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Telecommunications - Franchises -  
Municipalities - Right-of-Way - Jefferson  
County

A telecommunications service provider that obtained a statewide franchise under the predecessor of section 23-1-85 of the Code of Alabama and prior to the enactment of the 1901 Alabama Constitution, may, under state law, use and/or modify its existing transmission facilities or install new transmission facilities within a municipality's rights-of-way (absent municipal approval) for the purpose of providing new services, such as high speed internet access, video services, video programming, voice-over-internet services, or like services, that are technological advancements of communication services and which facilitate the transmission of intelligence and are consistent with the existing servitude.

Dear Representative Canfield:

This opinion of the Attorney General is issued in response to your request.

QUESTION

May a telecommunications service provider, pursuant to its statewide franchise and absent municipal approval, use and/or modify its existing transmission facilities or even place new transmission facilities within a municipality's rights-of-way for the purpose

of providing services other than those currently provided?

### FACTS AND ANALYSIS

Since 1855, the State of Alabama has allowed corporations to build and operate facilities along the rights-of-way of public highways statewide. *See* General Acts of Alabama 1855-56, at 6; ALA. CODE § 1364 (1867); ALA. CODE § 1670 (1876); ALA. CODE § 1434 (1887); ALA. CODE § 2490 (1897) (Acts of Alabama, 1890-91, at 6); ALA. CODE § 5817 (1907); ALA. CODE § 1357 (1923); ALA. CODE Tit. 23, § 48 (1940) (recompiled 1958); ALA. CODE § 23-1-85 (2000). For example, section 2490 of the 1897 Alabama Code provided that “[t]he right-of-way is granted to any person or corporation having the right to construct telegraph or telephone lines within this state, to construct them along the margin of the public highways.” ALA. CODE § 2490 (1897). By constructing facilities along public rights-of-way, a corporation obtained a statewide franchise from the State of Alabama to conduct such activity. *See, e.g., City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 66 (1913); *City of Bessemer v. Birmingham Elec. Co.*, 27 So. 2d 565, 571-72 (Ala. 1946).

This statewide franchise specifically included the right to install transmission facilities along municipal streets, even without specific approval from a municipality. *See Southern Bell Tel. & Tel. Co. v. City of Mobile*, 162 F. 523 (S.D. Ala. 1907), *aff’d City of Mobile v. Southern Bell Tel. & Tel. Co.*, 174 F. 1020 (5th Cir. 1909). In *Southern Bell*, the court considered whether the Southern Bell telephone company had the right to place poles and lines along the streets of the City of Mobile pursuant to the company’s franchise under section 2490 (1896) absent a specific grant of authority to do so by the city. *See* 162 F. at 528. The issue turned on the definition of “public highways” within the statute. *See id.* The court observed that “[t]he term “[h]ighways” embraces city streets within the meaning of the statutes conferring upon . . . telephone companies the right to occupy the public highways of the state, unless a different intent is clearly indicated.” *Id.* (quoting 27 Am. & Eng. Encyc. of Law (2d ed.) 1006). It further noted that “[m]unicipal corporations constitute a part of the civil government of the state, and their streets are highways.” *Id.* at 529 (citations omitted). Accordingly, the court held as follows:

If the word “highways,” in its ordinary and legal significance, includes streets, and there are no other words in the statute under consideration to lessen or limit its meaning, it is held that the word includes urban as well as rural highways. There is nothing in the subject-

matter of the statute of Alabama that is inapplicable to urban highways. . . . I therefore hold that the state of Alabama, by [section 2490], granted to [Southern Bell] the right of way on the streets of the city of Mobile for the purpose of constructing thereon its telephone lines.

*Id.* at 529 (citations omitted).<sup>1</sup> In restraining the City of Mobile from interfering with Southern Bell's lines and poles, the District Court went on to note that Southern Bell's authority to install and maintain its lines and poles was not dependent upon any grant of authority by the city. The Fifth Circuit Court of Appeals subsequently affirmed this decision. *See City of Mobile v. Southern Bell Tel. & Tel. Co.*, 174 F. 1020 (5th Cir. 1909).

Section 220 of article XII of the 1901 Alabama Constitution and legislation adopted pursuant to the same [*i.e.*, ALA. CODE § 11-49-1 (1992)] restricted the scope of any easement granted to a telecommunications service provider by requiring the consent of municipalities prior to a utility's use of "the streets, avenues, alleys and other public places of cities or towns for the construction or operation" of its facilities. ALA. CONST. art. XII, § 220. Section 220 of article XII, however, and subsequent statutes did not eliminate an existing franchise, nor did they alter the authority of the franchise holder to construct and operate its facilities without the consent of the relevant municipality. The United States Supreme Court and the Alabama Supreme Court have consistently ruled that a franchise grant is a vested contractual property right protected by both the federal and state constitutions. *See City of Bessemer v. Birmingham Elec. Co.*, 27 So. 2d 565, 572 (Ala. 1946); *Russell v. Sebastian*, 233 U.S. 195, 204 (1914); *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 65 (1913); *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649, 664 (1912); *Port of Mobile v. Louisville & N.R. Co.*, 4 So. 106, 108 (Ala. 1888).

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<sup>1</sup> The opinion of the Alabama Supreme Court in *Town of New Decatur v. American Tel. & Tel. Co.*, 58 So. 613 (Ala. 1912) did not alter this holding. At issue in *Town of New Decatur* was whether the term "public highways" in section 2490 encompasses municipal streets (so that the telephone company's statewide franchise would allow it to install and maintain transmission facilities along municipal rights-of-way). *See id.* at 614-15. The trial court ruled that the telephone company had the right to place facilities along municipal rights-of-way. *See id.* at 613. On appeal, the Supreme Court initially reversed the trial court and held that the term "public highways" does not include municipal streets. *See id.* at 614-15. Upon rehearing, however, the original decision was set aside and the trial court's decision was affirmed, thus allowing the telephone company to place transmission facilities within municipal rights-of-way without municipal approval. *See id.* at 631.

The fact that section 220 of article XII is a state constitutional provision does not invalidate a franchise granted previously by state statute nor restrict the scope of the authority granted by it. Indeed, the Alabama Supreme Court held, as follows, in *City of Bessemer*:

A constitutional provision can no more destroy vested rights nor impair the obligation of existing contracts than can a statute or municipal ordinance.

. . . .

We think it is beyond the question that the "contract impairment" clause of the Federal Constitution prohibits the Alabama Constitution of 1901 from operating retroactively so as to limit or restrict rights under contracts existing prior to its adoption.

27 So. 2d at 578 (citations omitted).

Thus, there exist two categories of telecommunication service providers in Alabama: (1) those who possess a franchise that was acquired prior to the adoption of the 1901 Alabama Constitution; and (2) those who possess a franchise that was acquired subsequent to that time. For those providers who fall within the latter category, section 220 of article XII and section 11-49-1 of the Code require the consent of a municipality for the "construction or operation" of a public utility's facilities. Whether a telecommunication service provider within the latter category who has constructed and operates its facilities with the consent of a municipality will need additional authority to provide additional services will depend in large part upon the terms of the ordinance by which the city granted the telecommunications service provider its original authority and, thus, will be a factual determination that will have to be made on a case-by-case basis.

With regard to those telecommunications service providers who possess a franchise that was granted prior to the adoption of the 1901 Alabama Constitution, the question is, what is the breadth of the franchise? Or, in other words, is the holder of the franchise limited to the provision of only those services offered at the time the franchise was originally acquired, and if not, what services may be provided without the grant of additional authority? In determining the scope of the franchise granted to a public utility, Alabama courts have been consistent in broadly construing the scope of those franchises so as to

take into account technological changes that have occurred and will undoubtedly continue to occur.

The burden rests upon the courts continually of applying the principles of the law to situations and complications of human affairs hitherto undreamed of. . . . [A] careful examination [of those decisions addressing whether new services constitute an additional servitude on landowners so as to require additional authority to operate a utility] will show a gradual development of the principles of the law, in order to accommodate them to the progress of events and the onward march of civilization.

*Hobbs v. Long Distance Tel. & Tel. Co.*, 41 So. 1003, 1003-1004 (Ala. 1906).<sup>2</sup>

In *Crawford v. Ala. Power Co.*, 128 So. 454 (Ala. 1930), the Alabama Supreme Court held that Alabama Power Company could erect transmission lines along a public highway and over a rail line without condemning the property and paying the landowner additional compensation. The Court concluded that such construction and subsequent operation did not constitute an additional servitude upon the landowner given the presence of the public highway that already crossed over the line. In so doing, the Court acknowledged that, in *Hobbs*, it had adopted “the broader view that the uses of a public highway were expansive, not confined to uses already permitted, or even in contemplation at the time, but admitting new uses, consistent and proper as civilization advances” and went on to note “that the erection of telephone poles and wires in the public street or highway created no additional servitude upon the fee.” *Id.* at 457. The Court then applied the same rationale to allow for the erection of power lines, which likewise created no additional servitude. *Id.* In other words, the use of an easement once it has been obtained is not restricted to the original use of the easement.

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<sup>2</sup> “[T]he street franchise constitutes a right in land, viz., an easement or incorporeal hereditament. . . .” *City of Bessemer v. Birmingham Elec. Co.*, 27 So. 2d 565, 572 (Ala. 1946). Given the fact that the grant of a franchise creates an easement, decisions addressing the scope of an easement or right-of-way acquired by condemnation provide insight into and, at least, persuasive authority regarding the appropriate analytical framework for determining the scope of the easements in question in the absence of any Alabama appellate decisions that directly address the question posed in this instance.

The Alabama Supreme Court has noted that it “stands committed to the doctrine that the primary and original purpose of the dedication of a street includes the transmission of intelligence as well as public travel; that telephone and telegraph lines are simply improved methods of communication; and hence that the erection and maintenance of such lines are within the scope of the original easement for which the landowner has been compensated.” *Ala. Power Co. v. Christian*, 112 So. 763, 764 (Ala. 1927). It is, thus, clear that the franchise is not limited in scope to only those services originally provided. The aforementioned authorities likewise make it clear that to fall within the parameters of the franchise, the new services must not be inconsistent with the purpose of the grant of the franchise and must not represent an additional servitude upon the fee.

In *Telvue Cable Ala., Inc. v. City of Homewood*, Case No. 146-255 (10th Judicial Circuit, May 24, 1968), the Jefferson County Circuit Court ruled that a utility may use its existing telephone wires and cables within a municipality to carry television programming. In so ruling, the court observed as follows:

[T]he transmission of TV signals and impulses is merely another improvement in the burgeoning science and art of telegraphy and telephony, and constitutes a part of the over-all, legitimate communications services which are innate and natural to telegraphy and telephony and occupy the same general posture in that field as the kindred services of closed circuit TV, facsimile and data transmission, et al.

*Id.* at \*4. Thus, the utility was allowed to transmit television programming over its existing telephone lines. *Id.* at \*8.

Courts in numerous other states have similarly held that telecommunications service providers may—without seeking additional approvals—use or modify their existing transmission facilities for the purpose of providing new non-voice services based upon preexisting grants of authority. See *Southern Bell Tel. & Tel. Co. v. City of Meridian*, 131 So. 2d 666, 674 (Miss. 1961) (upholding the right of a telephone company to use its facilities “for the transmission of radio, television, teletype and other modern communication developments”); *Ball v. American Tel. & Tel. Co.*, 86 So. 2d 42, 45 (Miss. 1956) (holding that a telephone company may use its facilities to carry television programming without obtaining an additional easement); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 42-43 (Cal. 1955) (holding that a telephone company is not restricted as to the type of communication it may carry over its existing lines); *Ohio Tel. & Tel. Co. v. Steen*, 85 N.E.2d 579, 580 (Ohio 1949) (finding

that “the transmission of television is merely an improvement in the art of telegraphy and telephony”);<sup>3</sup> *see also: McDonald v. Miss. Power Co.*, 732 So. 2d 893, 897 (Miss. 1999) (“[a] fiber optics cable is nothing more than a technologically advanced or new type of telephone line”). Similarly, in *James Driver v. MCI WorldCom Commc’ns*, Case No. CV-2001-694 (Circuit Court of Baldwin County, Alabama, March 15, 2002), the Baldwin County Circuit Court held that fiber optic cable fell within the definition of “telephone and telegraph lines” found at section 23-1-85 of the Code of Alabama.

Thus, if the proposed services are technological advancements of communication services that facilitate the transmission of intelligence such as providing high speed internet access, video services, video programming, voice-over-internet services, or like services, these services would be consistent with the purpose of the grant of the franchise and fall within the scope of the franchise.

Moreover, if the telecommunications service provider is merely using existing cables or wires, however described, or even erecting new poles, placing new transmission facilities or equipment, or installing new or additional conduit underground within the boundaries of the original easement, under Alabama law, these facilities do not constitute an additional servitude upon the fee. *See Crawford*, 128 So. at 457; *Christian*, 112 So. at 764.

Accordingly, the provision of new services that are technological advancements of communication services and that facilitate the transmission of intelligence via either existing facilities or the construction and operation of new facilities within the right-of-way consistent with the existing servitude would fall within the parameters of a statewide franchise obtained under the predecessor of section 23-1-85 of the Code and prior to the enactment of the 1901 Alabama Constitution. Municipal approval would, therefore, not be required for the use of existing facilities, the modification of existing facilities, or the construction and operation of new facilities to provide such services.<sup>4</sup>

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<sup>3</sup> In addition, both the Mississippi Attorney General and the Oklahoma Attorney General have recently issued opinions upholding the right of telecommunications service providers to carry video programming over transmission facilities situated in municipal rights-of-way without obtaining municipal approval. *See* MS A.G. opinion issued to Tom King (September 28, 2007); OK A.G. opinion issued to Dennis L. Adkins, No. 06-015 (May 3, 2006).

<sup>4</sup> It is possible that a telecommunications service provider executed documents whereby the municipality sought to limit or in some way restrict the provider’s rights. Whether that is the case would depend upon the terms of any

CONCLUSION

A telecommunications service provider that obtained a statewide franchise under the predecessor of section 23-1-85 and prior to the enactment of the 1901 Alabama Constitution, may, under state law, use and/or modify its existing transmission facilities or install new transmission facilities within a municipality's rights-of-way (absent municipal approval) for the purpose of providing new services, such as high speed internet access, video services, video programming, voice-over-internet services, or like services, that are technological advancements of communication services and which facilitate the transmission of intelligence and are consistent with the existing servitude.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Keith Miller of my staff.

Sincerely,

TROY KING  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division

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such agreement, including the enforceability of the agreement and, thus, would be a determination that would have to be made on a case-by-case basis. Municipalities may also exercise their police powers in a reasonable fashion, including regulation over construction and installation of facilities in the rights-of-way. *See Bellsouth Telecomms., Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (S.D. Ala. 2001). In addition, this opinion does not address any question of federal law, including, but not limited to, the Federal Telecommunications Act of 1996, 47 U.S.C.A. §253, *et seq.* (1996). *See, generally, TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6<sup>th</sup> Cir. 2000).