

**FAST PHONES, INC. AND SEVEN
BRIDGES COMMUNICATIONS, LLC,**

Complainants/Petitioners

**IN RE: COMPLAINT AND REQUEST FOR
DECLARATORY RULING CONCERNING
THE CITY OF MONTGOMERY,
ALABAMA'S LICENSE ORDINANCE 48-91.**

DOCKET 28889

DECLARATORY ORDER

BY THE COMMISSION:

I. INTRODUCTION/BACKGROUND

A. The Complaints/Petitions of Fast Phones and Seven Bridges.

On February 21, 2003, Fast Phones, Inc. ("Fast Phones") filed with the Commission a Complaint and Request for a Declaratory Ruling ("Complaint/Petition") concerning the City of Montgomery, Alabama's License Ordinance 48-91 as said Ordinance was amended on or about September 4, 2002.¹ In Count One of its Complaint/Petition, Fast Phones urged the Commission to, among other things, enter an order finding that Fast Phones does not own or operate a telephone exchange or exchanges within the City of Montgomery, Alabama. Fast Phones also sought a finding that it and other CLECs created pursuant to the authority of the Telecommunications

Act of 1996 (the "Telecom Act")², are not subject to the license fee/tax imposed by the City of Montgomery's License Ordinance 48-91 as amended; that the City of Montgomery's amended License Ordinance 48-91 prohibits, or has the effect of prohibiting, the ability of Fast Phones to compete in the telecommunications market as a provider of local telephone exchange service or access in the City of Montgomery, Alabama; and that the City of Montgomery's License Ordinance 48-91 as amended violates §253(a) of the Telecom Act.³

In Count Two of its Complaint/Petition, Fast Phones sought to file a complaint against the City of Montgomery. Fast Phones specifically requested as part of said Complaint that the Commission issue a Cease and Desist Order prohibiting the City of Montgomery from enforcing its amended License Ordinance 48-91.⁴

Fast Phones represented that it is an Alabama corporation with its principal place of business in the City of Montgomery, Alabama. Fast Phones noted that it is certificated by the Commission to provide Competitive Local Exchange Carrier ("CLEC") service and Resold Long Distance service in the State of Alabama.⁵

Fast Phones further asserted that the City of Montgomery's License Ordinance 48-91 was originally adopted by the City of Montgomery in 1991 for purposes of

¹ A copy of the City of Montgomery's Amended License Ordinance 48-91, Section 19C-21i, Special and Privilege License-Telephone Companies is appended hereto as Attachment A. ("Amended License Ordinance 48-91" or "License Ordinance 48-91, as amended")

² Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §151 *et seq.*

³ See Complaint/Petition of Fast Phones at pp. 4-7.

⁴ *Id.* at pp. 7-8.

⁵ Fast Phones received its certification to provide Resold Local Exchange Telecommunications Services pursuant to Commission Order entered in Docket 26574 on September 23, 1998. Fast Phones' Prepaid Long Distance authorization was granted pursuant to Commission Order entered on September 13, 2000 in that same Docket.

imposing an annual business license fee in the amount of \$12,000 on each person, firm or corporation which operates a telephone exchange or exchanges within the City of Montgomery. Fast Phones alleged that the City of Montgomery informed Fast Phones that its business license would be revoked if Fast Phones did not pay the annual \$12,000 fee imposed by License Ordinance 48-91.⁶

Fast Phones maintained that it paid the required fee under protest for the years 1999 through 2001. When Fast Phones was subsequently assessed the annual business license fee of \$12,000 for the year 2002 by the City of Montgomery, Fast Phones noted that it challenged the Ordinance and ultimately had the Supreme Court of Alabama rule in its favor in *Fast Phones, Inc. v. the City of Montgomery*.⁷ Fast Phones pointed out that in that case, the Alabama Supreme Court held that Fast Phones did not operate “a telephone exchange” and thus was not subject to the City of Montgomery’s License Ordinance 48-91.

Following the release of the Alabama Supreme Court’s decision in *Fast Phones v. City of Montgomery*, Fast Phones asserted that it petitioned the City of Montgomery for a refund of the license fees which it had paid under protest. According to Fast Phones, said request was denied by the City of Montgomery.⁸

Fast Phones maintained that on or about September 4, 2002, the City of Montgomery enacted an amendment to its License Ordinance 48-91 (the “Amendment”)

⁶ See Complaint/Petition of Fast Phones at p. 2.

⁷ 842 So.2d 617(Ala. 2002).

⁸ *Complaint/Petition of Fast Phones* at pp. 2-3.

which attempted to reimpose upon CLECs the same annual business license fee imposed upon telephone companies pursuant to the predecessor License Ordinance 48-91.⁹ Fast Phones alleged that even though it does not use any rights-of-way belonging to the City of Montgomery, Alabama, it was nonetheless assessed the annual business license fee imposed under the amendment to License-Ordinance 48-91 for the year 2003.¹⁰

In the Complaint/Petition filed with the Commission by Fast Phones on February 21, 2003, Fast Phones formally challenged the annual business license fee imposed by the City of Montgomery under amended License Ordinance 48-91. Fast Phones alleged that the \$36,000 in business license fees it had paid to the City of Montgomery had placed it at a competitive disadvantage with other market providers of Resold Local Exchange Telecommunications Services. Fast Phones further alleged that it had been assessed an additional \$24,000 in business license fees for the years 2002 and 2003 by the City of Montgomery thereby placing Fast Phones at a further competitive disadvantage.¹¹

Fast Phones asserted that the Telecom Act was enacted by Congress to foster rapid competition in the telecommunications industry and to end the monopolies of local telephone service providers. Fast Phones noted that §253(a) of the Telecom Act prohibits the enforcement of any state or local statute, regulation or requirement that

⁹ See Attachment A hereto.

¹⁰ See Complaint/Petition of Fast Phones at p. 3.

¹¹ *Id.* at pp. 3-4.

“may prohibit or have the effect of prohibiting” the ability of any entity to provide any interstate or intrastate telecommunications service. Given the fact that the Alabama Legislature delegated exclusive jurisdiction over telephone rates and service regulations in Alabama to the Alabama Public Service Commission, Fast Phones urged the Commission to issue the requested Declaratory Ruling and/or Order finding that the City of Montgomery’s License Ordinance 48-91, as amended, violates §253(a) of the Telecom Act.¹²

On or about March 6, 2003, Seven Bridges Communications, LLC (“Seven Bridges”) filed a Complaint and Request for Declaratory Ruling with the Commission, which, aside from minor factual variations, was virtually identical to the Complaint/Petition filed by Fast Phones. Seven Bridges is an Alabama limited liability company with its principal place of business in Hope Hull, Montgomery County, Alabama. Like Fast Phones, Seven Bridges is a CLEC created pursuant to the authority of the Telecom Act.

Seven Bridges was certified by the Commission to provide Resold Local Exchange Telecommunications Services pursuant to Commission Order entered in Docket 27230 on November 2, 1999. Like Fast Phones, Seven Bridges provides service pursuant to agreements entered into, by and between Seven Bridges and BellSouth Telecommunications, Inc. under the authority of the Telecom Act.¹³

¹² *Id.* at pp. 4-6.

¹³ See Complaint/Petition of Seven Bridges at pp. 1-2.

Seven Bridges alleged that, like Fast Phones, it paid Montgomery License Ordinance fee 48-91 under protest for the year 2000 and was subsequently assessed the annual business license fee imposed under said Ordinance for the years 2001 and 2002. Seven Bridges alleged that the City of Montgomery also assessed it the \$12,000 license fee required by amended License Ordinance 48-91 for the year 2003. Seven Bridges argued that the \$12,000 business license fee it paid for the year 2000 and the \$36,000 it had been assessed for the years 2001 through 2003 placed it at a competitive disadvantage.¹⁴

Given the substantial similarity of the Complaints/Petitions filed by Fast Phones and Seven Bridges, said filings were consolidated under this single Docket for consideration by the Commission. Even though obvious factual differences between Fast Phones' and Seven Bridges' situations were noted by the Commission, the Commission ultimately determined that the substantially similar relief requested by both parties justified the consolidation of the Complaints/Petitions.

B. The City of Montgomery's Motions to Dismiss.

On March 25, 2003, the City of Montgomery ("the City") responded to the Complaint/Petition of Fast Phones by filing a Motion to Dismiss. The City argued that the Commission had no subject matter jurisdiction over the matters asserted by Fast Phones.¹⁵

¹⁴ *Id.* at pp. 2-3.

¹⁵ See *City of Montgomery's Motion to Dismiss* at p.2.

In support of its jurisdictional arguments, the City asserted that the jurisdiction of the Commission, as set forth in the *Code of Alabama*, 1975 at §§37-1-31 and 32, does not extend to the issuance of rulings regarding license fees and/or taxes established by municipalities.¹⁶ In fact, the City argued that the Commission would be precluded from exercising jurisdiction over matters such as municipally established license fees pursuant to *Code* §37-1-35(4). The City further asserted that the Telecom Act does not convey jurisdiction over such matters to the Commission.¹⁷

With respect to Fast Phones' request that the Commission issue a finding that Fast Phones does not operate a telephone exchange, the City conceded that the Supreme Court of Alabama in *Fast Phones, Inc. v. City of Montgomery* had already clearly determined that question in the negative. The City accordingly maintained that the Fast Phones request in that regard was moot and thus due to be dismissed.¹⁸

On April 8, 2003, the City also filed a Motion to Dismiss the Complaint/Petition of Seven Bridges. Said Motion to Dismiss was virtually identical to the Motion to Dismiss submitted in response to the Complaint/Petition of Fast Phones and merely substituted Seven Bridges as the Complainant/Petitioner.

C. The Commission's August 5, 2003 Order Establishing Declaratory Proceeding.

After reviewing the pleadings discussed above, The Commission entered an Order on August 5, 2003, establishing this Declaratory Proceeding. The Commission

¹⁶ *Id.* at p.3

¹⁷ *Id.* at pp. 3-4

initially concluded in said Order that the Commission did not possess the requisite jurisdiction to strike down the City of Montgomery's License Ordinance 48-91 with respect to Fast Phones and Seven Bridges.¹⁹ The Commission in fact concurred with the City of Montgomery's assertion that the Commission is precluded by *Code* §37-1-35(4) from exerting authority over a municipality's exercise of its reasonable police regulations and ordinances in the interest of the public.²⁰

With respect to the arguments of Fast Phones and Seven Bridges that the license fee imposed by the City of Montgomery's License Ordinance 48-91 constituted an impermissible barrier to market entry pursuant to §253(a) of the Telecom Act, the Commission noted that the Telecom Act grants to the Federal Communications Commission (the "FCC") the jurisdiction to address claims that the provisions of §253(a) have been violated and to in fact preempt state or local governmental statutes, regulations or legal requirements that violate §253(a) of the Telecom Act.²¹

The Commission went on to note, however, that the Telecom Act's grant of jurisdictional authority to the FCC with respect to the preemption of statutes or regulations which constitute §253(a) barriers to entry would not preclude the Commission from being an active participant in an inquiry wherein questions concerning the status of telecommunications competition in the State of Alabama are raised. To the contrary, the Commission noted that it had been charged by *Code* §37-2-3 with the

¹⁸ *Id.* at p.2

¹⁹ See *Code* §§37-1-31 and 32, 37-2-3, and 37-1-35(4).

²⁰ See Commission's August 5, 2003 Order Establishing Declaratory Proceeding at p.5.

responsibility of supervising, regulating and controlling providers of telecommunications services in Alabama to ensure that the public interest is served. This Commission thus concluded that it had a vested responsibility to ensure that competitive telecommunications alternatives are available to Alabama consumers.²²

The Commission reasoned that even prior to the passage of the Telecom Act by Congress, the Commission had a stated objective and desire to create an environment in which fair and effective local telecommunications competition flourished.²³ To that end, the Commission noted that it had endeavored to streamline regulatory procedures, where feasible, so that new entrants and incumbent providers of telecommunications services in Alabama were not unduly burdened in the transition to a more competitive marketplace.²⁴ The Commission stated that its objective in that regard was certainly in keeping with Congress's desire for the Telecom Act to encourage better telecommunications service through increased competition and the deployment of new technologies.²⁵

In light of those stated observations, the Commission noted that it had serious reservations regarding the level of the licensing fee the City of Montgomery imposed on providers of competitive local exchange service within the City of Montgomery. The Commission clarified that its reservations stemmed from a concern that the sheer

²¹ See 47 USC § 253(d)

²² See the Commission's August 5, 2003 Order Establishing Declaratory Proceeding at p.5.

²³ *Id.* Citing *In Re: Petition of South Central Bell Telephone Company to Restructure its Form of Regulation*, Docket Nos. 24499, *et al.*, Report and Order (Alabama Public Service Commission, September 29, 1995) ("Local Competition Order"), at p. 3.

²⁴ *Id.*

²⁵ *Id.* at pp. 5-6.

magnitude of the licensing fee imposed by the City of Montgomery might well have a “chilling effect” on the entry of competitive local exchange carriers into the Montgomery marketplace, particularly smaller carriers such as the Complainants/Petitioners in this cause. The Commission expressed concern that the situation could become exponentially compounded if all other municipalities in Alabama followed the City of Montgomery’s lead and began to levy the types of licensing fees that appeared to have originally been developed for carriers imposing substantial burdens on the resources of municipalities through rights-of-way usage and other such matters.²⁶

Given the Commission’s responsibility and objective of ensuring that a competitive telecommunications environment is cultivated in Alabama, the Commission determined that it should seek comment from interested parties regarding the question of whether the licensing fee assessed by the City of Montgomery’s amended License Ordinance 48-91 had created a chilling effect on the entry of CLECs into the Montgomery market. The Commission further sought comments as to the potential competitive ramifications of other municipalities following the City of Montgomery’s lead and imposing licensing fees which appeared more appropriate for telecommunications carriers with substantial physical plant in place. The Commission noted that if it appeared from the comments received by the Commission that the license fee imposed by the City of Montgomery constituted a barrier to entry, the Commission would

²⁶ *Id.*

consider forwarding its findings in that regard to the FCC for a determination as to whether there had been a §253(a) violation which should be rectified via preemption.²⁷

With respect to the Complainants/Petitioners' request that the Commission enter a finding that they did not own and/or operate a telephone exchange, the Commission noted that the Supreme Court of Alabama had already rendered a determination in *Fast Phones, Inc. v. City of Montgomery* that Fast Phones did not operate a telephone exchange or exchanges in the City of Montgomery. Given the fact that Seven Bridges' method of providing telecommunications services appeared substantially similar to that of Fast Phones, the Commission also concluded that Seven Bridges did not operate a telephone exchange or exchanges within the City of Montgomery pursuant to the Supreme Court's criteria.²⁸

Based on the foregoing findings and conclusions, the Commission sought comments on the question of whether the City of Montgomery's amended License Ordinance 48-91 imposed a barrier to entry pursuant to the provisions of §253(a) of the Telecom Act. The Commission's August 5, 2003 Order also sought comment regarding the competitive ramifications of other municipalities following the City of Montgomery's lead in the establishment of licensing fees for CLECs. The Commission's August 5, 2003 Order denied all other aspects of the relief requested by Fast Phones and Seven Bridges.

²⁷ *Id.*

II. The Comments Received in Response to the Commission's August 5, 2003 Order Establishing Declaratory Proceeding

A. The Comments Received in Support of the Position of the Complainants/Petitioners.

(1) The Comments of Fast Phones and Seven Bridges.

The Complainants/Petitioners Fast Phones and Seven Bridges jointly submitted comments which reaffirmed their previous argument that the City of Montgomery's amended License Ordinance 48-91 violated §253 of the Telecom Act. Fast Phones and Seven Bridges argued that §253 of the Telecom Act was enacted by Congress to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and would not be frustrated by isolated actions of individual municipal authorities or states.²⁹ More specifically, Fast Phones and Seven Bridges argued that §253 was designed to level the playing field previously monopolized by Incumbent Local Exchange Carriers ("ILECs") by requiring that any state or local regulation be "competitively neutral" and "nondiscriminatory."³⁰ Fast Phones and Seven Bridges noted that §253(a) has been broadly construed by the FCC so as to "sweep away not only those state or local requirements that explicitly or directly bar an entity from providing any telecommunications service, but also those

²⁸ *Id.* at pp.6-7.

²⁹ Joint Comments of Fast Phones and Seven Bridges at p.5.

³⁰ *Id.*

state or local requirements that have the practical effect of prohibiting an entity from providing service.”³¹

Fast Phones and Seven Bridges recognized that Congress exempted from §253(a)'s general proscription regulatory actions that meet the safe harbor criteria of §§253(b) and (c). Fast Phones and Seven Bridges noted that §253(b) preserves to the states the authority “to impose, on a competitively neutral basis and consistent with §254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.”³² Fast Phones and Seven Bridges went on to note, however, that §253(c) carves out a much narrower exception for local governments and preserves to local governments the right “to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way. As recognized by Fast Phones and Seven Bridges, such compensation must be publicly disclosed by such government.”³³

Fast Phones and Seven Bridges asserted, however, that the City of Montgomery License Ordinance 48-91 violates §253 of the Telecom Act because it does not satisfy the criteria of either of the safe harbors found in §253(b) or (c) of the Telecom Act.

³¹ *Id.* citing *In re: Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶¶ 4, 22 (1997)

³² *Id.* citing 47 U.S.C. §253(b)

³³ *Id.* citing 47 U.S.C. §253(c)

Fast Phones and Seven Bridges accordingly argued that the ordinance in question should be struck down, or, in the alternative, preempted under §253(d).³⁴

With respect to the provisions of §253(b) and (c), Fast Phones and Seven Bridges argued that there are clear distinctions between the authority of states and that of local governments to regulate under §253(b) and (c). Fast Phones and Seven Bridges asserted that the provisions of §253(b) and (c) recognize that states may regulate universal service, protect consumers, ensure quality, and protect public safety and welfare under §253(b) unless said state has specifically delegated that authority to local governments. Fast Phones and Seven Bridges maintained that §253(c) establishes a much narrower residual authority that is reserved for local governments to manage public rights-of-way.³⁵ Fast Phones and Seven Bridges thus argued that a state must specifically delegate to a local government the powers enumerated under §253(b) in order for any local statute or regulation to fall within the safe harbor of §253(b).³⁶ Fast Phones and Seven Bridges asserted that the State of Alabama has not specifically delegated the powers enumerated under §253(b) to local governments, thus rendering the provisions of §253(b) unavailable as a safe harbor for the City of amended Montgomery's License Ordinance 48-91.³⁷

Even if there had been a delegation of local authority as discussed above, Fast Phones and Seven Bridges further argued that the City of Montgomery's amended

³⁴ *Id.* at p.6

³⁵ *Id.* at p.7

³⁶ *Id.* at p.7

License Ordinance 48-91 is not imposed on a competitively neutral basis and thus fails to meet the safe harbor the provisions of 47 U.S.C. §253(b). Fast Phones and Seven Bridges, in fact, argued that the imposition of a \$12,000 annual fee on new market entrants such as Fast Phones and Seven Bridges would effectively allow the incumbent LEC in Montgomery, BellSouth Telecommunications, Inc. (“BellSouth”) to sustain its monopolistic power in the City of Montgomery. According to Fast Phones and Seven Bridges, such a result was intended to be avoided by the 1996 Telecom Act.³⁸

With respect to the safe harbor provisions of §253(c), Fast Phones and Seven Bridges noted that only those local ordinances which directly relate to the management of a local entity’s rights-of-way and the imposition of fair and reasonable fees for the use of such rights-of-way are exempted from the proscription of §253(a).³⁹ Fast Phones and Seven Bridges asserted that it was undisputed that they are resellers of local telephone service access lines and as such own no telephone lines, wires or equipment and instead utilize the existing facilities and equipment of BellSouth, the ILEC in the City of Montgomery. Fast Phones and Seven Bridges accordingly asserted that they did not “use” the City’s rights-of-way within the meaning of §253 such that a “fair and reasonable” fee in exchange for the use of such rights-of-way could be collected from them. Fast Phones and Seven Bridges accordingly concluded that the

³⁷ *Id.*

³⁸ *Id.* at pp. 10-11

³⁹ *Id.* at pp. 11-13.

City of Montgomery's amended License Ordinance 48-91 is unrelated to the Complainant/Petitioner's use of a local right-of-way and thus violates §253(a) and (c) of the Telecom Act.⁴⁰

Fast Phones and Seven Bridges further argued that License Ordinance 48-91 had already had a chilling effect on the entry of competitive local exchange carriers into the market in the City of Montgomery as well as other areas of the state.⁴¹ Fast Phones and Seven Bridges attached affidavits from executives of Amerimex Communications Corporation and Annox, Inc. in support of their claims in that regard. More specifically, Fast Phones and Seven Bridges asserted that the aforementioned affidavits demonstrated that License Ordinance 48-91 had discouraged and continued to discourage the entry of telecom competitors in the State of Alabama in direct opposition to the letter and spirit of §253 of the Telecom Act. As a result, Fast Phones and Seven Bridges maintained that Alabama's consumers were being deprived of many of the benefits associated with competition, including additional choices and reduced prices.⁴²

Fast Phones and Seven Bridges maintained that they could not continue to pay the license fees imposed by the City of Montgomery under License Ordinance 48-91 and would likely be forced to leave the Montgomery market altogether unless the City of Montgomery restructured its fee to make it more reasonable for resellers doing

⁴⁰ *Id.* at p. 13.

⁴¹ *Id.* at pp. 13-14.

⁴² *Id.* at p. 15.

business within the City's limits.⁴³ Fast Phones and Seven Bridges indicated, however, that they were even more concerned with the potential competitive ramifications of other municipalities following the lead of the City of Montgomery and assessing resellers like Fast Phones and Seven Bridges annual business license fees based on a fee structure similar to that relied upon by the City of Montgomery.⁴⁴

In conclusion, Fast Phones and Seven Bridges argued that the Commission had, within its broad and exclusive grant of authority, the jurisdiction to strike down License Ordinance 48-91 as an unreasonable exercise of the City of Montgomery's police power.⁴⁵ Fast Phones and Seven Bridges accordingly urged the Commission to enter an order finding that the City of Montgomery's License Ordinance 48-91, as amended, violated §§253 (a) and (c) of the Telecom Act and thus should be struck down. In the alternative, Fast Phones and Seven Bridges urge the Commission to recommend to the Federal Communications Commission that License Ordinance 48-91 be preempted as a barrier to entry pursuant to §253(a) of the Telecom Act.

2. The Comments of the Other CLECs.

The Commission also received comments from a number of other CLECs including dPi Teleconnect, LLC; Metro Teleconnect Companies, Inc., d/b/a Metro Teleconnect; 1-800 Reconex; Sprint Communications Company, LP; AmeriMex Communications Corp.; Annox, Inc.; Optimum Global Communications, Inc., d/b/a

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at pp. 16-17.

Local Phone Company; Cat Communications International, Inc., d/b/a "CCI"; Alternative Phone, Inc.; Now Communications, Inc.; and Joint Comments filed by the Association of Communications Enterprises; the Competitive Carriers of the South, Inc.; and AT&T of the South Central States, LLC (collectively the "Commenting CLECs"). The Commenting CLECs unanimously asserted that the City of Montgomery's License Ordinance 48-91 constituted an impermissible barrier to entry under §253(a) of the Telecom Act. According to the Commenting CLECs, the one size fits all nature of Ordinance 48-91 and its disregard for the level of revenues generated by CLECs has a disproportionate impact on smaller local market entrants which precludes their entry into the Montgomery market.

The Commenting CLECs also asserted that License Ordinance 48-91's chilling effect on competition deprived Montgomery's citizens of the benefits of local competition and thereby defeated the underlying purposes of the Telecom Act. The Commenting CLECs also expressed concerns regarding the level of statewide competition in the local market if other municipalities began to adopt license fees on the same basis as the City of Montgomery.

3. The Comments of the Office of the Attorney General of Alabama.

The Office of the Attorney General of Alabama (the "AG") also submitted comments asserting that the City of Montgomery's amended License Ordinance 48-91 placed new entrants at a competitive disadvantage due to the fact that said ordinance was imposed regardless of the level of revenues generated by carriers operating in the

city.⁴⁶ According to the AG, the source of the City of Montgomery's authority for imposing the \$12,000 license fee, *Code of Alabama*, 1975 §11-51-128, relies upon a municipality's population to calculate the tax due and is appropriate only when the company paying the tax provides service to the entire population of the municipality in question. The AG contended that when the Alabama Legislature enacted *Code* §11-51-128, operators of telephone exchange service had a monopoly in provisioning telephone service and thus were the only legal providers of service within the service territories.⁴⁷

The Attorney General disputed the City of Montgomery's argument that amended License Ordinance 48-91 was competitively neutral because every company that enters the City of Montgomery has to pay the tax. According to the AG, there is nothing competitively neutral about every company paying a flat tax based on the number of potential customers, particularly when startup companies are trying to enter the market and compete against the former regulated monopolist. The AG maintained that using the number of potential customers as a factor in taxation is an unreasonable approach when there are a number of companies operating within a jurisdiction and every company has a different number of customers and thereby differing revenues.⁴⁸

The AG asserted that the City of Montgomery must demonstrate that its amended License Ordinance 48-91 does not prohibit or have the effect of prohibiting

⁴⁶ *Comments of the Attorney General* at pp. 4-5

⁴⁷ *Id.* at pp. 3-4.

⁴⁸ *Id.*

the ability of a telephone company to provide telecommunications services within the City of Montgomery. If the City is unable to prove that the Ordinance in question does not violate subsection (a) of §253, it may be able to demonstrate that the Ordinance falls within one of the safe harbor provisions §253. However, until all of the issues involving the validity of the Ordinance are resolved, the AG asserted that the Commission should issue an order prohibiting the local exchange companies it regulates from paying the fee imposed by the City of Montgomery.⁴⁹

According to the AG, *Code* §37-1-31 provides the Commission with exclusive jurisdiction over the rates of utilities. The AG maintained that since taxes are a component of every utility rate, the payment of taxes by a utility is definitely within the rate setting jurisdiction of the Commission.⁵⁰ The AG asserted that such action by the Commission would not be contrary to the jurisdictional exemption provided by the *Code of Alabama* 1975, §37-1-35(4) which precludes the Commission from “exerting authority over a municipality’s exercise of its reasonable police regulations and ordinances in the interest of the public.”⁵¹ According to the AG, *Code* §37-1-35(4) only applies to “matters other than rates and service regulations ... “ and does not otherwise create powers in the municipality.⁵² The AG represented the State of Alabama has not

⁴⁹ *Id.* at p.6

⁵⁰ *Id.*

⁵¹ *Id.* at p.6.

⁵² *Id.*

delegated any authority to the City of Montgomery or any other municipality to affect the rates of utilities under the guise of exercising its police powers.⁵³

The AG urged the Commission to resolve the dispute at hand without referring the matter to the FCC. In the view of the AG, there is shared jurisdiction between the federal and the state government under the Telecom Act which would allow the Commission to render an ultimate determination on the propriety of the City of Montgomery's License Ordinance 48-91.⁵⁴

B. The Comments Received in Support of the Position of the City of Montgomery.

1. The City of Montgomery's Motion to Terminate.

The City of Montgomery did not submit did not comments in response to the Commission's August 5, 2003 Order establishing this Declaratory Proceeding, but did submit a Motion for the Commission to Terminate its Proposed Inquiry into the City of Montgomery's License Tax. In said Motion, the City of Montgomery again asserted that the Commission did not have authority to engage in a wide ranging inquiry regarding the propriety of an individual municipality's exercise of its legitimate taxing authority or police powers and may not present highly speculative conclusions to the FCC on the possible impact of other municipalities taking similar actions. The City of Montgomery noted that the Telecom Act specifically preserved the local taxing

⁵³ *Id.* at pp. 6-7.

⁵⁴ *Id.* at p. 7.

authority of municipalities and exempted that authority from the jurisdiction of the said Act.⁵⁵

The City of Montgomery further asserted that the precise question in this cause has already been submitted to the FCC for over two years thereby rendering the Commission's current inquiry superfluous and untimely.⁵⁶ In particular, the City of Montgomery noted that Fast Phones had already submitted the issue of the appropriateness of the City of Montgomery's licensing fee to the FCC for that agency's determination of its own jurisdiction over Montgomery's licensing tax in early 2001.⁵⁷

The City of Montgomery further argued that the Telecommunications Act's tax saving provision found at §601(c) (2) expressly demonstrates that the Act was not meant to impair the City's ability to tax telephone exchange operators.⁵⁸ The City of Montgomery asserted that the FCC had also recognized the importance of tax matters for state and local governments and the considerable constraints that §601(c)(2) of the Telecommunications Act imposed upon the FCC with respect to its review of municipal tax initiatives.⁵⁹

The City of Montgomery contended that an assessment of Ordinance 48-91 reveals that it is clearly consistent with the tax saving provision of §601(c)(2) of the Telecom Act because the Ordinance draws its underlying authority from §11-51-90 of

⁵⁵ See City of Montgomery's Motion to Terminate at p.3.

⁵⁶ *Id.* at p.4.

⁵⁷ *Id.* See *In the Matter of: Petition of the Association of Communications Enterprises for preemption of Montgomery, Alabama Tax Policy*, FCC Docket No. 01-40.

⁵⁸ *Id.* at pp. 5-6.

⁵⁹ *Id.* at p.6.

the *Alabama Code* which expressly grants each municipality in the State of Alabama the power to license any trade, business, vocation, occupation or profession which may be carried on in the municipality. The City of Montgomery accordingly argued that under the tax savings provision embodied in 601(c)(2) of the Telecom Act, said Act was not meant to impair the City's ability to license or tax Fast Phones for the privilege of doing business within its jurisdiction.⁶⁰

Even absent the tax savings provision of 601(c)(2), the City of Montgomery asserted that its Ordinance 48-91 was proper because it fell within the Telecom Act's safe harbor provision of §253(b). The City of Montgomery acknowledged that the broader grant of regulatory authority in §253(b) is normally applicable only to states. However, the City of Montgomery argued that municipalities are allowed to enjoy the authority of §253(b) when a state has specifically delegated its state authority to a local government.⁶¹ The City of Montgomery asserted that the State of Alabama clearly and specifically delegated to municipalities the power to license businesses which operate within their jurisdictions pursuant to *Alabama Code* §11-51-90. Because the State of Alabama specifically delegated the more general authority to regulate and protect the public safety and welfare to municipalities, the City of Montgomery argued that its licensing fee was governed by the broader grant of regulatory authority found in §253(b) and did not contravene or impede the purposes of the Telecom Act.⁶²

⁶⁰ *Id.* at p.7.

⁶¹ *Id.* at p.9.

⁶² *Id.* at p.10.

The City of Montgomery further argued that its license ordinance was competitively neutral as required by §253(b) and was intended to ensure both the fiscal responsibility and financial stability of any provider seeking the privilege of doing business in the City of Montgomery. As such, the City of Montgomery asserted that its License Ordinance preserved and advanced universal service, protected the public safety and welfare, ensured the continued quality of services offered by telecommunications providers operating within the City of Montgomery and safeguarded the rights of the City of Montgomery's telephone consumers.⁶³

The City of Montgomery concluded that the Commission should terminate the present proceeding due to its lack of jurisdiction and cease the unwarranted expenditure of the State's resources by considering a matter that is already pending before the FCC. The City asserted that the termination of any proposed inquiry into this matter by the Commission was not only proper but mandated under law.⁶⁴

The City of Mobile, Alabama also submitted comments supporting the positions advanced by the City of Montgomery. More particularly, the City of Mobile argued that the Commission did not have authority under state law to assert jurisdiction over an Alabama municipality's exercise of its taxing authority pursuant to its police powers.⁶⁵ The City of Mobile further asserted that the federal Telecom Act did not extend to the Commission the authority to engage in a wide-ranging inquiry regarding the propriety of

⁶³ *Id.* at pp. 10-11.

⁶⁴ *Id.* at p.11.

⁶⁵ Comments of the City of Mobile at p. 1, citing *Alabama Code* §37-1-35(4).

an individual municipality's exercise of its legitimate police powers. In particular, the City of Mobile argued that the Telecom Act specifically preserved the local taxing authority of municipalities at §601(c). The City of Mobile accordingly concluded that the Commission should terminate the proceedings under consideration.⁶⁶

Also submitting comments in support of the position of the City of Montgomery was the Alabama League of Municipalities (the "League"). The League represented that it was formed to advance the legal and operational interests and concerns of its approximately 444 city and town members in the State of Alabama. The League emphasized the importance of the issues under consideration to municipalities in Alabama and sought to adopt the positions advanced in the comments filed by the City of Mobile.⁶⁷

The League additionally emphasized that its membership would be directly and substantially impacted by a ruling against the City of Montgomery in the case at bar. More particularly, the League explained that under the "Dillon Rule" Alabama municipalities have no inherent power to generate funds and are instead completely dependent upon legislative authority for the ability to raise funds. The League noted that the power to license businesses pursuant to *Code* §11-51-90 was one of the most important revenue sources the Legislature granted to Alabama's municipalities. The League asserted that the City of Montgomery's licensing fee under consideration was competitively neutral and thus satisfied the federal requirements under the

⁶⁶ *Id.* at p.6.

Telecommunications Act. The League accordingly concluded that amended License Ordinance 48-91 was a legitimate exercise of the City of Montgomery's taxing authority and was preserved by §601(c) of said Act. The League thus urged the Commission to deny the relief sought by Fast Phones and Seven Bridges.⁶⁸

C. The Unsuccessful Mediation Efforts

Pursuant to Commission Order entered on March 4, 2004, this matter was, at the request of the parties, referred to Commission supervised mediation. Those mediation efforts did not produce a settlement, however.

III. Findings and Conclusions

A. The Commission is vested with the Jurisdictional Authority to recommend to the FCC that amended City of Montgomery License Ordinance 48-91 be preempted as a barrier to entry in contravention of § 253(a) of the Telecom Act.

In order to proceed with a further assessment of the appropriateness of the City of Montgomery's amended License Ordinance 48-91, we are compelled to again address the threshold issue of the jurisdictional authority of the Commission to take further action in this cause. As noted in our Order of August 5, 2003, the Commission is empowered by the *Code of Alabama*, 1975, §§ 37-1-31 ,37-1-32 and 37-2-3 with broad authority to supervise, regulate and control telecommunications service providers operating within the State of Alabama and to ensure that the public interest is served by

⁶⁷ Comments of the Alabama League of Municipalities at pp. 1-2.

⁶⁸ *Id.* at pp. 2-3

such operations.⁶⁹ The aforementioned grant of authority is largely exclusive with respect to the rates, service regulations and equipment of regulated telecommunications entities. In fact, *Code* § 37-1-31 provides:

The rights, powers, authority, jurisdiction and duties by this title conferred upon the Commission shall be exclusive and, in respect of rates and service regulations and equipment, shall be exercised notwithstanding any rights heretofore acquired by the public under any franchise, contract or agreement between any utility and municipality, county or municipal subdivision of the State, and shall be exercised so far as they may be exercised consistently with the Constitution of the State and of the United States notwithstanding any right heretofore so acquired by any such utility.

In light of the foregoing statutory language, the Alabama Supreme Court has on numerous occasions affirmed that the Commission's authority is broad and exclusive with respect to matters concerning rates and service regulations.⁷⁰ The Supreme Court of Alabama has also recognized that the Commission's interpretations of its broad jurisdictional authority are entitled to great weight.⁷¹

For purposes of this cause, it is noteworthy that *Code* § 37-1-46 empowers the Commission to sit or confer with federal commissions or agencies in "any proceeding involving directly or indirectly any rate, charge, *practice, rule or regulation enforced in the State of Alabama.*" [Emphasis added] Further, the Commission is authorized

⁶⁹ See Order at p. 8.

⁷⁰ *QCC, Inc. v. Hall* 757 So.2d 1115 (Ala. 2000); *South Central Bell Telephone Company v. Holmes*, 689 So.2d 786 (Ala. 1996) and *Talton Telecommunication Corp. v. Coleman*, 665 So.2d 914 (Ala. 1995)

⁷¹ *Ala. Metallurgical Corporation v. Alabama Public Service Commission* 441 So.2d 565, 571 (Ala. 1995) ["It is established law in this jurisdiction that an administrative body's interpretation of its authorizing legislation is entitled to great weight."]

pursuant to *Code* § 37-1-47 to “initiate or participate in, as a real party in interest or as a permissive party with a recognized interest in the outcome any litigation, administrative hearings, or any other proceedings before the ... Federal Communications Commission ... or any other federal bureau, agency or instrumentality *whenever deemed in the best interest of the utility ratepayers in Alabama.*” [Emphasis added]⁷²

The jurisdictional powers of the Commission are however, not without limitation. For purposes of this proceeding, we have already noted that *Code of Alabama* 1975 § 37-1-35 provides an exemption or limitation for the exercise of certain powers by municipalities. In particular, *Code* § 37-1-35(4) provides an exemption or limitation from the jurisdiction of the Commission regarding the exercise of certain municipal powers. Said *Code* section provides that nothing in Title 37 of the *Code* shall be construed:

In respect of matters other than rates and service regulations and equipment, to repeal any power of any municipality to adopt and enforce reasonable police regulations and ordinances in the interest of the public safety, morals and convenience, or to protect the public against fraud, imposition or oppression by utilities within their respective jurisdiction, or to require the discharge by utilities of the respective duties within such municipalities, whether arising out of contract with the municipality or by statute or regulation by the Commission or otherwise.

After a consideration of each of the foregoing statutory provisions, the Commission determined in its August 5, 2003 Order establishing this Declaratory Proceeding that the Commission was generally precluded by *Code* § 37-1-35(4) from

⁷² With respect to federal law, 47 USC § 410(b) also provides for cooperation between the FCC and state commissions.

directly exerting authority over a municipality's exercise of its reasonable police regulations and ordinances in the interest of the public. The Commission accordingly held that it did not possess the requisite authority to strike down the City of Montgomery's amended License Ordinance 48-91.⁷³

The Commission did, however, express reservations regarding amended License Ordinance 48-91 in light of the provisions of § 253(a) of the Telecom Act. In particular, the Commission expressed its concern that the City of Montgomery's amended License Ordinance 48-91 created a barrier to entry which would undermine the pro-competitive goals of the Telecom Act as well as the pro-competitive policies of the Commission.⁷⁴ The Commission further noted that even though §253(d) of the Telecom Act conferred upon the FCC the jurisdiction to address claims regarding barriers to entry, nothing therein precluded the Commission from being an active participant in any inquiry which raised questions regarding the status of telecommunications competition in the State of Alabama.⁷⁵

Upon further review of the findings and conclusions previously rendered in our August 5, 2003 Order and the comments received in response thereto, we are further convinced that the Commission not only has the requisite authority, but a duty to compile findings regarding the City of Montgomery's amended License Ordinance 48-91 and the negative impact that the continued imposition of said fee will have on local

⁷³ See Order at p. 7.

⁷⁴ *Id.* at pp. 8-10.

⁷⁵ *Id.*

telecommunications competition in Alabama. We further find that it is our duty and responsibility to forward those findings to the FCC due to the negative impact that amended License Ordinance 48-91 has had and will continue to have on local competition in Montgomery and throughout Alabama.

We again emphasize that our duty to undertake the actions described herein are derived from the broad supervisory responsibilities regarding telecommunications matters delegated to the Commission by *Code* §§ 37-1-31, 37-1-32 and 37-2-3. When coupled with the jurisdictional authority in *Code* §§ 37-1-46 and 37-1-47 which allows the Commission to confer with federal agencies such as the FCC, we believe these broad grants of authority to the Commission dictate that we have a duty and a responsibility to compile our findings in this cause and recommend to the F.C.C. that the City of Montgomery of Montgomery's License Ordinance 48-91 be pre-empted as a barrier to entry in contravention of § 253(a) of the Telecom Act. Indeed, § 253(d) of the Telecom Act creates a duty on our part by precluding states from even permitting the promulgation of state or local statutes, regulations or requirements that violate the provisions of §§ 253(a) or (b).

We are keenly aware of the arguments of the City of Montgomery, the City of Mobile, and, to some extent, the Alabama League of Municipalities, that neither state nor federal law empowers the Commission to assert jurisdiction over an Alabama municipality's exercise of its taxing authority granted pursuant to *Code* § 11-51-90. We note in response to those arguments, however, that the Commission is not in this

proceeding directly asserting jurisdiction over the City of Montgomery's authority to tax pursuant to *Code* § 11-51-90. We are instead concerned with the effect the city's alleged exercise of its taxing authority has had and will continue to have on competition in the local telephone market in Montgomery, Alabama through amended License Ordinance 48-91. As established elsewhere herein, it is our belief that the proper forum for the ultimate determination of whether amended License Ordinance 48-91 should be preempted due to its creation of a barrier to entry in contravention of § 253(a) of the Telecom Act should be before the FCC.⁷⁶ In this cause, we are merely compiling and forwarding our findings and recommendations to the FCC regarding the subject ordinance.

We are also intrigued by the fact that the City of Montgomery has moved away from its initial reliance on *Code* § 11-51-128 as the statutory support for the License Ordinance under review. Indeed, the City of Montgomery now seeks to cloak its amended License Ordinance 48-91 with the encompassing blanket of its general taxation authority found at *Code* § 11-51-90. It is apparent from the totality of the circumstances, however, that the Ordinance in question remains little more than a semi-veiled franchise fee imposed pursuant to § 11-51-128. The Commission notes that the federal courts have held that franchise fees have a discriminatory impact against resellers of telecommunications services because such carriers do not physically use public rights-of-way and thus do not generate the costs related to

⁷⁶ See *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F. 3d 1169, 1189-1191 (11th Cir. 2001) [holding that there is

rights-of-way usage that are typically recovered via franchise fees.⁷⁷ In effect, franchise fees imposed on carriers that exclusively resell the facilities of other carriers force such resellers to pay for the same facilities twice: once to the city imposing the fee and once to the ILECs that own the facilities. Such a result is totally inconsistent with the underlying purposes and objectives of the Telecom Act.

B. Amended License Ordinance 48-91 creates a barrier to entry and is thus inconsistent with § 253(a) of the Telecom Act.

(1) Overview of § 253.

It is undisputed that one of the primary purposes of the Telecom Act of 1996 was to encourage competition in the local telecommunications market. Section 253 of the Telecom Act was one of the primary measures implemented by Congress to ensure that its goal of encouraging the development of local competition would not be frustrated by state and local governments through the passage of restrictive local regulations or requirements. As such, § 253 preempts state or local statutes, regulations or legal requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Congress vested the jurisdiction necessary to preempt and correct violations of § 253(a) or (b) with the F.C.C.⁷⁸

It is important to note that § 253(a) has been broadly construed by the F.C.C. so as to “sweep away not only those state or local requirements that explicitly and directly

a private cause of action for challenges to § 253(c), but that all other challenges must be addressed to the F.C.C.]

bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service.”⁷⁹ With respect to the inquiry of whether a state or local requirement has the “practical effect of prohibiting an entity from providing service,” the F.C.C. considers “whether the [requirements at issue] materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment” as a primary factor in its analysis.⁸⁰

Although § 253(a) forbids all state and local regulations that “prohibit or have the effect of prohibiting” market entry, Congress did create two safe harbors for certain state and/or local regulatory actions. In particular, § 253(b) preserves to the states the authority “to impose, on a competitively neutral basis and consistent with § 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” The other safe harbor provision, § 253(c), carves out a much narrower exception for local governments and preserves the right of local governments “to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a

⁷⁷ *Bell Atlantic-Maryland, Inc. v. Prince George County* 49 F. Supp. 2d. 805, 819(D. MD. 1999). See also *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928(W.D. Tex. 1997).

⁷⁸ See § 253(d); See also *Bellsouth Telecommunications, Inc. v. Town of Palm Beach*, supra

⁷⁹ See *In re: Public utility Commission of Texas* 13 FCCR 3460, ¶¶ 4-22 (1997)

⁸⁰ *Id.* at p. ¶ 22

non-discriminatory basis, if the compensation required is publicly disclosed by such government.”

(2) **Amended License Ordinance 48-91 is not within the Safe Harbor of § 253(b) of the Telecom Act.**

As acknowledged by various courts interpreting its scope, § 253(b) allows **states** to impose competitively neutral requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers unless a state has specifically delegated that “state authority” to local governments.⁸¹ Thus, in order for any local statute or regulation to fall within the safeguards of § 253(b), a state must have specifically delegated to local governments the powers enumerated under § 253(b).

In Alabama, the Legislature has not specifically delegated the powers enumerated under § 253(b) to the local governments. To the contrary, the broad jurisdictional authority granted to the Commission in *Code* §§ 37-1-31, 37-1-32 and 37-2-3, empower the Commission, as a legislative agency of the state, to regulate matters concerning universal service, the public safety and welfare, telecommunications service quality and consumer rights. Although *Code* § 11-51-90 does confer on municipalities the general power to license “any exhibition, trade, business, vocation, occupation or profession,” this limited power does not begin to approximate the broad powers itemized in § 253(b) of the Telecom Act. At most, *Code* § 11-51-90 delegates to Alabama local

⁸¹ See *AT&T Communications v. City of Dallas* 8 F. Supp. 2d 582, 591 (N. D. Texas, 1998) *vacated and remanded on other grounds*, 243 F. 3d 928, (5th Cir. 2001)

governments an implied police power to license.⁸² This implied power does not, however, rise to the level of the specific powers enumerated by Congress under § 253(b).⁸³

Even if it is assumed *arguendo* that the Alabama Legislature has empowered municipalities in Alabama with the authority to regulate the matters enumerated in § 253(b), any such requirements implemented by municipalities like the City of Montgomery would have to be competitively neutral in order to pass muster under § 253(b). It appears from our review of the comments discussed at length herein that there is serious issue regarding the competitive neutrality of amended License Ordinance 48-91 as it has been imposed by the City of Montgomery. In particular, said license fee is assessed against ILECs and CLECs doing business in the City of Montgomery, regardless of their size and regardless of the proportionate revenues derived by each company doing business in the city. The imposition of the license fee in such a manner has a disproportionate impact on smaller CLEC operations. At a minimum, the imposition of the fee in its present form discourages smaller CLECs from entering the local market in Montgomery and providing competitive alternatives for telephone consumers in the city.

⁸² As noted previously, the Commission is not directly challenging the City of Montgomery's authority under *Code* § 11-51-90. The Commission will instead make recommendations to the FCC regarding amended License Ordinance 48-91's contravention of § 253(a) of the Telecom Act. Pursuant to § 253(d) of the Telecom Act, the final determination regarding preemption will ultimately be made by the FCC.

⁸³ See *BellSouth Telecommunications, Inc. v. City of Orangeburg*, 522 S.E. 2d 804 (S.C. 1999)

(3) **Amended License Ordinance 48-91 does not meet the safe harbor provisions of § 253(c).**

Section 253(c) recognizes that state and local governments should have the authority to manage their public rights-of-way and to require fair and reasonable compensation from telecommunications providers for the use of such rights-of-way provided that the associated fees are competitively neutral, non-discriminatory, and are publicly disclosed by the governmental body. However, the courts that have examined the safe harbor provisions of § 253(c) have generally defined the rights of state and local governments pursuant thereto very narrowly. If fact, the courts have generally held that any local ordinance that is not directly related to a telecommunications company's use of a public right-of-way violates § 253(a) as an unlawful barrier to entry.⁸⁴

In the case at bar, it is undisputed that as resellers of local telephone service access, the Petitioner's own no telephone lines or equipment but instead use the facilities and equipment of BellSouth. The Petitioners accordingly do not use the City of Montgomery's rights-of-way within the meaning of § 253 such that a "fair and reasonable" fee in exchange for use of the city's rights-of-way can be collected from them. As such, amended License Ordinance 48-91 is unrelated to Fast Phones and Seven Bridges use of rights-of-way in the City of Montgomery and would not be saved by the provisions of § 253(c). Perhaps most telling is the fact that the City of

⁸⁴ See *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582 at 593; *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp .2d 1304, 1309, (S. D. Florida 1999); and *City of Auburn et al. v. Quest Corp.*, 260 F.3d 1165 (9th Cir. 2001)

Montgomery does not even bother to raise an argument that its amended License Ordinance 48-91 is saved under the provisions of § 253(c).

(4) The Commission should advise the FCC of its conclusion that amended License Ordinance 48-91 constitutes a barrier to entry.

It is apparent from the foregoing that amended License Ordinance 48-91 does not satisfy the criteria of either of the safe harbor provisions found at §§ 253 (b) or (c). Given the fact that the comments received in this cause have confirmed the previously expressed fears of the Commission that License Ordinance 48-91 as amended imposes a barrier to entry in violation of § 253(a), we herein conclude that the Commission should forward this matter to the F.C.C. with a recommendation that amended License Ordinance 48-91 be preempted as incompatible with §253(a).

We further note that the potential ramifications of amended License Ordinance 48-91 go far beyond the City of Montgomery. The participation of the City of Mobile and the League of Municipalities in this cause is a clear indication that other municipalities in Alabama are closely monitoring the outcome of this proceeding and may well begin to impose license fees which approximate the fee imposed by the City of Montgomery's amended License Ordinance 48-91 unless there is preemption by the F.C.C. The CLEC comments discussed at length herein demonstrate that License Ordinance 48-91 has discouraged and continues to discourage the entry of market competitors in the State of Alabama. The imposition of a similar fee in other municipalities throughout the State would only compound that result.

C. The Tax Savings Provision of § 601(c) of the Telecom Act does not preclude the F.C.C. from reviewing amended License Ordinance 48-91 and preempting said ordinance pursuant to Section 253(d).

The City of Montgomery, the City of Mobile, and the Alabama League of Municipalities contend that the Telecom Act specifically preserves the local taxing authority of municipalities and exempts the same from its jurisdiction pursuant to § 601(c)(2). In short, the City of Montgomery, the City of Mobile and the League of Municipalities assert that the tax saving provision of § 601(c)(2) clearly indicates that the Telecom Act was not meant to impair state or local government's ability to tax providers of telephone service.

Although there has been little litigation regarding the scope of § 601(c)(2) of the Telecom Act, it is clear from a review of F.C.C. precedent that the F.C.C. does not interpret § 601(c)(2) of the Telecom Act as an absolute prohibition to its review of state and local taxing matters.⁸⁵ Even though the F.C.C. has conceded that its legal authority to preempt state and local tax policies is extremely limited, the F.C.C. has nonetheless emphasized its concern that local taxes should not have a discriminatory and anti-competitive effect.⁸⁶

⁸⁵ *In re: Promotion of Competitive Networks and Local Telecommunications Markets, Wireless Communications Association International, Inc., Petition for Rulemaking to amend § 1.40 of the Commission's Rule to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Local Taxes and Assessments, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking and Notice of Inquiry in WD Docket No.99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, WD Docket No. 99-217 and CC Docket No. 96-98, ¶¶ 81-84 (July 7, 1999)*

⁸⁶ *Id.*

D. The record compiled by the F.C.C. with respect to its review of Ordinance 48-91 should be updated.

The City of Montgomery and the City of Mobile argue that the precise question regarding the applicability of License Ordinance 48-91 with §253(b) has been under submission to the F.C.C. for over two years in F.C.C. Docket No. 01-40.⁸⁷ The Cities of Montgomery and Mobile accordingly argue that the Commission's current inquiry regarding License Ordinance 48-91 is superfluous and untimely as well as lacking in jurisdiction. In fact, the City of Montgomery and the City of Mobile argue that at this stage, the Commission's inquiry is unwarranted, unnecessary and a wasteful expenditure of public resources.

Although the Commission is grateful for the City of Montgomery and the City of Mobile's concerns regarding the Commission's management of its resources, the Commission finds that the record compiled in this cause should be submitted to the F.C.C. along with the recommendation of the Commission that License Ordinance 48-91 be preempted by the F.C.C. as inconsistent with § 253(a). We are of the opinion that the updated evidence compiled in this cause will be helpful to the F.C.C. in its further consideration of License Ordinance 48-91 as it has now been amended. The Commission also concludes that the recommendations of the Commission developed herein will be helpful to the FCC in its consideration of amended License Ordinance 48-91.

⁸⁷ See *In the Matter of the Petition of the Association of Communications Enterprises for Preemption of Montgomery, Alabama Tax Policy*, FCC Docket No. 01-40

E. Conclusion

Based on the foregoing, we find that the record compiled in this cause demonstrates that the City of Montgomery's amended License Ordinance 48-91 should be preempted as inconsistent with § 253(a) of the Telecom Act by the F.C.C. We conclude that amended License Ordinance 48-91, at a minimum, has a chilling effect on competition in the City of Montgomery and could have the same effect on local competition throughout the State of Alabama in the event that other municipalities follow the lead of the City of Montgomery and impose license fees in a manner similar to that imposed by the City of Montgomery. It is, therefore, our belief that the findings, conclusions and recommendations herein rendered are necessary to protect and serve the best interests of the affected telephone ratepayers in Alabama and should be forwarded to the F.C.C.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may be deemed just and reasonable in this cause.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DOCKET 28889 - #41

DONE at Montgomery, Alabama, this 15th day of September, 2004.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

DOCKET 28889 - #42
ATTACHMENT A

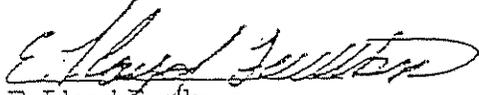
ADDITIONAL CLASSIFICATION AND LICENSE FEE

Under the authority granted me under the passage of Ordinance NO. 48-91, I, E. Lloyd Faulkner, as Director of Finance for the City of Montgomery do hereby identify and cost the following business classification as listed under the Standard Industrial Code:

4813 Competitive Local Exchange Carriers:

Each person, firm, or corporation who operates as a competitive local exchange carrier ("CLEC") and offers or resells local telephone exchange service within the City of Montgomery shall pay an annual license or privilege tax for the privilege of doing intrastate business within the City of Montgomery in the sum of \$1,100.00 for the first 20,000 inhabitants, and \$60.00 for each additional 1,000 inhabitants or major fraction thereof up to 175,000. For a population of over 175,000, the license fee will be \$12,000.

Given under my hand this the 14th day of September, 2002.


E. Lloyd Faulkner
Director of Finance