchise water, electric, and transportation systems, but could no longer negotiate telephone company franchises. By legislative grant, the state authorized any telephone company to do business anywhere in the state and lay their lines over any public or private lands\(^\text{152}\) for that purpose. The United States Supreme Court found that state franchise contracts like South Carolina's were protected from impairment by the United States Constitution.\(^\text{153}\) The

\(^{151}\) See supra note 9 and accompanying text.

\(^{152}\) See S.C. CODE ANN. § 58-9-2020 (Law. Co-op. 1976). To that end, telephone utilities have condemnation powers equal to those of government.

\(^{153}\) See infra notes 214-18 and accompanying text. But see BellSouth Telecomms., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160, at *6 (S.C. Nov. 8, 1999) (upholding a yearly 5% of gross receipts franchise fee by denying that the 1899 franchise constituted a contract); see also supra note 94 and accompanying text.
Court's holding formed a suitable legal foundation to support the financing and construction of the telephone network in South Carolina and elsewhere.

3. National Jurisdiction

As noted above, in 1910 Congress amended the Interstate Commerce Act of 1887 to classify telephone companies as common carriers, which were required to provide nondiscriminatory service and to charge just and reasonable interstate rates.\footnote{154. Lipartito, supra note 5, at 161-65.} Congress granted the Interstate Commerce Commission jurisdiction over interstate rates,\footnote{155. 47 U.S.C. § 601 (1994).} reasoning that the significance of the telephone as an instrumentality of interstate commerce and military defense necessitated national control. Also, early on, the phone company was expected to fund other social and political objectives, such as universal service.\footnote{156. See supra note 41 and accompanying text.}

The Federal Communications Act of 1934 provided more detailed regulation,\footnote{157. See supra Part II.B.3.} including a formal requirement of universal service. The language of section 151 of the Act creating Federal Communications Commission expressed the importance of federal regulation:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission" .... \footnote{158. 47 U.S.C. § 151 (Supp. III 1997).}

The 1934 Act left the regulation of intrastate rates and services to the states.\footnote{159. Id. § 152(b).} In \emph{Louisiana Public Service Commission v. FCC}\footnote{160. 476 U.S. 355 (1986).} the United States Supreme Court held that the 1934 Act did not preempt state efforts to set depreciation rates for telephone plant and equipment.\footnote{161. Id. at 371.} The Court noted that the act
purported "to define a national goal of the creation of a rapid and efficient phone service, and to enact a dual regulatory system to achieve that goal."162

The telephone industry is the epitome of interstate commerce, state regulation of which can be preempted by the federal government. The federal courts, in the Divestiture Decision of 1982, broke up AT&T intending to create a more competitive phone system. Congress went much further with the Telecommunications Act of 1996, which sets forth the national objective of a competitive local and interstate system and expressly preempts state constitutions or state or local laws that might act as barriers.163 Finally, the recent Supreme Court decision in AT&T Corp. v. Iowa Utilities Board164 limits and clarifies the remaining state statutory jurisdiction after the Telecommunications Act of 1996.

4. Summary

A telephone company’s legal relations to South Carolina’s state and local governments may be summarized as follows.

a. Police Power

A telephone company is subject to the state’s police power like any other citizen. Usually the state has delegated some of this power to its cities.

b. Property Tax

The state has delegated the power to its cities to impose a general property or "ad valorem" tax on a telephone company, like any other taxpayer. However, a municipality cannot single out a telephone company for a special high tax any more than it can do so for any other taxpayer.

c. License Tax

The state has delegated the power to its cities to impose a license tax on a telephone company subject to two important limitations. First, cities may not single out a company by imposing grossly disproportionate rates. Second, cities may not impose an extraterritorial tax on income earned outside the city.

d. Other Taxes

The state has delegated no other taxing power to its cities, as expressly

162. Id. at 370.
provided in the South Carolina Code.\textsuperscript{165}

e. \textit{Municipal Consent}

According to the South Carolina Supreme Court’s construction of article VIII, section 15 of the South Carolina Constitution, a city may demand that a \textit{new} telephone company pay a fee as a condition to the grant of municipal consent for the construction of its telephone lines.\textsuperscript{166} The Telecommunications Act of 1996, however, prohibits any state or local law—including state constitutional law—from burdening the entry of a telecommunications provider.\textsuperscript{167} Consequently, any of our state courts’ future constructions of the local consent power must conform to the federal law. Although federal law may permit a city to require an administrative fee to cover the costs of registration, other burdens—such as uniform license taxes—violate the 1996 federal law.

f. \textit{State Franchise Contract}

In 1899 the South Carolina legislature had plenary control over all the highways and streets of the state. To encourage the growth of telephone service, the South Carolina General Assembly passed Act No. 40 of 1899, which authorized telephone companies to run their lines anywhere in the state—over any streets, lands, or waters, public or private. As now codified, Act No. 40 provides:

Any telegraph or telephone company incorporated under the laws of this State . . . may construct, maintain and operate its line through, upon, over and under any of the public lands of this State, under, over, along and upon any of the highways or public roads of the State, over, through or under any of the waters of this State, on, over and under the lands of any person in this State and along, upon and over the right of way of any railroad or railway company in this State . . . .\textsuperscript{168}

In essence, Act No. 40 was a statutory offer to any telephone company to

\begin{footnotesize}
\begin{enumerate}
\item City of Cayce v. AT&T Comms., 326 S.C. 237, 243, 486 S.E.2d 92, 95 (1997). The court exempted from its decision incumbent telephone companies that had constructed their lines long ago. \textit{Id.} at 243, 486 S.E.2d at 95 ("We are not asked, and therefore do not answer, the [question of] whether Cayce . . . can impose a fee five years after the cable was installed."). This question was later answered in \textit{BellSouth Telecommns., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160} (S.C. Nov. 8, 1999) (upholding such a fee).
\item The provisions of the Telecommunications Act of 1996 were not advanced by either party in argument before the court in \textit{Cayce}.
\end{enumerate}
\end{footnotesize}
construct and operate its business in the rights-of-way of all highways and streets, as well as over and under all state lands and waters, for the purpose of providing the state’s citizens with telephone service.\(^{169}\) Act No. 40 also authorizes a telephone company to run its lines over any private lands or railroad right-of-way with the concomitant duty to pay compensation pursuant to special summary condemnation procedures.\(^{170}\) There is generally no requirement in Act No. 40 for any form of municipal consent, because the purpose of the statute was to withdraw existing authority from the cities.\(^{171}\) Telephone companies such as BellSouth clearly manifested their acceptance of and reliance on Act No. 40’s statutory offer through their performance, construction, operation, and maintenance of telephone lines after 1899 and through the continued construction, expansion, and extension of the telephone system.

g. The Telecommunications Act of 1996

Congress enacted The Telecommunications Act of 1996 to remove and prohibit all state and local barriers to the entry of telecommunications providers to all aspects of the telecommunications market.\(^{172}\) The Act outlaws any state or local constitution, statute, regulation, or other legal requirement that prohibits or may have the effect of prohibiting any entity’s ability to provide interstate or intrastate telecommunications service.\(^{173}\) Thus, a state or local law that discriminates against telecommunications providers must be struck down because it will interfere with the ability to provide services.\(^{174}\) The United States Constitution requires that the laws of the United States, including the Telecommunications Act of 1996, “shall be the supreme law of the land”\(^{175}\) and followed in the states’ courts.

B. The Traditional Nineteenth-Century Local Franchise Power

As previously discussed, prior to 1899 cities in South Carolina were authorized to enter into franchise agreements with telephone companies.\(^{176}\) In

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170. Id. at 61-62.
171. Article VIII, section 15 of the South Carolina Constitution allows municipalities to demand a fee from new telephone companies as a condition to the grant of municipal consent for the construction of telephone lines. However, such a requirement is inapplicable to established telephone companies that long ago constructed their lines. See supra note 166.
173. Id.
174. Id.
175. U.S. CONST. art. VI.
City of Richmond v. Southern Bell Telephone & Telegraph Co. the United States Supreme Court found that streets and highways are the public property of the state, and that for purposes of travel and common use, they are open to the citizens of every state.\textsuperscript{177} However, when an appropriation or exclusive use is sought, the state, if it chooses, may require telephone companies to pay a fee to the general public for depriving them of common use.\textsuperscript{178} For example, an 1894 franchise agreement between the City of Aiken and Southern Bell granted the telephone utility a franchise to use the city streets and rights-of-way. In exchange for this franchise, Southern Bell agreed to provide telephone service to the residents of Aiken and to provide to the City of Aiken certain concession telephone service.\textsuperscript{179}

South Carolina's goal of a statewide telephone system was slow in developing because the necessity of city-by-city negotiations discouraged the needed investment in a statewide telephone network. Local control, while satisfactory for independent local systems like water, electric, and transportation utilities, was not appropriate where the local activities were part of a state and national network. Consequently, in 1899 South Carolina withdrew from the cities the delegated franchise power over telephone companies in order to encourage construction of a statewide integrated system.\textsuperscript{180} Local government, of course, retained the power to police the streets, but could not do so in a way that hindered a company licensed to do business by state law—and later by federal law—from performing a public purpose.

In sum, after 1899 a South Carolina city could not exclude a telephone company from the use of its streets, because state law expressly authorized that use. Though state law did not exact compensation for this use, cities could make regulations for the use incident to a proper exercise of the police power and could impose taxes that applied to all.

C. The 1895 South Carolina Constitution

The 1895 South Carolina Constitution provided:

No law shall be passed by the General Assembly granting the right to construct and operate a street or other railway, telegraph, telephone or electric plant . . . without first obtaining the consent of the local authorities in control of the streets or public places proposed to be occupied for any such

\textsuperscript{177} 174 U.S. 761, 772-73 (1899).

\textsuperscript{178} Id.

\textsuperscript{179} Southern Bell Tel. & Tel. Co. v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983), transcript of record at 3.

or like purposes.\textsuperscript{181}

In 1997 the South Carolina Supreme Court construed the current version of this provision not as a limitation on the General Assembly, but as a grant of power to municipal governing bodies.\textsuperscript{182} Though the holding in \textit{City of Cayce v. AT&T Communications} did not fully define the nature and extent of the local power, the court did make clear that its ruling was not intended to disturb the authority of telephone companies that had constructed their lines long ago and had been operating for many years—namely, Bell and the independents.\textsuperscript{183}

Once given, local consent cannot be revoked. In \textit{City of Louisville v. Cumberland Telephone & Telegraph Co.}, the city had been granted the statutory power to consent to the laying of lines.\textsuperscript{184} The United States Supreme Court found that the provisions of the charter gave the municipality ample authority to deal with the subject, and by virtue of this statutory power it could have imposed terms, which the company might have been unable or unwilling to accept—in which event the franchise granted by the State would have been nugatory. But, when the assent was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action. For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent . . . . Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky.\textsuperscript{185}

Because the \textit{Louisville} Court did not define the municipality's "consent" power, new telephone companies operating in South Carolina face substantial uncertainty until a case can be brought to clarify \textit{Cayce}. South Carolina's municipalities have indicated their belief that \textit{Cayce} restores their unlimited nineteenth-century franchise powers under the name of a "consent

\textsuperscript{181} S.C. CONST. art. VIII, § 4, amended and replaced by S.C. CONST. art. VIII, § 15 (containing virtually equivalent language).


\textsuperscript{183} \textit{Id.} at 243, 486 S.E.2d at 95 ("We are not asked, and therefore do not answer, the [question of] whether Cayce . . . can impose a fee five years after the cable was installed."); see supra note 166 and accompanying text.

\textsuperscript{184} 224 U.S. 649 (1912).

\textsuperscript{185} \textit{Id.} at 658-59.
agreement." That is, the cities believe whatever a city could have done in the 1880s or 1890s under a franchise agreement it may now impose as a "consent agreement." However, the Louisville Court was hardly suggesting a return to the costly and balkanized system that existed in the nineteenth century.

Moreover, since 1996 section 253 of the Telecommunications Act has denied both states and municipalities the power to exclude telecommunications providers or impose discriminatory costs upon them. However, the South Carolina Supreme Court's recent decision in BellSouth Telecommunications, Inc. v. City of Orangeburg declined to construe Article VIII of the state constitution in conformity with the new federal telecommunications law. In Orangeburg the court inexplicably upheld a discriminatory tax imposed by the city despite the limitations established by the Telecommunications Act.

D. South Carolina Act No. 40 of the Laws of 1899: The Statewide Franchise for Telephones

As previously discussed, Act 40 of the Laws of 1899 gave telephone companies broad authority to freely use public rights of way for the purpose of providing telephone service. Despite this broad authorization, the South Carolina Supreme Court has allowed the City of Orangeburg to impose a hefty fee for such use of its rights-of-way. Other courts have interpreted comparable language quite differently. In TCG Detroit v. City of Dearborn a federal district court held that Dearborn could not impose a franchise agreement upon the incumbent local carrier, Ameritech Michigan. The court found that Ameritech "has vested state franchise rights" dating from the 1883 statute under which it was organized. The 1883 Michigan law is substantially similar to South Carolina's 1899 law. Likewise, in City of Hawarden v. U.S. West Communications, Inc. the Iowa Supreme Court recently interpreted a statewide franchise statute like South Carolina's to strike down an ordinance that sought to impose a "franchise fee" analogous to that currently imposed by Orangeburg. In that case, the City of Hawarden required U.S. West, its existing provider, to pay a "user fee" of 3% of gross revenues to continue operations. The city conceded that "the franchise fee will generate revenue over and above any expense incident to the city's administrative or regulatory

189. See BellSouth Telecomms., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160 (S.C. Nov. 8, 1999).
191. Id. at 797.
193. 590 N.W.2d 504, 509 (Iowa 1999).
costs." The lower court found that the fee was an unauthorized tax. On appeal the city argued that what the lower court had described as a tax was "in fact, rent, legitimately charged for the commercial use of public property." The Iowa Supreme Court affirmed the lower court:

[T]he record reveals the city's proposed fee is related, not to the expense of regulation or any special benefit conferred on the utility, but to gross revenues generated by the utility. Viewed in this light, the district court held, the fee is actually a revenue generating measure, i.e., a tax.

The court rejected the city's "rental" argument, finding it "identical to one this court rejected over eighty years ago." The earlier decision, based on the Iowa statute similar to South Carolina Act No. 40 of 1899, upheld the telephone company's "statutory authorization to occupy the city's streets and alleys, free of charge, subject to the city's police power to regulate the installation and maintenance of the facilities." In view of the legislative grant, "under no theory is the city entitled to recover from the telephone company the rental value of its streets used by said company with its poles and wires.

The Iowa court further held that the Hawarden ordinance conflicted with Iowa law and the Telecommunications Act of 1996. The court found the

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194. Id. at 506.
195. Id. at 507.
196. Id.; accord City of Chattanooga v. BellSouth Telecomms., Inc., No. E1999-01573-COA-R3-CV, slip op. at 6-7 (Tenn. Ct. App. filed Jan. 26, 2000). The Chattanooga court struck down a 5% gross receipts fee similar to Orangeburg's, finding the fee was in fact a tax that was invalid because it did "not necessarily bear any relation to the cost to the city of the franchises' use of the City's rights-of-way." Id., slip op. at 6. The court continued: The City chose a fee of 5% of gross revenue, based upon what some other cities charge telecommunication providers for the use of rights-of-way, which the Trial Judge referred to as a "me too" rationale. The mere fact that other cities charge similar rates, is not conclusive as to the reasonableness of the fee.

Id., slip op. at 7.
197. Id. (citing City of Des Moines v. Iowa Tel. Co., 162 N.W. 323 (Iowa 1917)).
198. Id.
199. Id. (quoting Des Moines, 162 N.W. at 331); see also City of Englewood v. Mountain States Tel. and Tel. Co., 431 P.2d 40 (Colo. 1967) (en banc) (holding that franchise rights granted by the state to the telephone company precluded the city from requiring the company to renew the expired city franchise for continued operation); U.S. West Commcns., Inc. v. City and County of Denver, No. 98CV691 (Dist. Ct. Colo., Mar. 5, 1999) (finding that a city ordinance imposing a franchise fee was a tax and was void because it conflicted with a state statute granting a franchise right).
200. Hawarden, 590 N.W.2d at 508 ("To the extent that Hawarden's ordinance 549 purports to require a revenue-based 'user fee' as a prerequisite to providing telephone service in Hawarden, it conflicts with Iowa Code sections 476.29(6), 477.1 and .3, as well as the
city’s case was weakened by reliance on cases construing municipal powers “in connection with the distinctly different statutory schemes governing utilities other than telephone systems” such as cable and electric.\textsuperscript{201} The Iowa court found two recent decisions to be more pertinent\textsuperscript{202}: \textit{American Telephone & Telegraph Co. v. Village of Arlington Heights}\textsuperscript{203} and \textit{Diginet, Inc. v. Western Union ATS, Inc.}\textsuperscript{204} \textit{Arlington Heights} sought to impose a franchise agreement on AT&T’s right to lay fiber-optic cable. The Illinois Supreme Court held that “public streets are held in trust for public use and a city’s regulatory powers over them do not include the authority to charge rent for their use.”\textsuperscript{205} The court found that to permit local governmental units to exact tolls for conduits installed over and under city streets “would amount to legalized extortion and a crippling of communication and commerce as we know it.”\textsuperscript{206}

\textit{Diginet} dealt with the City of Chicago’s imposition of a percentage-of-revenue user fee for the telephone utility’s right to operate a fiber-optic network under sixteen miles of Chicago’s streets. The city “made no pretense that the fee was other than a revenue-generating measure; indeed, the court could find no proof of costs imposed on the city by installation of the fiber optic network.”\textsuperscript{207} The \textit{Diginet} court held the city could not circumvent limitations on its taxing authority “by calling a tax something else, such as a ‘franchise fee.’”\textsuperscript{208} The court continued:

The test is functional. If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality’s regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.\textsuperscript{209}

\begin{quote}
Telecommunications Act of 1996.”). \\
\textsuperscript{201} \textit{Id.} (emphasis added). \\
\textsuperscript{202} \textit{See id.} at 508-09. \\
\textsuperscript{203} 620 N.E.2d 1040 (Ill. 1993). \\
\textsuperscript{204} 958 F.2d 1388 (7th Cir. 1992) (Posner, J.). \\
\textsuperscript{205} \textit{Arlington Heights,} 620 N.E.2d at 1044. \\
\textsuperscript{206} \textit{Id.} \\
\textsuperscript{207} \textit{Harwarden,} 590 N.W.2d at 508-09 (citing \textit{Diginet,} 958 F.2d at 1392). \\
\textsuperscript{208} \textit{Diginet,} 958 F.2d at 1399. \\
\textsuperscript{209} \textit{Id.; accord City of Chattanooga v. BellSouth Telecomms., Inc.,} No. E1999-01573-COA-R3-CV, slip op. at 4-8 (Tenn. Ct. App. filed Jan. 26, 2000). The \textit{Chattanooga} court struck the city’s 5% of gross receipts fee, noting: The fee varies based upon the provider’s gross revenue, and is therefore measured by the provider’s earnings and not to the burdens assumed by the city in regulating the particular provider. This is particularly true because a telecommunications
The essential question, the *Diginet* court found, was whether a modern telecommunications system can withstand such local ordinances:

If municipalities such as Chicago can use their control over the public ways to extract fees unrelated to costs from telephone and other right of way companies, the provision of telephone and other utility-type services may be disrupted. To run a cable across the state a telephone company might have to cross a hundred municipal boundaries, and at each one... it could be held up for a monopoly toll, as if Illinois's municipalities were so many little medieval German principalities.\(^{210}\)

The Iowa Supreme Court in *Hawarden* noted that *Arlington Heights* and *Diginet* reflect the same policy as its *City of Des Moines* decision decided 82 years earlier.\(^{211}\) The *Des Moines* court noted:

The writer well remembers the advent of the telephone, and has watched its growth. First it was purely a local affair, then short lines connected some of the towns, and finally it spread over the entire country, so that it is now possible for one in New York to talk with another in San Francisco. In the early days every town wanted an exchange; next it wanted toll lines connecting its exchange with other exchanges in neighboring towns. Every one wanted a phone. At this stage the Legislature was appealed to, and no one thought at that time of charging for the use of poles or wires upon either public highways or streets. The main thing was to secure them and to get capital wherewith to procure them. No one it seems could foresee the tremendous development of this industry, and so the Legislature passed the act giving to telephone companies the right to construct their poles and wires over and along every highway and street in the state in order to encourage their development. Capital was invested on this basis, and the business has become very large. Now it appears that these grants and franchises were valuable, and the use of the streets and public highways is thought to be worth something.

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provider must pay 5% of its gross receipts, regardless of the extent to which the provider uses the City's rights-of-way.

*Id.*, slip op. at 6-7.

210. *Diginet*, 958 F.2d at 1400.
211. *Hawarden*, 590 N.W.2d at 508.
In this situation attempt is being made to collect rentals for the use thereof. It is a clear case of hindsight and not foresight; but courts are confined to a definition of rights under the original grants, save as these may be modified under the reserved power of the state.212

A telephone company accepts the statutory offer by constructing, maintaining, and operating its lines.213 Once the contract is made and the right-of-way established, and as long as the right-of-way is used for telephone purposes, neither the state nor its cities can require additional consideration. The company’s contract with the state is protected by both state and federal constitutional provisions against impairment of contractual obligations.214 In Russell v. Sebastian the United States Supreme Court held a municipal ordinance unconstitutional because it impaired a state contract.215 The Court held the fact that “the grant, resulting from an acceptance of the State’s offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court.”216 Likewise, in City of Owensboro v. Cumberland Telephone & Telegraph Co. the United States Supreme Court found: “If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights.”217 The street franchise, or right to use city streets in conducting a telephone business, “has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property.”218 The nation’s telephone system was constructed based on state franchise contracts and the Supreme Court’s holdings that these contracts were protected by the federal contracts clause.

A statutory phrase that authorizes use of “the public roads and highways in [the] state” for the construction of telephone lines clearly includes the right to use not only nonprivate, rural roads in the state, but also the streets of a city as well.219 The Minnesota federal district court in Abbott v. City of Duluth

213. According to Cayce, 326 S.C. 237, 242-43, 486 S.E.2d 92, 94-95, (1997), Art. VIII, § 15 of the South Carolina Constitution requires municipal consent as a condition of the state’s offer of the franchise right. For companies like BellSouth and others that have long been investing in and providing services within municipalities, no records documenting that consent exist. However, the acquiescence of municipalities to decades of investment would appear to foreclose their ability to expand Cayce to exact fees from these utilities.
215. 233 U.S. 195, 204 (1914).
216. Id.
stated: "Public road' and 'highway' are usually understood to mean the same thing, and include all ways which of right are common to the whole people, and therefore differ from private roads or byways."220 The court continued:

The amendment of 1881 . . . if it only granted rights along rural roads, would never have been asked or enacted; but granting, as it did, such rights upon all highways in the state, it was of great value to telephone companies, besides saving them the annoyance of dealing with municipal bodies for rights and powers, and so obviously for the advantage of the public as to induce the legislature to act directly and at once in respect to all parts of the state.221

In 1903 the Iowa Supreme Court also construed the statutory phrase "public highways of this state" to authorize telephone companies to use city streets because it was "known by all that the principal business of telephone companies was confined to urban ways."222 Telephone companies "were given the use of highways and streets without limitation, and without control by city authorities."223 Other courts have also prohibited cities from interfering with state franchises.224

Similarly, the Mississippi Supreme Court found a city ordinance demanding "rental" payment for each pole was illegal because a state franchise allowed the company to use the city streets without payment.225 The court found that the ordinance was "exacting a certain sum as rent, pure and simple, from the company, for the identical entry upon and occupation of the streets by the company, with its poles, which it was authorized by the act of 1886 [state franchise] to make, without compensation to the state or city.9226

In 1956 Mississippi enacted a statute that attempted to impose upon Southern Bell a fee of 2% of the company's monthly service charges paid by customers as payment for the continued use of the streets, alleys, and public places within all state municipalities.227 However, in order to induce the construction of a statewide telephone system, Mississippi had enacted in 1886 a statutory offer228 almost identical to South Carolina's 1899 law. In Southern

220. Id. at 837.
221. Id. (emphasis added).
223. Id.
224. See, e.g., Southern Bell Tel. & Tel. Co. v. City of Mobile, 162 F. 523 (S.D. Ala. 1907); Northwestern Tel. Exch. Co. v. City of Minneapolis, 83 N.W. 527 (Minn. 1900); Village of Carthage v. Central N.Y. Tel. & Tel. Co., 78 N.E. 165 (N.Y. 1906); City of Seattle v. Western Union Tel. Co., 153 P.2d 859 (Wash. 1944).
225. Hodges v. Western Union Tel. Co., 18 So. 84, 84 (Miss. 1895).
226. Id. at 85.
227. See Southern Bell Tel. & Tel. Co. v. City of Meridian, 131 So.2d 666, 667 (Miss. 1961).
228. Act of Mar. 16, 1886, ch. 38, § 1, 1886 Miss. Laws 93.
Bell Telephone & Telegraph Co. v. City of Meridian the Mississippi Supreme Court found this statute "constituted an offer by the State to telephone and telegraph companies to use highways and streets for the purpose of providing citizens with telephone service without any requirement of paying compensation to either municipalities or the State." Southern Bell and its predecessors had accepted the offer by the construction, maintenance, and operation of their lines. The court concluded that the company’s acceptance "resulted in the creation of an irrevocable contract between appellant, on the one hand, and the State, on the other, which is protected from impairment by the contract clause of the State Constitution." Consequently, the court concluded that the imposition of the 2% fee "as compensation for the use of the streets" amounted to "an unlawful impairment of the obligations of this contract" in violation of the state constitution.

South Carolina’s constitution, like Mississippi’s, provides that "[n]o . . . law impairing the obligation of contracts . . . shall be passed." In Meridian the court could not avoid the constitutional issue because the state itself, with the 1956 law, had clearly impaired its own contract. However, in South Carolina the state itself has not contradicted or impaired the state franchise. Instead, the actions of some municipalities, acting on their own, have given rise to constitutional violations. Section 5-7-30 of the South Carolina Code does not authorize cities to impose additional charges on telephone companies that have been contractually entitled to operate on city streets since 1899. Telephone companies, both local and interstate, have constructed and maintained their lines in reliance upon their contracts with the state. The state has not authorized, nor could it authorize, municipalities to impair existing state contracts, including the contract set forth in section 58-9-2020 of the South Carolina Code.

IV. DEVELOPMENTS AFFECTING THE INDUSTRY: 1980S TO THE PRESENT

A. 1980s South Carolina Business License Tax Litigation

The litigation between South Carolina cities and Southern Bell in the

229. Meridian, 131 So.2d at 670.
230. Id.
231. Id.
232. Id.
234. Meridian, 131 So.2d at 670.
1980s,\textsuperscript{238} which led to the execution of various "franchise agreements" around South Carolina, was based on a constitutional history dating to colonial days.

\textbf{1. Constitutional History}

The South Carolina Constitution grants the legislative power of the state to the General Assembly.\textsuperscript{239} The grant is unlimited except as it is limited specifically by another provision of the constitution or by the United States Constitution.\textsuperscript{240} Municipal corporations "are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified, or diminished at any time, without their consent, or even without notice."\textsuperscript{241}

Under the 1895 South Carolina Constitution, municipal corporations hold those powers delegated to them by the legislature in their incorporation law or other statute.\textsuperscript{242} A municipal corporation could not impose a tax unless the legislature authorized it,\textsuperscript{243} but South Carolina cities enjoyed substantial "home rule" because they could impose real estate taxes unless the legislature altered or repealed their power.\textsuperscript{244}

South Carolina counties, on the other hand, were administered directly by the General Assembly through annual county appropriations acts. These bills were commonly referred to as "county supply bills."\textsuperscript{245} The supply bills set forth the method and rate of tax and each item of expenditure, including salaries for county employees. Through these county delegations, the General Assembly ran the counties.

In April 1966 the General Assembly created a committee to study the South Carolina Constitution of 1895. The committee elected Lieutenant Governor John C. West as its chairman in 1967, presenting its final report to the governor in 1969. Based on the West Committee's recommendations, the General Assembly provided for a referendum vote to amend Article VIII of the South Carolina Constitution on the general election ballot in November 1972. After a favorable referendum vote, the General Assembly ratified the amendment on March 7, 1973. Article VIII, Section 7 now provides:

\begin{flushright}
\textbf{239. See} S.C. CONST. art. III, § 1.
\end{flushright}
The General Assembly shall provide by general law for the structure, organization, powers, duties, functions, and the responsibilities of counties, including the power to tax different areas at different rates of taxation related to the nature and level of government services provided. Alternate forms of government, not to exceed five, shall be established. No laws for a specific county shall be enacted and no county shall be exempted from the general laws or laws applicable to the selected alternative form of government.\textsuperscript{246}

Article VIII, Section 9 currently states that: "[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law; provided, that not more than five alternative forms of government shall be authorized."\textsuperscript{247} Additionally, Article VIII, Section 14 prohibits the legislature, in exercising its Article VIII authority, from interfering with the administration of any function which requires statewide uniformity.\textsuperscript{248}

Article X, governing finance and taxation, was amended in 1977.\textsuperscript{249} Section 1 provides in part: "The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property."\textsuperscript{250} Additionally, Section 6 provides in part: "The General Assembly may vest the power of assessing and collecting taxes in all of the political subdivisions of the State. Property tax levies shall be uniform in respect to persons and property within the jurisdiction of the body imposing such taxes . . . ."\textsuperscript{251}

In \textit{Knight v. Salisbury} the South Carolina Supreme Court explained that the purpose of these so-called Home Rule Amendments was to get the seat of county government out of Columbia:

These changes were prompted by the feeling that Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to problems at the state level. It was against this background that Article VIII was written. It is clearly intended that home rule be given to the counties and that county government should function in the county seats rather than at the State Capitol. If the counties are to remain units of government, the power to function must exist at the county level. Quite obviously, the

\textsuperscript{246} S.C. CONST. art. VIII, § 7.
\textsuperscript{247} Id. art. VIII, § 9.
\textsuperscript{248} Id. art. VIII, § 14. An example of a function requiring uniformity is the construction and operation of a unified, interconnected telephone network.
\textsuperscript{249} Act of May 4, 1977, No. 71, § 1, 1977 S.C. Acts 90.
\textsuperscript{250} S.C. CONST. art. X, § 1.
\textsuperscript{251} Id. art. X, § 6.
framers of Article VIII had this in mind.  

With powers delegated by the legislature, municipal corporations were already governing themselves in a satisfactory way. Article VIII was directed at county, not municipal, problems.

2. Home Rule Amendment and Section 5-7-30

South Carolina Code section 5-7-30 was enacted in 1975 pursuant to the Home Rule Amendments. It allows municipalities to enact ordinances to deal with local concerns, provided the ordinances are not inconsistent with general law. Section 5-7-30 states:

Each municipality of the State . . . may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets . . . which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, including the authority to . . . grant franchises for the use of public streets and make charges for them . . . .

Importantly, section 5-7-30 provides that it will not apply if it is inconsistent with existing general law. Section 58-9-2020, enacted to revoke the city franchise power respecting telephone companies, is such an existing general law. Section 58-9-2020 states:

Any telegraph or telephone company . . . may construct, maintain and operate its line through, upon, over and under any of the public lands of this State, under, over, along and upon any of the highways or public roads of the State, over, through or under any of the waters of this State, on, over and under the lands of any person in this State and along, upon and over the right of way of any railroad or railway company in this State . . . .

The only conditions on a company’s authority to construct and operate its telephone business are (1) that the lines must be “constructed so as not to

255. Id. § 58-9-2020.
endanger the safety of persons or to interfere with the use” of the roads, “the navigation of such waters or the operation and running” of railroad engines and cars; and (2) that “just compensation” must first be paid to the owners of private lands and the railroads for such rights.\textsuperscript{256} Again, the entire purpose of the original 1899 enactment of what is now section 58-9-2020 was to withdraw from the localities the previous delegation of the franchise power with respect to telephones. The legislature had determined that as far as telephone companies were concerned, a statewide franchise was in the best interests of the state’s citizens.

The police powers that section 58-9-2020 permit states to impose, however, are regulatory only. Assuming that a city may recover the cost of regulation from the telephone company, South Carolina law clearly mandates that the city may not use the police power as a device to generate revenue.\textsuperscript{257} Our Supreme Court has stated that “[a] regulatory measure of this kind may produce only such revenue as is reasonably necessary to defray the expense connected with its operation, and that an ordinance passed for the real purpose of raising revenue, under the guise of obtaining funds for the enforcement of a police regulation, is invalid.”\textsuperscript{258}

\section*{3. The Aiken and Spartanburg Cases\textsuperscript{259}}

Following the Home Rule Amendments and other legislation, South Carolina municipalities dramatically raised business license taxes imposed on Southern Bell.\textsuperscript{260} Aiken, for example, raised its tax by 2100\%\textsuperscript{261} and Spartanburg raised its tax by 900\% to 1,000\%.\textsuperscript{262} Southern Bell resisted the cities’ demands, and in both \textit{Southern Bell Telephone & Telegraph Co. v. City of Aiken} and \textit{Southern Bell Telephone & Telegraph Co. v. City of Spartanburg}, the South Carolina Supreme Court held for the company.\textsuperscript{263} The court established the constitutional limits on the local power to collect a license.
tax. The municipalities, which had budgeted revenue from the now-illegal business license ordinances, faced deficits and sudden large real estate taxes. To assist them, Southern Bell offered franchise agreements to make some money available to them.

Section 5-7-30, as noted above, confers specific powers on municipalities. With respect to taxes, municipalities are authorized to (1) "levy and collect taxes on real and personal property," and (2) "levy a business license tax on gross income." These are the only taxing powers delegated; a city is not authorized to impose an income or sales tax.

In Southern Bell Telephone & Telegraph Co. v. City of Aiken the court found that "the licensing power of municipalities is to be strictly construed and exercised in strict conformity with the terms of its grant." At the same time, however, the power to impose a license tax implies a power to classify business and differentiate as to rates of taxation," so that some businesses pay higher rates than others. The power to classify the license tax, unlike a uniform rate tax like the property or income tax, is subject to the abuse of singling out a business taxpayer for discriminatory treatment. A city council may define a class in which only one, or very few, taxpayers will fall. By its very nature, a license tax discriminates among taxpayers. The discrimination is reasonable, or "rationally based," when the historical factors are considered properly. The business license tax is a special tax whose classification must be rationally based on the level of governmental services and benefits provided to the taxpayer. Specifically, the South Carolina Supreme Court has required that a license tax (1) be rationally based on the provision of governmental services, the benefits derived by the taxpayer, and the burdens imposed by him; and (2) that the license tax must act in aid of the real property tax to assure that all taxpayers make a fair contribution to government.

In State v. Columbia the court explained that the license tax had evolved from a police power regulation to a revenue producer while retaining some of its police power roots (i.e., that it is a special tax and classification must be
rationally based on services provided to the business by the government).\textsuperscript{271} Initially, the court noted, "a license of a trade . . . is referable to the police power . . . and implies authority to prohibit the exercise of such business."\textsuperscript{272} Basically, licensing was intended to regulate the conduct of the undertaking and the fee was related to the cost of enforcement.

In its next stage, the license tax was imposed on places of public entertainment and amusement "based upon the idea that avocations of that class should contribute specially to the support of the government in excess of the burdens borne by the productive industries."\textsuperscript{273} In its last historical stage the tax was imposed on lawful occupations "where circumstances of a peculiar nature rendered it requisite that each particular avocation should have its own rate of taxation."\textsuperscript{274}

If the city cannot show a rational basis for its classifications, a license tax is an illegal gross receipts tax. A high tax rate must be based upon special or disproportionate services rendered. The court's decision in \textit{Aiken} reaffirmed this traditional principle.\textsuperscript{275} The court held that the Aiken license tax ordinance "offend[ed] the Equal Protection Clauses of the South Carolina and United States Constitutions."\textsuperscript{276} The court found that Aiken's 1979 ordinance imposing a 3\% tax on Southern Bell "applied an unreasonable and discriminatory rate to the appellant."\textsuperscript{277} Southern Bell "was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance."\textsuperscript{278} The court noted the record "lacks sufficient evidence that would support an express finding of a rational basis."\textsuperscript{279} The court concluded: "[W]e look no further than the disproportionality just noted and the lack of any rational basis therefor in concluding that a denial of equal protection has here occurred."\textsuperscript{280}

The court found the \textit{Aiken} case to be "comparable" to its 1972 decision in \textit{United States Fidelity & Guaranty Co. v. City of Newberry}.\textsuperscript{281} In \textit{Newberry} the court held equal protection requires that a license tax be fair and nondiscriminatory, stating that "the cardinal issues there is [sic] whether the city had any rational basis for such a gross disparity and differentiation between the rate charged" plaintiff and the rate charged others.\textsuperscript{282} "In all of our decisions wherein a classification in a tax statute or ordinance has been challenged . . . this Court has recognized that a reasonable basis for the

\textsuperscript{271} 6 S.C. 1, 4-5 (1874).
\textsuperscript{272} \textit{Id.} at 4.
\textsuperscript{273} \textit{Id.}
\textsuperscript{274} \textit{Id.} (emphasis added).
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textit{Id.} at 274, 306 S.E.2d at 222.
\textsuperscript{278} \textit{Id.} at 273, 306 S.E.2d at 222.
\textsuperscript{279} \textit{Id.}
\textsuperscript{280} \textit{Id.}
\textsuperscript{281} 257 S.C. 433, 186 S.E.2d 239 (1972).
\textsuperscript{282} \textit{Id.} at 439, 186 S.E.2d at 241.
different treatment was essential to the constitutionality thereof.283

In Spartanburg the court concluded the rate disparity between Southern Bell and other companies "is palpably unreasonable and violative of equal protection of the laws."284 The court found a gross disparity and a lack of any rational basis for the disparity:

The gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts ($238,875 in 1981 and $267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of $725. The city has advanced no reasonable basis for the differential treatment.285

Spartanburg illustrates that the South Carolina Supreme Court requires a city’s ordinance to be based on an understandable classification system. Ordinances must indicate the standard or standards used to divide businesses into different classes to pay different rates. Equal protection requires that known standards be consistently applied to all taxpayers.286 The taxpayer is denied equal protection if the city refuses to disclose what standards, if any, it has used.

In Aiken the court affirmed the ruling of Circuit Judge Rodney A. Peeples in favor of Southern Bell as follows:

By way of cross-appeal, the City of Aiken contends that the trial court erred in failing to sustain its claim that intrastate calls should be included in gross income of the appellant for license tax purposes. The trial court expressly found that such a claim had no rational basis in the record. We agree and affirm the finding of the trial judge on this point.287

Judge Peeples had ordered Aiken to refund the tax attributable to intrastate tolls.288 Because I find a definite lack of adequate basis by which an intrastate toll that may be made or placed, why it’s fair, or proper, or reasonable, or rational for

283. Id. at 440, 186 S.E.2d at 242.
285. Id. at 497, 331 S.E.2d at 335 (emphasis added). The City of Spartanburg, in its Brief to the South Carolina Supreme Court, stated at page 20 that the “South Carolina Supreme Court is unique among the Courts in the United States in holding” that the burden of coming forward with a rational basis shifts to the taxing authority once a gross disparity is shown.
288. Transcript of Record at 202-04, Aiken (No. 79-CP-02-860).
that to have been taxed as being locally performed within the City of Aiken." 289 Judge Peeples' finding, affirmed by the court, was that the

Doctrine of Fair Apportionment requires a local license tax upon businesses doing business both within and outside the taxing jurisdiction, be apportioned by a municipality in a manner by which the measure of the tax fairly reflects that proportion of the taxed activity which is actually carried on within, and I emphasize within, the taxing jurisdiction. 290

In the case of the intrastate toll, he continued, where "you have unitary activities carried on almost simultaneously in several cities, that being the intrastate toll call, I do not think that a tax can fail to do anything but unreasonably discriminate or deny equal protection." 291 The "complexity of the system just makes it impossible to apply the language of the ordinance to the toll charges in a manner which would arrive at a reasonable proportion of such charges." 292 Similarly, the Spartanburg court found "no rational basis for including intrastate calls in gross income for license tax purposes." 293

Indeed, the State legislature has never authorized its cities to impose a statewide or worldwide tax. 294 Under South Carolina law a city may only impose a reasonable tax based on business actually carried on in the city. 295 It may not impose a tax on extraterritorial revenues earned by activities taking place elsewhere and from customers residing elsewhere. 296 Due Process and Equal Protection require that cities confine their taxes to their own boundaries. 297

Even a lawful city license tax, of course, must be passed on to the company's customers in the city that imposes it. The Southern Bell General Subscriber Service Tariff, like those of other utilities, provides a schedule of permitted license tax levels. Taxes in excess of the schedule are passed on to subscribers within the municipal boundaries. 298 The purpose of the pass-on

289. Id. at 196.
290. Id. at 197 (emphasis added).
291. Id.
292. Id. at 198.
294. See S.C. CODE ANN. § 5-7-30 (Law. Co-op. Supp. 1999), But see Eli Witt Co. v. City of W. Columbia, 309 S.C. 555, 425 S.E.2d 16 (1992) (allowing the City of West Columbia to tax income from sales made outside the city where the company's business property was all in West Columbia).
296. Id.; Spartanburg, 285 S.C. at 497, 331 S.E.2d at 334.
tariff is to prevent one city from imposing what would in substance be an extraterritorial tax on ratepayers throughout the state.\textsuperscript{299} The pass-on tariff was upheld by the South Carolina Supreme Court, over Spartanburg's objection, in \textit{City of Spartanburg v. Public Service Commission}.\textsuperscript{300} The Court held that "to charge customers outside the city exchange or across the state for a city license tax would be unjust discrimination."\textsuperscript{301}

4. \textit{Settlement of the 1980s Litigation}

As federal funds diminished in the 1980s, municipalities across the state struggled with the need to maintain and expand services to their citizens. Many of the state's larger cities—such as Columbia, Spartanburg, Charleston, and North Charleston—began to impose substantial business license fees on utilities, intending to generate hundreds of thousands of dollars in new revenues. When compromise negotiations between the cities and Southern Bell proved futile, Southern Bell successfully challenged this type of license fee in \textit{Aiken} and \textit{Spartanburg}, as detailed above. A number of other suits were pending, but the principles of \textit{Aiken} and \textit{Spartanburg} indicated Southern Bell would succeed in those as well.

Harry Marsh, then Southern Bell's chief executive in South Carolina, was troubled by the impact these South Carolina Supreme Court rulings would have on the cities, and on the company's relationship with them. He directed his lawyers to undertake negotiations with the cities against which suits were pending with the stated goal of keeping them, for the most part, whole while preserving the principles established by the state supreme court. These negotiations began in earnest, first with then-Mayor John Bourne of North Charleston. Discussions continued over a number of weeks until what became the standard "voluntary franchise" agreement was developed. The so-called "franchise" agreement was in reality a vehicle to provide funds to the cities, because the cities had not possessed the power to franchise BellSouth or any other telephone company since 1899.

Weighing the recent South Carolina Supreme Court rulings against the inevitable litigation costs, cities across South Carolina—from Charleston to Rembert to Greenville—embraced the new voluntary franchise agreements. However, many municipalities chose not to accept BellSouth's offer because the "franchise" fees were to be passed on to subscribers within the city's limits. Indeed, the City of Spartanburg even challenged this "pass-on" ability in 1984, albeit unsuccessfully.\textsuperscript{302}

The nature of the telecommunications industry has drastically changed since the execution of the initial agreements. Today, hundreds of new carriers

\textsuperscript{299} Id.
\textsuperscript{300} Id. at 225, 314 S.E.2d at 600.
\textsuperscript{301} Id. at 226, 314 S.E.2d at 600.
\textsuperscript{302} Id. at 223, 314 S.E.2d at 599.
are authorized to provide telephone service in South Carolina. Congress, the FCC, and the Public Service Commission have allowed competition in every part of the industry. The next challenge is to implement a uniform assessment and collection of taxes from all taxpayers to allow competition to take place on a level playing field.

5. 1984 Divestiture

Before divestiture, an intrastate long distance call (e.g., Charleston to Greenville) was accomplished solely by Southern Bell, which was then a wholly owned subsidiary of AT&T. Southern Bell carried the call from the caller's residence in Charleston to its terminus in Greenville. Because the call was totally intrastate, Southern Bell retained 100% of the call revenues.

Interstate calls required an extra step. Southern Bell and AT&T participated jointly to provide interstate service, and both were compensated pursuant to a business arrangement known as "division of revenues." The long distance call was billed and collected by Southern Bell, and all revenues collected by Southern Bell from interstate service were pooled. AT&T and Southern Bell then shared such revenues, pro rata, based upon a formula contained in the division of revenues agreement between the two carriers.

In 1982 a Federal court issued an order that changed the structure of the telephone industry forever.303 The court decree split the old Bell System into a new AT&T and 22 operating companies grouped under seven regional holding companies.304 The new AT&T inherited the Bell System long distance network, which remains subject to FCC regulation.305 However, AT&T can sell telecommunication and computer equipment and services without regulation.306 The operating companies inherited the Bell system local networks, which are subject to regulation by state regulators, the FCC, and the associated "Yellow Pages" operations. The regional holding companies may sell, but not make, equipment.307 They are not presently allowed to offer information services (like data processing) directly.308

The Modified Final Judgment in United States v. American Telephone & Telegraph Co.309 held that Southern Bell could no longer function as a long distance carrier; its phone service was limited to a defined local exchange area. Further, AT&T was not to provide local facilities or services; correspondingly, long distance was off limits for the operating companies.310 Under the Modified Judgment the operating companies may provide long distance, or toll, services

304. Id. at 142 n.41.
305. Id. at 141.
306. Id. at 174.
307. Id. at 225.
308. Id.
309. Id. at 131.
310. Id. at 224.
only inside the 169 “local access and transport areas” (LATAs) into which the decree divides the country.311 The operating companies were specifically forbidden to place calls between LATAs. In that regard their required role was to provide mere “access” from the local network to the “long distance” carriers’ switches. The operating companies were also locked out of any new lines of business unless they received special permission of the Justice Department and the district court.312

As a result of divestiture, Southern Bell became part of an independent entity renamed BellSouth. The manner of doing business with AT&T pursuant to the division of revenues arrangement ended, and BellSouth was required to offer any and all long distance carriers equal access to its lines on a tariff basis.313 Accordingly, all long distance carriers now pay BellSouth an access charge—an FCC or PSC approved charge for the provision of BellSouth service for originating or terminating long distance telecommunication, whether intrastate or interstate, on behalf of the long distance carrier. The access charge is calculated based on the long distance carrier’s actual use of BellSouth’s lines.314

Coupled with the independence of BellSouth, all telephone users were given the opportunity, in both intrastate and interstate telecommunication, to select the long distance carrier to carry their calls. Each long distance carrier bills directly, on behalf of itself, for the total charge of the call. The long distance carrier does not share these revenues with BellSouth. Instead, BellSouth charges the long distance carrier an access charge, as explained above, that is a part of the long distance carrier’s overall cost for the long distance call.

Southern Bell no longer functions as the long distance carrier, although it has tried on three different occasions to obtain FCC permission to do so. While BellSouth could offer long distance services to customers outside its nine-state operating territory it has chosen not to. Because Southern Bell’s telecommunications service is now limited to service within its LATA, the Charleston to Greenville call is now carried by BellSouth to its interface with the long distance carrier, which then takes the call to Greenville; there the call is carried to its terminus by BellSouth. To give another example, in an intrastate call from Columbia to Charleston, the call (1) originates in Columbia, where BellSouth carries it to its interface with the long distance carrier (sometimes called an interexchange carrier), (2) is carried to a Charleston interface by the long distance carrier, and (3) is carried it to its end by BellSouth. In the above example the long distance carrier charges the phone user for the whole call (perhaps $1.22 for a three minute call); which includes

313. Id. at 131.
314. To avoid these charges, some carriers are going so far as to build their own networks or pursue the use of cable T.V. facilities.
the access charge paid to BellSouth (perhaps $.49 for the three minute call).

After divestiture, BellSouth must provide access service to any long distance carrier, and must provide this service under terms and conditions established by the regulatory authorities—the FCC and the PSC. The agreements between BellSouth and the long distance companies are imposed by law in the form of FCC and PSC tariffs. BellSouth is not free to alter the terms and conditions established by the tariffs, and it is not free to refuse to deal with any long distance carrier. The relationship is legally imposed as part of the regulatory framework of the country’s telephone business.

Since divestiture, AT&T and the other long distance carriers have been free to sell to BellSouth’s large business customers by selling them intracompany phone networks and providing them direct access to long distance service as opposed to access through BellSouth. Today, literally hundreds of telephone companies that did not exist even ten years ago operate throughout the Southeast. They compete in every aspect of the telecommunications industry. Because they are accessing BellSouth’s services to operate, these companies are not forced by any city to pay for business licenses or franchises—even though many of them are deriving revenues from customers in almost every South Carolina municipality. As radically as the industry changed in the late 1980s, however, unheard of leaps in technology and Congressional reaction brought about even more radical change before the century came to a close.


Congress established national jurisdiction and federal regulation over telecommunications to avoid the “practical difficulties inhering in state by state regulation of parts of an organic whole.” As noted earlier, Congress granted the FCC the authority to regulate “interstate and foreign commerce in wire and radio communication.” However, Congress permitted state regulation to continue. Although state Public Service Commissions continued to fix intrastate rates and cities still imposed franchise fees, Congress could end state and local regulation at will under the commerce power.

During the dual-regulation period, state and local governments viewed the telecommunications industry as a traditional public utility that enjoyed substantial freedom from competition, special governmental privileges, and a guaranteed rate of return. However, many states and municipalities subjected the industry to special taxes (e.g., statewide utility gross receipts taxes) and

local franchise fees.\textsuperscript{320} The special taxes, at times, were justified as a return for the special rights and privileges the state and localities had granted, such as the power of eminent domain and the right to use the public rights-of-way. At other times, states and localities justified the special charges on the pragmatic ground that the utility was able to pass the charges along to its customers. In many cases, states also singled out utilities for higher rates under more general taxes, such as the property tax,\textsuperscript{321} the state license tax on utilities’ property and gross receipts,\textsuperscript{322} and sales and use taxes.\textsuperscript{323} The classic telephone monopoly was thus an important source of revenue for state and local government.

For more than sixty years Congress dealt with telecommunications as a vital national asset that required strong regulation to promote and protect the public interest and national defense. A regulated legal monopoly, of course, charges the rate fixed by the regulatory authorities.\textsuperscript{324} The regulatory authorities may set the rate high enough to allow the company to earn excess revenues that are available for other purposes. For many years the federal regulatory scheme allowed telephone companies to earn long distance revenues that could be used to subsidize universal service at the local level.

However, in recent years new telecommunications technology has rapidly replaced the industry’s traditional network. The old system based on poles and wires has quickly turned into a modern one based on microwaves, fiber-optic technology, and satellites. The system now transmits, in addition to voice, a variety of data and video. Consequently, the traditional regulated monopoly is no longer an effective legal framework to release the potential of available telecommunications technology for the benefit of consumers and business. In the 1990s Congress came to the realization that “[t]echnological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.”\textsuperscript{325}

1. The Removal of Barriers and the Prohibition of Discrimination Among New Entrants

In 1996, following years of debate, Congress created a new legal framework to carry out an updated national telecommunications policy. The Telecommunications Act of 1996\textsuperscript{326} was designed “to provide for a pro-

\textsuperscript{320} See BROOKS, supra note 7, at 297.

\textsuperscript{321} S.C. CONST. art. X, § 1, cl. 1 (imposing a 10.5% ratio assessment on utilities).


\textsuperscript{323} S.C. CODE ANN. § 12-36-910 (Law. Co-op. Supp. 1999) (imposing a tax on telecommunications services although services are not generally included in the sales tax that is imposed on selling tangible personal property at retail).

\textsuperscript{324} See generally Livia Solange West, Deregulating Telecommunications: The Conflict Between Competition and Universal Service, 9 DEPAUL BUS. L.J. 159 (1996).


competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. 327 The 1996 law prohibits any local burdens or discriminatory costs directed against the provision of telecommunications services. 328 The Conference Report reveals that the Act "is intended to remove all barriers to entry in the provision of telecommunications services," 329 and in the spirit of free competition, Senator Hollings declared "let the games begin." 330 The Act recognizes, in short, that the citizen-consumer is entitled to a more accountable system— one in which taxes are called taxes and phone bills are for phone services alone.

The Telecommunications Act imposes a series of duties on carriers to promote competition. The local company must provide competitors (1) interconnection; 331 (2) "unbundled access" (i.e., access to the individual elements of the local phone company's network); 332 and (3) "resale options" (i.e., the sale to competitors, at wholesale rates, any service the local phone company provides to its customers at retail rates to allow competitors to resell the services). 333 When a competing carrier requests that the local phone company provide interconnection, unbundled access, or resale, both parties have a duty to negotiate in good faith the terms and conditions of an agreement. 334 If they fail to reach an agreement, either party may petition the State Utility Commission to arbitrate and resolve open questions. 335 The final agreement, however accomplished, must be approved by the State Commission. 336

The Supreme Court has described the background and purpose of the Telecommunications Act as follows:

Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances,

332. Id. § 251(c)(3).
333. Id. § 251(c)(4).
334. Id. § 251(c)(1).
335. Id. § 252(a)(2).
336. Id. § 252(e)(1).
however, have made competition among multiple providers of local service seem possible, and Congress recently ended the longstanding regime of state-sanctioned monopolies.

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996 Act or Act) fundamentally restructures local telephone markets. \textit{States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry}. Foremost among these duties is the LEC's obligation under 47 U.S.C. § 251(c) (1994 ed., Supp. II) to share its network with competitors.\(^{337}\)

The Federal policy of facilitating competition in telecommunications services in order to reduce consumer costs and encourage invention is discussed further below.

Section 253(a) of the Act comprehensively preempts any state or local law or requirement that could prohibit the provision of telecommunication services.\(^{338}\) Indeed, section 253(a) is so broad that, as Senator Hollings reports, the states and mayors went to Congress and said: "\textit{Wait a minute, that sounds good but we have the responsibilities [in some specific situations to regulate in the public interest] . . . . So what about that? How are we going to do our job with that overencompassing general section (a) you have there[?]\(^{339}\) In response Congress drafted four exceptions to section 253(a)'s preemption. The four exceptions are discussed in the following subsections of this Article.

The term "telecommunications" is defined broadly under the Act, and clearly includes wireless communication.\(^{340}\) "Telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."\(^{341}\)

Under the Act, BellSouth Telecommunications is authorized to provide service anywhere in the country because federal law preempts any state or local requirement that "\textit{may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate and intrastate telecommunications service}.\(^{342}\) The traditional city franchise, which was based on the power to

\(^{338}\) 47 U.S.C. § 253 is titled "Removal of barriers to entry." Section 253(a) states: "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."
\(^{340}\) "[The] transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (Supp. III 1997).
\(^{342}\) Id. § 253(a).
exclude a company, is thus preempted by this Act. Otherwise, one city could hold hostage the entire national and international telecommunications network. Senator Pressler explained that because this Act would not allow cities and states to exclude service, the Act would remove the cost and uncertainty of endlessly lobbying state legislatures and city councils:

If our companies and our investors have the uncertainty of not knowing what every city will do, of not knowing what every State will do and each State legislature and each city council may change, the companies will be in the position of having to endlessly lobby city officials and State officials on these issues—not only that, at any time certainty is taken out, thus discouraging investment.  

Any cost imposed by a state or local government on a provider burdens the company and may discourage it from entering, or staying, in a market; such costs are thus prohibited by section 253(a). But not all costs are forbidden. Congress did not intend to exempt the industry from laws that apply equally to all or from taxes that other businesses in the community pay. These costs, unlike special or discriminatory charges, are part of the normal expenses of doing business.

Section 253(a), therefore, does not bar a property tax that applies a uniform rate to all property assessed in the same manner. But if a state imposes a higher millage on telecommunications property than another business property, or values it in a different way, the state will violate section 253(a). Similarly, other general taxes—like a sales and use tax or a corporate income tax—are valid unless they are manipulated in some way to single out, or target, telecommunications providers. Section 253(a) bars discrimination against any particular telecommunications provider as well as discrimination against the industry as a whole.

In enacting section 253(a), Congress reserved only four areas for continued state and local regulatory authority. The four sections are (1) section 253(b) (authorizing nondiscriminatory state regulation of specified areas); (2) section 253(c) (authorizing state or local government to manage the public rights-of-way and charge for the cost of this management); (3) section 253(e) (authorizing state regulation of the terms and conditions of mobile service but not entry or rates charged); and (4) section 253(f) (authorizing states to continue to control entry in rural markets). Each of these reservations are discussed below.

2. The First Reservation: State Regulation

Section 253(b) permits the state to impose, "on a competitively neutral basis," requirements that are "necessary to (1) preserve and advance universal service; (2) protect the public safety and welfare; (3) ensure the continued quality of telecommunications services; and (4) safeguard the rights of consumers." 346 Except for a cost imposed on companies "to preserve and advance universal service," such state requirements would not appear to prohibit or have the effect of prohibiting the ability of companies to provide telecommunications services.

As the Court noted in *AT&T Communications, Inc. v. City of Dallas*, cities have no authority under section 253(b) unless the state legislature expressly grants it to them. 347 The federal district court in *Dallas* found:

The language of § 253 is straightforward. Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality—this is a function reserved to states by § 253(b), not to local governments. 348

The South Carolina legislature has not delegated any authority to its cities pursuant to section 253(b), nor is it likely to do so as these are functions already provided by the state Public Service Commission.

3. **The Second Reservation: Cost Reimbursement**

   Section 253(c) allows state or local governments to (1) manage public rights-of-way in a nondiscriminatory manner and (2) demand compensation for doing so by companies that use the rights-of-way. This reservation is designed to forestall the argument that a city managing its rights-of-way in the normal course of business and recovering its costs is "prohibiting service" by doing so. Section 253(c) provides for management cost reimbursement as follows:

   (c) **State and local government authority**

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346. *Id.* § 253(b) (numbering and punctuation added).

347. 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998). The House version of section 253(b) authorized both local and state governments to impose costs on telecommunications companies. However, the conference committee adopted only the Senate version of section 253(b), which grants authority to state governments alone. *Compare* section 243 of H.R. 1555, 104th Cong. § 243 (1995), *reprinted in* 141 CONG. REC. H8427 (daily ed. Aug. 4, 1995) *with* 47 U.S.C. 253 (Supp. III 1997).

348. *Dallas*, 8 F. Supp. 2d at 591 (footnotes omitted); see also *AT&T Commcs., Inc. v. City of Austin*, 975 F. Supp. 928, 940 & n.10 (W.D. Tex. 1997) (recognizing that states may "delegate local regulation ... to local authorities," but maintaining that "it appears that Congress did not anticipate that local governments would attempt to regulate telecommunications service providers for the public good."). The City of Austin has appealed to the Fifth Circuit.
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 telecommunication 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.\(^\text{349}\)

Congress likely felt compelled to add section 253(c) because it recognized that an over-broad construction of that section, standing alone, might be interpreted as limiting local police power to manage the rights-of-way. Ironically, the small exception centered in section 253(c) has itself become the target of over-broad interpretation by cities, which have used the exception to justify exorbitant "franchise" fees that actually have little or no relation to reimbursement for management costs.\(^\text{350}\)

As Senator Hollings has explained, "we [Congress] wrote in there" section 253(c) to create a small exception allowing a city to recover the actual cost of managing its rights-of-way.\(^\text{351}\) Senator Pressler added:

> Are we going to allow the cities and the State to put up barriers of entry to telecommunications firms? In the past, we have done so, with cable television. We have allowed cities not only to add a franchise fee, but also to require certain programming, and sometimes the companies do something else for the city as an incentive.

> In telephones, we have allowed our States to set up a monopoly in the State and sometimes to collect certain things or to put certain requirements on. In this bill, . . . we are trying to deregulate, open up markets, and we are trying to let the fresh air of competition come forward.\(^\text{352}\)

Since the enactment of section 253, a city has no authority to require a franchise, franchise fee, or even the cost reimbursement allowed by section 253(c) from a telecommunications provider that does not use the city's rights-of-way.\(^\text{353}\) Nonetheless, obdurate cities still try. For example, in 1997 the city of Austin, Texas adopted an ordinance requiring telecommunications providers


\(^{350}\) See, e.g., BellSouth Telecommcs., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160, at *2 (S.C. Nov. 8, 1999).


\(^{353}\) AT&T Comms., Inc. v. City of Austin, 975 F. Supp. 928, 941 (W.D. Tex. 1997) ("The City's only legitimate interest under federal and Texas law is to regulate its public rights-of-way, an interest that is in no way implicated by AT&T's activities in Austin."); see infra Part IV.C.1.a.
“to obtain municipal consent before operating telecommunications services in the City.”354 The consent application required a fee and also detailed corporate financial and technical information.355 Under the ordinance a company was subject to criminal penalty and fines if it failed to secure a municipal consent.356 The federal district court noted that section 253(c) “reserves to municipalities only the limited authority” to manage the rights-of-way and be compensated for costs incurred.357 The court found the municipal consent ordinance could not be justified “under § 253(c) since AT&T is not installing or maintaining any facilities in the public rights-of-way.”358 The court found that the ordinance thus “violates § 253(a) of the FTA [Federal Telecommunications Act] by flatly prohibiting non-facilities-based providers like AT&T from providing local service without the City’s consent.”359

If a telecommunications provider does use the public rights-of-way, a city’s franchise power is now largely formal. A city cannot exclude a company, and consequently, it cannot deny a franchise based on its own arbitrary discretion.360 The Dallas court found that a city’s “requirement that AT&T pay four percent of the gross revenue from all of its activities in Dallas” was illegal because it “contradicts the requirements of the FTA.”361 Consistent with the FTA, a city is only entitled under 253(c) to reimbursement of its cost in managing the rights-of-way attributable to AT&T’s use: “In sum, any fee that is not based on AT&T’s use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry.”362

The 1996 Act does not define the term “fair and reasonable compensation” used in section 253(c). However, courts have held that in order to be fair and reasonable, the compensation must be tied to the carrier’s use of the rights-of-way.363 Fees based not on actual usage of rights-of-way but on overall profits have been found not to be “fair and reasonable,” as have requirements that the carrier provide service elsewhere in the jurisdiction as a condition of gaining use of public rights-of-way.364 For example, the court in Bell Atlantic-Maryland, Inc. v. Prince George’s County reasoned that “local governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of . . . maintaining and improving their public amenities and infrastructures.”365

354. Austin, 975 F. Supp. at 934.
355. Id. at 934-35.
356. Id. at 935.
357. Id.
358. Id.
359. Id. at 935-36.
360. AT&T Comms., Inc. v. City of Dallas, 8 F. Supp. 2d 582, 592 (N.D. Tex. 1998).
361. Dallas, 8 F. Supp. 2d at 593.
362. Id.
364. Dallas, 8 F. Supp. 2d at 593.
rights-of-way."\textsuperscript{365}

The original House version of section 243 contained a section 243(e), entitled "Parity of Franchise and Other Charges."\textsuperscript{366} This subsection, known as the Schaefer amendment, provided that local government could not impose any "franchise, license, permit, or right-of-way fee" that "distinguishes between or among providers of telecommunication services."\textsuperscript{367} That is, a locality could impose a franchise fee—as an exception to the general prohibition of section 253(a)—provided it charged all carriers the same fee; a one-fee-franchise.

However, section 243(e) was deleted at the request of the mayors. Representative Stupak, speaking for the mayors, explained that section 243(e) did not allow for sufficient local control and stated that "local governments must be able to distinguish between different telecommunication providers. . . . [The existing bill] states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets."\textsuperscript{368} The Representative explained that local governments must be able to distinguish between companies in certain cases because "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."\textsuperscript{369} Stupak’s amendment passed the House by a 338 to 86 vote.\textsuperscript{370}

By deleting the one-fee-franchise, the Stupak amendment removed the statute’s only express exception to section 253(a)’s prohibition of franchises based on the power to exclude. The mayors preferred the power under section 253(c) allowing them to manage a city’s rights-of-way and be compensated for the cost thereof.\textsuperscript{371} Section 253(c) expressly requires the city to exercise its authority "on a competitively neutral and nondiscriminatory basis."\textsuperscript{372} Because

\textsuperscript{365} Prince George’s County, 49 F. Supp. 2d at 817. In denying a preliminary injunction, a New York district court questioned the correctness of limiting local governments to recovering their reasonable costs. Omnipoint Comms., Inc. v. Port Authority, No. 99 Civ. 0060(BJS), 1999 WL 494120 at *8 (S.D.N.Y. July 13, 1999). As discussed below, however, cost is the only available objective standard.

\textsuperscript{366} H.R. 1555, 104th Cong. § 243(e) (1995).

\textsuperscript{367} Id.


\textsuperscript{369} Id.

\textsuperscript{370} Id. at H8477.

\textsuperscript{371} 47 U.S.C. § 253(c) (Supp. III 1997).

\textsuperscript{372} Id. The First Circuit, in Cablevision of Boston, Inc. v. Public Improvement Comm’n of Boston, 184 F.3d 88 (1st Cir. 1999), construed “competitively neutral and nondiscriminatory” to mean that local authorities need not be required to “seek out opportunities to level the telecommunications playing field.” Id. at 105. However, if a local authority “decides to regulate for its own reasons (e.g., to minimize disruption to traffic patterns), § 253(c) would require that it do so in a way that avoids creating unnecessary competitive inequities among telecommunications providers.” Id. The court upheld denial of a preliminary injunction sought by Boston’s cable monopoly against the city and its electric monopoly. Id. at 106. The cable company maintained that the city discriminated by permitting Boston Edison to pull fiber-optic cable through its existing conduit without hearing and notice while requiring no procedures when
a city, by the statute's express terms, cannot discriminate against a carrier, it consistently must apply the same standard to all. A uniform fee would be nondiscriminatory, but a city, in view of the specific legislative history deleting the parity proposal, cannot impose a one-fee-franchise or right-of-way fee. Consequently, as indicated by Representative Stupak's floor comments and the Dallas case, the standard must be tailored to the individual carrier's use of the right-of-way. The only available objective standard is the city's actual cost incurred because of the carrier's use of the right-of-way.

At least one federal district court, however, has taken a different view. In TCG Detroit v. City of Dearborn the court found that section 253(c) allows a city to require a telecommunications provider to pay an annual franchise fee of 4% of gross revenues, "a $50,000 one time payment (in lieu of providing the City with four fiber-optic strands), and up to $2500 of the costs incurred by the City" in granting the franchise. \(^{373}\) The district court held the city franchise did not violate section 253(a) because "[t]he City is not prohibiting TCG from entry, rather, TCG has chosen not to pay for its access." \(^{374}\) However, the district court's conclusion is inconsistent with the language and history of section 253(a) and (c). A state or locality cannot, consistent with section 253(a), exclude, regulate, or impose a special tax on a telecommunications provider. \(^{375}\)

In BellSouth Telecommunications, Inc. v. City of Coral Springs, a federal district court in Florida recently held that a city could not impose a mandatory buy-out provision in an ordinance because that would exclude the bought-out company from providing telecommunications services in violation of section 253(a). \(^{376}\) The buy-out provision, the court concluded, was a barrier to the provision of service and would "prohibit BellSouth from providing such service in the City, and is not a reasonable regulation to manage the rights-of-way." \(^{377}\)

The Telecommunications Act permits a city to manage its right-of-way if state law so authorizes. However, the court in Coral Springs held the Act does not permit the type of regulation attempted by Coral Springs. The court quoted sections 253(b) and 253(c), which provide:

\begin{itemize}
  \item[(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 title, requirements necessary to preserve and advance universal service, protect the public safety and
\end{itemize}

\begin{flushright}
373. 16 F. Supp. 2d 785, 787 (E.D. Mich. 1998). Both sides have appealed, and arguments were heard by the Sixth Circuit on November 5, 1999.
374. Id. at 793.
377. Id.
\end{flushright}
welfare, ensure the continued quality of telecommunications services, 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.378

The Coral Springs court noted that Congress distinguished between the authority of the 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."379

Since before the turn of the century, Florida provided a statewide franchise—pursuant to a statute similar to South Carolina Act No. 40 of 1899—to any telephone company. On May 20, 1997 Coral Springs passed Ordinance 97-114, entitled "Telecommunications," which set out an extensive regulatory scheme for telecommunications providers.380 Section 20-2 of the Coral Springs ordinance required all operators of telecommunications services to obtain a franchise before constructing a telecommunications facility or providing telecommunications services.381 Section 20-3 required (1) an annual occupancy fee to recover an apportioned share of the cost to the city of maintaining the rights-of-way used by the telecommunications provider, and (2) a market value fee intended to reflect the value of the rights-of-way.382 Section 20-4 provided for numerous restrictions on BellSouth's ability to use the rights-of-way.383 Section 20-6 provided for fines and the seizure of all facilities in the event BellSouth did not apply for a franchise or violated the franchise agreement.384 Section 20-21 also required franchisees to comply with any universal service plan or quality standards the city may adopt.385

Based on the "plain language of both the state and federal law" and the Dallas decision, the Coral Springs court held that Coral Springs "can only

378. Id. at 1307 (quoting 47 U.S.C. § 253(b)-(c) (Supp. III 1997)).
379. Id. (citing AT&T Comms. v. City of Dallas, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998)) (emphasis added).
380. Id.
381. Id.
382. Id.
383. Id.
384. Id. at 1310.
385. See generally Coral Springs, 42 F. Supp. 2d at 1309-11 (containing the court's reaction to selected sections of the ordinance).
regulate the use of its rights-of-way.”\textsuperscript{386} Hence, “those parts of Ordinance 97- 114 that do not deal directly with managing the rights-of-way must be struck down on grounds of preemption.”\textsuperscript{387} The court quoted from \textit{In the Matter of Classic Telephone, Inc.}\textsuperscript{388} to the effect that a city can justify a requirement only “if it can show that the requirement is ‘an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights of way.’”\textsuperscript{389}

The court analyzed each section of the ordinance with an eye towards striking any provisions that “do not deal directly with managing the rights-of- way.”\textsuperscript{390} The franchise requirement of section 20-2 was held valid but limited, because a grant of a “franchise may only be conditioned on a company’s agreement to comply with the city’s reasonable regulations of its rights-of-way and the fees for use of those rights-of-way.”\textsuperscript{391} As the \textit{Dallas} court found, “In sum, any fee that is not based on AT&T’s use of City rights-of-way violates § 253(a) of the FTA as an economic barrier to entry.”\textsuperscript{392}

The \textit{Coral Springs} court struck down section 20-4, through which the city had claimed authority to require information concerning future plans, holding that “[s]uch investigation into future plans of a telecommunications provider go beyond the allowable reasonable regulation of the management of the rights-of-way.”\textsuperscript{393}

The \textit{Coral Springs} court preempted most of section 20-21 for requiring that an applicant “submit proof of its financial, technical, and legal qualifications.”\textsuperscript{394} The court noted that Dallas “specifically holds that such requirements are unrelated to the use of the rights-of-way, and thus beyond the scope of municipal authority.”\textsuperscript{395}

The \textit{Coral Springs} court also preempted subsection (4)(A) of the Coral Springs ordinance because “it allows the City to review an applicant’s qualifications when reviewing a franchise application.”\textsuperscript{396} The court again noted that the “grant of a franchise must only be conditioned” on an agreement to comply with reasonable right-of-way regulation and the fees for using those

\textsuperscript{386} Id. at 1309.
\textsuperscript{387} Id. (emphasis added).
\textsuperscript{389} Id. ¶40 at 13103, quoted in Coral Springs, 42 F. Supp. 2d at 1308 n.3.
\textsuperscript{390} Coral Springs, 42 F. Supp. 2d at 1309-11.
\textsuperscript{391} Id. at 1309 (citing AT&T Comms. v. City of Dallas, 8 F. Supp. 2d 582, 592-93 (N.D. Tex. 1998)).
\textsuperscript{392} Dallas, 8 F. Supp. 2d at 593.
\textsuperscript{393} Coral Springs, 42 F. Supp. 2d at 1309-10. Sections 3 and 4 of the Orangeburg ordinance recently upheld by the South Carolina Supreme Court are similar to the provision struck down in Coral Springs. \textit{See} BellSouth Telecomms., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160, at *3 (S.C. Nov. 8, 1999).
\textsuperscript{394} Coral Springs, 42 F. Supp.2d at 1310.
\textsuperscript{395} Id. (citing Dallas, 8 F. Supp. 2d at 593).
\textsuperscript{396} Id.
rights-of-way. The court also preempted the ordinance’s claimed power to impose universal service requirements, stating “Coral Springs cannot include within a franchise the reservation to comply with any universal service plan the City may adopt.”

South Carolina has over two hundred municipalities, any or all of which could pass ordinances similar to that of Coral Springs. The essential question, as the court in Diginet, Inc. v. Western Union ATS, Inc. posed it, is whether the modern telecommunications industry can withstand the burden and regulation of such local ordinances.

4. The Third and Fourth Reservations

Section 253 includes two further reservations to the all-encompassing prohibition of state and local impediments to competition contained in section 253(a).

First, section 253(e) provides that “nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.” Section 332(c)(3) provides that “no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service,” but a state may regulate “the other terms and conditions of commercial mobile services.” Section 253(a), by its own terms, like section 332(c)(3), would prohibit any state effort to regulate either entry or rates for commercial mobile services. Without the reservations in 253(e), section 253(a) would also preempt the state’s ability to regulate “other terms and conditions.”

Second, section 253(f) provides that “it shall not be a violation of this section for a State to require a telecommunications carrier” that seeks to serve a rural market (defined by section 214(e)) to be an “eligible telecommunications carrier.” Section 214 reserves to the states the power to designate an “eligible telecommunications carrier” if the state finds it consistent with the “public interest, convenience, and necessity.” Consequently, section 253(f) preserves the state’s ability to limit competition in rural markets by failing to designate a carrier. In all other markets section 253(a) denies a state the power to exclude a provider.

Congress recognized the broad sweep and comprehensive preemption that

397. Id.
398. Id. at 1311.
402. Id.
it had written into section 253(a). While legislators debated the bill, governors and mayors provided examples of special cases to show where it was necessary to preserve some state and local control. In response, Congress drafted the four specific exceptions discussed above to cover these situations.

The House Report summarizes the purpose of the Act:

Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies. Consequently, the Communications Act of 1995 opens all communications services to competition. The result will be lower prices to consumers and businesses, greater choice of services, more innovation, a competitive edge for American businesses, and less regulation. Indeed, the enormous benefits to American businesses and consumers from lifting the shackles of monopoly regulation will almost certainly earn the Communications Act of 1995 the distinction of being the most deregulatory bill in history.\footnote{What has indeed been called the most “deregulatory bill in history” was written to bar discriminatory taxes, period. If the Act is not so enforced, its purpose is lost; it will not engender “lower prices to consumers and businesses, greater choice of services, more innovation, [or] a competitive edge for American businesses.”}^{406}

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C. South Carolina Business License Tax Litigation II

1. The 1997 and 1998 Municipal Association Ordinances and Ensuing Litigation

As noted above, in 1997 the South Carolina Supreme Court held in City of Cayce v. AT&T Communications that the state legislature cannot grant a company “the right to construct and operate in a public street a . . . telephone [utility] . . . without first obtaining the consent of the governing body of the municipality.”\footnote{The court found that “a municipality may require payment of a fee as a condition of permitting a telephone utility to construct and operate [lines] using the city’s streets.”}^{408} In late 1997 the Municipal Association of South Carolina recommended

\footnote{407. Id.}
\footnote{409. City of Cayce, 326 S.C. at 242, 486 S.E.2d at 94.}
a model ordinance to its members (hereinafter "Consent Ordinance"). The Association believed the Consent Ordinance properly implemented the Cayce decision. A number of municipalities adopted the Consent Ordinance in the first part of 1998, including Whitmire (January) and Orangeburg (May). Section 1 provides:

Sec. 1 Permission to use streets required.
It shall be unlawful for any person to construct, install, maintain or operate in, on, above or under any street right-of-way or public place under control of the municipality any line, pipe, cable, pole, structure or facility for utilities, communications, Cablevision or other purposes without a consent agreement or franchise agreement issued by the municipal council by ordinance which prescribes the term, fees and conditions for use.410

Section 2 provides that the annual consent or franchise fee shall be set by the ordinance approving the agreement and shall be based on gross revenues.411 No consent or franchise fee shall be construed to be in lieu of a business license tax unless specifically provided by ordinance.412 Section 2 also provides for a business license tax of 3% of gross receipts imposed on telephone companies not using public streets under a franchise or consent agreement.413 Telephone companies are defined—as described in Standard Industrial Classification (SIC) group 481—as companies that, among other things, provide local and long distance service and cellular services.414 The 3% tax is imposed on "all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not been paid to another municipality."415

Section 253(a) of the Telecommunications Act provides that no state or city legal requirement "may prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services.416 In other words, section 253(a) preempts the city's power to exclude such entities. Nevertheless, section 1 of the Consent Ordinance unmistakably claims the power to exclude by providing that it is illegal for telephone companies to operate without the city’s consent.417 The Model Consent Ordinance—and the Cayce Ordinance on which it was based—thus clearly conflict with federal law, despite the court’s

411. Id.
412. Id. at § 2.
413. Id.
414. MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, BUSINESS LICENSING HANDBOOK
A-9 (1997 Revised) [hereinafter HANDBOOK].
416. Id.
holding in Cayce.\textsuperscript{418}

In July of 1998 the Municipal Association recommended to its members a model ordinance entitled “Amending the Business License Ordinance Levying a Business License Tax or Telecommunications” (hereinafter “Business License Ordinance”). Section 1 of this ordinance also categorizes telecommunications providers according to SIC 481. This section defines the tax base as “gross receipts from all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not been paid to another municipality.” Further, the tax is due on December 31 and the “penalty for delinquent payments shall be 5% of the tax due each month.” Section 2 provides that existing exemptions from interstate commerce are repealed, and that gross income from interstate commerce is included for every business subject to a license tax. Section 3 approves, “in the form attached,” an Agreement with the Municipal Association for collection of current and delinquent license taxes.\textsuperscript{419} Approximately 200 municipalities adopted the Business License Ordinance in July and August of 1998.

Before its 1997 and 1998 telecommunications ordinances the Municipal Association recommended a Sample SIC Business License Ordinance to its members.\textsuperscript{420} The Municipal Association describes the design of the first seven classes of Model Ordinance as follows:

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

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

1. Businesses were grouped according to major groups in the Standard Industrial Classification (SIC) Manual, 1987, published by the United States Office of Management and Budget. Each business is required to indicate the appropriate SIC number on federal tax returns.

2. IRS statistics on nationwide business income published

\textsuperscript{418} City of Cayce v. AT&T Comms., 326 S.C. 237, 242, 486 S.E.2d 92, 94 (1997).

\textsuperscript{419} Municipal Association of South Carolina, Model Ordinance MASC-50, 98-002; see also infra Part IV.C.1.f.

\textsuperscript{420} See HANDBOOK, supra note 414, at A-1.
periodically through the Government Printing Office were used to calculate a ratio or index of ability to make a profit for each SIC group to be included in the business license ordinance.\(^{421}\)

The Municipal Association recites that the basic approach of the Model Ordinance "has been ruled constitutional by the Supreme Court."\(^{422}\)

The Town of Whitmire's 1994 ordinance follows the Model Ordinance. It defines a "classification" at section 10-2 as: "C. 'Classification' means that division of businesses by major groups subject to the same license rate as determined by a calculated index of ability to pay based on national averages, benefits, equalization of tax burden, relationships of services, or other basis deemed appropriate by Town Council."\(^{423}\)

The uniform objective standard applied to other taxpayers is the "calculated index of ability to pay." Under this index, the telephone business would fall in Rate Class Four, which is composed of the following business groups (preceded by their SIC number): "27: Printing, Publishing & Allied Products; 28: Chemicals and Allied Products; 35: Machinery (except Electrical); 48: Communication (except Telephone); 76: Miscellaneous Repair Services."\(^{424}\) The rates for Class Four are $175.00 for the first $2,000 of gross income and $1.60 per $1,000 for each additional $1,000.\(^{425}\) Declining rates apply where income exceeds $1,000,000 (e.g., only 75% of the normal rate is payable on amounts in excess of $9,000,000). A Class Four business that earned $1,000,000 of gross income would pay a license tax of $1,147.70.

Based on this comparison, a City of Aiken 3% business license tax on telephone companies was held unconstitutional by the state supreme court, which declared "we look no further than the disproportionality just noted and the lack of a rational basis therefor in concluding that a denial of equal protection has here occurred."\(^{426}\) The Aiken court applied the following standard to telecommunications companies:

The record reveals that the City of Aiken in 1979 adopted a revised licensing ordinance. Seven classifications of business were designated and rates of taxation established for each category. This portion of the ordinance was drafted for the City of Aiken by a consulting firm. An eighth category was

\(^{421}\) HANDBOOK, supra note 414, at 48.
\(^{422}\) Id. (citing Southern Bell Tel. & Tel. Co. v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983); see North Charleston Land Corp. v. North Charleston, 281 S.C. 470, 316 S.E.2d 137 (1984)).
\(^{423}\) See also HANDBOOK, supra note 414, at A-1.
\(^{424}\) Id. at A-14.
\(^{425}\) Id. at A-7.
thereafter created which, in the words of the trial court, presented a "hodge podge" assortment of occupations and businesses. We are struck by the fact that at no point does the trial court find any rational basis for this residual classification nor does the record, in our view, support it. Even more striking is the undisputed fact that the appellant was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance. 427

The drafter of the Model Ordinance even testified that telephone companies would be classified in Class Four if the uniform standard is applied to them. "Q: [Southern Bell Attorney] So if it had not been for the franchise, and by applying the standard national data that you used, that is the industry grouping and the profitability, the net profit ratio, Southern Bell would have been in rate Class Four, is that correct? A: [Mr. G. C. Robinett, Jr., draftsman of the Model Ordinance] That is correct." 428 Unsurprisingly, the court found that Aiken’s ordinance did not afford Equal Protection of the law because it did not apply the same standard to all taxpayers. 429

a. Section 253 Preempts the Municipal Association Ordinances and Cayce

The Telecommunications Act of 1996, discussed at Part IV.B, does not preempt a business license tax that treats telecommunications as it treats other businesses. However, it does preempt ordinances that discriminate against telecommunications providers, like the 1997 and 1998 Municipal Association Ordinances. Courts in other jurisdictions have correctly interpreted the Act as prohibiting similar ordinances. 430

AT&T Communications of the Southwest, Inc. v. City of Austin 431 is the clearest holding on the meaning of section 253(a). 432 There the court held that section 253(a) preempts a city consent agreement requirement (including a detailed financial disclosure or a quarterly franchise fee requirement) that is imposed on a provider that does not use the city’s rights-of-way. 433 The court also held that the state regulation exception contained in section 253(b) and the cost reimbursement exception of section 253(c) did not apply. Section 253(c) was inapplicable because it reserves power for the state, not the city, to

427. Id. at 273, 306 S.E.2d at 222.
429. Aiken, 279 S.C. at 271, 306 S.E.2d at 221.
431. Id. at 933-34 ("AT&T will use SWBT's [Southwestern Bell Telephone's] existing facilities and will not install, operate, maintain, or repair any telecommunications facilities in the City's public rights-of-way.").
432. Id. at 939.
determine whether a particular entity is fit to serve.\textsuperscript{433} Section 253(c) was inapplicable because there was no "use" of the rights-of-way—AT&T was simply reselling services purchased from Southwestern Bell Telephone [SWBT].\textsuperscript{434} The court found section 253(c) reserves only limited authority to cities: "The City's interest in regulating local telephone service providers is limited by federal and state law to managing and demanding compensation for the use of the City's public rights-of-way."\textsuperscript{435} The city argued that its ordinance was a small burden that did not amount to exclusion. The court disagreed, stating "the threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition."\textsuperscript{436} The \textit{Austin} holding shows that neither section 253(b) nor section 253(c) creates any additional rights; rather, both \textit{limit} the power of states and municipalities to assess fees.

Another Texas case, \textit{AT&T Communications of the Southwest, Inc. v. City of Dallas}\textsuperscript{437} involved a provider who intended to use the city's rights-of-way. The federal district court in \textit{Dallas} emphasized the provider's actual use of the rights-of-way, noting "in sum, any fee that is not based on AT&T's use of City rights-of-way violates section 253(a) of the FTA as an economic barrier to entry."\textsuperscript{438} The court reconciled sections 253(a) and 253(c) by holding that a city may require a franchise to use the rights-of-way, but the requirement is largely formal; the city cannot condition the franchise on anything "other than AT&T's agreement to comply with the City's reasonable regulations of its rights-of-way and the fees for use of these rights-of-way."\textsuperscript{439} The court's reconciliation is incomplete because the use of the term "fees" is not based on the statute. The emphasis on actual use by the provider is consistent with a cost reimbursement approach, but the term "fee" is not. Unfortunately, the district court leaves the issue up in the air, asserting that "it is not necessary for the Court to determine at this time what \textit{would} constitute a reasonable fee for the use of rights of way."\textsuperscript{440}

The \textit{Dallas} court held that the city had no power to require a comprehensive application or a fee of 4\% of gross revenues.\textsuperscript{441} But the dictum concerning a "reasonable fee" is vague and the facts are limiting: the "vast majority" of facilities needed by AT&T were to be SWBT lines obtained by arrangement with SWBT.\textsuperscript{442} The SWBT agreement called for AT&T to pay its

\begin{thebibliography}{9}
\bibitem{433} \textit{Id.} at 939-40 n.10 (suggesting that although § 253 does not preempt all local regulatory power, such power is limited by the specifications of § 253(c)); see \textit{supra} Part IV.B.2.
\bibitem{434} \textit{Austin}, 975 F. Supp. at 942-43.
\bibitem{435} \textit{Id.} at 942-43.
\bibitem{436} \textit{Id.} at 939.
\bibitem{437} 8 F. Supp. 2d 582 (N.D. Tex. 1998).
\bibitem{438} \textit{Id.} at 593; see \textit{supra} Part IV.B.3.
\bibitem{439} \textit{Dallas}, 8 F. Supp. 2d at 586.
\bibitem{440} \textit{Id.} at 593.
\bibitem{441} \textit{Id.}
\bibitem{442} \textit{Id.} at 587.
\end{thebibliography}
pro rata share of SWBT's franchise fee. The court said it would be "double billing" to also charge AT&T a franchise fee on the resale revenues.

On the other hand, Judge Zatkoff in TCG Detroit v. City of Dearborn upheld a Dearborn ordinance requiring a telecommunications provider to enter into a franchise agreement including, among other obligations, a new entrant franchise fee of 4% of gross revenues by stating that "the City is not prohibiting the TCG from entry, rather, TCG has chosen not to pay for its access." Judge Zatkoff apparently read section 253(a) to mean that city can prohibit a telecommunications provider if it does so in a nondiscriminatory and reasonable way. However, the comprehensive terms of section 253(a) bar all prohibitions, including nondiscriminatory and reasonable ones. Thus, the Dearborn construction of section 253(a) is in error.

The statutory language "fair and reasonable compensation" is understandable if "compensation" means cost. "Fair and reasonable" modify cost to require that the city's costs that will be reimbursed are reasonably connected with the provider's use of the rights-of-way. But if "compensation" is read to mean rent, or otherwise allows profit to the city, the statute becomes self-contradictory. Unlike the fair market rental of a piece of land that can be determined in a private market, rights-of-way are unique assets for which no market exists. "Fair and reasonable," without statutory standards, is wholly subjective. The judge can say, as Judge Zatkoff did in Dearborn, that he will determine its meaning "by examining the totality of the facts and circumstances," but both the selection of facts and circumstances he will examine and the amount of weight he will give to them are subjective.

Judge Zatkoff wrote, "[f]irst, there is nothing inappropriate with the city charging compensation, or 'rent,' for the City owned property that the Plaintiff seeks to appropriate for its private use. The statute specifically allows it." However, the statute clearly does not specifically allow a city to charge rent. Because there is no way to objectively determine "fair and reasonable," reading the statute to allow "fees" or "rent" deprives section 253 and the Telecommunications Act of purpose.

Section 253(c), if read apart from its historical context and statutory purpose, could have three meanings, depending on how "compensation" is viewed:

(1) "fair and reasonable" rental. The main problem with this reading is that rights-of-way are unique and do not trade in a

443. Id. at 593.
444. Id.
445. 16 F. Supp. 2d 785 (E.D. Mich. 1998) (currently on appeal in the Sixth Circuit). The district held that while the ordinance could be enforced against a new entrant it could not be enforced against the incumbent local exchange carrier, Ameritech. Id. at 791.
446. Id. at 793; see supra Part IV.B.3.
447. Id. at 789.
448. Id. (emphasis added).
normal market. There is no objective standard.

(2) "fair and reasonable" fee. The lack of an objective standard is even more pronounced in the case of a reasonable fee. Judges, in the absence of statutory guidance, have no competence to determine reasonable fees.

(3) "fair and reasonable" recovery of cost. This is the correct reading. The city is allowed to recover its costs incurred that are attributable to a particular provider, but it must be reasonable in what costs it assigns to the provider.

A proper construction of section 253(c) should also incorporate its legislative history, which required parity between all franchise and right-of-way fees or rental and "any other charge or equivalent thereof as a condition for operating in the locality." Representative Stupak successfully argued that local government needed to be able to distinguish between providers since it is unfair "to charge the same fee to every company, regardless of how much or how little they use the right-of-way or rip up our streets." The House consequently rejected a one-fee-franchise or right-of-way fee. Section 253(c), as proposed by Stupak and as enacted, requires that any city action be nondiscriminatory. In view of the legislative history, cities cannot comply with the nondiscriminatory requirement by charging flat fees, as the 1997 and 1998 Municipal Association Ordinances attempt to do by requiring that all providers pay 3% of gross receipts. Instead, cities must apply the same standard consistently to all providers. The cost recovery interpretation is the only approach that satisfies the statutory language and history, and the only one that is subject to an objective standard.

b. Commerce Clause

In Complete Auto Transit, Inc. v. Brady the United States Supreme Court held the Commerce Clause requires (1) a substantial nexus with the taxing state, and (2) proper apportionment of the income to the taxing jurisdiction. In other words, a state may not tax interstate activities carried on outside the state's borders. The 1997 Municipal Association ordinance imposes a business license tax of "3% of gross receipts from all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not

451. But see BellSouth Telecomms., Inc. v. Orangeburg, No. 25009, 1999 WL 1037160, at *4 (S.C. Nov. 8, 1999) (finding a flat fee of 5% of gross receipts nondiscriminatory, noting "BellSouth is the only telephone service provider required to pay these fees because it is the only telephone service provider that holds a franchise for private use of the public streets.").
been paid to another municipality.\textsuperscript{453} The 1997 ordinance thus fails both Commerce Clause tests.\textsuperscript{454}

In \textit{Goldberg v. Sweet}\textsuperscript{455} the United States Supreme Court sustained the Illinois Telecommunications Excise Tax, which was imposed on the “act or privilege of originating” or “receiving . . . interstate telecommunications . . . in [the] State at the rate of 5\% of the gross charge for [the] telecommunications.”\textsuperscript{456} The tax applied only to calls charged to an Illinois service address regardless of where the call was billed or paid.\textsuperscript{457} The Illinois Act provided a credit to any taxpayer on proof that the taxpayer had paid a tax on the same call in another state.\textsuperscript{458} The plaintiffs argued that the Illinois Act violated the Commerce Clause because “Illinois is attempting to tax the entire cost of an interstate act which has taken place only partially in Illinois.”\textsuperscript{459} However, if apportionment were required, how could it be done? The Court found the tax internally consistent “for if every State taxed only those interstate phone calls [which begin or end in Illinois and] which are charged to an in-state service address, only one State would tax each interstate phone call.”\textsuperscript{460} The Court found only a small possibility of multiple taxation. If a second state taxed the origination or termination of an interstate call billed or paid in that state, it was possible that a call from an Illinois subsidiary to its headquarters in the second state would be subject to two state taxes if the headquarters paid the bill.\textsuperscript{461} However, the risk was obviously remote and the credit was available to avoid actual multiple taxation.

The question of external consistency “asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.”\textsuperscript{462} In \textit{Oklahoma Tax Commission v. Jefferson Lines, Inc.}\textsuperscript{463} the Court explained that “external consistency . . . looks . . . to the economic justification for the State’s claim upon the value taxed, to discover whether a State’s tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.”\textsuperscript{464} Usually, apportionment requires the division of the rate base among the taxing jurisdictions claiming it. However, in the case of a sale of goods, the

\begin{itemize}
  \item \textsuperscript{453} HANDBOOK, \textit{supra} note 414, at 39.
  \item \textsuperscript{454} The actions of the General Assembly in 1999 fortunately obviate the problem. \textit{See infra} Part IV.D.
  \item \textsuperscript{455} 488 U.S. 252 (1989).
  \item \textsuperscript{456} \textit{Id.} at 256 n.5.
  \item \textsuperscript{457} \textit{Id.}
  \item \textsuperscript{458} \textit{Id.}
  \item \textsuperscript{459} \textit{Id.} at 258 (quoting App. to Juris. Statement in No-87-826 at 24a, Goldberg \textit{v. Johnson}, No. 85 CH 8081 (Cook County, Oct. 21, 1986)).
  \item \textsuperscript{460} \textit{Id.} at 261.
  \item \textsuperscript{461} \textit{Id.} at 263.
  \item \textsuperscript{462} \textit{Id.} at 262 (citing Container Corp. \textit{v. Franchise Tax Bd.}, 463 U.S. 159, 169-70 (1983)).
  \item \textsuperscript{463} 514 U.S. 175 (1995).
  \item \textsuperscript{464} \textit{Id.} at 185.
\end{itemize}
Court does not require a division of the sales tax base because the sale is most readily viewed as a "discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which . . . interstate activity affects the value."\textsuperscript{465} Because a division of the sales tax base is not practicable, the Court has "consistently approved taxation of sales [of goods] without any division of the tax base among different States, and [has] instead held such taxes properly measurable by the gross charge for the purchase."\textsuperscript{466}

In Goldberg the Supreme Court noted that in cases involving "intangible movement of electronic impulses through computerized networks[,] . . . [a]n apportionment formula based on mileage or some other geographic division . . . would produce insurmountable administrative and technological barriers."\textsuperscript{467} The Court found the Illinois tax "has many of the characteristics of a sales tax."\textsuperscript{468} Further, "its economic effect is like that of a sales tax."\textsuperscript{469} The Court concluded the tax, as a tax on the sale of services, is "fairly apportioned" because the call originated or terminated in Illinois and was charged to a service address in Illinois, and because "the risk of multiple taxation is low . . . and actual multiple taxation is precluded by the credit provision."\textsuperscript{470}

In contrast, the 1997 Municipal Association license tax is not a sales tax and has none of the characteristics of one. The Municipal Association tax is imposed on "3% of gross receipts from all communications activities conducted in the municipality and for communications services billed to customers located in the municipality on which a business license tax has not been paid to another municipality."\textsuperscript{471} Unlike the Illinois tax on interstate calls upheld in Goldberg, the 1997 Municipal Association Ordinance does not limit itself to calls begun or ended in the city and charged to a service address within the city. It applies to "all communications activities conducted in the municipality and [to] communications services billed to customers located in the municipality."\textsuperscript{472} The 1997 Municipal Association ordinance imposes a tax on two separate bases: (1) "activities" performed in the city (an undefined term), and (2) billing, without respect to activities in the city. An example of the second basis would be a Charleston resident visiting New York who calls Paris and charges the call to his home phone. The Municipal Association's ordinance would tax the call. However, the Goldberg standard approves only the "activities" basis, which would encompass calls that originate or terminate in the state "as long as the call is billed or charged to a service address, or paid by

\textsuperscript{465} Id. at 186.
\textsuperscript{466} Id.
\textsuperscript{467} Goldberg, 488 U.S. at 264.
\textsuperscript{468} Id. at 262.
\textsuperscript{469} Id. at 265.
\textsuperscript{470} Id.
\textsuperscript{471} MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, MODEL ORDINANCE MASC-50, 98-002 (emphasis added).
\textsuperscript{472} Id.
an addressee, within the taxing State."\textsuperscript{473}

The Supreme Court in \textit{Goldberg} expressed doubt that jurisdictions "through which the telephone call’s electronic signals merely pass have a sufficient nexus to tax that call."\textsuperscript{474} The Court found the issue analogous to that in \textit{United Air Lines, Inc. v. Mahin},\textsuperscript{475} in which the court held the "State has no nexus to tax an airplane based solely on its flight over the State."\textsuperscript{476} The \textit{Goldberg} Court continued, "[w]e also doubt that termination of an interstate telephone call, \textit{by itself}, provides a substantial enough nexus for a State to tax a call."\textsuperscript{477} The Court stated:

We believe that only two States have a nexus substantial enough to tax a customer’s purchase of an interstate telephone call. The first is a State like Illinois which taxes the origination or termination of an interstate telephone call \textit{charged to a service address within that State}. The second is a State which taxes the origination or termination of an interstate telephone call \textit{billed or paid within that State}.\textsuperscript{478}

In its 1995 \textit{Jefferson Lines}\textsuperscript{479} decision the Court characterized its \textit{Goldberg} holding as follows:

[I]n addressing the interstate provision of services, we recently held that a State in which an interstate telephone call originates or terminates has the requisite Commerce Clause nexus to tax a customer’s purchase of that call \textit{as long as} the call is billed or charged to a service address, or paid by an addressee, within the taxing State.\textsuperscript{480}

The 1997 Municipal Association ordinance not only lacks a substantial nexus, as this concept is enunciated in \textit{Goldberg}, but it also fails that decision’s standard for proper apportionment. Apportionment under \textit{Goldberg} requires the origination or termination of a call that is charged to a service address in the state. The 1997 ordinance makes no provision for apportioning income to assure that the tax is not imposed on activities carried on outside the city’s borders. A gross receipts tax is "simply a variety of tax on income, which [is] required to be apportioned to reflect the location of the various interstate


\textsuperscript{474} \textit{Goldberg}, 488 U.S. at 263.

\textsuperscript{475} 410 U.S. 623, 631 (1973).

\textsuperscript{476} \textit{Goldberg}, 488 U.S. at 263.

\textsuperscript{477} \textit{Id.} (emphasis added).

\textsuperscript{478} \textit{Id.} (emphasis added).


\textsuperscript{480} \textit{Id.} at 184 (citing \textit{Goldberg}, 488 U.S. at 263) (emphasis added).
activities by which it [is] earned." The tax base must be apportioned to reflect interstate values. An unapportioned gross receipts tax on interstate commerce is simply illegal.

The Municipal Association takes the position that a tax is properly apportioned if the statute provides a credit in the event that the same tax is paid to another jurisdiction. Both the Due Process and Commerce Clauses, however, require that a city can only tax income that is "fairly related" to it. A city has no power to tax economic activities that take place elsewhere, as discussed above under external consistency and more fully below under Due Process.

c. Equal Protection

i. Gross Disparity

License taxes require close judicial scrutiny because, unlike uniform rate taxes, the license tax is particularly subject to the abuse of singling out a taxpayer, or group of taxpayers, for special treatment. By its very nature, license taxes classify and discriminate among taxpayers.

The South Carolina Supreme Court has upheld a municipality's power to classify its various businesses and professions for license taxing purposes. In United States Fidelity & Guaranty Co. v. City of Newberry the court noted that a city had "considerable discretion." However, the court also stated that:

In all of our decisions wherein a classification in a tax statute or ordinance has been challenged as being in violation of the equal protection clauses of the state and federal Constitutions, this Court has recognized that a reasonable basis for the different treatment was essential to the constitutionality thereof.

Similarly, in its earlier decision in City of Columbia v. Niagra Fire

481. Id. at 190.
482. See, e.g., City of Winchester v. American Woodmark Corp., 471 S.E.2d 495 (Va. 1996) (holding that the city's occupation license tax on 100% of the company's revenues—although it had facilities and operations elsewhere—was "'out of all appropriate proportions to' and has 'no rational relationship' to the business transacted in [the city]" and, consequently, violated the Commerce Clause) (citing Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 180 (1982)).
485. See, e.g., United States Fidelity & Guaranty Co. v. City of Newberry, 257 S.C. 433, 439, 186 S.E.2d 239, 241 (1972); State v. City of Columbia, 6 S.C. 1 (1874); State v. Hayne, 4 S.C. 403 (1873).
Insurance Co., the court held that "[t]he obvious purpose of the license ordinance is to impose a tax, or license fee, upon the privilege of doing business in the city during the current year. Implicit in that purpose is the requirement that the tax be fair and nondiscriminatory."\(^{487}\)

If the taxpayer can show a "gross disparity" of rates, the court will inquire closely into whether the city had any rational basis. The court in Newberry held:

It is conceded that the city had the right to classify for the purpose of license taxes and considerable discretion as to the rate to be imposed upon the respective classifications, but the cardinal issue [here] is whether the city had any rational basis for such a gross disparity and differentiation between the rate charged.\(^{488}\)

In Newberry, the court found a "gross disparity" to exist when fire and casualty insurance companies were required to pay 2% of gross receipts while other businesses in the city were taxed at much lower rates.\(^{489}\)

In Southern Bell Telephone & Telegraph Co. v. City of Aiken\(^{490}\) the court held that Aiken's 1979 license tax, which imposed a 3% gross receipts tax on Southern Bell, was an "unreasonable and discriminatory rate."\(^{491}\) The court found Southern Bell "was taxed at twenty-four (24) times the average rate imposed upon other businesses under the ordinance."\(^{492}\) The record contained the company's exhaustive requests to the city for every justification—special services provided by the city or burdens imposed upon the city by the company—which conceivably could support the tax as well as the company's exhaustive factual rebuttal of each justification.\(^{493}\) The record, the court concluded, "lacks sufficient evidence that would support an express finding of a rational basis."\(^{494}\)

Similarly, in Southern Bell Telephone & Telegraph Co. v. City of Spartanburg, the South Carolina Supreme Court found the city's business license tax violated equal protection.\(^{495}\) The court held Spartanburg's 1% gross receipts tax on Southern Bell to be "palpably unreasonable and violative of equal protection of the laws."\(^{496}\) The court's opinion stated that:

\[^{487}\text{249 S.C. 388, 392, 154 S.E.2d 674, 676 (1967).}\]
\[^{488}\text{\textit{Newberry}, 257 S.C. at 439, 186 S.E.2d at 241 (emphasis added).}\]
\[^{489}\text{\textit{Id.} at 441-42, 186 S.E.2d at 242-43; see supra Part IV.A.3.}\]
\[^{490}\text{279 S.C. 269, 306 S.E.2d 220 (1983).}\]
\[^{491}\text{\textit{Id.} at 274, 306 S.E.2d at 222; see supra Part IV.A.3.}\]
\[^{492}\text{Newberry, 257 S.C. at 273, 306 S.E.2d at 222.}\]
\[^{493}\text{See generally Transcript of Record, Aiken (No. 79-CP-02-860) (containing testimony regarding city services).}\]
\[^{494}\text{\textit{Newberry}, 279 S.C. at 273, 306 S.E.2d at 222.}\]
\[^{495}\text{285 S.C. 495, 331 S.E.2d 333 (1985); see supra Part IV.A.3.}\]
\[^{496}\text{Spartanburg, 285 S.C. at 498, 331 S.E.2d at 335.}\]
The gross disparity in the license tax rate imposed by the Spartanburg ordinance is reflected by the fact that Southern Bell pays a tax of 1% of its gross receipts ($238,875 in 1981 and $267,262 in 1982), while a textile mill or manufacturing plant with the same revenue as Southern Bell pays a maximum of $725. The city has advanced no reasonable basis for the differential treatment. The amendment was not part of any overall reform of the ordinance. Nor did the city prove that Southern Bell benefitted more from city services than did other businesses. Moreover, since Southern Bell is the highest ad valorem taxpayer in the city, it contributes greatly to the cost of city government. Apparently, the sole consideration in drastically increasing the tax on Southern Bell was that, since Duke Power had agreed by contract to pay the city 3% of its gross revenues, Southern Bell’s taxes should be increased.497

The court further noted that “the record reveals a great disparity between the tax rate imposed on Southern Bell and the rate imposed on retail businesses, hospitals, and others.”498

ii. Special Tax

A city violates equal protection when it classifies taxpayers without a rational basis.499 Over the past 100 years the South Carolina Supreme Court has defined the controlling principles that compose a rational basis for license tax purposes. A license tax must (1) be rationally based on the provision of governmental services (i.e., the benefits derived by the taxpayer and the burdens imposed on him); and (2) complement the real property tax to equalize the tax burden to assure that all taxpayers make a fair contribution to government.500

The cities that adopted the Municipal Association ordinances made no effort to comply with the court’s historical standards. They made no study attempting to show any unusual burdens imposed upon the city by telecommunications. The cities made no study showing that BellSouth, or the others in the Municipal Association Telecommunications class that includes

497. Id. at 497-98, 331 S.E.2d at 334 (citation and footnote omitted).
498. Id. at 497, 331 S.E.2d at 335 n.3.
BellSouth, pays few real property taxes and should pay a higher license tax so that it makes a fair contribution to government.

The court’s holdings are clear that a large disparity in rates must be based upon a large disparity in services provided by the city. The city’s rendering of customary services to a taxpayer does not justify a higher license tax.

d. Due Process Issues in Aiken and Spartanburg

As a matter of basic constitutional principle, a city cannot tax people, property, or activities beyond its corporate borders. The Aiken and Spartanburg cases hold that the Due Process Clause of the South Carolina Constitution requires that the city have jurisdiction over both the taxpayer and the income the city seeks to tax.501 Additionally, the Doctrine of Fair Apportionment requires that a local license tax upon the income earned within and outside the taxing jurisdiction be apportioned so that the measure of the tax fairly reflects the proportion of the taxed activity that is actually carried on in the city.502 For example, a company might be headquartered in Columbia, with warehouses and places of business throughout the state. Columbia would have to apportion its tax; it could not tax the gross income earned throughout the state. However, if a company had only one facility in the state out of which it made deliveries throughout the state, a city may tax statewide earnings that are not taxed elsewhere.503 For example, the court in Eli Witt Co. v. City of West Columbia held that the statewide income of the company was fairly attributable to the company’s distribution center business carried on in West Columbia. Similarly, if a transportation company has its sole facility in Columbia and is in the business of transporting goods from Columbia to Charleston, Columbia may be able to tax the entire amount as a kind of rough apportionment, even though most of the business activity obviously took place outside the city.

Telephone customers in South Carolina annually place over 100 million intrastate calls. The calling pattern of customers, the volume of calls, and the number of taxing jurisdictions that toll calls go through make it impossible to apportion the revenue on a call that instantaneously travels through numerous taxing jurisdictions. Indeed, depending on traffic patterns, calls between the same points may be indiscriminately routed in different ways. No reasonable, rational, or fair way exists to apportion the revenue among the various taxing jurisdictions that arguably have some claim on it.

At the time of the Aiken and Spartanburg cases, interstate calls were exempted by the city ordinances. However, section 2 of the Municipal

502. See supra note 290 and accompanying text.
503. See Eli Witt Co. v. City of W. Columbia, 309 S.C. 55, 425 S.E.2d 16 (1992) (upholding a West Columbia ordinance that allowed a deduction for sales outside the city if a license tax was paid to another city).
Association Model ordinance repeals the interstate exemption and provides that "[g]ross income from interstate commerce shall be included in the gross income for every business subject to a business license tax." The reasoning of Aiken and Spartanburg apply to interstate calls a fortiori.

e. Delegation

Many American jurisdictions use private bill collectors to collect taxes after the state has determined a tax is due. The practice began with efforts to collect from out-of-state taxpayers. However, bill collectors can neither bring judicial actions on behalf of a government nor audit to determine the tax due.

The Municipal Association of South Carolina's sample ordinance, adopted by 219 cities, goes far beyond the practice of other American jurisdictions. The ordinance authorizes the bill collector association to assess the tax due, audit the tax, and bring an action "in the name of the Municipality without further approval by the Municipality." The city agrees to pay the bill collector 4% of taxes collected. Further, the city agrees that it will not accept or compromise any city taxes.

504. Municipal Association of South Carolina, Model Ordinance MASC-50, 98-002.

505. The Agreement provides:

4. MASC is hereby designed as the exclusive agent of the Municipality for assessment and collection of the said business license taxes and penalties utilizing all procedures and actions authorized by ordinance or State law, and such procedures and actions may be invoked in the name of the Municipality without further approval by the Municipality. (emphasis added).

506. The Agreement provides:

6. The Municipality acknowledges that it is an essential element of the program for all such taxes to be paid to MASC, and no such taxes will be accepted, waived or compromised by the Municipality directly from or with an insurer or broker. All communications from insurance companies and brokers will be sent to MASC. Payments accepted by the Municipality will be included in the computation of compensation to MASC. (emphasis added).

8. The Municipality agrees that MASC shall retain four percent (4%) of all funds collected for the Municipality pursuant to this Agreement, together with any interest earned on funds held on deposit prior to disbursement, as compensation for the
The power to tax includes three functions:

1. The legislative act of imposing the tax, usually called the levy.
2. The act of determining what each citizen owes, usually called the audit or assessment.
3. The act of collecting the tax once the debt is fixed.

Though states can delegate the third function, they cannot delegate the first and second functions. The black-letter law is clear that the taxing power exists exclusively in the legislature and cannot be delegated:

As a general rule, subject to some exceptions, the power of taxation, existing exclusively in the legislature, cannot be delegated. Accordingly, unless otherwise provided by the constitution, such power cannot be delegated to either of the other departments of the government, or to any individual, private corporation, officer, board, or commission.

However, if the constitution expressly authorizes it, the legislature may delegate the power to tax to political subdivisions for local purposes:

The legislature may, however, within constitutional limitations, delegate the power of taxation for local purposes to political subdivisions of the state, and may create such agencies as it may deem proper for the purpose; and taxes levied and collected under such delegated power are regarded as levied and collected under the authority of the state in the exercise of its sovereign powers for governmental purposes of a public nature. Such delegation of power is subject to strict limitations, and the taxing function may be conferred to be exercised only within constitutional limitations applicable to the taxing power generally.
The general law is also clear that the power to tax must be expressly and distinctly granted to a political subdivision, and must be exercised in strict conformity with the terms of the grant:

The power of a political subdivision to levy taxes must be expressly and distinctly granted, and must be exercised in strict conformity with the terms of the grant. A grant by the legislature of the power of taxation will be strictly construed, since the reasonable presumption is that the state has granted in clear and unmistakable terms all that it intended to grant.509

South Carolina is more strict about the delegation of the taxing power than required by the general rule. For many years, the South Carolina Supreme Court has struck down delegations of the taxing power to public bodies where no delegation is conferred by the state constitution.510 In Crow v. McAlpine511 the court stated, "[t]he people of this State, in their sovereign capacity have, by the Constitution, entrusted the taxing power to the General Assembly and except by express permission of the sovereign authority, this power cannot be delegated to any subordinate agency."512

In Crow the legislature delegated to a governor-appointed school board the power to levy and collect the tax millage necessary to meet the school district's operating budget. The delegation was permissible on its face because the court recognized that school districts were political subdivisions within the meaning of the South Carolina Constitution, Article X, Section 6, which expressly authorizes the delegation of the taxing power to political subdivisions.513

However, the court held that the delegation violated an "implied limitation upon the power of the General Assembly to delegate the taxing power."514 The court held that taxing power must be delegated to a body composed of elected officials or subject to the supervisory control of such a body.515 Consequently, the court held the delegation unconstitutional, stating:

The taxing power is one of the highest prerogatives of the General Assembly. Members of this body are chosen by the people to exercise the power in a conscientious and deliberate manner. If this power is abused, the people could, at least,

509. Id. (footnotes omitted).
512. Id. at 243, 285 S.E.2d at 357 (citing Gaud v. Walker, 214 S.C. 451, 53 S.E.2d 316 (1949)).
513. Id. at 243-44, 285 S.E.2d at 357.
514. Id. at 244, 285 S.E.2d at 358.
515. Id. at 244, 285 S.E.2d at 358.
prevent a recurrence of the wrong at the polls. However, where the power is reposed in a body not directly responsible to the people, the remedy is uncertain, indirect and likely to be long delayed.\textsuperscript{516}

The court found the "implied limitation" on the General Assembly in Article X, Section 5 of the constitution, which prohibits taxation without representation: "No tax, subsidy or charge shall be established, fixed, laid or levied under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled."\textsuperscript{517} The court summarized the import of this section as follows:

Article X, Section 5 recognizes that the power to levy taxes rests with the people. As such, we believe it constitutes an implied limitation upon the power of the General Assembly to delegate the taxing power. Where the power is delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people, this constitutional restriction is violated.\textsuperscript{518}

C\textsuperscript{row} was followed in the court's 1997 decision in \textit{Weaver v. Recreation District}.\textsuperscript{519} In 1969 the General Assembly had created the Richland County Recreation Commission and authorized it to levy upon all taxable property "a tax of not exceeding five mills per annum."\textsuperscript{520} The plaintiff in \textit{Weaver} asserted the law violated Article X, Section 5 because the commission was an appointed, not elected, body.\textsuperscript{521} The court found the delegation impermissible because "it violates Article X § 5 of the South Carolina Constitution and may not stand."\textsuperscript{522}

In light of these cases, the Municipal Association's attempted delegation to a private body through its ordinances would appear to be unconstitutional.

\section*{2. Federal Court Jurisdiction in Municipal License Cases}

On April 27, 1999 the U.S. District Court for the District of South Carolina, Anderson Division, held that the Tax Injunction Act\textsuperscript{523} did not
foreclose a federal forum for a challenge to a municipal license tax.\footnote{524} The district court decided to allow the taxpayer an opportunity to be heard in the federal forum because South Carolina fails to provide a "plain, speedy, and efficient remedy."\footnote{525} The court's ruling is significant because (1) it relies on the United States Supreme Court's McKesson holding,\footnote{526} and (2) it provides telecommunications companies a federal forum in which to challenge discriminatory city gross receipts taxes.

In 1998 Seneca, South Carolina, amended its Business License Tax Ordinance (No. 98-4), entitled "An Ordinance Amending the Business License Tax Levying a Business License Tax on Telecommunications."\footnote{527} BellSouth brought suit to enjoin the enforcement of the ordinance based on the Telecommunications Act of 1996 and violations of the Equal Protection, Due Process, Commerce, and Impairment of Contract clauses of the United States Constitution.\footnote{528} However, federal subject matter jurisdiction was the sole issue before the court.

The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under [s]tate law where a plain, speedy and efficient remedy may be had in the courts of such State."\footnote{529} A sufficient remedy must provide a full hearing and judicial determination.\footnote{530} The district court found that an efficient remedy must also be clear, certain, and nonspeculative within the meaning of the due process requirements of McKesson.\footnote{531} That is, a remedy cannot be plain, speedy, and efficient if it does not comply with due process. In most states, the Tax Injunction Act may well prevent federal courts from determining whether state or local taxes are barriers. However, the court held the Tax Injunction Act did not divest the district court of jurisdiction because South Carolina had repealed the exclusive statutory remedy applicable to municipal license taxpayers in

\footnotesize{\begin{itemize}
\item \footnote{524}{BellSouth Telecomm., Inc. v. City of Seneca, No. 8:98-3451-13 (D.S.C. April 27, 1999).}
\item \footnote{525}{Id., slip op. at 7.}
\item \footnote{526}{Id., slip op. at 3 (citing McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36 (1990)).}
\item \footnote{527}{Id., slip op. at 1. The new tax imposes a 3\% rate on the gross receipts of all telecommunications services billed to customers located in the city on which a business license tax is not paid to another municipality. The new tax raises the business license tax on BellSouth by about 2,700\%--from $4,500 (the highest license tax paid to Seneca in 1998) to $120,000 due December 31, 1998. The new ordinance also imposes a nonpayment penalty of 5\% per month until payment.}
\item \footnote{528}{Id., slip op. at 2.}
\item \footnote{529}{28 U.S.C. § 1341 (1994).}
\item \footnote{530}{Seneca, No. 8:98-3451-13, slip op. at 2 (citing Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 514 (1990)).}
\item \footnote{531}{Id., slip op. at 1-2 (citing McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 36, 39 (1990)). Appendix A provides a detailed comparison of McKesson's due process requirements with existing South Carolina treatment of the municipal taxpayer.}
\end{itemize}
Since 1870 South Carolina taxpayers have not been permitted any predeprivation remedy. For more than 100 years, the pay-under-protest statutory remedy was the taxpayer’s exclusive post deprivation remedy.\textsuperscript{533} In view of the exclusivity statutes, the South Carolina Supreme Court held several times that a taxpayer could not use any general remedies, such as a declaratory judgment procedure.\textsuperscript{534}

The City of Seneca argued that because the pay-under-protest statute had been repealed, the exclusivity provisions were no longer applicable, and the taxpayer could use general remedies despite the earlier Supreme Court holdings to the contrary.\textsuperscript{535} The city cited two cases from other jurisdictions that found a declaratory judgment to be a “plain, speedy and efficient remedy.”\textsuperscript{536}

The district court found the out-of-state cases readily distinguishable because, in both instances, the state courts had a well-established practice of permitting declaratory judgments in tax cases, whereas South Carolina courts had specifically ruled to the contrary.\textsuperscript{537} The district court noted that the city’s argument “would provide at best, a very uncertain and speculative taxpayer remedy.”\textsuperscript{538} Given the stiff penalties in the ordinance, the taxpayer “would be put in the untenable position of bringing a state court action for declaratory judgment relief with the knowledge that it would be highly unlikely to receive both trial court and appellate review within a short period of time.”\textsuperscript{539} The district court concluded that “[a] remedy is not plain, speedy, and efficient where ‘there is such uncertainty concerning the . . . remedy as to make it speculative whether the state affords full protection to the federal rights.’”\textsuperscript{540}

For many years, the Tax Injunction Act has required taxpayers to use state procedures to attempt to secure refunds. To discourage refunds, states typically establish procedural minefields that are unfair to taxpayers. If the taxpayer manages to get across alive, she is generally dispatched with a truncated judicial review. Since 1990 the United States Supreme Court has developed the \textit{McKesson} line of authority—with cases such as \textit{Newsweek, Inc. v. Florida Department of Revenue}\textsuperscript{541} and \textit{Dryden v. Madison County}\textsuperscript{542}—as a balance to state overreaching. No Supreme Court opinion, including the 1999 decision in

\textsuperscript{532} Id., slip op. at 4.
\textsuperscript{533} S.C. CODE ANN. §§ 12-47-10 to -230 (repealed 1995).
\textsuperscript{535} \textit{Seneca}, No. 8:98-3451-13, slip op. at 4-5.
\textsuperscript{536} Id., slip op. at 5 (citing \textit{Folio v. City of Clarksburg}, 134 F.3d 1211 (4th Cir. 1998); \textit{Tully v. Griffin, Inc.}, 429 U.S. 68 (1976)).
\textsuperscript{537} Id., slip op. at 5-6.
\textsuperscript{538} Id., slip op. at 6.
\textsuperscript{539} Id.
\textsuperscript{540} Id., slip op. at 6-7 (quoting Hillsborough Township v. Cromwell, 326 U.S. 620, 625 (1945)).
\textsuperscript{541} 522 U.S. 442 (1998).
\textsuperscript{542} 552 U.S. 1145 (1998).
South Central Bell v. Alabama,\textsuperscript{543} has found prospective application to be appropriate. McKesson threatens many current state abuses, including requiring taxpayers to spend years exhausting their so-called administrative remedies. With Seneca, the district court has merged the Tax Injunction Act and McKesson lines of authority to provide the South Carolina taxpayer an opportunity to be heard in a neutral forum. The court's ruling will have a beneficial impact on future state and local practice. Of course, states can avoid McKesson problems altogether by providing adequate predeprivation remedies.

\section*{D. 1999 South Carolina Legislation}

As discussed above, the Telecommunications Act prohibits discriminatory state and local taxes on the telecommunications industry. Despite the Act, South Carolina localities have continued to impose special taxes on telecommunications companies of 3\% and 5\% of their gross income.\textsuperscript{544} In 1999 South Carolina limited—but did not remove—the localities' power to impose discriminatory taxes.\textsuperscript{545} Under the new law the city's business license and franchise taxes are reduced to .3\% of gross income until 2003\textsuperscript{546} and to .75\% thereafter.\textsuperscript{547} The new law does not conform to the Telecommunications Act because it continues the historical discrimination against the industry, albeit at a reduced rate.

Several other states have enacted similar legislation.\textsuperscript{548} The draftsman's theory seems to be that the Telecommunications Act requires municipalities to tax all telecommunications providers the same, but that a city may freely discriminate against the industry as a whole. Clearly, however, neither the language nor the history of the Telecommunications Act supports such a theory.

\section*{E. South Carolina Gross Receipts Tax}

In many states, public utilities are subject to gross receipts taxes and special property tax rules. Many of these provisions date back to the nineteenth century. South Carolina Code section 12-20-100 imposes an additional license tax on utilities.\textsuperscript{549} Section 12-20-50 imposes on corporations generally an

\begin{itemize}
\item \textsuperscript{543} 526 U.S. 160 (1999).
\item \textsuperscript{544} See supra note 29 and accompanying text.
\item \textsuperscript{546} Id.
\item \textsuperscript{547} Id. § 58-9-2220(2)(a).
\item \textsuperscript{548} COLO. REV. STAT. § 38-5.5-101(2)(b) (1999); 35 ILL. COMP. STAT. § 635/5-5 (Supp. 1999); TEX. TAX. CODE ANN. § 301.004 (West 1992).
\item \textsuperscript{549} S.C. CODE ANN. § 12-20-100 (Law. Co-op. Supp. 1999). The full text of the section is set forth below:
\end{itemize}

\begin{verbatim}
§ 12-20-100. License tax on utilities and electric cooperatives; tax based on value of property;
\end{verbatim}
annual license fee of fifteen dollars, plus one dollar for each thousand “of capital stock and paid-in or capital surplus of the corporation.”

Section 12-20-50 would result in a much smaller tax than the special tax on utilities.

Until the United States Supreme Court’s 1977 decision in Complete Auto Transit, Inc. v. Brady, state taxation on interstate commerce was unconstitutional. For example, in Western Union Telegraph Co. v. Alabama, the Supreme Court struck down an Alabama tax on the gross receipts from messages sent through interstate commerce. The Court found the company could be taxed on intrastate income—which the Court described as “receipts arising from commerce wholly within the State”—as well as the interstate

additional tax based on gross receipts; payment; consolidated or combined return; minimum license fee.

(A) In the place of the license fee imposed by Section 12-20-50, every express company, street railway company, navigation company, waterworks company, power company, electric cooperative, light company, gas company, telegraph company, and telephone company shall file an annual report with the department and pay a license fee as follows:

(1) one dollar for each thousand dollars, or fraction of a thousand dollars, of fair market value of property owned and used within this State in the conduct of business as determined by the department for property tax purposes for the preceding taxable year; and

(2)(a) three dollars for each thousand dollars, or fraction of a thousand dollars, of gross receipts derived from services rendered from regulated business within this State during the preceding taxable year, except that with regard to electric cooperatives, only distribution electric cooperatives are subject to the gross receipts portion of the license fee under this subitem (2)(a).

(b) When a consolidated return is filed pursuant to section 12-6-5020, the phrase “the gross receipts derived from services rendered from regulated business” does not include gross receipts arising from transactions between the separate members of the return group;

(B) The minimum license fee under this section is the same as provided in Section 12-20-50(A). When a combined return is filed, the minimum license fee applies to each corporation in the combined group.

Id. (emphasis added).

552. 132 U.S. 472 (1889).
553. Id. at 477-78.
554. Id. at 477.
income. Similarly, in *Pacific Express Co. v. Seibert* the Supreme Court explained that the language "within this State" meant "business begun and ended within the State." The Supreme Court further stated that "[b]usiness done within this State cannot be made to mean business done between that State and other States." In *Seibert* the Missouri statute provided that every express company was taxed on 2% of the "entire receipts for business done within this State." *Pacific Express* stated that it would owe $12,000 if the tax included interstate commerce and $3,000 if it was limited to intrastate commerce. The company sought a federal injunction against enforcement of the law on the grounds it was an invalid tax on interstate commerce. The Court agreed that the state could not tax interstate commerce:

> It is well settled that a State cannot lay a tax upon interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on; for the reason that such taxation is a burden on that commerce and amounts to a regulation of it which belongs to Congress.

The Court, however, disagreed with *Pacific Express* on the proper construction of the statute:

> The question on this point, therefore, is narrowed down to the single inquiry, whether the tax complained of in any way bears upon or touches the interstate traffic of the company, or whether, on the other hand, it is confined to its intra-state business. We think a proper construction of the statute confines the tax which it creates to the intra-state business, and in no way relates to the interstate business of the company.

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555. 142 U.S. 339 (1892).
556. *Id.* at 350.
557. *Id.*
558. *Id.* at 344.
559. *Id.* at 342.
560. *Id.*
561. *Id.* at 349 (citations omitted).
562. *Id.* at 349-50. The Court continued:

> The act in question, after defining in its first section what shall constitute an express company or what shall be deemed to be such in the sense of the act, requires such express company to file with the state auditor an annual report "showing the entire receipts for business done within this State of each agent of such company doing business in this State," etc., and
Twelve years after Seibert, the South Carolina gross receipts tax on telephones was enacted to apply to business done "within this State." The 1904 law calculated gross receipts in section II by referencing to the following:

In the case of telegraph and telephone companies, the entire gross receipts, including all sums earned or charged, whether actually received or not, for the fiscal year the next preceding from whatever source derived, whether messages, telephone tolls, rentals, or otherwise, for business done within this State, at each office within this State, giving the name of the office and the total receipts of the company for such period in South Carolina from business done within South Carolina.\(^{563}\)

The law required the State Board of Assessors to ascertain the gross receipts of telephone companies "for business done within South Carolina."\(^{564}\) Finally, "after ascertaining the gross receipts for business done in South Carolina, or the gross earnings from its operation within South Carolina," the State Board of

\[\text{further provides that the amount which any express company pays "to the railroads or steamboats within this State for the transportation of their freight within this State" may be deducted from the gross receipts of the company on such business; and the act also requires the company making a statement of its receipts to include, as such, all sums earned or charged "for the business done within this State," etc. It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other States and the State of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the State. This positive and oft-repeated limitation to business done within the State, that is, business begun and ended within the State, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. "Business done within this State" cannot be made to mean business done between that State and other States. We, therefore, concur in the view of the court below that it was not the legislative intention, in the enactment of this statute, to impinge upon interstate commerce, or to interfere with it in any way whatever; and that the statute, when fairly construed, does not in any manner interfere with interstate commerce.}  

\(Id.\) at 350.

\(^{563}\) 1904 S.C. Acts 269 § 1(11) (emphasis added).

\(^{564}\) 1904 S.C. Acts 269 § 7.
Assessors was directed to assess "an annual license fee of three mills on such gross income."\textsuperscript{565} The ordinary license fee on foreign corporations was one-half of one mill on the value of property "used within this State."\textsuperscript{566} The 1904 legislature's repeated use of the phrase "within this state," after the Supreme Court's construction of that phrase in \textit{Pacific Express Co.}\textsuperscript{567} and \textit{Western Union Telegraph Co.}\textsuperscript{568} should, of course, be read to incorporate that construction.\textsuperscript{569}

The sale of local telephone exchange access is analogous to the facts in \textit{Complete Auto Transit, Inc.}, where the taxpayer picked up General Motors cars at the railhead at Jackson, Mississippi and delivered them to dealers in Mississippi.\textsuperscript{570} Mississippi law imposed a 5% tax on the privilege of engaging in business on every pipeline, railroad, airplane, bus or other transportation business "between points within this State."\textsuperscript{571} The Supreme Court noted this language and the history of the statute may indicate a legislative intent "to reach only intrastate commerce, and that it should be so construed."\textsuperscript{572} Complete Auto, however, "[did] not make that argument."\textsuperscript{573} Instead, Complete Auto argued the transaction was an illegal tax on interstate commerce.\textsuperscript{574} For the first time, however, the Court held that interstate commerce could be taxed.\textsuperscript{575}

The current statutory language—"gross receipts derived from services rendered from regulated business within the State"\textsuperscript{576}—originated in 1985 while \textit{Duke Power Co. v. South Carolina Tax Commission}\textsuperscript{577} was pending. Before the change, the tax was imposed on "the entire gross receipts from business within the State."\textsuperscript{578} Duke Power argued unsuccessfully in the litigation that "gross receipts from business" meant the regular course of business (i.e., the company's sales to customers).\textsuperscript{579} Although the court disagreed with Duke Power, the legislative change in language seems to have adopted Duke's interpretation.

A selective gross receipts tax, such as section 12-20-100, is a relic of the

\begin{footnotes}
\item 565. 1904 S.C. Acts 269 § 9.
\item 566. 1904 S.C. Acts 269 § 5.
\item 569. From 1904 to 1991 the state interpreted the gross receipts tax to apply to intrastate business and not to a portion of the receipts of interstate business. See Op. Att'y Gen. 2823 (1970).
\item 571. \textit{Id.} at 275.
\item 572. \textit{Id.} at 276 n.2.
\item 573. \textit{Id.}
\item 574. \textit{Id.} at 277.
\item 577. 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (holding that the sale of a portion of an unfinished nuclear power plant was a gross receipt for the corporate license tax).
\item 578. \textit{Id.}
\item 579. \textit{Id.}
\end{footnotes}
monopoly days when the Public Utility Commission regulated both rate of return and service charges.\textsuperscript{580} Taxes were considered a cost and were simply rolled directly into utility rates. However, the historical rationale for special taxes—that they were a quid-pro-quo for special privileges granted by the state—is simply no longer valid. Moreover, section 12-20-100(A)(1) is inconsistent with section 253 of the Telecommunications Act of 1996\textsuperscript{581} and with Article X of the South Carolina Constitution, which governs property taxation.\textsuperscript{582} Hence, there is no apparent justification for special taxes on the gross receipts or property of phone companies.

1. Inclusion of Intrastate Access Charges in the Local Exchange Company's Tax Base

a. Inclusion by the Long Distance Carrier

Litigation recently brought by AT&T and MCI has established that intrastate access charges are properly part of the gross receipts base of the long distance carrier.\textsuperscript{583} That is, the long distance carrier may not deduct or exclude the charge from its gross receipts base. The long distance company, of course, books the revenue that is charged to the customer.

Courts have found the long distance carrier's payment for intrastate access to be a normal cost of business for the carrier. The carrier's arguments that they are sharing revenue with, or collecting revenue for, the local company have been consistently rejected. Specifically, three cases have disallowed attempts by long distance carriers to deduct intrastate access charges from their gross receipts tax base.

In the first case, \textit{AT&T v. State Department of Revenue},\textsuperscript{584} the court held that AT&T could not deduct \textit{intrastate} access charges paid to a local company because charges are a cost of business, not a division of revenue.\textsuperscript{585} The court found:

\begin{quote}
Through the system of access charges, the local exchange carriers involved in a long distance call received an access charge for that call. Access charges were paid by AT&T to the local exchange carriers for long distant [sic] calls regardless of whether AT&T received any revenue from those calls, e.g., incomplete calls, busy signals, wrong
\end{quote}

\textsuperscript{582} S.C. CONST. art. X.
\textsuperscript{584} 677 So. 2d 772 (Ala. Civ. App. 1996).
\textsuperscript{585} Id. at 775.
numbers, etc. Also, AT&T paid the access charge rate set by the PSC regardless of the rate AT&T charged its customers for the completed and billable calls.

The access charges in this case were calculated or based upon usage by AT&T regardless of whether the call was completed. Unless a call was completed, AT&T did not and could not charge its customer for that call; consequently, no revenue was received by AT&T for an incomplete call. Therefore, AT&T's obligation to pay the access charges was "dependent on usage of the service, not the revenue received."586

In the second case, *MCI Telecommunications Corp. v. Taylor*,587 MCI argued, on equal protection grounds, that the telephone gross receipts tax (prior to its 1989 repeal) discriminated against long distance carriers by taxing them on *intrastate* access charges in contrast to a call between two local operating companies.588 The court disagreed, finding that MCI was not similarly situated "because the local companies have a shared revenue agreement with their counterparts within the LATA [local access and transport area] while MCI does not have a shared revenue agreement."589 On this point the court continued:

[T]he commissioner advances the argument that MCI and the local exchange companies are indeed differently situated because the local companies have a *shared revenue agreement with their counterparts within the LATA while MCI does not have a shared revenue agreement*. Under this view of the relationship of the parties, the local operators are indeed acting only as the collecting agents for each other. The revenue belongs to both companies according to their prior agreement and each company may record as a gross receipt only its share of the long distance toll.

On the other hand, MCI purchases services from the local operating companies for which it pays a regulated access charge set by the PSC. In our view the access charge is more like a merchant's payment for the goods he sells. It is, therefore, one of the costs of doing business. MCI is not the collecting agent for the local companies.590

586. *Id.* at 775 (footnote omitted) (quoting State Dep't. of Revenue v. Teinet Corp., 595 So.2d 469 (Ala. Civ. App. 1991)).
587. 914 S.W.2d 519 (Tenn. Ct. App. 1995).
588. *Id.* at 520.
589. *Id.* at 522.
590. *Id.* at 522 (emphasis added).
In the third case, *MCI Telecommunications Corp. v. Tracy*, MCI sought to deduct intrastate access charges from its tax base under Ohio's public utility gross receipts. The court explained the effect of divestiture as follows:

Apparently, before divestiture local companies were not required to collect for intrastate long distance calls for MCI and they did not do so. Accountingwise, MCI collected the entire amount and, after so listing the full amount as receipts, paid the local companies for the access purchased from them. After 1983, i.e., after divestiture, all companies operated on the same basis with respect to payment for or collection of revenues for intrastate long distance telephone calls.

In 1984 Ohio informed "long distance carriers, who are paying access charges and reporting them as an expense, that a reduction of gross receipts was not permitted." MCI sought a redetermination permitting it "to exclude from the excise tax base of a long distance telephone company amounts paid to local telephone companies in Ohio for originating or terminating intrastate long distance telephone calls." The court, however, concluded that "absent a joint venture or collection agency agreement, there is no basis for 'sharing' revenue. The payments were indeed costs for the purchase of access." A contractual arrangement for dividing revenue "would have to be something other than a debtor-creditor arrangement."

**b. Exclusion by the Local Carrier**

The three cases discussed above dealing with gross receipts statutes similar to that of South Carolina establish that a long distance carrier cannot exclude from its gross receipts base the cost of intrastate access. This principle appears to be settled. Another justification for not including the intrastate access charge in the local carrier's base is that the same event—the intrastate access—should not be taxed twice. Further, the Chesapeake & Potomac litigation discussed below holds that payments received by local carriers from other carriers should not be included in the local bases. Finally, the terms of section 12-20-100 do not, as discussed above, apply to receipts from other carriers.

In New York the issue has been the subject of specific statutory

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592. Id. at 1213-14.
593. Id. at 1213.
594. Id. at 1213.
595. Id. at 1214.
596. Id. at 1215.
597. Id.
Before 1990 AT&T reported the intrastate access charge and the local telephone carriers did not. In 1990 the legislature reversed the situation by requiring the local carriers to report the change while giving AT&T a deduction. AT&T, however, objected to the method of apportionment because it provided a preapportionment deduction instead of a postapportionment deduction. AT&T successfully argued to the New York Court of Appeals that limiting it to the preapportionment deduction was discriminatory against interstate carriers because long distance intrastate carriers would secure a dollar for dollar deduction while AT&T would only get about 5%, its 1990 apportionment percentage.

In District of Columbia v. Chesapeake & Potomac Telephone Co. the court held that the local access to long distance carriers was nontaxable because such gross receipts were not from the sale of public utility commodities and services. The District of Columbia argued that the access charge was a receipt of Chesapeake & Potomac Telephone Company (hereinafter "C&P"). The court outlined the divestiture periods as follows:

[W]hen a C&P customer placed a long distance call in the District, C&P directly billed that customer. Upon receiving payment for such long-distance charges, C&P remitted that amount to an interstate "pool" from which AT&T allocated the respective shares to the local telephone companies. The revenues that C&P received under this process were subject to the gross receipts tax because C&P was providing long-distance service directly to its customers.

Describing the post-1974 access service provided to other long distance carriers, the court wrote that the FCC in 1974 ordered AT&T to provide access to other long distance carriers—pursuant to complex formulas—in order to provide other carriers the interconnection needed to access local facilities. The other carriers (e.g., MCI and Sprint) billed their own customers and were paid directly by them. In turn, the other carriers paid C&P for use of the local system. The court noted that the revenues received by C&P from the other

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598. AT&T v. New York State Dep't of Taxation & Fin., 637 N.E.2d 257, 258-59 (N.Y. 1994) (discussing a 1990 tax law and holding it violative of the Commerce Clause for discriminating between interstate and intrastate carriers).
599. Id. at 258.
600. Id.
601. Id. at 259.
603. Id. at 184-85.
604. Id. at 185.
605. Id. at 182.
carriers were not taxable.\textsuperscript{607}

Finally, the court addressed post-divestiture, when C&P ceased providing long distance service. Like the other long distance carriers, AT&T could and did use C&P’s network. The District of Columbia asserted that amounts received by C&P from AT&T were subject to the gross receipts tax.\textsuperscript{608} The court, however, held that network access revenues were nontaxable because the services C&P provided other companies were not public utility services as contemplated by the statute.\textsuperscript{609} The court cited a 1963 decision of the United States Court of Appeals for the District of Columbia, which held that the revenues received from other carriers for use of local facilities by the other carriers in serving their customers were not subject to the gross receipts tax:

[W]hen a public service company supplies services or facilities to another public utility company in the same field for the sole purpose of enabling the latter company to serve its customers more efficiently, such services are not “public utility commodities or services” within the meaning of our statute, and thus are not subject to the gross receipts tax.\textsuperscript{610}

Before divestiture, telephone companies shared revenues. Divestiture, as noted previously in this Article, altered the companies’ relationship and transformed shared revenues into a cost of business for independent entities furnishing services to one another.\textsuperscript{611} The Illinois Message Tax Act imposed on persons engaged in the business of transmitting intrastate messages a tax of 3\% on the gross receipts of such business.\textsuperscript{612} In \textit{Illinois Bell Telephone Co. v. Allphin}, Illinois sought to charge Illinois Bell the message tax on revenues billed to the customers by Bell, but paid to and retained by 57 independent telephone companies for participation in the transmission of intrastate tolls. These revenues were merely forwarded to the independents by Bell pursuant to traffic agreements, and the independents had already paid the message tax on them. Illinois argued that Bell’s payments to the independents were a cost of doing business—a charge by the independents for the use of their

\begin{itemize}
  \item\textsuperscript{607} \textit{Chesapeake & Potomac}, 516 A.2d at 183.
  \item\textsuperscript{608} \textit{Id.} at 183-84.
  \item\textsuperscript{609} \textit{Id.} at 182, 184. A similar argument can be made in South Carolina where the statute refers to “regulated business” and probably means the same thing (i.e., service to customers in view of the legislative history).
  \item\textsuperscript{610} \textit{Id.} at 185 (quoting \textit{Chesapeake & Potomac Tel. Co. v. District of Columbia}, 325 F.2d 217, 222 (D.C. Cir. 1963)).
  \item\textsuperscript{611} \textit{See, e.g., Illinois Bell Tel. Co. v. Allphin}, 443 N.E.2d 580, 590-91 (Ill. 1982) (“When an independent telephone company’s service and facilities are utilized in transmitting a message, it is satisfying its statutory obligation to the public . . . . The costs and expenses of participating telephone companies are their costs and expenses . . . .”); \textit{see also} Part IV.A.5 (discussing the 1984 divestiture).
  \item\textsuperscript{612} \textit{Allphin}, 443 N.E.2d at 582.
\end{itemize}
facilities.\textsuperscript{613} The court, however, held that the traffic agreements accomplished a division of revenue that made the gross receipts those of the company whose facilities contributed to the completion of the call, stating "[u]nder the \textit{division-of-revenues concept}, the telephone companies \textit{act as collection agents for each other} in the functioning of an integrated, interconnected, statewide telephone network, not as independent contractors furnishing services to each other and charging compensation for those services."\textsuperscript{614} Divestiture affected the \textit{Allphin} decision by altering the historical relations exemplified by division of revenues pursuant to traffic agreements.

Another predivestiture case involving C&P established that revenues received for services supplied to other carriers to enable the latter to serve their customers were not gross receipts to the local company.\textsuperscript{615} The payments in question were received by C&P, which served customers in the District of Columbia, for services provided to companies doing business in Maryland and Virginia. Because of the geographical proximity of the three areas, the Washington company performed certain services for the other companies, including information calls and certain Maryland calls.\textsuperscript{616} The District of Columbia argued the revenues were subject to its 4% gross receipts tax because they resulted "from the sale of public utility commodities and services within the District."\textsuperscript{617} However, the court found the receipts were not subject to the District's tax because they constituted reimbursement for assistance rendered to another utility company in performing its obligations, not a tariffed receipt from its customers.\textsuperscript{618}

In South Carolina sales tax cases the courts consistently avoid a double tax.\textsuperscript{619} In \textit{Southeastern-Kusan, Inc. v. South Carolina Tax Commission}\textsuperscript{620} Chief Justice Littlejohn held:

\begin{quote}
To allow Southeastern to claim this exemption produces no absurd result. It is consistent with the \textit{general purpose of this exemption, which is to avoid the pyramiding of taxes on the same commodity (thereby preventing the increase of sales price to the ultimate consumer)} and to promote new industry within the State and encourage expansion of present
\end{quote}

\textsuperscript{613} \textit{Id.} at 589.
\textsuperscript{614} \textit{Id.} at 590 (emphasis added).
\textsuperscript{615} Chesapeake & Potomac Tel. Co. v. District of Columbia, 325 F.2d 217 (D.C. Cir. 1963).
\textsuperscript{616} \textit{Id.} at 218.
\textsuperscript{617} \textit{Id.} at 217 (quoting D.C. CODE ANN. § 47-1701 (1961)).
\textsuperscript{618} \textit{Id.} at 222.
\textsuperscript{619} Palmettonet, Inc. v. South Carolina Tax Comm'n., 318 S.C. 102, 456 S.E.2d 385 (1995) (holding that sales of services by the owner of fiber-optic line between cities were exempt from sales tax as wholesale sales). Also, to settle 1987 litigation with Southern Bell, the state removed the access charge for the taxable base.
industry.\textsuperscript{621}

2. Inclusion of Interstate Access Charges in Local Company’s Tax Base

South Carolina is apparently the first state to attempt to include the \textit{interstate} access charges in a local company’s tax base. The Department’s rationale is Tax Commission Decision 91-41, which holds that interstate access charges should be included. In Decision 91-41 the taxpayer argued that interstate access charges should not be included.\textsuperscript{622} The Tax Commission responded:

\begin{quote}
We disagree with the taxpayer. Our corporate license tax is a franchise tax imposed on the privilege of doing business as a corporation in this State. Thus, the focus of our inquiry is not on the intricacies of the nation’s interstate telephone system. Instead, the question is simply whether the access charges are received by the taxpayer for services it has rendered in South Carolina. Any other approach would allow the taxpayer to exclude receipts that are derived as a result of exercising its corporate powers in this State.\textsuperscript{623}

Turning to the facts, it is evident the services rendered by the taxpayer with respect to the subject access charges all occurred within South Carolina. The equipment, facilities, lines, and personnel used by the taxpayer to generate the access charges are all located here. Simply stated, none of the activities conducted by the taxpayer with regard to the access charges occurred out of state. Accordingly, such charges are properly included in the taxpayer’s South Carolina license tax base.\textsuperscript{624}
\end{quote}

Decision 91-41 concludes that “it is evident” the services rendered in connection with the “access charges all occurred within South Carolina.”\textsuperscript{625}

As noted, section 12-20-100 applies to “gross receipts derived from

\textsuperscript{621} Id. at 488, 280 S.E.2d at 59 (emphasis added).

\textsuperscript{622} A Finding Concerning The License Tax Liability of ABC Telephone Company For the Tax Years Ending December 31, 1987 Through December 31, 1989, No. 91-41, slip op. at 3 (South Carolina Tax Commission August 12, 1991) (Modified No. 91-58 (Oct. 4, 1991)).

\textsuperscript{623} Id., slip op. at 4 n.4 (citations omitted). This view is neither new nor novel. See Chesapeake & Potomac Tel. Co. v. District of Columbia, 137 F.2d 6745 (1943), in which a similar analysis was sustained.

\textsuperscript{624} Finding Concerning The License Tax Liability of ABC, No. 91-41, slip op. at 4.

\textsuperscript{625} Id.
services rendered from regulated business within this State." With this section the Tax Commission is attempting to cut off a piece of interstate commerce and impose an intrastate tax on it. The formal subject of the tax, as the Commission views it, are the gross receipts from access in South Carolina. However, the tax is in fact on gross receipts from part of an interstate call. The interstate phone call is, of course, interstate commerce, and the facilities employed are obviously instrumentalities of interstate commerce. Any tax on interstate commerce must comply with Complete Auto Transit, Inc. v. Brady. More particularly, a tax on an interstate phone call must comply with Goldberg v. Sweet. However, the Commission’s decision makes no effort to comply with Supreme Court authorities because it apparently takes the position that it is taxing a local event. With the Commission’s decision, South Carolina attempts to set up a toll booth to charge those who want to engage in interstate commerce. Because the South Carolina State tax is in fact on the interstate call, it is improper for several reasons:

(1) Section 12-20-100 does not apply because both its language and established interpretation confine it to intrastate commerce.

(2) If section 12-20-100 is construed to apply to interstate commerce, the tax will fail because it discriminatorily imposes a tax on the interstate call that is not paid on the intrastate call.

(3) Section 12-2-100, if construed to apply to interstate commerce, would also fail because it makes no effort to apportion the call in accord with Goldberg v. Sweet—that is it fails to tax only those calls that originated or terminated in the state and were charged to a service address in the state. To the contrary, South Carolina is seeking to tax calls originating and terminating in the state but that may be charged to someone in Illinois. A state tax on interstate phone calls, that is not designed to follow Goldberg v. Sweet will fail because of nexus, apportionment, and discrimination problems. For example, the same call could be taxed by the state of origin and the state of destination, creating a risk of multiple taxation. Multiple taxation is also possible because, unlike Illinois, South Carolina does not offer a credit if payment is made to another state on the same call.

(4) In Oklahoma Tax Commission v. Jefferson Lines, Inc. the Supreme Court held that a “gross receipts tax . . . [is] simply a variety of tax on income, which is required to be apportioned to reflect the location of the various interstate activities by which it was earned." The Jefferson Lines court thus reaffirmed Central Greyhound Lines, Inc. v. Mealey, which held

630. Id. at 190.
unconstitutional an unapportioned gross receipts tax on the full price of a ticket for interstate trips. South Carolina may argue that it is not taxing interstate values but only a receipt for the local loop, which is entirely in South Carolina. The local loop, however, is indivisible with interstate calls, and only has value as part of the whole long distance call. Under Jefferson Lines, the whole must be valued and then fairly apportioned—if it can be.

In the monopoly era, state and city gross receipts taxes could be passed on to customers in the form of rates. The gross receipts tax is one of many special taxes and fees that state and local governments imposed and built in to the rate base, along with high personal property taxes, business license taxes, and franchise fees. The system of using the phone company as a tax collector, while comfortable for the parties, was not transparent. In moderation, it probably did little harm. But the gross receipts and other special taxes of today—at 3% (Municipal Association ordinances) or 5% (Orangeburg franchise fee) or some higher number—make the state and city partners in a company’s profits but not its losses, when they should not be partners in either. The industry, as established by the Telecommunications Act of 1996, is meant to be market efficient and transparent. The Act requires state and local governments to treat telecommunications providers as they do other taxpayers.

V. CONCLUSION

Since Southern Bell first entered into a franchise with the City of Aiken in 1890, the telephone business in South Carolina has expanded to include new information technologies that have revolutionized American life.

The Telecommunications Act defines “telecommunications” to mean “the transmissions, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” “Information” today includes voice, data, image, graphics, and video. The control and regulation of communication and information technology is obviously a vital national concern—as such technology is an integral instrumentality of interstate commerce and military defense—for which policy is made at the national level.

The Telecommunications Act expressly preempts state and local laws that burden the entry of telecommunications providers. The special taxes left over from the monopoly days are consequently outlawed. The business is subject only to the reasonable exercise of the state’s police and taxing powers; the taxes cannot be discriminatory and the police power cannot be a subterfuge for interfering with the provision of service. State and local governments, as Theodore N. Vail said in 1915, “should think of themselves as juries charged with ‘protecting the individual member of the public against corporate

632. See BellSouth Telecomms., Inc. v. City of Orangeburg, No. 25009, 1999 WL 1037160 (S.C. Nov. 8, 1999).
aggression or extortion, and the corporate member of the community against public extortion and aggression.\textsuperscript{634} Similarly, the federal government should assure—either by competition or regulation—that Bell's remarkable invention is available to our citizens at a price close to cost.

\textsuperscript{634} Brooks, supra note 4, at 144.