PUBLIC UTILITIES AND TRANSPORTATION

Franchises: Municipalities are not authorized to grant exclusive franchise or exclusive right to any person, firm, or corporation to use or occupy the public streets, highways, bridges, or public places in the municipality for any purpose.[87] However, municipalities may grant nonexclusive franchise or authority to any person, firm, or corporation for the erection of telegraph, electric light or telephone poles, post wires, gas, water, sewer, or pipes along and upon any of the public streets, alleys, and other public grounds for a period of not longer than 25 years.[88]

Municipal Utilities: Municipalities may erect and operate public water works,[89] water supply systems, sewage systems, sewage disposal systems, gas producing systems, gas generating systems, gas transmission or distribution systems, electronic generating, transmission, or distribution systems, garbage and rubbish disposal and collection systems and incinerators, systems of public transportation, or combinations of the above systems for the benefit of its citizens.[90] Each municipality also has the discretion to establish a public utility commission to control, manage, and operate such public utility systems.[91]

STREETS, PARKS, AND OTHER PUBLIC FACILITIES

Public Facilities in General: Municipalities have authority to construct, erect, purchase, and equip suitable public buildings, facilities, and offices of the municipality, its municipal court and for such other purposes including public meetings of its citizens[92] and exercise full jurisdiction in the matters of public streets, sidewalks, street lights, sewers, parks, piers, markets, libraries, cemeteries, and parking with authority to open, layout and construct, repair, maintain, and insure same.[93]

Eminent Domain: Municipalities are delegated authority to exercise the right of eminent domain for public purposes.[94] This authority includes the right of immediate possession in certain instances.[95]

Special Improvements: Certain public improvements, including streets, sidewalks, water/sewer, and drainage systems may be constructed and improved at the cost of the property owners benefitted thereby by levying and collecting special assessments.[96] Mississippi law also

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[87]Code, § 21-27-1.
[88]Code, §§ 21-27-3 and 21-27-5. See also Code, § 21-13-3 (requiring an election prior to the award of certain franchises).
[89]Code, §21-27-7.
[90]Code, § 21-27-11. See also Code, § 21-17-1.
[91]Code, § 21-27-13.
[92]Code, § 21-37-1.
[93]Code, §§ 21-37-3 et seq.
[94]Code, § 21-37-47.
[95]Code, § 11-27-81.
[96]Code, §§ 21-41-1 et seq.

Resolutions and orders are more in the nature of ministerial acts evidencing the executive or administrative power to deal with matters of a temporary character.[16] As such, resolutions and orders require less formality. In any event, whether the action is an "ordinance" or "resolution", or some other form depends not so much on what the action is styled as on its substance and effect. It is always important to carefully research the law to ascertain what particular form of enactment and what corresponding procedure is required for the contemplated action.

General Authority: *Code*, § 21-13-1 gives municipalities the power to pass ordinances and to enforce them by a fine not exceeding One Thousand Dollars ($1,000.00) or imprisonment not exceeding ninety (90) days or both.

General Statutory Requirements: When the governing authorities of a municipality determine to enact a permanent rule or regulation of government adopted to regulate continuing conditions and operating until formally repealed, the enactment should be in the form of an ordinance. The procedural requirements for the adoption of municipal ordinances are enumerated in *Code*, §§ 21-13-1 *et seq*. *Code*, § 21-13-3 requires that ordinances:

- shall be introduced in writing at a regular meeting of the governing body of the municipality;
- shall remain on file with the municipal clerk for public inspection for at least two weeks before final passage or adoption;
- shall, upon request of one or more members of the governing authority, be read by the clerk before a vote is taken thereon;
- shall, upon final passage vote, be taken by "yeas" and "nays" which shall be entered on the minutes by the clerk; and
- granting franchise or use or occupancy of public places or rights-of-way to any interurban or street railway, railroad, gas works, waterworks, electric or power plant, heating plant, telephone or telegraph system, or other public utility must also be approved by a majority of the qualified electors voting in a special or general election on the question.

The style of all municipal ordinances shall be as follows:

> "Be it ordained by the mayor and board of aldermen (or other proper governing body, as the case may be) of the city (or town or village, as the case may be) of _____,"[17]

Each ordinance shall not contain more than one (1) subject which shall be clearly expressed in its title.[18] Every ordinance passed by the governing body of the municipality, except as otherwise

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[16] *New Orleans & N.E.R. Co. v. City of Picayune*, 164 Miss. 737, 145 So. 101, 102 (1933).
[17] *Code*, § 21-13-7.
[18] *Code*, § 21-13-9.

STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 28, 2007

Senator Tom King
P. O. Box 1134
Petal, Mississippi 39465

Re: Video Services Franchise Authority

Dear Senator King:

Attorney General Jim Hood has received your opinion request and has assigned it to me for research and reply. Your letter states as follows:

> As Chairman of the Public Utilities Committee of the Mississippi Senate, I am writing to seek your opinion on an issue that has arisen elsewhere in the country and is of statewide importance. Specifically, an existing telephone company, which is a successor in interest to Southern Bell Telephone and Telegraph Company, seeks to provide video services to the public. As such, I respectfully seek your opinion as to the following questions:
>
> 1. Whether 1886 Miss. Laws Ch. 38 Section 1 grants the successor in interest to Southern Bell Telephone and Telegraph Company the right to use its telephone and like lines and related facilities to provide video programming transmissions without the need for any other additional and/or separate authority; and if so,
>
> 2. Whether the exercise of the foregoing right is subject to the payment of any additional fees assessed by local governments in providing video services via telephone and like lines and related facilities in their geographic jurisdiction.

450 HIGH STREET - POST OFFICE BOX 220 - JACKSON, MISSISSIPPI 39205-0220
TELEPHONE (601) 359-3680 - FACSIMILE (601) 359-2285

In response, as you are aware, the Mississippi Supreme Court held in Southern Bell Telephone and Telegraph Company v. City of Meridian, 131 So. 2d 666 (Miss. 1961) that the State of Mississippi granted by statute in 1886 a perpetual right of Southern Bell Telephone and Telegraph Company and its beneficiaries to use the public rights of way without cost. The statute which was the subject of the Southern Bell opinion was Chapter 38, Miss. Laws 1886, and was entitled "An Act to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi." Southern Bell, 131 So. 2d at 668.

In the Southern Bell case, the Supreme Court also made clear that this right to use the public rights of way not limited to just telephone/telegraph lines, *to-wit:*

> Appellant [Southern Bell] has not exceeded its rights under the contract by operating under streets and using its lines for the transmission of radio, television, teletype and other modern communication developments. [This Court in] Ball v. American Tel. & Tel. Co., 1956, 227 Miss. 218, 86 So.2d 42, 43, refused to enjoin the use of a coaxial cable buried in the ground for television and radio transmission. It still employed the used of electrical impulses, and related uses are integral parts of the telephone company's business.

In the prior Ball case, the Court had held that AT&T did not have to secure new easements for every new device which employed the use of electrical impulses through its lines. In that case, a landowner had sued to prevent the company from maintaining a coaxial cable buried in the ground, some circuits of which were used for the transmission of television and radio programs. The Court found that such was an integral part of the telephone business. Ball v. American Telephone and Telegraph Company, 227 Miss. 218, 86 So.2d 42 (1956). This holding was extended by the Court in 1999 to include fiber optic cable.

This office has referenced and relied upon the Southern Bell case in several official opinions. MS AG Op., Tullus (August 9, 2002); MS AG Op., Haque (February 2, 2001); MS AG Op., Davis (October 2, 1998).

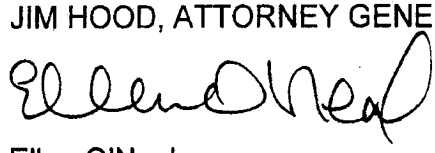
Therefore, our response to your first question is Yes. It is the opinion of this office that Chapter 38, Miss. Laws 1886 grants to the successor in interest of Southern Bell Telephone and Telegraph Company the right to use its lines and facilities to provide video programming transmissions without necessity of further authority.

In response to your second question, the use of the rights of way established in 1886 and recognized by the Court in Southern Bell includes the right to do so without payment of any fees. Southern Bell, 131 So. 2d at 675. Therefore, it is the opinion of this office that the exercise of the right discussed in question 1 is not subject to the payment of any additional fees assessed by local governments.

If this office may be of further assistance to you, please let us know.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By: 

Ellen O'Neal
Special Assistant Attorney General

2002 WL 31169210 (Miss.A.G.)

Office of the Attorney General
State of Mississippi
*1 Opinion No. 2002-0277

August 9, 2002

Re: Telephone
Franchise
/Gross Revenues

Mr. Thomas L. Tullos
P.O. Drawer 567
420 Hwy 18 East
Bay Springs, MS 39422

Dear Mr. Tullos:

Attorney General Mike Moore has received your recent letter on behalf of the Town of Louin and has asked me to respond. Your letter states:

> On February 6, 1951, the Town granted a telephone **franchise** to the Bay Springs Telephone Company, granting Bay Springs Telephone Company the right to operate a telephone system within said municipality. Further, the Town granted to Bay Springs Telephone Company the right to use its streets, alleys, etc. for the laying of all necessary lines and equipment. As consideration for the **franchise**, the telephone company agreed to allow the users of the system to make telephone calls within those areas of Jasper and Smith Counties served by Bay Springs Telephone Company without being assessed with long distance charges. (To the Town's knowledge, this provision was never followed by Bay Springs Telephone Company. Customers were regularly charged with long distance tolls.) No other consideration was paid by Bay Springs Telephone Company. The **franchise** expired on February 6, 1976, and has never been renewed.
>
> It has come to the attention of the Town that Bay Springs Telephone Company should have paid it 2% of the telephone company's gross revenues generated from the Town's residents and commercial users. However, from February 6, 1951, till the present date, Bay Springs Telephone Company has not paid the Town anything.
>
> Based upon the foregoing scenario, I have the following questions:
>
> 1) Since Bay Springs Telephone Company never paid any consideration for the February 6, 1951 **franchise**, does it owe the Town 2% of its gross revenues for the period February 6, 1951, to February 6, 1976?
>
> 2) Since Bay Springs Telephone Company has operated within the municipality since February 6, 1976, without a **franchise**, does it owe the Town 2% of its gross revenues from February 6, 1976, till the present date?

3) Although this matter extends over a 51 year period of time, is the statute of limitations tolled by Section 15-1-51 if the Town determines that it is in the best interest of the Town to attempt to collect the **franchise** fee from 1951 till the present?
4) If the Town is owed any **franchise** fee arrearage, is the Town entitled to statutory interest on the money owed from the time the debt became due to the town to the present?
5) Since Bay Springs Telephone Company always charged long distance tolls to Louin telephone users for calls made within certain areas of Jasper and Smith counties which were served by Bay Springs Telephone Company, can the town bring an action for the recovery of the toll charges for the period of time from February 6, 1951, until February 6, 1976, for and on behalf of the customers so defrauded?

The Mississippi Supreme Court held in ***Southern Bell*** *Telephone and Telegraph Company v. City of Meridian,* 131 So. 2d 666 (Miss. 1961) that the State of Mississippi established in 1886 by statute a perpetual right of **Southern Bell** Telephone and Telegraph Company to use the public rights of way without cost. Successors of **Southern Bell** are beneficiaries of this decision. You stated by telephone that Bay Springs Telephone is not a successor to **Southern Bell. See** *MS AG Op., Davis* (October 2, 1998)(discussing ***Southern Bell*** decision); *MS AG Op., Haque* (February 2, 2001)(same).

***2** Miss. Code Ann. Section 77-3-17 provides that telephone companies and other public utilities must pay compensation to the municipality of 2% of the utility's gross revenue from sales to residential and commercial customers within the municipality, stating in relevant part:

In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this article covering the geographical area of such municipality, and which (1) is operating under a municipal **franchise** on March 29, 1956, or (2) shall have previously operated under such a municipal **franchise** which has expired within five years prior to said date, or (3) which shall hereafter operate under a municipal **franchise** hereafter granted, may, after the expiration of any such **franchise** continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2 %) of said utility's gross revenue from sales to residential and commercial customers within said municipality, in case of a utility defined in subparagraphs (1) and (2) of paragraph (d) of Section 77-3-3 and in the case of a utility defined in subparagraph (3) of paragraph (d) of said Section the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a **franchise** to operate therein or not, such payments to be made quarterly of each year, and (2) after the expiration of such **franchise** the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity

> may then and thereafter be granted on a permanent basis. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality.

You state that the **franchise** which the Town of Louin granted to Bay Springs Telephone eon February 6, 1951, expired on February 6, 1976, 25 years later. We are of the opinion that the municipal governing authorities do not have authority to collect the **franchise** fee set in Section 77-3-17 for those revenues collected during the term of this **franchise**.

The Town of Louin may have a claim against the Bay Springs Telephone Company for 2% of revenues generated from residential and commercial customers as set forth in Section 77-3-17 from February 6, 1976, to the present. We are of the opinion that the Town of Louin may grant to Bay Springs Telephone Company a new **franchise** for 25 years if approved by the voters in an election as described in Section 21-13-3. We are of the opinion that collection of **franchise** fees which are in arrears is not barred by Section 15-1-51. We do not find authority for the municipality to collect interest on **franchise** fees which are in arrears. Whether any monies are actually owed by the telephone company to either the Town of Louin or its residents is a matter which cannot be adjudicated by way of an official opinion of the Office of the Attorney General.

***3** If we may be of any further assistance, please let us know.

Sincerely,
Mike Moore
Attorney General

By: Alice Wise
Special Assistant Attorney General

2002 WL 31169210 (Miss.A.G.)
END OF DOCUMENT

2001 WL 283610 (Miss.A.G.)

Office of the Attorney General
State of Mississippi
*1 Opinion No. 2000-0747

February 2, 2001

Re: Fees for communications utilities' use of public rights of way

Ms. Ruma Haque
Attorney for the Board of Supervisors,
Hinds County, Mississippi
Post Office Box 686
Jackson, Mississippi 39205

Dear Ms. Haque:

Attorney General Mike Moore has received your request and has referred it to me for research and reply. You state that certain entities or persons wish to use existing public rights of way, whether above or below the surface. They wish to place within the right of way lines and/or other physical transmission equipment to provide communications services. Some of these communications companies offer for sale the transmission of communications both directly and as a carrier for other providers. The communications systems may include cable or wireless systems. After speaking with you by phone, for clarification, you present two questions: First, whether the county may charge communications companies specifically for use of Hinds County rights of way. Second, whether the county may charge such companies fees, such as **franchise** fees, merely for operating within and/or serving customers within Hinds County.

LEGAL AUTHORITIES

First, Miss. Code Ann. Section 19-3-40 provides that the Board of Supervisors has the power "to adopt any orders, resolutions, or ordinances with respect to county affairs . . . ." This statute, the county home rule statute, provides such authority except where no specific provision has been made in another statute. This statute further states that such directives by the Board of Supervisors apply countywide, except where a municipality within the county adopts an order, resolution, or ordinance governing the same general subject. Miss. Code Ann. Section 19-3-40 (1972 & Supp. 2000).

Section 19-3-41, Miss. Code Ann., in conjunction with Section 170, Miss. Const. 1890, grants each county with "full jurisdiction over roads, ferries and bridges . . . ."

Sections 77-9-711, 77-9-713, 77-9-715, and 77-9-717, Miss. Code Ann., are quoted below in entirety:

Section 77-9-711 Erection of telegraph and telephone lines.

All companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines shall be authorized to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, or waters, and along and across all turnpikes, railroads, and canals, and also through any of the public lands. Such lines, posts and fixtures shall be so constructed and placed as not to be dangerous to persons or property, and as not to interfere with the common use of such roads, streets, or waters, or with the convenience of any landowner more than may be avoidable. In case it shall be necessary to cross any highway, such lines, posts and fixtures shall be so constructed as to cross such highway at right angles.

Section 77-9-713 Local authorities may regulate construction and maintenance of lines.

***2** The board of supervisors of any county, and the governing authorities of any city, town or village, through which any telegraph or telephone line may pass, shall have power to regulate, within their respective limits, the manner in which the same shall be constructed and maintained, with a view to the safe and convenient use of the public highways and streets. If the proprietors of any telegraph or telephone line refuse or omit to comply with such regulations, the board of supervisors, or the authorities of the city, town or village, may cause such line to be abated within its jurisdiction as a nuisance.

Section 77-9-715 Liability for damages caused by erection, continuance and use of lines.

Telegraph and telephone companies or associations shall be responsible for any damages which any person shall sustain by the erection, continuance, and use of telegraph and telephone lines and the fixtures thereof. In any action for the recovery thereof brought by any owner or possessor of land over or along which such line may run, damages shall be assessed for the permanent continuance of such line and fixtures, and on payment thereof the right to continue and use such line and fixtures shall exist as if by leave and license of the owner of the land.

Section 77-9-717 Exercise of eminent domain for construction of new lines.

Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in Chapter 27 of Title 11, Mississippi Code of 1972.

In 1998, this office issued an official opinion to Howard Davis on whether the Town of Sunflower could charge a 2% fee to its local phone company as set forth in Miss. Code Ann. Section 77-3-17. **MS AG Op.**, Davis (October 2, 1998). Section 77-3-17 deals specifically with a fee for utility **franchises** in municipalities. The Davis opinion discussed an important case on this issue, **Southern Bell** v. City of Meridian, 131 So. 2d 666, 241 Miss. 678 (Miss. 1961), which held that the State of Mississippi established in 1886 a perpetual right of **Southern Bell** Telephone and Telegraph Company to use the public rights of way without cost. This office

therefore opined that if the facts presented in the Town of Sunflower were such that the perpetual right to use public rights of way explained in **Southern Bell** v. City of Meridian applied to the local phone company, then the Town could not charge the **franchise** fees in the statute. However, if that local company was not found to be a beneficiary of **Southern Bell**, then the fee could be legally charged by the Town. That opinion determined that whether or not the local phone company was a beneficiary of **Southern Bell** was a fact question to be left to the determination of the local governing authority. **MS AG Op.**, Davis (October 2, 1998), citing **Southern Bell** v. City of Meridian, 131 So. 2d 666, 241 Miss. 678 (Miss. 1961).

In **Southern Bell** v. City of Meridian, 131 So. 2d 666, 241 Miss. 678 (Miss. 1961), the Mississippi Supreme Court considered the validity of a state law which charged rent to the telephone company for its use of public streets. The Court stated the issue was whether the state law which charged for use of rights of way was a law which impaired the obligation of contracts. Section 16, Miss. Const. 1890. The obligation of contract in question was a purported offer by the State of Mississippi to the phone company to use the public streets free of charge in return for the service locating in Mississippi. The phone company argued that the statutory charge conflicted with a pre-existing contractual right vested in the phone company by an 1886 state statute. The Court reasoned that the 1886 statute was an offer by the State of Mississippi to the phone company which was accepted. The 1886 statute granted the phone company the "right to use the streets," according to the Court. **Southern Bell**, 131 So. 2d at 672. The acceptance by the phone company occurred when the company constructed its lines across public rights of way.

***3** The statute which was the subject of the **Southern Bell** opinion was Chapter 38, Miss. Laws 1886, and was entitled "An Act to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi." **Southern Bell** v. City of Meridian, 131 So. 2d 666, 668, 241 Miss. 678 (Miss. 1961). The 1886 law, as cited and described in the opinion of the Court, is not identical to Section 77-9-711 and subsequent sections, but it does appear to be the source of the present sections, quoted above. Worthy of note is one difference: the original statute states the following in regard to telephone companies:

> That any telegraph or telephone company . . . shall, **upon making due compensation, as hereinafter provided**, have the right to construct, maintain, and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State;

Chapter 38, Miss. Laws 1886, quoted in **Southern Bell** v. v. City of Meridian, 131 So. 2d 666, 668, 241 Miss. 678 (Miss. 1961). As in the present version of the statutes, the subsequent sections include references to compensating owners of

property for easements and the power of eminent domain. Miss. Code Ann. Sections 77-9-711, 77-9-713, 77-9-715, and 77-9-717, quoted supra.

The Mississippi Supreme Court concluded that the phone company had no legal duty to pay compensation to either the City of Meridian or the state. The Court stated,

> The continued maintenance of poles, lines and other facilities by its predecessors and appellant, after 1886, as well as the continued construction, expansion, and extension of such lines on the public streets of Meridian constituted an acceptance by **Southern Bell** and its predecessors of the offer of the right to use the streets, which was contained in the 1886 act. * * * Hence imposition upon appellant of the two per cent monthly service charge as compensation for the use of the streets constitutes an unlawful impairment of the obligations of this contract so created.

Southern Bell v. City of Meridian, 131 So. 2d 666, 670, 241 Miss. 678 (Miss. 1961).

While the 1961 case of **Southern Bell** v. City of Meridian stands for a prohibition of fees for use of rights of way by successors of those phone companies who "accepted" the "offer" of the 1886 statute, the focus of this prohibition is upon charges of "rent" or fees for using the rights of way. Thus, clearly, this case does not prohibit fees or taxes in general to be charged to communications or phone companies. For example, Section 27-65-19 provides for a state-levied tax on communication companies "equal to seven percent (7%) of the gross income of such business." Miss. Code Ann. Section 27-65-19 (1972 & Supp. 2000) (discussed in Monaghan v. **Southern Bell**, 242 Miss. 611, 81 So. 2d 712 (1962).

***4** This office has opined, in accord with state law, that entities which propose to excavate within public right-of-way must obtain prior approval from the county board of supervisors (or appropriate governing body) to ensure that the activity does not damage or endanger the roads or rights-of-way. **MS AG Op.**, Griffith (April 23, 1987). This is based upon Section 170, of the Mississippi Constitution of 1890 and Miss. Code Ann. Section 19-3-41, which provides counties full jurisdiction over roads.

This office issued an opinion to Thomas Rosenblatt regarding Woodville's natural gas pipeline. **MS AG Op.**, Rosenblatt (March 9, 1994). Woodville owned this pipeline and proposed to lease it to a private entity; this office opined that the municipality had authority to enter into a long-term lease of its gas pipeline. Also, in an opinion to Gary Snyder, this office opined that, pursuant to the municipal **franchise** statute, a city could grant a **franchise** to an electric utility company to construct and maintain a line across a specific strip of fire station property owned by the city. **MS AG Op.**, Snyder (August 27, 1999) (citing, Miss. Code Ann. Section 21-27-5, authorizing municipality to grant utility **franchises**).

The applicability of such reasoning to the issue here means that publicly owned easements or rights-of-way are public property which may, in whole or in part, be leased or sold, for use by a private utility provider. Similar logic is found in persuasive precedent.

In City of Gary v. Indiana Bell Telephone Company, Inc., 732 N.E. 2d 149 (Sup. Ct. Ind. 2000), the City's exercise of its statutory home rule authority was challenged by a telecommunications provider. The City adopted a charge for the telecommunications company's use of public rights of way. The ordinance as adopted by the City set up a Trust whose role was to help encourage the availability of telecommunications in the City of Gary and to develop, implement, and collect fees which were fair and reasonable compensation for the commercial use of public rights-of-way. The Supreme Court of Indiana upheld the city's authority to charge, reasoning that it had the authority to charge for occupancy or use of city-owned space by a utility company, citing, among other authorities, City of St. Louis v. Western Union Tel. Co., 148 U.S. 92, 99, 13 S. Ct. 485, 37 L. Ed. 380 (1893).

This office has issued an official opinion on a related question regarding cable television services. In an opinion requested by the City of Pascagoula, this office opined that subsequent to the adoption of city and county home rule statutes, cities and counties have authority to grant nonexclusive cable service **franchises**. **MS AG Op.**, Mitchell (April 21, 1993) (citing **MS AG Op.**, McKenzie (January 10, 1990). The Mitchell Opinion went on to opine that a municipal statute authorized cities to regulate cable television rates within the confines of federal law, but the opinion did not address the issue for counties.

***5** The McKenzie Opinion did interpret the county home rule statute in the context of cable television franchising. **MS AG Op.**, McKenzie (January 10, 1990). The issue was whether the granting of nonexclusive cable **franchises** was a "county affair" within the meaning of Section 19-3-40, the home rule statute for counties. Citing persuasive out of state precedent, this office opined that granting nonexclusive cable television **franchises** is a matter of governmental concern and is a "county affair" under Section 19-3-40. **MS AG Op.**, McKenzie (January 10, 1990).

I.

WHETHER TO THE COUNTY MAY CHARGE COMMUNICATIONS COMPANIES SPECIFICALLY FOR USE OF COUNTY RIGHTS OF WAY

Based upon the above authorities, we opine that a county board of supervisors may charge actual damages for use of county rights of way, but only after a finding of fact is made in accordance with **Southern Bell** v. City of Meridian, 131 So. 2d 666, 241 Miss. 678 (Miss. 1961). If **Southern Bell** has no application to the circumstances presented, then a county may charge damages for use of its rights of way.

II.

WHETHER TO THE COUNTY MAY CHARGE COMMUNICATIONS COMPANIES FEES, SUCH AS **FRANCHISE** FEES, FOR OPERATING WITHIN AND/OR SERVING CUSTOMERS WITHIN TO THE COUNTY REGARDLESS OF WHETHER THEY USE PUBLIC RIGHTS OF WAY.

With regard to communications companies in general, including wireless providers

which may not use the public rights of way, we find no statutory authority for a county to charge a **franchise** fee or other charges for the mere operation of a communications company in the county.

Very truly yours,
Mike Moore
Attorney General

By: Samuel D. Habeeb
Special Assistant Attorney General

2001 WL 283610 (Miss.A.G.)
END OF DOCUMENT

1998 WL 833666 (Miss.A.G.)

Office of the Attorney General
State of Mississippi
*1 Opinion No. 98-0532

October 2, 1998

Mr. Howard Q. Davis, Jr.
Attorney at Law
115 Main Street
Indianola, Mississippi 38751
Re: Sledge Telephone Company/Town of Sunflower, MS

Dear Mr. Davis:

Attorney General Mike Moore has received your recent letter on behalf of the Town of Sunflower, Mississippi, and has asked me to respond. Your letter states, in part:

> I represent the Town of Sunflower, Mississippi in which is located a private telephone company, Sledge Telephone Company, whose predecessor was Sunflower Telephone Company of Sunflower, Mississippi. On February 29, 1916, Sunflower Telephone Company entered into a connecting company traffic agreement with Cumberland Telephone & Telegraph Company.
>
> The Town of Sunflower has demanded that Sledge pay the 2% required by Section 77-3-17 and Sledge maintains that, because of the connecting company traffic agreement, they are protected under **Southern Bell** Telephone & Telegraph v. City of Meridian, Mississippi, 131 So. 2d 666.
>
> There was a twenty-five year **franchise** granted by the Town to Sledge Telephone on July 7, 1970, which expired July 6, 1995. It would appear that, if Sledge Telephone is not protected by the City of Meridian case, the provisions of 77-3-17 are mandatory, and the 2% fee should be retroactive to July 6, 1995; that there is nothing in 77-3-17 that says the Town has to impose the 2% fee.

Based on these facts, you question whether the Town of Sunflower may impose the 2% fee pursuant to Section 77-3-17, and, if so, whether the fee should be imposed retroactively to July 6, 1995.

In the case of **Southern Bell** Telephone and Telegraph Company v. City of Meridian, 131 So.2d 666 (Miss. 1961) the appellant successfully argued, based upon an 1886 statute repealed in 1892, that it was not subject to a 2% charge levied by a 1956 statute for the use of the municipal streets, alleys and public places to provide telephone services to the public The Mississippi Supreme Court held that the 1886 statute constituted an offer by the State to telephone companies to use the

streets without paying compensation for the **franchise**, i.e., an offer to grant the telephone companies the right to an irrevocable, perpetual **franchise** to use the streets without charge. Id. at 668, 670. The contract could not be impaired, the Court reasoned, by the imposition of an additional, subsequent charge for use of the streets. Id. See also, MS AG Op., Ellis (August 5, 1992), attached. Whether **Southern Bell** is applicable to your situation involves a question of fact which this office is unable to determine. As you may be aware, pursuant to Miss. Code Ann. § 7-5-25, the Attorney General is authorized to issue official opinions on questions of law only.

The Court in **Southern Bell** held that "the offer contained in the 1886 act was not revocable after its acceptance by appellant's predecessors, but, when accepted, it created an irrevocable contract right in favor of **Southern Bell** and its predecessors which is protected against impairment by the 1956 two per cent rent or charge, . . ." Id. at 674. The Court further concluded that this irrevocable contract right is of perpetual duration, is transferable and assignable as a property right, and is not inconsistent with the making of a **franchise** agreement with a municipality. Id. Thus, if it is determined that Sledge Telephone Company is a beneficiary of the decision in **Southern Bell**, then the **franchise** fees set forth in Section 77-3-17 are inapplicable to Sledge Telephone Company.

***2** If, on the other hand, Sledge Telephone Company is not protected by the **Southern Bell** decision, then at the expiration of its municipal telephone **franchise** in 1995, Section 77-3-17 would apply. That section provides, in relevant part:

> In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this article covering the geographical area of such municipality, and which (1) is operating under a municipal **franchise** on March 29, 1956, or (2) shall have previously operated under such a municipal **franchise** which has expired within five years prior to said date, or (3) which shall hereafter operate under a municipal **franchise** hereafter granted, may, after the expiration of any such **franchise** continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenue from sales to residential and commercial customers within said municipality, in case of a utility defined in subparagraphs (1) and (2) of paragraph (d) of Section 77-3-3 and in the case of a utility defined in subparagraph (3) of paragraph (d) of said Section the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a **franchise** to operate therein or not, such payments to be made quarterly of each year, ...

(Emphasis added).

If it is determined that Section 77-3-17 does apply to Sledge Telephone Company, we are of the opinion that upon the expiration of its **franchise** to operate in the

Town of Sunflower, Sledge Telephone Company:

(1) May continue to use the streets, alleys and public places of the municipality upon the condition that it shall pay 2% of the monthly service charges to the municipality and continue to operate there so long as such payment is made; and,

(2) May be granted by the municipality a new **franchise** for 25 years if approved by the voters in an election as described above in Section 21-13-3; and,

(3) If a new **franchise** is granted, the 2% described in (1) shall continue to be paid as set out above; and,

(4) If the Public Service Commission, acting under Section 77-3-19, shall rule that the municipality is arbitrarily withholding a **franchise** from the applicant, then the applicant shall not be required to pay the 2% described in (1) above, until such **franchise** is granted.

Based on §77-3-17, the utility would owe to the city the two percent of the monthly service charges that it has not paid or that would be in arrears thereunder. See MS AG Op., Logan (February 20, 1987), attached.

Finally, we note that Section 21-33-203 of the city utility tax law provides:

In addition to the taxes now or hereafter provided by law, there is hereby levied upon, assessed to and shall be collected from all telephone or communication utilities as defined by section 77-3-1, Mississippi Code of 1972 and regulated under said section 77-3-1, an additional tax of two per cent of the gross amount of revenue made and collected on local business from customers within the corporate limits of any municipality of the State of Mississippi, which qualifies as provided by the City Utility Tax Law. Such public utility shall add to the sales price of its service the amount of any tax due under the provisions of the City Utility Tax Law to the extent that such tax was not included as a part of the cost of furnishing services in the fixing of the rates and charges for such service by the Mississippi Public Service Commission. The tax levied herein shall not apply to the cash receipts collected through coin boxes or other mechanical devices where it is impracticable to render periodic statements and thereby add the tax to the sales price of its service.

***3** Any such public utility which pays any municipality of the State of Mississippi the compensation provided for in municipal **franchises** or levied and provided for by section 77-3-17, Mississippi Code of 1972, shall be exempt from the tax herein imposed and from the provisions of the City Utility Tax Law. In addition, any such public utility which makes payment of the tax imposed herein shall not be required to make payments, if any, which may be required under the terms of said section 77-3-17.

We are of the opinion that unless a telephone company is required to pay compensation pursuant to Section 77-3-17, such telephone company must pay a city utility tax pursuant to Section 21-33-203. See MS AG Op., Ellis (August 5, 1992).

If we may be of any further assistance, please let us know.

Sincerely,
Mike Moore
Attorney General

By: Patricia F. Aston
Special Assistant Attorney General

1998 WL 833666 (Miss.A.G.)
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