

## Telecoms Proceed With Leaner Baltimore Rate Hike Suit

By **Jimmy Hoover**

*Law360, Washington (June 15, 2016, 9:16 PM ET)* -- A Maryland federal judge spared a lawsuit Tuesday that several telecoms brought against the Baltimore City Council over its decision to triple underground conduit fees, but tossed the Fifth Amendment takings and other claims.

U.S. District Judge J. Frederick Motz refused to toss unjust enrichment claims and allegations that the rate hike violated the Telecommunications Act, but said that a claim over the city's threats to shut down the telecoms' operations if they did not pay the fees was not "ripe" given Baltimore had yet to act on the threat.

The group includes Level 3 Communications LLC and subsidiaries of Comcast Corp. and CenturyLink Inc., among others.

In upholding the Telecommunications Act claim, Judge Motz said the group "pleaded facts showing that the city's increase in fees had a prohibitive effect on their provision of telecommunications services." The judge noted that the rate hike was "both sudden and significant."

He added that the telecoms had pled facts sufficient to show unjust enrichment.

"[T]he city admits that if revenues from the conduit fee exceed the city's costs for operating and maintaining the conduit, the fee is unlawful," Judge Motz wrote. "Plaintiffs, throughout their complaint, plead exactly this."

Still, in addition to nixing the Fifth Amendment claim, the court dismissed Comcast's claim that the rate hike violated the Cable Act by exceeding 5 percent of the company's revenue.

According to Judge Motz, that rule applies only to franchise fees, and franchise fees have to have been based on Comcast's status as a cable operator.

"Each conduit user, cable operator or not, is subject to the same fee," he said.

In an interview with Law360, the telecoms' attorney Paul Werner of Sheppard Mullin Richter & Hampton LLP said he was largely "pleased" with the ruling.

"The court has determined that our core claims have merit, and we look forward to proving those on the merits going forward," he said. As to those claims that did not survive, Werner noted that Judge Motz

simply found them unripe, leaving the telecoms the ability to bring the claims at a later date.

The dispute stems from the city council's September decision to hike the telecoms' rates from a decades-old rate of between 83 and 98 cents to \$3.33 per linear foot of space that equipment occupies in the city-owned underground conduit system, per year.

The companies sued in late February, prompting a motion to dismiss from the city.

The telecom providers were allegedly being held "captive" by the city's threats to block their ability to operate if they withhold payment of the fees. The companies have also filed a motion for preliminary injunction.

The prospect of disconnection leaves the providers without "legal, practical or economically viable alternative to maintaining their existing networks in the rights of way," and threatens essential phone and emergency services to residents and businesses, the companies have argued.

In opposition to the injunction bid, the city said the companies were unlikely to prevail on the merits of the case. The carriers had not shown how the increase was illegal, and public interest factors favored Baltimore because the companies' failure to pay their bills would impede the ability to repair the nearly 100-year-old system, the city said.

Counsel for the city could not be reached Wednesday for comment.

The communications providers are represented by Christopher Loveland, Paul Werner and Megan Grant of Sheppard Mullin Richter & Hampton LLP. Several of the companies are additionally represented by Leslie G. Moylan, Maria T. Browne and T. Scott Thompson of Davis Wright Tremaine LLP, as well as in-house counsel.

Baltimore is represented by Matthew W. Nayden, Sara E. Gross, and Jason R. Foltin of the Baltimore City Department of Law.

The case is Zayo Group LLC et al. v. Mayor and City Council Of Baltimore et al., case number 1:16-cv-00592, in the U.S. District Court for the District of Maryland.

--Editing by Edrienne Su.

---