Locality may impose public rights-of-way use fee and business license tax on telephone company providing telephone exchange service in locality.

The Honorable James L. Williams
Treasurer for the City of Portsmouth
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You ask whether, if the City of Portsmouth adopts an ordinance imposing a public rights-of-way use fee on telephone companies, the city may continue to collect an annual business license tax on telephone companies conducting a telephone exchange in the city.

Section 56-458(A) of the Code of Virginia grants telephone companies the authority to occupy and use public parks, roads, streets and alleys in any county, city or town for the erection of poles, wires and cables or for laying underground conduits. If the road or street is in the State Highway System or the secondary system of state highways, the company must first obtain a permit from the Commonwealth Transportation Board. Otherwise, the company must obtain the consent of the local governing body. Section 56-458(B) states:

No locality or the Commonwealth Transportation Board shall impose any fees on a certificated provider of telecommunications service for the use of public rights-of-way except in the manner prescribed in § 56-468.1.

Section 56-468.1(B) establishes a public rights-of-way use fee chargeable to a provider of telecommunications service. The fee is imposed by the Commonwealth Transportation Board or by a locality if the streets in the locality are not maintained by the Virginia Department of Transportation. Section 56-468.1(B) provides, in part:

Notwithstanding any other provisions of law, there is hereby established a Public Rights-of-Way Use Fee to replace any and all fees of general application (except for zoning, subdivision, site plan and comprehensive plan fees of general application) otherwise chargeable to a certificated provider of telecommunications service by the Commonwealth Transportation Board in connection with a permit for such occupation and use granted in accordance with § 56-458 or § 56-462. Cities and towns whose public streets and roads are not maintained by the Virginia Department of Transportation, and any county
that has withdrawn or elects to withdraw from the secondary system of state highways ... may impose the Public Rights-of-Way Use Fee only by local ordinance.

The enabling legislation for the local assessment of business license taxes is set out in Chapter 37 of Title 58.1. Section 58.1-3703(A) authorizes a locality to adopt an ordinance assessing a business, professional and occupational license ("BPOL") tax on the gross receipts of any person, firm or corporation that is operating a licensable business within the locality. Section 58.1-3731 expressly authorizes a locality to impose the BPOL tax on telephone companies providing a telephone exchange service in the locality.

The rights-of-way use fee and the BPOL tax are dissimilar in purpose and application. The public rights-of-way use fee is imposed on the telephone company’s use of the public parks, roads, streets and alleys, with the amount of the fee measured by the number of highway and street miles in the Commonwealth, the number of feet of new installations and the number of access lines in the Commonwealth. In contrast, the BPOL tax is imposed on the telephone company for the privilege of engaging in business in the locality, with the amount of the tax measured by the company’s gross receipts accruing from sales to the ultimate consumers in the locality. Moreover, the amounts imposed by a locality under the BPOL statutes constitute a tax rather than a fee.

It is clear that the BPOL tax is neither a fee “for the use of public rights-of-way” under § 56-458(B) nor a fee “of general application … chargeable … in connection with a permit for such occupation and use” under § 56-468.1(B). No other language in the public rights-of-way statutes indicates a legislative intent to prohibit a locality that imposes a public rights-of-way use fee from imposing a BPOL tax on a telephone company. Accordingly, it is my opinion that collection of a public rights-of-way use fee on a telephone company under § 56-468.1 is not prevented by the collection of a BPOL tax on the company under § 58.1-3731.

1Section 56-458(A).
2Id.
3Section 56-468.1(B).
4Sections 58.1-3700 to 58.1-3735. I assume for purposes of this opinion that the city’s present license tax on telephone companies conducting a telephone exchange in the city is imposed pursuant to this enabling legislation.

5See § 56-468.1(C), (D). The Department of Transportation is to calculate the fee annually. Section 56-468.1(C). The telephone company collects the fee by adding it to the ultimate end user’s monthly bill and remits the fee either to the Department of Transportation or to the locality that imposes the fee. Section 56-468.1(G), (H)(1)-(2).

7Section 58.1-3731.