

Alabama Supreme Court Strikes Down Charge Assessed For Installing Fiber-Optic Cables Along Public Right-of-Way

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WASHINGTON, D.C. - April 19 2001 - In a Opinion issued on March 30, 2001, the Alabama Supreme Court reversed the ruling of the lower court and struck down a charge assessed by Escambia County, Alabama, against Lightwave Technologies, LLC, for installing its fiber-optic cabling along a public right-of-way.

The Court found that "the County's authority extends only so far as to allow it to regulate the use of the rights of way so that the roads will not be unreasonably or unnecessarily interfered with." In striking down the charge, however, the Court concluded that "the purpose behind the per-linear-foot charge was not to 'regulate' the use of the County's rights-of-way; rather the charge was not a 'fee,' but was in reality an impermissible tax." The tax was impermissible under Alabama law because county governments do not have taxing authority; the power to tax must proceed from an express Legislative grant, and no such grant had been provided in this instance.

In concluding that the charge was an impermissible tax, the Court focused on the fact that: (i) the charge was designed to generate revenue for the County; (ii) that the amount of the fee was not rationally related to the expected cost of repairing the rights-of-way after the fiber-optic cabling had been installed; and (iii) that monies collected from the assessment of the charge would be deposited into the County's Gasoline Tax Fund, which is used for the maintenance of the county's roads and bridges, not for maintaining the County's rights-of-way. It was the "lack of correlation between the expected cost to the county and the magnitude of the fee" that the Court concluded "militates in favor of a finding that the right-of-way fee is a revenue raising tax under State law."

Although this Opinion represents a significant victory for Lightwave, it is important to understand that the applicability of the Opinion is limited to the facts and circumstances before the Court; that is, to per-foot charges imposed for rights-of-way by a county government in Alabama. Indeed, because the Court was able to resolve the issue based on its interpretation of Alabama law, it did not express any opinion as to whether the charge would violate the Telecom Act, in particular, or any other provision of law.

Nevertheless, the Alabama decision underscores the importance of closely scrutinizing state and local regulatory schemes to ensure they are properly promulgated under state law and in conformity to the authority delegated to the regulating entities involved. Close attention should also be paid to whether the applicable state or local regulatory scheme addressing rights-of-way issues is consistent with the requirements of the Telecom Act. Long-standing regulations should be examined with particular care, as they may have been promulgated before the Telecom Act and thus may not take into account the new competitive marketplace or the associated legislative and regulatory paradigms.

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