

**IN THE CIRCUIT COURT OF BUTLER COUNTY
STATE OF MISSOURI
CIVIL DIVISION**

POPLAR BLUFF INTERNET, INC.,)	
)	
PLAINTIFF,)	
)	
v.)	CASE No. 11BT-CV00566
)	
THE CITY OF POPLAR BLUFF, ET AL.)	
)	
DEFENDANTS.)	

**PLAINTIFF’S MOTION FOR RECONSIDERATION OF THE COURT’S
GRANTING DEFENDANTS SUMMARY JUDGMENT AS TO PLAINTIFF’S SECOND
AMENDED PETITION AND AFFIRMATIVE DEFENSES FOUR THROUGH SIX**

COMES NOW, Plaintiff Poplar Bluff Internet, Inc., by and through its counsel, and submits the following Motion for Reconsideration of the Court’s Granting Defendants Summary Judgment as to Plaintiff’s Second Amended Petition and Affirmative Defenses Four through Six and for leave to supplement Plaintiff’s Response to Defendants’ previously filed Motion for Summary Judgment:

Plaintiff filed its Second Amended Petition claiming that Defendants illegally changed its Open Access Policy and setting rates far in excess of Defendants’ costs in violation of §392.410 RSMo. Defendant City of Poplar Bluff filed a Counterclaim against Plaintiff claiming Plaintiff owed Defendant City of Poplar Bluff for services rendered. Defendants subsequently moved for summary judgment as to Plaintiff’s Second Amended Petition, in part, on the basis that Defendants did not provide “telecommunications” services and, thus, §392.410 RSMo. was not applicable. Likewise, Defendants argued that they were entitled to summary judgment as to Plaintiff’s affirmative defenses to Defendant City of Poplar Bluff’s Counterclaim.

On November 25, 2011, the Court granted Defendants summary judgment as to Plaintiff’s Second Amended Petition against the defendants. On March 29, 2012, the Court

granted an interlocutory order dismissing Plaintiff's Affirmative Defenses four through six to Defendant City of Poplar Bluff's Counterclaim. Since those interlocutory orders were issued, Plaintiff has discovered several new facts that undermine and directly refute the arguments made by Defendants. Accordingly, Plaintiff requests that the Court review these newly discovered facts and set aside its previous interlocutory orders granting Defendants' summary judgment as to Plaintiff's Second Amended Petition and Affirmative Defenses four through six to Defendant City of Poplar Bluff's Counterclaim. In addition, Plaintiff seeks leave to supplement its previously-filed Response to Defendants' Motion for Summary Judgment.

STATEMENT OF RELEVANT NEWLY DISCOVERED FACTS

1. On May 17, 1999, the City of Poplar Bluff passed an ordinance employing United Telesystems, Inc. "to develop a broadband telecommunications master plan for the City of Poplar Bluff." A copy of the ordinance is attached hereto as Exhibit A.
2. On June 30, 1999, United Telesystems, Inc. issued its feasibility study, which was titled "The City of Poplar Bluff, Missouri Broadband Telecommunications Initiative." A copy of the feasibility study is attached hereto as Exhibit B.
3. The introduction to the feasibility study reads:

"Following, is an executive summary of an independent broadband telecommunications systems business case (the "Business Case") prepared by United Telesystems, Inc. ("UTI") which assesses and evaluates opportunities available to the City of Poplar Bluff, Missouri (the "City") associated with the construction and operation of a broadband telecommunications network (the "Network" or the "Broadband Network") in and around the City of Poplar Bluff, Missouri." (Exhibit B)
4. The feasibility study then listed the "Potential Services" the City of Poplar Bluff could provide if the "Broadband Telecommunications Network" was constructed and operated,

which included:

“Broadband Video Services (Cable Television)
Local Area Telecommunications Networking
Wide Area Telecommunications Networking
Competitive Local Exchange Carrier Telephone Service
Fiber Optic Transport
Long Distance Telephone Service
High Speed Broadband Internet Access
Utility Management” (Exhibit B)

5. On Monday, November 15, 1999, the City of Poplar Bluff voted and adopted Ordinance Number 6224, titled “AN ORDINANCE CALLING FOR A SPECIAL ELECTION IN THE CITY OF POPLAR BLUFF, MISSOURI, ON FEBRUARY 8, 2000 TO DETERMINE WHETHER THE CITY SHOULD ISSUE ITS GENERAL OBLIGATION BONDS IN THE AMOUNT OF \$9,020,000 FOR THE PURPOSE OF ESTABLISHING AND CONSTRUCTING AND EQUIPPING A BROADBAND TELECOMMUNICATION SYSTEM.” A copy of the ordinance is attached hereto as Exhibit C.
6. On February 7, 2000, the City of Poplar Bluff put an advertisement in the Daily American Republic explaining the aforementioned bond initiative to the voters of the City of Poplar Bluff. A copy of the advertisement is attached hereto as Exhibit D.
7. In the February 7, 2000 advertisement, the City of Poplar Bluff listed certain “facts about this proposed system,” which included the following:

“During the beginning of 1999, the City of Poplar Bluff commissioned the preparation and submission of a feasibility study which clearly demonstrated the

deployment of a broadband telecommunications network by the City is a viable, financially sound endeavor and is in the best interest of our community”

“The system will be capable of providing a telecommunications network for (a) cable television service, (b) distance learning, (c) any energy management and (d) high speed data transfer.” (Exhibit D)

8. The bond issue passed on February 8, 2000. (Exhibit E)
9. The Official Statement for the bonds that were issued states that “[t]he bonds were approved at an election duly held in the City on February 8, 2000, at which more than two-thirds of the qualified voters of the City voting on the question voted in favor of the issuance of bonds of the City in the amount of \$[Principal Amount]. The Bonds are being issued pursuant to the Bond Ordinance for the purpose of establishing, constructing and equipping a broadband communications system. . . The City will deposit the proceeds of the Bonds in the Project Fund established under the Bond Ordinance. Such proceeds will be used by the City solely to pay costs of such improvements, in accordance with the report and estimate and plans and specifications prepared by United Telesystems, Inc., the City’s consultant.” A copy of the Official Statement is attached hereto as Exhibit E.
10. The “telecommunications network” was constructed and began offering cable television services in September 2001. (Exhibit G)
11. The “telecommunications network” began offering telecommunications services in February 2002. (Exhibit G)
12. Beginning in 2002, §392.410 RSMo. provided that the Missouri Public Service Commission conduct surveys of all telecommunications systems operated by municipalities. (Exhibit F)

13. The Missouri Public Service Commission issued a report dated December 27, 2002, which detailed its survey of telecommunications systems operated by municipalities, including the City of Poplar Bluff. A copy of the report is attached hereto as Exhibit F.
14. The City of Poplar Bluff answered the aforementioned survey to the Missouri Public Service Commission, in which the City of Poplar Bluff answered “Yes” to the question of whether the City of Poplar Bluff “own[s] or operate[s] a telecommunication network offering services to the public.” A copy of the City of Poplar Bluff’s survey answers is attached hereto as Exhibit G.
15. On September 28, 2004, the Missouri Public Service Commission sent the City of Poplar Bluff a survey stating “the Missouri legislature passed House Bill No. 1402 to provide certain guidelines and standards by which municipalities and political subdivisions may own and operate Telecommunications or telecommunication facilities and services.” A copy of the survey answer is attached hereto as Exhibit H.
16. The City of Poplar Bluff completed and returned the survey for its “telecommunications network.” (Exhibit H)
17. On October 4, 2007, the Missouri Public Service Commission sent the City of Poplar Bluff a survey stating “Section 392.410 of the Missouri Revised Statutes directs the Missouri Public Service Commission to perform an annual economic impact study of the effects of municipally owned telecommunications networks.” A copy of the survey answer is attached hereto as Exhibit I.
18. The City of Poplar Bluff completed and returned the survey for its “telecommunications network.” (Exhibit I)

19. From 1999 to the present, Poplar Bluff Internet, Inc., has owned and operated a wireless telecommunications facility in and around Poplar Bluff, Missouri. (Affidavit of Brian Becker, attached hereto as Exhibit J)
20. From 1999 to the present, Poplar Bluff Internet, Inc. has purchased wholesale DSL services from Socket Telecom, Southwestern Bell Telephone, AT&T, and Windstream Communications.(Exhibit J)
21. From 1995 to the present, Poplar Bluff Internet, Inc. purchased or requisitioned wholesale data and telecommunications services from the following telecommunications providers: Nitel, AT&T, Socket Telecom, Level3, Big River Telephone, Southwestern Bell Telephone, and Alltel. (Exhibit J)
22. From 1995 to the present, Poplar Bluff Internet, Inc. has been a provider of telecommunications (or a telecommunications provider) in and around Poplar Bluff, Missouri. (Exhibit J)
23. From 2002 to 2011, Poplar Bluff Internet, Inc., purchased Open Access connections from City Cable of Poplar Bluff. (Exhibit J)
24. City Cable's Open Access service included no Internet Service and required Poplar Bluff Internet, Inc., to provide its own Internet Service. (Exhibit J; see also Pry deposition, attached hereto as Exhibit K)
25. City Cable of Poplar Bluff never sold Internet Service to Poplar Bluff Internet, Inc. (Exhibit J)

REASON PREVIOUSLY ENTERED ORDER SHOULD BE SET ASIDE

At the time the Court entered its interlocutory orders granting Defendants summary judgment as to Plaintiff's Second Amended Petition and Affirmative Defenses four through six

to Defendant City of Poplar Bluff's Counterclaim, none of the above-referenced facts was considered. Plaintiff only discovered these facts and materials after the Court entered its interlocutory orders. Now that the information is available, there certainly is a question of material fact as to whether Defendants were/are operating a "telecommunications" network such that they are constrained by the provisions of §392.410 RSMo.

As the above facts and exhibits show, the City of Poplar Bluff commissioned a feasibility study with respect to a "telecommunications master plan." (emphasis added) The feasibility study was titled "The City of Poplar Bluff, Missouri Broadband Telecommunications Initiative." (emphasis added) The City of Poplar Bluff then passed an ordinance permitting a bond initiative for "the purpose of constructing and equipping a broadband telecommunications system. (emphasis added) The bond initiative passed and the bonds issued were to "pay costs of such improvements, in accordance with the report and estimate and plans and specifications prepared by United Telesystems, Inc." This study, of course, was titled and set forth plans to build a telecommunications network. (Exhibit A)(emphasis added)

Accordingly, if the City of Poplar Bluff now is arguing that the tax money obtained through this bond initiative did NOT build a "telecommunications network," the City of Poplar Bluff would be in direct violation of the bond terms and would be subject to a taxpayers' suit to recover the money that was illegally spent building something other than a "telecommunications network" as provided by the "report and estimate and plans and specification prepared by United Telesystems, Inc." This is especially true since the City of Poplar Bluff advertised the bond initiative as being for the construction of a "telecommunications network." (Exhibit E) Surely the City of Poplar Bluff is not arguing that it illegally spent \$9 million to build something else.

These additional facts lead, at the very least, to a genuine issue of material fact precluding Defendants from the right to summary judgment as to Plaintiff's Second Amended

Petition and Affirmative Defenses four through six to Defendant City of Poplar Bluff's Counterclaim. In their initial motion and reply brief, Defendants argued that it did not provide telecommunications services to Plaintiff and, thus, the provisions of §392.410 were inapplicable. The attached documents show that from the inception of the idea to build the network at issue, Defendants identified it as a "telecommunications network" and part of its "telecommunications master plan." This identification continued through the bond initiative, the construction of the network and the reporting to the State of Missouri. Simply speaking, while Defendants' attorneys have argued that the system does not provide telecommunications services, the people who thought of and designed the system, the voters who approved the system, and the people who constructed and operated the system all believed that it was/is a "telecommunications network." Accordingly, the Court should set aside its interlocutory orders granting Defendants Summary Judgment as to Plaintiff's Second Amended Petition and Affirmative Defenses four through six to Defendant City of Poplar Bluff's Counterclaim.

Respectfully submitted,

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