216 Va. 317
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SUPREME COURT OF VIRGINIA
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RICHMOND, VIRGINIA

IN THE

Supreme Court of Virginia

AT RICHMOND
RECORD NO. 75-0399

CITY OF NORFOLK,
Appellant,

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
Appellee.

JOINT APPENDIX

Philip R. Trapani
City Attorney
Harold P. Juren
Assistant City Attorney
Room 908
City Hall Building
Civic Center
Norfolk, Virginia 23501
Counsel for Appellant

A.W. Whittaker
703 East Grace Street
Richmond, Virginia 23219
Richard D. Rogers, Jr.
State Corporation Commission
Blanton Building
Richmond, Virginia 23219 (Rule 5:1)
Andrew P. Miller, Attorney
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219 (Rule 5:1)
Counsel for Appellee

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C&P Telephone

703 East Grace Street
Richmond, Virginia 23219
Telephone 804-772-2000

July 30, 1974.

State Corporation Commission,
Richmond, Virginia.

Gentlemen:

Attached, in duplicate, for filing with your Honorable Commission is the following tariff page to become effective September 1, 1974.

General Regulations Tariff, S.C.C.-Va.-No. 201
Section 1, 1st Revised Page 11

This filing withdraws the exclusion to the regulation concerning Adjustments for Certain Local Taxes and Fees and will have the effect of establishing a surcharge for customers within the City of Norfolk.

Very truly yours,

ORIGINAL SIGNED BY
JOHN D. LANDERS

General Staff Supervisor.

GENERAL REGULATIONS

D. PAYMENT ARRANGEMENTS AND CREDIT ALLOWANCES (Cont'd)

6. Adjustments for Certain Local Taxes and Fees

When a political subdivision of the state charges the Company a license tax or franchise fee at a flat rate or based on receipts or based on poles, wires or conduits, so much of the aggregate amount of such taxes and fees as exceeds one-half of one per cent of the aggregate bills of such customers for exchange service will be billed pro rata to the exchange customers receiving service within the political subdivision.

(D)

E. LIABILITY OF THE TELEPHONE COMPANY

In view of the fact that the customer has exclusive control over the use of the service and facilities furnished by the Telephone Company, and because of unavoidableness of errors incident to the services and to the use of such facilities of the Telephone Company, services and facilities are furnished by the Telephone Company subject to the terms, conditions and limitations herein specified:

1. Service Irregularities

The liability of the Telephone Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission, or failures or defects in facilities furnished by the Telephone Company, occurring in the course of furnishing service or other facilities and not caused by the negligence of the customer, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the service or facilities affected during the period such mistake, omission, interruption, delay, error or defect in transmission, or failure or defect in facilities continues after notice and demand to the Telephone Company.

When facilities of others are used in establishing connections to points not reached by the Telephone Company's facilities, the Telephone Company is not liable for any act or omission of others furnishing such facilities.

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, AUGUST 27, 1974

APPLICATION OF

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

CASE NO. 19428

To amend its tariff provision providing for "Adjustments for Certain Local Taxes and Fees"

THE APPLICANT herein, the Chesapeake and Potomac Telephone Company of Virginia ("Company"), by letter dated July 30, 1974, filed with the Commission a proposed amendment to its present tariffs to become effective September 1, 1974. The Company desires to delete from its "Adjustments for Certain Local Taxes and Fees" regulation the following sentence:

> Excluded from the foregoing adjustment are all franchise fees fixed by contract between the Company and the locality before 1956.

The effect of this amendment would be to allow the Company to collect from its customers who are located within any locality presently coming under this exclusion a surcharge based on the amount of the franchise fee collected by the locality in excess of one-half of one percent of the aggregate bills of such customers.

AND IT APPEARING that the proposed amendment may result in increased monthly bills for telephone service in those localities coming within the foregoing exclusion clause where a franchise fee in excess of one-half of one percent of the aggregate bills of customers is now collected, that certain members of the public may be affected by this proposed amendmen that a public hearing should be had on the amendment, that affected members of the public should be notified of the hearing, and that the effective date of the tariff should be suspended; accordingly,

IT IS ORDERED:

(1) That a proceeding be instituted, assigned Case No. 19428, docketed and set for hearing at 10:00 a.m., on November 21, 1974, in the Commission's Courtroom, Blanton Building, Bank and Governor Streets, Richmond, Virginia, and the proposed tariff amendment be filed therein;

(2) That any person desiring to intervene and be heard should give written notice thereof by November 6, 1974, to William C. Young, Clerk, State Corporation Commission, with a copy thereof to Joseph E. Blackburn, Esquire, Counsel to the Company; and that any intervener desiring a copy of the Company's proposed amended tariff should so request in his notice and it will be supplied;

(3) That the Company give members of the public who may be affected by the proposed amendment notice of this proceeding by publishing once a week for three successive weeks in a newspaper or newspapers of general circulation in the City of Norfolk, and any other areas within the Company's service territory which may be affected by the amendment, the following words and figures:

NOTICE TO THE PUBLIC

Notice is hereby given to the public that Chesapeake and Potomac Telephone Company of Virginia has filed with the State Corporation Commission a proposed amendment to its presently enforced tariffs. This amendment is not a request for a general increase in telephone rates, but it may result in increased monthly bills rendered for telephone service. The effect of the amendment would be to allow the Company to collect a surcharge from its customers who are located within a locality that imposes certain fees on the Company. The surcharge to the customers of any affected locality would be based upon the amount of the franchise fee in excess of one-half of one percent of the aggregate bills of such locality's customers. A public hearing on this matter has been scheduled for 10:00 a.m. on November 21, 1974, in the Commission's Courtroom, Blanton Building, Richmond, Virginia. Members of the public may appear and present such relevant data as may be desired. The proposed amendment may be seen at the office of the Commission, and at any Company business office where bills may be paid.

Any person desiring to intervene and be heard should so notify the Commission in writing by November 6, 1974. This notice should include the person's name, address and interest in the proceeding and should be filed with William C. Young,

Clerk, State Corporation Commission. P.O. Box 1197, Richmond, Virginia 23209, with a copy thereof to Joseph E. Blackburn, Esquire, Counsel to the Company, 703 East Grace Street, Richmond, Virginia 23219. Any intervener desiring a copy of the proposed amendment should so request in his notice and it will be supplied.

STATE CORPORATION COMMISSION
OF VIRGINIA

(4) That a copy of this order and of the proposed amendment be forthwith served by the Company on the Commonwealth's Attorney and Chairman of the Board of Supervisors, or equivalent officials, of each county, and on the Mayor and Attorney, or equivalent officials, of each city and town, within the Company's service territory which may be affected by the proposed amendment, such service to be made either (i) in person or by delivery to the customary place of business or to the residence of the person served, or (ii) by certified mail, return receipt requested;

(5) That proof of the above publication and service be furnished to the Commission at or prior to the hearing;

(6) That enforcement of the proposed amendment shall be suspended for a period of sixty (60) days to begin as of September 1, 1974, unless otherwise, in the meantime, ordered.

AN ATTESTED COPY hereof shall be sent to Joseph E. Blackburn, Esquire, Counsel to the Company, 703 East Main Street, Richmond, Virginia 23219; and an attested copy shall be delivered to the Division of Public Utilities and to the Accounting Division.

A True Copy
Teste: William B. Marye
Clerk of the State Corporation Commission

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

EX PARTE, IN RE APPLICATION OF
CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF VIRGINIA

CASE NO. 19428

PROTEST OF THE CITY OF NORFOLK

Now comes the protestant, City of Norfolk, and in response to the application of Chesapeake and Potomac Telephone Company of Virginia to amend its tariff provision providing for "Adjustments for Certain Local Taxes and Fees" filed herein, files its protest and states:

1. The City of Norfolk is a municipal corporation chartered by the General Assembly of Virginia.

2. The City of Norfolk by its common council did on April 5, 1898, grant to Southern Bell Telephone and Telegraph Company, its successors and assigns, a franchise to use the public ways of the City of Norfolk.

3. Said franchise was granted in consideration that Southern Bell Telephone and Telegraph Company, its successors and assigns, pay the City of Norfolk annually three (3) per centum of the gross earnings realized from local telephone exchange service within the corporate limits of the City of Norfolk.

4. Chesapeake and Potomac Telephone Company is a successor to Southern Bell Telephone and Telegraph Company and has lived up to its franchise agreement to the present time.

5. By its application, Chesapeake and Potomac Telephone Company seeks this Commission to relieve it of paying its negotiated franchise fee.

6. The City of Norfolk contends that the State Corporation Commission can not and/or should not interfere with the negotiated terms of a binding legal franchise.

WHEREFORE, the City of Norfolk prays that the application of Chesapeake and Potomac Telephone Company be dismissed.

CITY OF NORFOLK

By _____
Gordon B. Tayloe, Jr.
Assistant City Attorney

Leonard H. Davis
City Attorney
Gordon B. Tayloe, Jr.
Assistant City Attorney
Room 908, City Hall Building
Civic Center
Norfolk, Virginia 23501

I hereby certify that on the 10th day of October, 1974, a copy of the foregoing Protest was mailed to Mr. Joseph E. Blackburn, 703 East Main Street, Richmond, Virginia, 23219, of counsel for Chesapeake and Potomac Telephone Company of Virginia.

Gordon B. Tayloe, Jr.
Assistant City Attorney

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

CITY ATTORNEY'S OFFICE

AT RICHMOND, OCTOBER 28, 1974

APPLICATION OF

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

CASE NO. 19428

To amend its tariff providing for "Adjustments for Certain Local Taxes and Fees"

BY ORDER entered herein on August 27, 1974, enforcement of the proposed tariff revision filed herein was suspended by the Commission, pursuant to its authority under §56-238 of the Code of Virginia, for a period of sixty (60) days to begin as of September 1, 1974.

AND IT APPEARING that the Commission will be unable to conclude its investigation of and hearing on this matter within the aforesaid period of sixty (60) days,

IT IS ORDERED:

That enforcement of the proposed tariff revision be, and it hereby is, further suspended for an additional period of ninety (90) days from the day the initial suspension period expires, until the Commission otherwise orders.

AN ATTESTED COPY hereof shall be sent to Joseph E. Blackburn, Esquire, Counsel to the Company, 703 East Main Street, Richmond, Virginia 23219 and to Leonard H. Davis, Esquire, City Attorney, City of Norfolk, 908 City Hall, Norfolk, Virginia 23501; and an attested copy shall be delivered to the Division of Public Utilities and to the Accounting Division.

A True Copy

Teste: William C. Young

Clerk of State Corporation Commission.

BEFORE THE STATE CORPORATION COMMISSION

COMMONWEALTH OF VIRGINIA

RICHMOND, VIRGINIA

APPLICATION OF

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA

CASE NO. 19428

To amend its tariff providing for
"Adjustments for Certain Local
Taxes and Fees

STIPULATION
OF
DOCUMENTS AND FACTS

For purposes of the captioned proceeding only, the City of Norfolk ("Norfolk") and The Chesapeake and Potomac Telephone Company of Virginia ("C&P") stipulate and agree as follows:

DOCUMENTS

1. That the appended documents which consist of:

   a. the April 5, 1898, Franchise Agreement by and between Norfolk and C&P plus related ordinances (Attachment A);

   b. paragraph D.6., section 1 of C&P's General Regulations Tariff S.C.C. - Va. - No. 201 (Attachment B); and

c. the July, 1974, filing of C&P by which it proposes to amend paragraph D.6., section 1 of S.C.C. - Va. - No. 201 (Attachment C)

are true and accurate copies.

FACTS

2. Southern Bell Telephone & Telegraph Company of Virginia ("Southern Bell"), the original grantee of the Norfolk franchise, assigned that franchise to C&P on or about October 8, 1912; that C&P, the successor to Southern Bell, has at all times since that assignment made the payments required by the franchise and has otherwise fulfilled the obligations of the grantee set out therein.

3. The present paragraph D.6., section 1 of S.C.C. - Va. - No. 201 (Attachment B) was ordered effective by the State Corporation Commission of Virginia ("Commission") following hearings in Case No. 12823 [C&P Tel. Co. of Virginia, 12 PUR 3d 1, 517 (1956)] and following modification to conform to the Virginia Supreme Court of Appeals decision [City of Newport News v. The Chesapeake and Potomac Telephone Co., 198 Va. 645, 96 S.E. 2d 145 (1957)].

4. Today the only currently effective franchise agreement to which C&P is a party and that predates 1956 is the Norfolk franchise. Agreements with the four other localities (Lynchburg, Pulaski, Richmond and Roanoke) that had franchise agreements with C&P at the time of the Commission's 1956 order in Case No. 12823 have either been renegotiated or have expired. The Norfolk franchise is the only current franchise agreement C&P has which exceeds 0.5% and which is not surcharged to local exchange customers of the locality imposing the franchise or license fee.

5. C&P currently surcharges local exchange telephone subscribers pursuant to paragraph D.6., section 1 of S.C.C. - Va. - No. 201 in the following localities:

   Alexandria, Appalachia, Arlington County, Danville, Hopewell, Louisa, Portsmouth, Richmond, Roanoke, Staunton

6. Pursuant to section 9 of the Norfolk franchise, C&P has endeavored to negotiate amendments to the 1898 franchise. These negotiations, which have occurred since 1956, have been unsuccessful.

7. C&P's payments to Norfolk under the 1898 franchise have increased more than 300% since 1950:

Year	Amount
1950	$120,516
1955	168,080
1960	263,427
1965	241,437
1970	449,973
1971	469,034
1972	533,656
1973	550,867

REVENUE EFFECT

8. C&P represents, and Norfolk does not challenge, that the additional revenues to C&P, if its proposed tariff amendment becomes effective, will increase the Company's rate of return 3 basis points (0.03%) and that a 0.03% additive to C&P's current return will not produce a rate of return in excess of the 8.65% earnings level authorized by the Commission in C&P's last rate case (Case No. 19152).

AGREED to this 21st day of November, 1974:

CITY OF NORFOLK

Gordon B. Tayloe, Jr.
Assistant City Attorney

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

By Its Attorneys:

Joseph E. Blackburn

A. W. Whittaker

AN ORDINANCE

GRANTING PERMISSION TO THE SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, ERECT, OPERATE AND MAINTAIN SUB-WAYS, POLES, WIRES, CABLES AND OTHER ELECTRICAL CONDUCTORS UPON, OVER AND ALONG THE PUBLIC WAYS OF THE CITY OF NORFOLK, VIRGINIA.

SECTION 1. Be it ordained by the Select and Common Council of the City of Norfolk, Virginia: That permission be, and hereby is, granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, to erect, operate and maintain its lines, including the necessary poles, wires and fixtures, upon, along and over subways, with the necessary manholes and other appurtenances, under the surface of such public ways for the purpose of transmitting communication by electricity, the use of such public ways to be under such regulation affecting the general supervision and maintenance of such public ways as may be prescribed by law and the ordinances of said city; provided, however, that within that section of the city as described in "An Ordinance extending the business section of the city in which conduits are to be placed", passed by the Common Council on February 8th, 1898, and by the Select Council on February 24th, 1898, no pole or overhead fixture shall be erected, except poles and fixtures for local distribution; the use of such public ways to be subject to the general regulations relating thereto as may be prescribed by the laws of the State of Virginia and the ordinances of the City of Norfolk governing the manner of the use of such public ways as aforesaid.

SECTION 2. In consideration of the rights herein granted to the Southern Bell Telephone and Telegraph Company, its successors and assigns, said Company shall supply to the City of Norfolk, when demanded by the City Councils, free service for the fire alarm wires of the city, such wires to be placed upon the topmost arms or fixtures of all poles erected and space shall also be provided by said Company, free of cost to said City, within all subways constructed under the provisions of this ordinance for such wires. The said Company shall also furnish, free of cost to said City, ten telephones to be placed as designated by the City Councils, and shall also pay to said city annually three (3) per centum of the gross earnings realized from local telephone exchange service within the corporate limits of the city of Norfolk; but this does not exempt the said Southern Bell Telephone and Telegraph Company, its successors and assigns, from any license or other tax or assessment that may be levied by the City of Norfolk; and as a guarantee of the faithful performance of the foregoing provisions the books and system of accounts, showing the gross income derived from such local exchange telephone business as aforesaid, shall be subject, at the end of each fiscal year, to inspection and verification by the Auditor of the City of Norfolk; and it shall be the duty of the Auditor, upon the request of the Finance Committee, to so inspect, audit and report said accounts and verify such reports as may be made by the said Southern Bell Telephone and Telegraph Company, its successors and assigns.

SECTION 3. The Southern Bell Telephone and Telegraph Company, its successors and assigns, before proceeding with the work of erecting poles, or laying subways, or constructing any of the details connected with this franchise, shall file a written description thereof with the City Engineer at least one week before the beginning of said work so as to give the said Engineer time to examine into the matter, and shall protect and not interfere in any way with the existing gas, water, sewer or other pipes in the streets and avenues of said city, and shall, upon notification from the said Engineer, make good to the satisfaction of the owners of any pipes which may be damaged by it, any damage to said pipes done by it or its workmen, and should the said Southern Bell Telephone and Telegraph Company, its successors and assigns, refuse at any time to obey the directions of the said City Engineer in the premises and fail to make good any damage whatever to gas, water, sewer or other pipes, or to relay the pavements of said city to the satisfaction of the City Engineer, then the Southern Bell Telephone and Telegraph Company, its successors and assigns, shall be liable to a fine, payable to the City of Norfolk, of not exceeding $100.00 a day, for each and every day's delay in carrying out said order, after reasonable notification thereof, to be recovered by law; and should the Southern Bell Telephone and Telegraph Company, its successors and

assigns, at the expiration of ten days from the termination of such reasonable notice still fail to carry out the directions of the City Engineer, then the said Engineer is hereby authorized and empowered to have said damage repaired at the expense and cost of the said Southern Bell Telephone and Telegraph Company, its successors and assigns; and should they fail to pay the expensesand cost of said work promptly upon the bills therefor being presented, then the franchise herein granted to the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall at once cease and determine, if so ordered by the City Councils; provided, however, that if the failure to carry out any directions from the City Engineer as provided in this section, shall be found to have been unavoidable, then the said fine herein provided for shall be remitted. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall within sixty days from the passage of this ordinance enter into a bond payable to the City of Norfolk in a penalty of ten thousand dollars, with security satisfactory to the Councils of said City, conditioned to indemnify said City against any damage or lost that may result in any way from the prosecution of said company's work, whether to gas, water, sewer, or other pipes, buildings or individuals, or any other damage to property or persons, and for the proper restoration and repair of all streets and pavements in anyway disturbed by it; but the taking of such bond of ten thousand dollars by said city shall not be construed as limiting to this amount the liabilities of said Southern Bell Telephone and Telegraph Company, its successors or assigns, for any damage or loss that may recall

in any way from the prosecution of its work, as aforesaid; and the Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, upon notification by the City Engineer that he intends to lay sewer or water pipes, at once proceed to change the location of any subways constructed by it that may interfere with the progress of the work, or else protect the same at its own expense and without cost to the city.

SECTION 4. All work under the ordinance shall be under the supervision of the Board of Electrical Control and in compliance with the ordinances of the City of Norfolk.

SECTION 5. This ordinance is subject to the further condition that said Southern Bell Telephone and Telegraph Company, its successors and assigns, shall, within sixty days from the passage of this ordinance, and before the same shall take effect, make and enter into a bond in a penalty of fifty thousand dollars, with security satisfactory to the Councils of the City of Norfolk, and payable to said city with condition to indemnify and save harmless the said city from any and all damage or damages for which the city may become liable to the Southern States Telephone Company, its successors or assigns, by reason of the passage of this ordinance, or any section hereof, in consequence of the same being in conflict with the ordinance entitled "An ordinance granting permission to W. R. Brown and J. A. Helvin, and associates, to erect, maintain and conduct under certain streets subways or conduits, pipes or continuous ducts of metal stone or other durable material, and to conduct within the same wires for certain electrical business, and to do a telephone business", adopted

by the Common Council August 6th, 1895, and by the Select Council August 13th, 1895; provided, however, that the city of Norfolk shall notify the Southern Bell Telephone and Telegraph Company, its successors or assigns, of any suit or action which may be brought by the Southern States Telephone Company, its successors or assigns, against the said city for the causes aforesaid, and permit the said Southern Bell Telephone and Telegraph Company, its successors and assigns, to join with said city in the defence thereof.

SECTION 6. The privileges conferred by this ordinance are granted upon the condition that the local exchange telephone service to be furnished by the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall be equal in all respects to the service furnished by said Company in other cities in the State of Virginia of about the same population as the city of Norfolk; otherwise the rights herein granted shall cease and determine; provided, further, that the Southern Bell Telephone and Telegraph Company, its successors or assigns, shall not furnish service at rates below those from time to time charged by any other Telephone Company in the city of Norfolk for the same service.

SECTION 7. Nothing contained in this ordinance shall be construed as granting to the Southern Bell Telephone and Telegraph Company, its successors and assigns, and exclusive right or rights, or as preventing the granting of similar privileges to other individuals or companies for like purposes on the public ways of the city of Norfolk.

SECTION 8. The Southern Bell Telephone and Telegraph Company, its successors and assigns, shall at all times be subject to the general ordinances of the city now in existence or which may be hereafter passed, relative to the manner of the use of public streets or other public places by telegraph or telephone companies.

SECTION 9. The right to amend, alter or repeal this ordinance is hereby reserved to the city of Norfolk at its pleasure and without making compensation for any damage that may result from such amendment, alteration or repeal.

SECTION 10. The Southern Bell Telephone and Telegraph Company is authorized to use the conduits of any other company, upon such terms as may be mutually agreed upon between such companies, and nothing in an ordinance entitled "An Ordinance granting permission to The American Telephone and Telegraph Company of Virginia to construct, erect, operate and maintain sub-ways, poles, wires, cables and other electrical conductors on the public ways of the city of Norfolk, Va.", passed by the Common Council of the city of Norfolk, on the 7th day of April, 1897, and by the

Select Council of said city on the 11th day of May, 1897, shall be construed as forbidding said American Telephone and Telegraph Company of Virginia, from entering into contracts with the Southern Bell Telephone and Telegraph Company for the use of its conduits.

SECTION 11. This ordinance shall be in force from its passage.

Adopted by the Common Council April 5th, 1898.

(Sd.) Jas. L. Winston,
President Common Council.

Adopted by the Select Council April 12th, 1898.

(Sd.) J. C. Carroll,
President Select Council.

A Copy- teste: (Sd.) H. S. Herman,
City Treasurer.

GENERAL REGULATIONS

D. PAYMENT ARRANGEMENTS AND CREDIT ALLOWANCES (Cont'd)

6. Adjustments for Certain Local Taxes and Fees

When a political subdivision of the state charges the Company a license tax or franchise fee at a flat rate or based on receipts or based on poles, wires or conduits, so much of the aggregate amount of such taxes and fees as exceeds one-half of one per cent of the aggregate bills of such customers for exchange service will be billed pro rata to the exchange customers receiving service within the political subdivision.

Excluded from the foregoing adjustment are all franchise fees fixed by contract between the Company and the locality before 1956.

E. LIABILITY OF THE TELEPHONE COMPANY

In view of the fact that the customer has exclusive control over the use of the service and facilities furnished by the Telephone Company, and because of unavoidableness of errors incident to the services and to the use of such facilities of the Telephone Company, services and facilities are furnished by the Telephone Company subject to the terms, conditions and limitations herein specified:

1. Service Irregularities

The liability of the Telephone Company for damages arising out of mistakes, omissions, interruptions, delays, errors or defects in transmission, or failures or defects in facilities furnished by the Telephone Company, occurring in the course of furnishing service or other facilities and not caused by the negligence of the customer, shall in no event exceed an amount equivalent to the proportionate charge to the customer for the service or facilities affected during the period such mistake, omission, interruption, delay, error or defect in transmission, or failure or defect in facilities continues after notice and demand to the Telephone Company.

When facilities of others are used in establishing connections to points not reached by the Telephone Company's facilities, the Telephone Company is not liable for any act or omission of others furnishing such facilities.

Issued: October 11, 1967 Effective: October 16, 1967

By R. W. Neale, General Marketing Manager, 703 East Grace Street, Richmond, Virginia

C&P Telephone

703 East Grace Street
Richmond, Virginia 23219
Telephone 804-772-2000

July 30, 1974.

State Corporation Commission,
Richmond, Virginia.

Gentlemen:

Attached, in duplicate, for filing with your Honorable Commission is the following tariff page to become effective September 1, 1974.

General Regulations Tariff, S.C.C.-Va.-No. 201
Section 1, 1st Revised Page 11

This filing withdraws the exclusion to the regulation concerning Adjustments for Certain Local Taxes and Fees and will have the effect of establishing a surcharge for customers within the City of Norfolk.

Very truly yours,

ORIGINAL SIGNED BY
JOHN D. LANDERS

General Staff Supervisor.

DEC 24 1974
CITY ATTORNEY'S OFFICE

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, DECEMBER 20, 1974

APPLICATION OF

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA

CASE NO. 19428

To amend its tariff providing for
"Adjustments for Certain Local
Taxes and Fees"

ORDER GRANTING APPLICATION

This matter came on for consideration upon application heretofore filed on July 30, 1974, upon briefs submitted by counsel for applicant and for the protestant, City of Norfolk, and upon argument by counsel.

It appearing to the Commission for reasons stated in a separate memorandum opinion of even date herewith that the relief sought should be granted, it is, hereby

ADJUDGED AND ORDERED that the proposed amendment to GENERAL REGULATIONS TARIFF S. C. C. - Va. - No. 201, The Chesapeake & Potomac Telephone Company of Virginia, Sec. D. par. 6, Adjustments for Certain Local Taxes and Fees, as heretofore filed in this proceeding, be and the same hereby is to become effective as of January 1, 1975.

AN ATTESTED COPY hereof shall be sent to Joseph E. Blackburn, Esquire, Counsel to the Company, 703 East Grace Street, Richmond, Virginia 23219; and to Leonard H. Davis, Esquire, City Attorney, City of Norfolk, 908 City Hall, Norfolk, Virginia 23501; and an attested copy shall be delivered to the Division of Public Utilities and to the Accounting Division.

A True Copy

Teste: William P. Young

Clerk of State Corporation Commission.

APPLICATION OF

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA

To amend its tariff providing for "Adjustments for Certain Local Taxes and Fees"

CASE NO. 19428

OPINION of the Commission

The only point of law raised by the City of Norfolk in the captioned proceeding is whether the State Corporation Commission has the legal authority, if it be so disposed to act, to authorize C&P to surcharge its Norfolk subscribers the amount of any local tax on franchise fee paid to that city to the extent that such fee or tax exceeds one-half of one percent of local exchange revenues. The Company's present liability for such tax or fee arises from an ordinance adopted by the Common Council of Norfolk on April 5, 1898, which authorized C&P's predecessor, Southern Bell Telephone and Telegraph Company, its successors and assigns, to construct and maintain necessary facilities within the public ways of that city to provide "communication by electricity." The ordinance required certain other minor considerations from the Company and exacted the execution of certain bonds to protect the city in prescribed

instances. It is particularly noted that the ordinance is just that - an ordinance granting permission to C&P's predecessor to occupy public ways upon the meeting of certain conditions precedent and subsequent. The ordinance, by its terms, can be unilaterally amended, altered or repealed by the city "... at its pleasure and without making compensation for any damage that may result..." from such action.

The ordinance does not grant exclusive rights to the Company, but specifically reserves the right to grant similiar "privileges to other individuals or companies for like purposes on the public ways of the city.... ."

The ordinance further provides that the Company, it successors and assigns shall be, and remain, subject to general ordinances of the city relative to the manner of use of its public streets and places.

As the Company points out, telephone rates currently paid by C&P subscribers outside Norfolk reflect, in part, the added cost to C&P attributable to the 1898 ordinance which is considered by the parties to be in force and effect. Since 1955, following an order by this Commission in Case No. 12823, Re: Chesapeake and Potomac Telephone Company of Virginia, 12 PUR 3d 1, C&P has been permitted

to surcharge telephone subscribers the amount of license taxes and franchise fees in excess of one-half percent imposed by the locality in which the subscribers receive service. Excepted from this right to surcharge are "all franchise fees fixed by contract between the company and the locality before 1956."

At the time of the aforementioned order five localities fell within the exemption; today, only Norfolk claims it since the four other municipalities appear to have had franchise agreements as provided by statute, which are limited in term. Upon renewal subsequent to 1956, all such agreements were subject to the present surcharge provision of C&P's tariff.

It appears that the Norfolk ordinance would have been controlled by Sections 1287 and 1290, 1887 Code of Virginia. Section 1287 authorizes every telegraph and telephone company, incorporated by Virginia, any other state, or by the United States, to construct and maintain its facilities along state or county roads or works, over the waters of the State, and along all railroads, provided the ordinary use thereof is not obstructed. This code section also authorizes the construction, maintenance and operation of telegraph and telephone facilities "... along and over the streets of any city or town with the council thereof."

Section 1290, Code of 1887, reserves to the General Assembly, at its pleasure, the right to revoke or modify the rights and privileges acquired under Sections 1287 - 1289, the latter two sections relating to contracts for right-of-way, the determination of compensation therefor and title thereto.

In the present proceeding, the City of Norfolk contends, inter alia, that the payment required by the 1898 ordinance is a franchise fee, not a rate or charge, for the use of the streets - an adaptation of Judge Catterall's reasoning in his opinion in Case No. 12823 in which he said: " ... The order does not apply to franchise fees based on pre-existing contractual arrangements. Those arrangements were entered into voluntarily, and are in the nature of payments for easements. ..." Re: Chesapeake & Potomace Telephone Company, 12 PUR 3d 519-520.

The City further argues that the present 3 percent charge cannot be a tax because such can't be levied by contract, citing Danville T & P Co. v. Danville, 168 Va. 430 (1937).

We are of the opinion that it makes no difference whether the present charge made by Norfolk is called a tax or a franchise fee in payment of easements; it is within the discretion of the Commission to authorize that it be treated the same as are all other franchise fees

and license taxes imposed by the municipalities of this State upon C&P, i.e., that all such charges in excess of one-half of one percent of the aggregate bills of such customers for exchange service will be billed pro rata to the exchange customers receiving service within the political subdivision.

It is recognized that there are jurisdictions which treat franchise payments to municipalities as compensation for use of the streets - to be classed as "operating expense" and spread equally among all subscribers. On the other hand, at least one such decision recognizes that if such payments appear excessive or out of proportion to the privilege accorded to use city property, the regulatory body "... would have power to fix the proper proportion of the payment to be allocated to operating expense." State Ex Rel. Pacific T. & T. Co. v. Dept. of Public Service, 142 P (2d) 498, 52 PUR (NS) 6, at 61 (1943), a case relied upon by Judge Catterall in his opinion in Case No. 12823.

However, looking to the decisions of our Supreme Court, it seems evident that the charge fixed by the Norfolk ordinance of 1898 is more in the form of a tax than it is any sort of contractual payment for use of easements.

As earlier noted, the ordinance, by its terms, can be amended or repealed at the will of the city and the General Assembly could have negated or altered the privilege of the original company at its pleasure.

Under such circumstances we cannot conclude that a contract ever existed between the parties, only a revocable license for which a continuing charge was made.

In Danville T & P Co., above, cited by the City of Norfolk, we find further support for the proposition that the charge arising from the 1898 ordinance was a tax. Speaking of the agreement in issue in the Danville case, the Court said: "[4] Here there is a consideration moving by consent from and to each of the parties. The amount to be paid is fixed. The use to be allowed is determined. Neither present nor succeeding councils of the city may change or vary the amount to be paid, or the terms of the contract, except by mutual consent of the parties. Yet no consent is required for the imposition or change of a tax or taxable rate. The ordinance provision has all the characteristics of a contract and lacks those of a tax." 168 Va. 430 at 436.

We conclude that the subject ordinance in this case possesses no attributes of a franchise contract with payment for use of the city's streets, but, to the contrary, it has the necessary characteristics of a tax. But, as earlier observed, we know of no statutory prohibition against our granting the tariff change requested by C&P, regardless of how one defines the nature of the present charge. No good reason

is apparent why the residents of Norfolk should be privileged to enjoy a revenue source from non-residents far in excess of that allowed any other municipality. The facts stipulated by the parties show that C&P payments to Norfolk have increased more than 300% between 1950 and 1973, rising from $120,516 to $550,867. It is our judgment that the nature of the payments to Norfolk pursuant to the ordinance of 1898 does not require that we treat them preferentially in relation to similiar charges by other Virginia cities.

VIRGINIA:

BEFORE THE STATE CORPORATION COMMISSION

APPLICATION OF

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF VIRGINIA

CASE NO. 19428

To amend its tariff provision providing for
"Adjustments for Certain Local Taxes and Fees"

NOTICE OF APPEAL

Protestant, City of Norfolk, hereby gives notice of appeal from an Order Granting Application entered in the above captioned case on December 20, 1974.

ASSIGNMENTS OF ERROR

1. The Commission erred in arbitrarily and unreasonably disregarding its earlier determination of the matters in controversy in a case arising between the same parties, involving the same issues and substantially the identical facts as those in the case at bar, and which determination was approved and affirmed on appeal by the Supreme Court of Appeals of Virginia.

2. The Commission erred in failing to follow the

principle of stare decisis in regard to controlling questions of law decided by it in an earlier case arising between the same parties, involving substantially the identical facts as those in the case at bar, and which determination was approved and affirmed on appeal by the Supreme Court of Appeals of Virginia.

3. The Commission erred in that its action exceeds the powers granted to it by the Constitution, statutes and general law of the State of Virginia.

4. The Commission erred in that its action is contrary to the law and is unsupported by the evidence.

CITY OF NORFOLK

By _____
Harold P. Juren
Assistant City Attorney

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City Attorney
Harold P. Juren
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Norfolk, Virginia 23501

I hereby certify that on the 9th day of January, 1975, true copies of the foregoing Notice of Appeal and Assignments of Error were mailed to Mr. A. W. Whittaker, Counsel for the Chesapeake and Potomac Telephone Company of Virginia, 703 East Grace Street, Richmond, Virginia, 23219; to Mr. Richard D. Rogers, Jr., General Counsel, State Corporation Commission, Blanton Building, Richmond, Virginia; and to The Honorable Andrew P. Miller, Attorney General of the State of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219.

Harold P. Juren
Assistant City Attorney