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**Municipal Law—Utility Franchise Fees—True Nature of Levy Immaterial When City Possesses Statutory Authority. *City of Little Rock v. AT&T Communications, Inc.*, 318 Ark. 616 (1994).**

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## I. INTRODUCTION

In the wake of the war over states' rights, unfunded federal mandates, and greater local control over revenues, local governments may find themselves lost at sea rather than waiting for their ship to come in. In the last decade, the financial seams of our nation's cities have been stretched to their terminal point as local revenues have dwindled in the face of increasing demands for additional services.<sup>1</sup> The crisis has resulted in a scramble by city officials to uncover new and fertile sources of revenue without surpassing their limited authority.<sup>2</sup>

Fortunately for local governments, the municipal fee may provide a life preserver amidst the breaking waves of economic despair and thus prove to be a harbinger of fiscal stability.<sup>3</sup> The rush to develop new sources of

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1. See Mary Kay Falconer, *From the State of Florida: Fiscal Stress Among Local Governments: Definition, Measurement, and the State's Impact*, 20 STETSON L. REV. 809, 810 (1991). Falconer defines "fiscal stress" as the "continuing inability of a local government to fund service delivery needs and requirements imposed by state and federal governments." *Id.* at 811. A survey by the National League of Cities in 1989 of 360 cities revealed the decline of local revenues in the face of the ever increasing need for expenditures. *Id.* at 810 (citing PETERSON, NATIONAL LEAGUE OF CITIES RESEARCH REPORT, CITY FISCAL CONDITIONS IN 1989 vi (1989)). In fact, local governments cite several reasons for their growing financial burdens such as: cutbacks in federal funds, restrictions on financing, growth in population, and decreases in tax revenue. Wm. Terry Bray et al., *New Wave Land Use Regulation: The Impact of Impact Fees on Texas Lenders*, 19 ST. MARY'S L.J. 319, 327 (1987).

2. See Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (1987) (discussing the legal and policy issues encompassing development exactions and reporting current practices in America); Bray et al., *supra* note 1, at 327 (describing the prominent forms of municipal exactions and the legal limitations placed on local governments in imposing them). Generally, local governments may impose fees pursuant to either their prescribed statutory authority or their police power. Bauman & Ethier, *supra*, at 54. While statutory enactments may contain specific limitations on a local government's taxing power, any fee imposed under the police power must be limited to the city's power to regulate for the health, safety, morals, and general welfare of its citizens. Bauman & Ethier, *supra*, at 54; see also Julie K. Koyama, Note, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L.J. 1333, 1360 (1991) (describing the difficulty experienced by local governments in California trying to develop alternative sources of revenue in reaction to a state law limiting local property taxes and restricting state tax initiatives).

3. See Bray et al., *supra* note 1, at 321. The prevalent use of exactions has been "akin to a tidal wave. However, in the rush by local government to tap these attractive sources of new . . . revenues, there is growing concern that the 'zoning game' is being replaced with a new 'impact fee game.'" Bray et al., *supra* note 1, at 320 (citing Duncan et al., *Simplifying and Understanding the Art and Practice of Impact Fees*, in DEVELOPMENT

municipal funds in lieu of taxes has pitted cities against taxpayers. On the one hand, cities possess the tools and the desire to institute new sources of revenue to ensure fiscal stability;<sup>4</sup> on the other hand, businesses are armed with the necessary legal and monetary resources to challenge the legality of an exaction.

These competing interests squared off when the City of Little Rock (the City), experiencing a budgetary shortfall,<sup>5</sup> enacted an ordinance requiring all long distance telephone service providers to pay a fee for using the public rights-of-way. After years of protracted litigation,<sup>6</sup> the Arkansas Supreme Court held, in *City of Little Rock v. AT & T Communications, Inc.*,<sup>7</sup> that a levy of four mills upon all interstate and intrastate toll telephone calls, either originating or terminating at a city service address, was a validly enacted "franchise fee" for the use of the public rights-of-way.<sup>8</sup> This decision partially overruled the Arkansas Court of Appeals decision below<sup>9</sup> and reinstated the City's assessment of a municipal franchise fee upon interstate telecommunication service providers, although they were previously considered exempt from those fees under the Commerce Clause.<sup>10</sup> The court declined to follow the test set out in *City of Marion v. Baioni*<sup>11</sup> to determine whether the "franchise fee" was, in substance, a fee or a tax.<sup>12</sup> The court

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EXACTIONS CONFERENCE (1986) (course materials for conference sponsored by the Homer Hoyt Center for Land Economics and Real Estate, Florida State University)).

4. For a comprehensive guide to assessing the fiscal health of local governments and designing revenue sources to meet fiscal needs, see MUNICIPAL FINANCE OFFICERS ASS'N, IS YOUR CITY HEADING FOR FINANCIAL DIFFICULTY: A GUIDEBOOK FOR SMALL CITIES AND OTHER GOVERNMENTAL UNITS (1978); S. GROVES & M. VALENTE, EVALUATING FINANCIAL CONDITIONS: A HANDBOOK FOR LOCAL GOVERNMENT (1986).

5. Appellant's Brief and Abstract at 41, *City of Little Rock v. AT & T Communications, Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251).

6. AT & T filed its initial complaint against the City of Little Rock on July 25, 1989, and the Arkansas Supreme Court rendered its decision on November 14, 1994.

7. 318 Ark. 616, 888 S.W.2d 290 (1994).

8. *AT & T Communications*, 318 Ark. at 625, 888 S.W.2d at 295.

9. *AT & T Communications v. City of Little Rock*, 44 Ark. App. 30, 39, 866 S.W.2d 414, 418 (1993), *rev'd in part*, 318 Ark. 616, 888 S.W.2d 290 (1994). The Arkansas Court of Appeals held that the franchise fee constituted a tax and therefore was required to be approved by the qualified electors of the City; thus, the court never reached the issue of whether the franchise fee (or tax as denominated by the court) violated the Commerce Clause. *Id.* at 39, 866 S.W.2d at 418.

10. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292. For a detailed discussion of the Commerce Clause and its restriction on state and local taxation, see PAUL J. HARTMANN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, § 2 (1981 & Supp. 1992).

11. 312 Ark. 423, 850 S.W.2d 1 (1993).

12. *Baioni*, 312 Ark. at 426, 850 S.W.2d at 2. In order for a governmental levy or fee not to be denominated a tax, it must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services. *Id.*; see also *City of North Little*

found the test inapplicable where, as in this case, the municipality is empowered by statutory authority to enact the challenged levy.<sup>13</sup> Although the traditional inquiry begins with the nature of the levy,<sup>14</sup> the court found it necessary only to determine whether the levy fell within the purview of the statute, rather than within any common law classification.<sup>15</sup>

## II. FACTS

On July 5, 1989, the City, pursuant to statutory authority,<sup>16</sup> enacted an ordinance imposing a franchise fee on all providers of long distance telephone services for the use of the public rights-of-way.<sup>17</sup> Specifically, the ordinance assessed a fee of \$0.004 (or four mills) per minute on each provider of long distance telephone services for all long distance calls that either originate or terminate at a city service billing address.<sup>18</sup>

On July 25, 1989, American Telephone and Telegraph, Inc. (AT & T) filed a complaint with the Arkansas Public Service Commission (the Commission) challenging the validity of the ordinance.<sup>19</sup> An administrative law judge was designated to hear the complaint, and after the hearing was conducted, the administrative law judge ruled that the charge was a valid

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Rock v. Graham, 278 Ark. 547, 647 S.W.2d 452 (1983) (invalidating a "public safety fee" that was assessed without public approval); Holman v. City of Dierks, 217 Ark. 677, 233 S.W.2d 392 (1950) (upholding a fee imposed on each business and residence in the city as a fee for the performance of a service and not as a fee for general revenue purposes).

13. *AT & T Communications*, 318 Ark. at 620-21, 888 S.W.2d at 292-93.

14. *See Baioni*, 312 Ark. at 425, 850 S.W.2d at 2.

15. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292.

16. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993). The statute permits every city or town to determine the "terms and conditions upon which the public utility may be permitted to occupy the streets, highways, or other public places within the municipality, and the ordinance or resolution shall be deemed prima facie reasonable." *Id.*

17. Little Rock, Ark., Ordinance 15,706 (July 5, 1989), reprinted in Appellant's Brief and Abstract at 116, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251). The ordinance granted a franchise to all companies that provide long distance telephone service, whether interstate or intrastate, which permits the companies to erect, maintain, or construct facilities on all public rights-of-way within the city, in exchange for the payment of a franchise fee for the use of those public rights-of-way.

18. Little Rock, Ark., Ordinance 15,706, § 3 (July 5, 1989), reprinted in Appellant's Brief and Abstract at 119, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251). Section three of the ordinance also allows any long distance telephone service provider to pass the fee along to the end user to the extent permitted by Arkansas law. *Id.*

19. Arkansas law permits any public utility affected by such an ordinance to file a complaint with the Arkansas Public Service Commission describing in what way the ordinance is "unjust, unreasonable, or unlawful, whereupon the commission shall proceed with an investigation" or hearing of the matter. ARK. CODE ANN. § 14-200-101(b)(1) (Michie Supp. 1993).

franchise fee rather than an invalid tax; that the fee did not impose an unconstitutional burden on interstate commerce; that the fee was not unreasonable; and that a "rational basis" existed for not imposing the fee on cellular telephone companies while imposing the fee on long distance telephone companies.<sup>20</sup> The administrative law judge denied AT & T's petition for rehearing. Likewise, the full Commission upheld and adopted the administrative law judge's decision.<sup>21</sup>

AT & T then challenged the ordinance before the Arkansas Court of Appeals, raising three main contentions: (1) the City went beyond its statutory authority when it enacted the ordinance; (2) the ordinance is arbitrary, capricious, and discriminatory; and (3) the ordinance places an unconstitutional burden on interstate commerce.<sup>22</sup> The court of appeals, reversing the decision of the Commission, agreed with AT & T and held that the ordinance constituted an invalid tax because it had not been approved by the qualified electors of the City.<sup>23</sup> Because the court found the ordinance imposed an unlawful tax, the court found it unnecessary to address the other contentions maintained by AT & T.<sup>24</sup>

The Arkansas Supreme Court granted the City and the Commission's petition for review and subsequently reversed the court of appeals.<sup>25</sup> The supreme court, after considering all three contentions by AT & T, held that the fee was not an unauthorized tax, that the evidence supported the Commission's finding of a rational basis for the method of assessment, and that AT & T failed to demonstrate how the fee unreasonably burdens interstate commerce.<sup>26</sup> The opinion, however, written by Justice Glaze, was accompanied by two strong dissenting opinions, separately written by Justices Dudley and Corbin.<sup>27</sup>

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20. *AT & T Communications*, 318 Ark. at 619, 888 S.W.2d at 292.

21. *Id.*

22. *Id.*

23. *AT & T Communications v. City of Little Rock*, 44 Ark. App. 30, 39, 866 S.W.2d 414, 418 (1993), *rev'd in part*, 318 Ark. 616, 888 S.W.2d 290 (1994). The court found the tax invalid because Arkansas law requires a tax to be adopted by the voters of a city at a special or general election. *Id.*; see ARK. CODE ANN. § 26-73-103(a) (Michie 1987). In determining whether the levy was a fee or a tax, the court relied on *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), where the Arkansas Supreme Court found that the payment of tapping and access fees for water and sewer lines imposed on developers did not constitute a tax because the fees were not placed in the city's general fund, but were segregated to benefit directly the new users of the services.

24. *AT & T Communications*, 318 Ark. at 616, 888 S.W.2d at 290.

25. *Id.* at 625, 888 S.W.2d at 295.

26. *Id.*

27. *Id.* at 625, 888 S.W.2d at 295 (Dudley, J., dissenting).

### III. HISTORICAL DEVELOPMENT

To gain a full understanding of the precise legal issue involved in *AT&T Communications*, one must examine the historical development of municipal levies as compared to other forms of local revenue. This section of the Note will discuss the principal characteristics of a municipal franchise fee, contrast it with regulatory and revenue-producing exactions, and describe the statutory and common law frameworks for imposing a valid franchise fee.

#### A. The Historical Origin of the Municipal Franchise

The municipal franchise enjoys a lengthy heritage that traces back to early English law<sup>28</sup> and, although no longer dependent on the king's prerogative, is generally understood to be a special privilege granted only by the government to an individual or corporation.<sup>29</sup> During the early era of public utility regulation, the franchise was tantamount to a contract<sup>30</sup> with a municipality to operate within its jurisdiction.<sup>31</sup> The contract theory of the municipal franchise presupposes that the fee is the result of a bargaining process which gives the franchise holder the right to use the public rights-of-way and demand compensation for its services.<sup>32</sup>

Today, most franchising statutes allow a municipality to grant a franchise to a public utility for the right to construct, maintain, expand, and operate its systems, whether they are pipelines, underground cable, or above ground telephone and electrical lines, in exchange for the regulation of its

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28. Under early English law, a franchise was defined as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." 2 WILLIAM BLACKSTONE, COMMENTARIES 37 (9th ed. 1978).

29. 12 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 34.03 (3d ed. rev. vol. 1986). Under American law, a franchise may be conferred by the legislature or a municipality under statutory or constitutional authority, and it is a right not commonly possessed by the general public. *Id.*; CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 23.2 (1980).

30. RHYNE, *supra* note 29. As a contract, a municipal franchise is subject to the constraints of the United States Constitution. RHYNE, *supra* note 29.

31. *City of Fort Smith v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 521, 524, 648 S.W.2d 40, 41 (1983); see also Roger D. Colton & Michael F. Sheehan, *Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It*, 21 URB. LAW. 55 (1989); R.T. Miles & J.R. Russell, *The Growth of Utility Regulation in Arkansas: A Functional Survey*, 21 ARK. L. REV. 539 (1967).

32. For an excellent introduction into the nature and origin of the franchise fee, see Peter Krug, Comment, *Cable Television Franchise Fees for General Revenue: The 1984 Cable Act, Wisconsin Law, and the First Amendment*, 1985 WIS. L. REV. 1273, 1277-78; see also MCQUILLIN, *supra* note 29.

rates and services.<sup>33</sup> Usually, the franchise requires the particular utility to compensate the municipality for the use or occupation of the public rights-of-way.<sup>34</sup> In the context of utility franchises, a utility is justifiably required to make some remuneration for the privilege of using the public rights-of-way in a profit-making manner.<sup>35</sup>

These attractive qualities have thrust municipal utility franchises to the forefront as a viable means for a municipality to raise significant revenues without raising taxes.<sup>36</sup> However, the exaction of compensation from a local utility will raise necessary questions concerning a locality's statutory or inherent authority to do so.<sup>37</sup> Likewise, because a city is severely limited in its taxing authority,<sup>38</sup> it becomes critical to distinguish a tax and a fee, particularly when the lines separating the two may determine their validity.

## B. The Historical Development of the Fee/Tax Dichotomy

The methods of differentiating between a fee and a tax have evolved throughout the development of the common law. The classic distinction is that a municipality imposes a tax for general revenue purposes pursuant to its taxing power, while a fee is imposed pursuant to the exercise of its police powers.<sup>39</sup> Additionally, taxes are imposed on persons or property within the corporate limits of the municipality for the purposes of providing support and paying municipal debts; moreover, they are usually the principal source of municipal revenue.<sup>40</sup> Conversely, a fee is imposed for a particular purpose, the funds are separately allocated to pay for the service provided, and taxpayers similarly served by another provider are relieved of the charge.<sup>41</sup> Most importantly, in determining the nature of a particular levy, courts should consider the substance of the exaction rather than its label.<sup>42</sup>

The authority of a municipality to exact compensation is significantly restricted dependant upon its designation as a tax or a fee.<sup>43</sup> The municipal taxing power is limited by an unequivocal grant of authority by the state,

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33. Colton & Sheehan, *supra* note 31, at 56.

34. RHYNE, *supra* note 29.

35. MCQUILLIN, *supra* note 29.

36. RHYNE, *supra* note 29.

37. Bauman & Ethier, *supra* note 2, at 54.

38. See Charles W. Goldner, Jr., *A Call for Reform of Arkansas Municipal Law*, 15 U. ARK. LITTLE ROCK L.J. 175, 189 (1993).

39. City of North Little Rock v. Graham, 278 Ark. 547, 647 S.W.2d 452 (1983).

40. MCQUILLIN, *supra* note 29, § 44.02.

41. Vandiver v. Washington County, 274 Ark. 561, 571, 628 S.W.2d 1, 6 (1982).

42. City of Marion v. Baioni, 312 Ark. 423, 425, 850 S.W.2d 1, 2 (1993).

43. Colton & Sheehan, *supra* note 31, at 57.

and any attempt to impose a tax under the guise of a franchise fee may result in litigation.<sup>44</sup>

Cities have a greater degree of latitude when enacting regulatory measures in connection with their police power.<sup>45</sup> Under its police power, a city may regulate for the health, safety, morals, general welfare, and convenience of its citizens.<sup>46</sup> In that vein, a regulatory measure must have some reasonable relation between the means selected and the permissible end to be achieved.<sup>47</sup> In distinguishing between a regulatory or revenue-raising measure, a court primarily examines the intent of the municipality in imposing a charge, whether the intended result is to raise general revenues, merely to cover the costs of regulation, or to resolve a dispute.<sup>48</sup>

Whether a levy is in fact a fee or a tax typically has been the central issue in cases involving the imposition of municipal fees.<sup>49</sup> In *Holman v. City of Dierks*,<sup>50</sup> the city imposed a small "sanitation tax" upon each residence and business in the city to cover the cost of spraying insecticide throughout the city. A taxpayer challenged the constitutionality of the tax, alleging the city was powerless to impose it.<sup>51</sup> Although the charge was designated as a "tax," the court recognized it was actually a "fee" for a service payable by citizens who received the benefit.<sup>52</sup> Furthermore, the court found the fee within the city's delegated power to ensure its citizens' health.<sup>53</sup>

Using an identical analysis, the court reached a different result in *City of North Little Rock v. Graham*.<sup>54</sup> In *Graham*, the court invalidated a "public safety fee" because it constituted an unauthorized tax.<sup>55</sup> The city enacted the fee for the expressed purpose of increasing the salaries and benefits of its policemen and firemen.<sup>56</sup> The fee was assessed at three dollars per month on the water bill of each residence and business within the corporate limits, and the funds were to be placed in the city's general fund.<sup>57</sup> The court found that the public safety fee was in fact a tax because it was

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44. McQUILLIN, *supra* note 29, § 44.02.

45. McQUILLIN, *supra* note 29, § 44.02.

46. Bauman & Ethier, *supra* note 2, at 54.

47. *City of Marion v. Baioni*, 312 Ark. 423, 426, 850 S.W.2d 1, 2 (1993).

48. *Id.* at 427-28, 850 S.W.2d at 3.

49. Bauman & Ethier, *supra* note 2, at 54.

50. 217 Ark. 677, 233 S.W.2d 392 (1950).

51. *Id.* at 678, 233 S.W.2d at 393.

52. *Id.*

53. *Id.* at 679, 233 S.W.2d at 393.

54. 278 Ark. 547, 647 S.W.2d 452 (1983).

55. *Id.* at 549, 647 S.W.2d at 453.

56. *Id.* at 548, 647 S.W.2d at 452.

57. *Id.*



imposed to raise general revenue support for traditional government functions, and because the city's voters had not approved it.<sup>58</sup>

The court solidified the fee-versus-tax analysis in 1993 when it decided *City of Marion v. Baioni*.<sup>59</sup> In *Baioni*, the court determined whether the city could charge residential land developers sewer and water "tap and access fees" as valid city enacted fees, or whether the charge was a tax requiring voter approval. After considering the distinctions devised between taxes and fees in *Holman* and *Graham*, the court adopted the following test: "[I]n order not to be denominated a tax, [a fee] must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services."<sup>60</sup>

Because the fees could only be applied to expansion costs, the court upheld the access and tapping fees as a reasonable pro rata connection charge.<sup>61</sup> The court noted specifically that the funds were segregated into separate accounts and set aside for the exclusive purpose of expanding the water and sewer systems, thus conferring a direct benefit to the payers of the fee.<sup>62</sup>

The decision in *Baioni* brought Arkansas in line with the prevailing view that regulatory fees, as opposed to general revenue levies, should be imposed primarily to cover the cost of city regulation or services.<sup>63</sup> *Baioni* did not, however, establish whether a revenue raising fee could be enacted by a city without the constraints advanced in *Baioni*. To answer this central question, it is important to discuss the relationship between Arkansas municipalities, the state, and the source of authority permitting the imposition of municipal fees.

### C. Municipal Authority to Enact Utility Franchise Fees

The traditional role of Arkansas local governments has been that of an agent of the state, as opposed to an independent entity with an inherent right to control local affairs.<sup>64</sup> An Arkansas municipal corporation possesses only

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58. *Id.* at 549, 647 S.W.2d at 453.

59. 312 Ark. 423, 850 S.W.2d 1 (1993).

60. *Id.* at 426, 850 S.W.2d at 2.

61. *Id.* at 427, 850 S.W.2d at 3.

62. *Id.* at 427-28, 850 S.W.2d at 3.

63. *Id.* at 426, 850 S.W.2d at 2.

64. Goldner, *supra* note 38, at 183. The United States Supreme Court clarified the view that a municipality has no inherent right of authority distinguishable from the sovereignty of the state when it addressed the absence of federal protection for a municipal corporation against overreaching state power:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state

those powers that are either: (1) expressly given by the state legislature, (2) necessarily implied by the grant of express authority, or (3) essential to its operation.<sup>65</sup> These powers are subject to even greater restraint when a municipal corporation attempts to borrow money or raise revenue.<sup>66</sup>

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as may be intrusted to them . . . . Neither their charters, nor any law conferring governmental powers . . . constitutes a contract with the state within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, . . . expand or contract the territorial area, . . . repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by the any provision of Constitution of the United States. . . . [The inhabitants] have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

65. The limitations placed on local governments originate from Judge Dillon's classic statement:

It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation— not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.

JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89, at 115-16 (3d ed. 1881). For an example of the Arkansas Supreme Court's application of Dillon's Rule, see *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967). See also *City of Piggott v. Eblen*, 236 Ark. 390, 392-93, 366 S.W.2d 192, 194 (1963); *McClendon v. City of Hope*, 217 Ark. 367, 230 S.W.2d 57 (1950); *Bain v. Fort Smith Light & Traction Co.*, 116 Ark. 125, 172 S.W. 843 (1915).

66. See Goldner, *supra* note 38, at 183. Municipal corporations in Arkansas historically have been considered mere "creatures of the Legislature, subject to its control, . . . function[ing] only within the limits fixed by law." *City of Hot Springs v. Gray*, 215 Ark. 243, 245, 219 S.W.2d 930, 931 (1949) (quoting *Kitchens v. Paragould*, 191 Ark. 940, 945, 88 S.W.2d 843, 846 (1935)). The court's distrust of local government was evinced, in 1891, when it described the proper constraints on local autonomy:

Municipal corporations can levy no taxes, general or special, unless the power to do so be plainly and unmistakably conferred. The power must be given either in express words or by necessary or unmistakable implication. It cannot be deduced by doubtful inferences from other powers, or from any consideration of convenience or advantage.

*Fort Smith & Van Buren Bridge Co. v. Hawkins*, 54 Ark. 509, 513, 16 S.W. 565, 565 (1891).

Specifically, a municipality faces a myriad of constitutional restrictions on its power to tax.<sup>67</sup>

Fortunately for local governments, the Arkansas legislature has expressly indicated the parameters within which a municipal corporation may raise revenue by assessing fees on local utilities.<sup>68</sup> Arkansas cities derive their authority over local utilities from the state under *Arkansas Code Annotated* section 14-200-101, although the Arkansas Public Service Commission has exclusive jurisdiction over rate-making matters.<sup>69</sup> Specifically, in its regulatory capacity, a municipality may determine the "terms and conditions . . . upon which the public utility may be permitted to occupy" the public rights-of-way.<sup>70</sup> Furthermore, a municipality may impose only reasonable terms upon a utility for the use of the public streets.<sup>71</sup> The legislature has granted cities and towns the authority to enact ordinances imposing such "terms and conditions" by "ordinance or resolution."<sup>72</sup> If a city goes beyond this statutory scheme when enacting a fee, it invites a challenge to the assessment's validity on the basis that the levy constitutes a tax rather than a fee.<sup>73</sup> If the levy is found to be a tax, it is invalid unless it was adopted by the qualified electors of the city.<sup>74</sup>

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67. See Goldner, *supra* note 38, at 189-90. The current Arkansas Constitution, adopted in 1874, places express limitations on a municipal corporation's ability to raise revenue through taxes. Goldner, *supra* note 38, at 189-90. Numerous sections in the constitution designate taxes a municipal corporation may levy. Further, the constitutional sections set specific limits upon each kind of tax. Goldner, *supra* note 38, at 189-90. Likewise, the General Assembly has authorized the imposition of various forms of taxes, and, although they may be placed in the general fund, each requires voter approval. Goldner, *supra* note 38, at 189-90.

68. See ARK. CODE ANN. §§ 14-43-601, -602 (Michie 1987). The Arkansas legislature purports to grant cities of the first class the power to exercise home rule over their own municipal affairs. *Id.* § 14-43-602. Specifically, a city "is authorized to perform any function and exercise full legislative power in any and all matters of whatsoever nature pertaining to its *municipal affairs* including, but not limited to, the power to tax." *Id.* (emphasis added). Of course, after broadly defining "municipal affairs," the state reserved a laundry list of affairs that are exclusively state concerns. *Id.* § 14-43-601(a)(1)(A)-(O).

69. ARK. CODE ANN. § 23-4-201(a)(1) (Michie 1987); *City of Fort Smith v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 521, 525, 648 S.W.2d 40, 41 (1983).

70. ARK. CODE ANN. § 14-200-101(a)(1)(A) (Michie Supp. 1993).

71. *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 635, 609 S.W.2d 914, 918 (1980).

72. ARK. CODE ANN. § 14-200-101(a)(1)(A) (Michie Supp. 1993).

73. *Bauman & Ethier, supra* note 2, at 54.

74. ARK. CODE ANN. § 26-73-103(a) (Michie 1987).

D. The *Baioni* Test and the Utility Franchise Fee: Distinguishing Between Impact Fees and Franchise Fees

The court, in the *Baioni* line of cases, fashioned a rule proscribing the imposition of a governmental levy by an Arkansas municipality unless the levy bears a reasonable relationship to the benefits conferred upon the payors.<sup>75</sup> Understandably, this rule is readily applicable to municipal "impact fees" that are warranted by the exercise of the local police power. On the other hand, the judicial basis for requiring a reasonable relationship is that the city lacks a specific or implied grant of authority from the state and is merely exercising those powers that are essential to its operation.<sup>76</sup> In other words, a fee is assessed under the regulatory power of a municipality unless authority is derived from statutory or constitutional law.<sup>77</sup>

The assessment of an impact fee is properly distinguishable from the levy of a utility franchise fee. *Baioni*, *Graham*, and *Holman* involved impact fees imposed absent a statutory grant of authority by the state.<sup>78</sup> Conversely, the authority to impose a utility franchise fee for the use of the public rights-of-way, which may be used for general revenue purposes, must be specifically derived from a statute. Therefore, it is the statute, not the common law, that prescribes the applicable framework for analysis. Accordingly, a utility franchise fee will be valid if it falls within the meaning of "terms and conditions" and is otherwise reasonable.<sup>79</sup>

E. Federal Constitutional Limits on the Power to Tax Interstate Telecommunication Providers

In addition to the regulatory and statutory constraints on a city's power to raise revenue, local governments must also be wary of violating the Commerce Clause when imposing fees on interstate businesses. Cities historically have imposed franchise fees upon local telecommunication services in the same manner as other utilities. However, following the divestiture of AT & T in January of 1984, AT & T was able to procure access to its long distance customers through its former subsidiaries, while the subsidiaries reimbursed the local governments for the franchises.<sup>80</sup> The

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75. See *supra* note 12 and accompanying text.

76. See *supra* note 64 and accompanying text.

77. *City of Little Rock v. Raines*, 241 Ark. 1071, 1079, 411 S.W.2d 486, 491 (1967).

78. See *supra* note 64.

79. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993).

80. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983); *City of Little Rock v. AT & T Communications, Inc.*, 318 Ark. 616, 620, 888 S.W.2d 290, 292 (1994).

breakup of AT & T forced municipal authorities to scramble to recapture revenues lost in the changing telecommunications landscape.<sup>81</sup> While some jurisdictions, cities and states alike, enacted ordinances imposing a similar franchise fee on interstate telecommunications services, some local governments feared a levy on interstate long distance calls would place an impermissible burden on interstate commerce.<sup>82</sup>

However, the Commerce Clause barrier to a state's ability to tax interstate telecommunications toppled with the landmark decision of *Goldberg v. Sweet*.<sup>83</sup> In *Goldberg*, the United States Supreme Court held that the Illinois Telecommunications Excise Tax Act, which imposed a five percent gross charge on all calls originating or terminating within the state and chargeable to an Illinois service address, did not place an impermissible burden on interstate commerce.<sup>84</sup> The Court found it significant the retailer, or telecommunications provider, was granted a credit upon proof the retailer paid an identical tax to another state for the same interstate call.<sup>85</sup> Moreover, it was of no consequence that the tax was actually paid by the customer and collected by the retailer.<sup>86</sup>

In its Commerce Clause analysis, the Court applied the four prong test set out in *Complete Auto Transit, Inc. v. Brady*.<sup>87</sup> The Court held that: a substantial nexus existed between Illinois and the interstate telecommunications reached by the tax; a tax levied on gross charges of telephone calls was fairly apportioned because it was internally and externally consistent; the tax did not discriminate against interstate commerce because the tax burden fell on in-state residents and a gross

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81. *Sprint Communications Co. v. Kelly*, 642 A.2d 106 (D.C. Cir. 1994) (invalidating a gross receipts tax on interstate telecommunication providers as violating the Commerce Clause), *cert. denied*, 115 S. Ct. 294 (1994); *Barry v. American Tel. & Tel. Co.*, 563 A.2d 1069 (D.C. Cir. 1989) (reversing a trial court's determination that a gross receipts tax on telecommunications violated the Commerce Clause, but on alternate grounds).

82. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292; *see, e.g.*, ARK. CODE ANN. § 26-52-301 (Michie 1987); FLA. STAT. § 212.05(1)(e) (1988); HAW. REV. STAT. § 237-13(6) (Supp. 1987); MINN. STAT. ANN. § 297A.01 Subd. 3(f) (West 1987); N.M. STAT. ANN. § 7-9-56(C) (Michie Supp. 1994); OHIO REV. CODE ANN. § 5739.01(B)(3)(f) (Anderson 1991); OKLA. STAT. tit. 68, § 1354(1)(D) (West 1992); TEX. TAX CODE ANN. § 151.323 (West 1992); WASH. REV. CODE ANN. § 82.04.065 (West 1995); Greeley, Co., Ordinance, Tit. 4, § 4.04.005 (1985); Wheat Ridge, Co., Ordinance 630 (1988); Los Angeles, Cal., Ordinance 162,586 (1987).

83. 488 U.S. 252 (1989).

84. *Id.* at 267-68.

85. *Id.* at 265.

86. *Id.* at 266.

87. 430 U.S. 274, 279 (1977). For a tax to pass scrutiny under the Commerce Clause it must be "applied to an activity with a substantial nexus with the taxing State, . . . fairly apportioned, . . . [nondiscriminatory] against interstate commerce, and . . . related to services provided by the State." *Id.*

charge on long distance calls accommodated the difficulty in tracing the exact path of electronic signals; and, the tax was fairly related to the activities of the taxpayer in the state because interstate commerce may be required to contribute to the cost of providing all governmental services.<sup>88</sup> The Court noted that the test in *Complete Auto* balanced the tensions between the views that interstate commerce should enjoy a "free trade" immunity from state taxation and that businesses engaged in interstate commerce should be required to pay their own way.<sup>89</sup>

Following *Goldberg*, interstate telecommunications service providers could no longer hide behind the Commerce Clause and avoid paying their share of taxes. Consequently, the door opened for local municipalities to exact similar fees by utilizing their statutory authority over local public rights-of-way.

#### IV. REASONING OF THE COURT

In *AT & T Communications*, the Arkansas Supreme Court declined to apply the rule in *City of Marion v. Baioni*,<sup>90</sup> which would require a municipal levy to be segregated and applied only to the specific city services that directly benefit the paying utility.<sup>91</sup> The court noted the levy in *Baioni* was not a franchise fee,<sup>92</sup> and that the *Baioni* analysis<sup>93</sup> applies only if the fee lacks statutory authority,<sup>94</sup> unlike the fee in *AT & T Communications*.<sup>95</sup> Additionally, the court found the franchise fee merely constituted a rental payment for the use of the City rights-of-way.<sup>96</sup>

The court took judicial notice of the history of the municipal franchise fee imposed on telephone service providers for use of the City rights-of-way. The franchise fee was historically assessed by the City on local

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88. *Goldberg*, 488 U.S. at 267.

89. *Id.* at 259.

90. 312 Ark. 423, 850 S.W.2d 1 (1993).

91. *AT & T Communications*, 318 Ark. 616, 620, 888 S.W.2d 290, 292; see *supra* notes 11-12 and accompanying text.

92. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292.

93. *Baioni*, 312 Ark. at 426, 850 S.W.2d at 2. In distinguishing between a tax and a fee, the court applied the general rule that a "fee, in order not to be denominated a tax, must be fair and reasonable and bear a reasonable relationship to the benefits conferred on those receiving the services." *Id.*

94. *AT & T Communications*, 318 Ark. at 621, 888 S.W.2d at 292.

95. *Id.* Arkansas law provides that every city, by ordinance or resolution, may assess a fee for the occupation of the city's rights-of-way, and the ordinance is deemed *prima facie* reasonable. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993).

96. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292.

telephone service only.<sup>97</sup> The court recognized that, at the time, the conventional wisdom found that the assessment of a fee on long distance telephone carriers would place an impermissible burden on interstate commerce.<sup>98</sup> Consequently, following the breakup of AT & T in 1984, Southwestern Bell Telephone Company, which had acquired local facilities from AT & T, paid the franchise fees while AT & T continued to provide service to long distance customers via Southwestern Bell's facilities without paying a similar fee for using the city rights-of-way.<sup>99</sup>

In 1989, however, the United States Supreme Court held, in *Goldberg v. Sweet*,<sup>100</sup> that a tax on interstate telecommunication services was consistent with the Commerce Clause of the United States Constitution.<sup>101</sup> Accordingly, the City enacted the present ordinance levying a fee on all long distance carriers that provide services to local city service addresses.<sup>102</sup>

In response to AT & T's contentions, the court found that the challenged franchise fee did not constitute an unauthorized tax.<sup>103</sup> Specifically, the court stated that the *Baioni* analysis<sup>104</sup> was inapplicable to a franchise fee case, and, here, the City had specific statutory authority to impose a franchise fee upon utilities for using the City rights-of-way.<sup>105</sup> The court dismissed AT & T's argument that the Telephone Company Act of 1885<sup>106</sup> granted telephone companies the right to construct their facilities

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97. *Id.* A franchise fee for the use of the City's rights-of-way has been assessed on local telephone service providers since 1957. Prior to the Bell system break-up in 1984, nearly all local telephone services were provided by Southwestern Bell Telephone Corporation, a wholly owned subsidiary of AT & T.

98. *Id.*

99. *Id.* The City claimed that AT & T had access to its customers through the use of Southwestern Bell's 1000 miles of facilities that were over or under City rights-of-way. Appellee's Brief at iii, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251). Justice Dudley noted, in his dissenting opinion, that Southwestern Bell's facilities lying in the City's rights-of-way is probably closer to 500 miles. *AT & T Communications*, 318 Ark. at 629, 888 S.W.2d at 297 (Dudley, J., dissenting).

100. 488 U.S. 252 (1989).

101. *Id.* at 267-68.

102. *AT & T Communications*, 318 Ark. at 620, 888 S.W.2d at 292.

103. *Id.* at 622, 888 S.W.2d at 293.

104. See *supra* notes 11-12 and accompanying text.

105. *AT & T Communications*, 318 Ark. at 621, 888 S.W.2d at 292. An Arkansas municipality possesses the statutory authority to charge a franchise fee on all utilities, including telephone companies, operating within its jurisdiction. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993); see also ARK. CODE ANN. § 23-4-201 (Michie 1987); *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 609 S.W.2d 914 (1980); *Hot Springs Elec. Light Co. v. City of Hot Springs*, 70 Ark. 300, 67 S.W. 761 (1902). Arkansas municipalities also have the ability to determine "all other terms and conditions" for the use of the public rights-of-way. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993).

106. ARK. CODE ANN. §§ 23-17-101 to -307 (Michie 1987). AT & T argued that § 101

without the imposition of a fee because such a construction would render all fees on local telephone services illegal.<sup>107</sup> The court stated that legislation had been enacted since the 1885 Act allowing municipalities to assess franchise fees on telephone companies, and further that those fees were authorized by law.<sup>108</sup>

The court could not find the franchise fee to be an arbitrary, capricious, or unreasonable levy as applied to AT & T.<sup>109</sup> The court instead held that the Commission had a rational basis, due to the unique characteristics of telecommunication services and the considerable profits to be made by long distance telephone carriers, for finding lawful the City's assessment of a fee based on time of use of the City rights-of-way.<sup>110</sup> AT & T's contention that the franchise fees should be based on the number of miles each utility occupies within the public rights-of-way would create even greater disparity between those telephone companies that own their facilities and those that simply purchase access over presently installed lines.<sup>111</sup> Thus, the court stated the Commission could not be directed to require the City to use an alternative methodology, especially when the current time-use methodology

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of the Act granted telephone companies the right to "construct, operate, and maintain" their facilities "over the public highways and streets" of any city of the state, and that because telephone companies were given that right directly by the legislature, a franchise granted by the city was meaningless. Appellant's Brief and Abstract at 147, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251).

107. *AT & T Communications*, 318 Ark. at 621-22, 888 S.W.2d at 293.

108. *Id.* at 622, 888 S.W.2d at 293. The court found it significant that, over the years, telephone companies have acquiesced to the concept of franchise fees. *Id.*; see also *Mears v. Arkansas State Hosp.*, 265 Ark. 844, 846, 581 S.W.2d 339, 341 (1979) (holding that the intent of a statute is determined by examining the "contemporaneous conditions at the time of its enactment, consequences of interpretation, and other matters of common knowledge").

109. *AT & T Communications*, 318 Ark. at 623, 888 S.W.2d at 294. An administrative decision will be upheld as long as it is "supported by substantial evidence and [is] not arbitrary, capricious, or characterized by an abuse of discretion," and it is supported by a rational basis. *In re Sugarloaf Mining Co.*, 310 Ark. 772, 776, 840 S.W.2d 172, 174 (1992) (citations omitted).

110. *AT & T Communications*, 318 Ark. at 622-24, 888 S.W.2d at 293-94. Additionally, AT & T failed to overcome the statutory presumption of reasonableness because its own expert witness testified that the reasonableness or unreasonableness of the relationship was indeterminable. *Id.* at 623, 888 S.W.2d at 294; see ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993).

111. *AT & T Communications*, 318 Ark. at 623-24, 888 S.W.2d at 294. The court noted the absence of cited authority which would support the requirement of a mileage methodology. *Id.* at 623-24, 888 S.W.2d at 294. Also, a division of telephone messages in terms of mileage would create "insurmountable administrative and technological barriers" when trying to trace the path of electronic signals. *Id.* (quoting *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989)).



treats all long distance providers equally, and the alternative proposed by AT & T would discriminate between those providers.<sup>112</sup>

Finally, the court determined that the ordinance did not place an unconstitutional burden on interstate commerce.<sup>113</sup> AT & T argued that since the ordinance unquestionably places a burden on interstate commerce by placing a charge on interstate long distance toll calls, the remaining question was whether that burden was reasonable.<sup>114</sup> Under the test used in *Goldberg v. Sweet*,<sup>115</sup> a tax must be fairly related to the services provided by the state, and because the benefit conferred to AT & T, the occupation of the public rights-of-way, was allegedly minute, the burden imposed by the City was unreasonable.<sup>116</sup> The court found this argument unpersuasive because AT & T effectively paid a smaller percentage of its gross revenues than did the traditional utilities making use of the public rights-of-way;<sup>117</sup> furthermore, AT & T was able to produce a substantial profit by providing long distance services to the public.<sup>118</sup> It was inconsequential to the court that AT & T already paid license fees and sales taxes for general city services, because the level of sales taxes paid by all businesses are not uniform, and only a few businesses had been given the right to occupy the public rights-of-way.<sup>119</sup> Thus, the court reversed the case and affirmed the decision of the Commission.<sup>120</sup>

In his dissent, Justice Dudley, joined in part by Justice Corbin, alleged that a strict reading of the statute<sup>121</sup> did not authorize the City's assessment of this particular fee.<sup>122</sup> By its terms, the statute only grants the authority

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112. *Id.* at 623-24, 888 S.W.2d at 294.

113. *Id.* at 625, 888 S.W.2d at 295.

114. Appellant's Brief and Abstract at 167, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251).

115. 488 U.S. 252 (1989). The test had four prongs which required that the tax: (1) must be applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. *Id.* at 257 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

116. Appellant's Brief and Abstract at 168, *AT & T Communications*, 318 Ark. 616, 888 S.W.2d 290 (1994) (No. 93-1251).

117. *AT & T Communications*, 318 Ark. at 624, 888 S.W.2d at 294 n.1.

118. *Id.* at 625, 888 S.W.2d at 295.

119. *Id.*

120. *Id.*

121. ARK. CODE ANN. § 14-200-101 (Michie Supp. 1993).

122. *AT & T Communications*, 318 Ark. at 631, 888 S.W.2d at 298 (Dudley, J., dissenting). Justice Dudley specifically found that the method of assessment violated the requirement of reasonableness because a charge based on gross receipts results in a disproportionately high and discriminatory fee as applied to AT & T. *Id.* at 632-33, 888 S.W.2d at 299 (Dudley, J., dissenting).

to determine the "time and amounts of payment,"<sup>123</sup> provided they are reasonable,<sup>124</sup> for the "use" of the public streets.<sup>125</sup> Accordingly, Justice Dudley found that the franchise fee must be assessed singularly upon the basis of the actual occupation of space, the term "use" meaning "physical use" and not a charge based on time of use, and, further, an assessment based entirely on gross receipts was entirely unreasonable.<sup>126</sup>

Justice Corbin dissented from the majority opinion on alternative grounds.<sup>127</sup> According to Justice Corbin, the court should have determined whether the levy was in actuality a fee or a tax; as such, the factors outlined in *Baioni* would reveal that the levy, in substance, was actually a tax requiring approval by the electorate.<sup>128</sup> Additionally, even after applying the factors outlined in prior case law, if the court were to find the levy constituted a fee, it would still be unreasonable and discriminatory under Justice Dudley's analysis.<sup>129</sup>

## V. SIGNIFICANCE

As a result of the Arkansas Supreme Court's decision in *AT & T Communications*, Arkansas municipalities are now free to impose a franchise fee on providers of interstate telecommunication services. This fee may be in the form of a rental for the use of the public rights-of-way, and the proceeds may be set aside for general revenue purposes.<sup>130</sup> The courts will no longer be concerned with whether a franchise fee is actually a tax and therefore subject to voter approval, because a franchise fee is found implicitly within the purview of the statute.<sup>131</sup> Thus, the ultimate effect of the decision limits subsequent disputes over an exaction to the question whether a fee is reasonable as denoted by the statute.<sup>132</sup>

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123. *Id.* at 627, 888 S.W.2d at 296 (Dudley, J., dissenting) (quoting *Nakdimen v. Ft. Smith & Van Buren Bridge Dist.*, 115 Ark. 194, 208, 172 S.W.2d 272, 276 (1914)).

124. *Id.* (Dudley, J., dissenting) (quoting *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 609 S.W.2d 914 (1980)). Justice Dudley stated that the court had noted previously, in dictum, that the authorizing statute was limited by the requirement that the franchise fee must be reasonable in light of the use of the public rights-of-way. *Id.* (Dudley, J., dissenting).

125. *Id.* (Dudley, J., dissenting).

126. *Id.* at 631, 888 S.W.2d at 298 (Dudley, J., dissenting).

127. *Id.* at 633, 888 S.W.2d at 299 (Corbin, J., dissenting).

128. *Id.* (Corbin, J., dissenting).

129. *Id.* at 637, 888 S.W.2d at 301 (Corbin, J., dissenting).

130. *Id.* at 625, 888 S.W.2d at 295.

131. *Id.* at 621, 888 S.W.2d at 293.

132. ARK. CODE ANN. § 14-200-101(a)(1) (Michie Supp. 1993).

By abandoning the traditional analysis under *Baioni*, the court has enlarged Arkansas municipality's ability to raise general revenue without imposing unpopular taxes. Moreover, the statute as interpreted presents a difficult barrier for successful challenges to the validity of municipal exactions on utilities. The incentive to mount a forceful challenge is negligible in light of the pass-through nature of the franchise fee.

Interestingly, the *AT & T Communications* decision is consistent with a recent amendment to section 14-200-101 of the Arkansas Code. In 1994, prompted by the lower court's decision in the present case,<sup>133</sup> the Arkansas Legislature amended the statute to authorize a "reasonable franchise fee" as a valid term and condition to be determined by a municipality.<sup>134</sup> Legislative findings that municipalities historically have possessed the authority to assess franchise fees support the amendment.<sup>135</sup> Furthermore, it is now the expressed policy of the State that franchise fees imposed on utilities for the use of the public rights-of-way do not fall within the scope of section 26-73-103 of the Arkansas Code, requiring voter approval for municipal taxes.<sup>136</sup> Maintaining the theoretical contractual nature of the franchise, the legislature added a proviso which requires a utility to provide written acceptance to the imposition of a franchise fee.<sup>137</sup> Although *AT & T Communications* interpreted the pre-amended statute, no doubt remains that an Arkansas municipality is authorized by statute to impose a "reasonable" franchise fee.

The principal loser in the war over municipal franchise fees on interstate providers of long distance service may be the local consumer who must foot the bill for shortfalls in revenue.<sup>138</sup> Presumably, the intention of the protracted litigation surrounding the breakup of the Bell system was the infusion of competition among telecommunication providers that would

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133. The Bill is entitled "The Municipal Franchise Fee Clarification Act." S.B. 7, 79th Gen. Assembly, 1st Extra. Sess. (1994). The intention of the Arkansas General Assembly is made clear in the Emergency Clause, which provides:

[I]t is hereby found and determined . . . that the decision of the Arkansas Supreme Court of Appeals in *AT&T Communications of the Southwest, Inc. v. City of Little Rock* has created uncertainty and confusion concerning the ability of municipalities to assess franchise fees as a term or condition for the use of public rights-of-way; that the immediate implementation of the Act is necessary to eliminate this uncertainty and confusion and to reconfirm the authority of municipalities to levy franchise fees.

*Id.* § 10.

134. S.B. 7, 79th Gen. Assembly, 1st Extra. Sess., § 3 (1994).

135. *Id.* at § 1(b).

136. *Id.* § 2.

137. *Id.* § 3(a)(1).

138. *AT & T Communications*, 318 Ark. at 632, 888 S.W.2d at 299 (Dudley, J., dissenting).

indirectly benefit the individual consumer by lowering costs.<sup>139</sup> Although unintended, new developments in technology may have resulted in creative revenue sources that drive up the cost of services while telecommunications providers are permitted to pass on the higher costs to the consumer.

In his dissent, Justice Dudley noted that the ordinance was drafted specifically for revenue purposes.<sup>140</sup> The ordinance imposed a per minute charge on the time of use to permit the cost to be passed on to the consumer, rather than associating the fee with the actual physical occupation of the city streets.<sup>141</sup> The time-of-use methodology simplifies the collection of the fee by placing the charges on the customer's bill. Because the court found a charge on gross receipts to be reasonable, in light of the difficulty of tracing the exact path of electronic signals, perhaps technology may one day provide a method of assessment fairly attributable to the actual occupation of physical space rather than determined by the simplicity of administration. Until then, it appears highly unlikely that a municipal franchise fee will be imposed that falls outside the elastic concept of reasonableness.

*Mark N. Halbert*

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139. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 n.18 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

140. *AT & T Communications*, 318 Ark. at 631, 888 S.W.2d at 298 (Dudley, J., dissenting).

141. *Id.*

