SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 2006-C-2227

ELIZABETH W. NAQUIN, PLAINTIFF-RESPONDENT,

VERSUS

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, *ET AL*, DEFENDANTS-APPLICANTS

A CIVIL PROCEEDING

WRIT OF CERTIORARI
TO THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL, DOCKET NO. CA 06-00904,
AND THE 15TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF LAFAYETTE, NO. 2006-2014
HONORABLE EDWARD D. RUBIN, DISTRICT JUDGE

POST-ARGUMENT BRIEF ON BEHALF OF THE LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT, THE CITY OF LAFAYETTE, AND LAFAYETTE PUBLIC UTILITIES AUTHORITY, APPLICANTS

Respectfully submitted,

Patrick S. Ottinger (#08727)
City-Parish Attorney
P. O. Box 4017-C
Lafayette, Louisiana 70502
Telephone: (337) 291-8015
Facsimile: (337) 232-7273

Michael D. Hebert, Lead Counsel (#17297)
Milling Benson Woodward, L.L.P.
101 La Rue France, Suite 200
Lafayette, Louisiana 70508
Telephone: (337) 232-3929
Facsimile: (337) 233-4957

G. William Jarman (#7238)
Gordon D. Polozola (#23900)
Kean, Miller, Hawthorne, D'Armond,
McCowan & Jarman, L.L.P.
Post Office Box 3513
Baton Rouge, Louisiana 70821-3513
Telephone: (225) 387-0999
Facsimile: (225) 388-9133

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CLERK OF COURT

I. INTRODUCTION

The City respectfully submits this Post-Argument Brief to more concisely respond to certain questions posed by the Court and/or issues raised in oral argument, and to demonstrate the validity of the Supplemental Bond Ordinance and the flaws in both the *BellSouth* decision and the court below in this case.

As discussed at oral argument, the Legislature's stated purpose in enacting the Local Government Fair Competition Act (the "Act") is to promote and facilitate, not to frustrate or impede, competition in the provision of covered services. See La. R.S. 45:844.42, "Legislative findings and declaration of intent."

The statutory interpretation urged by Naquin, particularly as revealed at oral argument -- and seemingly adopted by the Third Circuit -- would create a barrier to the entry of a local government into the telecommunications business, and clearly frustrates the stated intention of the Legislature in adopting the Act.

II. ARGUMENTS AND AUTHORITIES

A. Constitutional Peremption of Naquin's Claims and the Resulting Absence of Subject Matter Jurisdiction:

On July 16, 2005, the electors of the City of Lafayette overwhelmingly approved the proposition (the "Proposition") authorizing the Supplemental Bond Ordinance at issue in this case. The results were promulgated on September 9, 2005. No person challenged the bond and payment provision of the Proposition election, and it is now unassailable.

Article VI, Section 35(A) of the Louisiana Constitution specifies what is unassailable.[1] As noted at oral argument, this constitutional provision does not merely apply to the validity of the *election*. It precludes, after the lapse of sixty days with no challenge, *any* court from hearing *any* challenge by *any* person relative to "the bond issue provided for," and "the . . . *revenues necessary to pay the same*."

The Proposition approved by the citizens of Lafayette explicitly provides that "said bonds [are] to be payable from the net income and revenues of the Communications System and to the amount

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[1] For sixty days after promulgation of the result of an election held to . . . issue bonds . . ., any person in interest may contest the legality of the election, the bond issue provided for, . . ., for any cause. After that time no one shall have any cause or right of action to contest the regularity, formality, or legality of the election, . . ., or bond authorization, for any cause whatsoever. If the validity of any election, . . ., or bond issue authorized or provided for is not raised within the sixty days, the authority to . . . issue the bonds, the legality thereof, and *the . . . revenues necessary to pay the same shall be conclusively presumed to be valid, and no court shall have authority to inquire into such matters.* (Italics supplied.).

necessary, from a secondary or subordinate pledge of the revenues of the Utilities System." That is to say, the "revenues necessary to pay the same" were explicitly defined and described in the adopted Proposition, and provided clear notice to the public of the payment mechanism. Therefore, the payment mechanism set forth in the unchallenged Proposition is unassailable, and no court – including the district court and the Third Circuit – should have heard any challenge to this payment mechanism.

Naquin attacked the Supplemental Bond Ordinance within the thirty (30) day peremptive period of Article VI, Section 35(B), but she does not assert in this proceeding that the repayment features of the Supplemental Bond Ordinance differed from that authorized by the citizens of Lafayette at the Proposition election. To hold that the thirty-day period in Article VI, Section 35(B) for attacking an ordinance is applicable under these circumstances renders meaningless and without effect the sixty (60) day peremptive period in Article VI, Section 35(A).

Other jurisprudence has consistently protected the integrity of bonds that are not timely challenged after an authorizing referendum, holding that no court has jurisdiction or "authority to inquire into such matters."[2]

For these reasons, this Honorable Court should hold that both the district court and the Third Circuit should have declined jurisdiction over the subject matter of Naquin's claims.

B. The Act Allows, and the LPSC Rules Specifically Govern, Loans Made by the Local Government to the Communications System:

Many of the Court's questions concerned loans made by the local government to the Communications System. As discussed below, the Act and Louisiana Public Service Commission's ("LPSC") Cost Allocation and Affiliate Transaction Rules ("Rules"):

(1) only consider below market rate loans from the local government to the Communications System to be a prohibited cross-subsidy;

(2) fully allow market rate loans for any purpose, including the payment of bond debt, because, by definition, such loans would not be considered a prohibited cross-subsidy; and

(3) provide for on-going monitoring and audit by the LPSC and Legislative Auditor of any loans made by a local government to the Communications System to ensure compliance with the cross-subsidy rule.

Moreover, as acknowledged by Naquin during oral argument, her interpretation of the Act would:

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[2] See the extensive authorities set forth in footnote 76 of the City's Original Brief, at Page 20 thereof.

(1) restrict loans, not only from the local government, but also private institutions like a commercial bank;

(2) render totally meaningless or purposeless the requirements of the Act which calls for the preparation and adoption, after public hearings, a feasibility study designed to show when the project would make enough money on its own to pay the Bonds; and

(3) impose a barrier restricting local governments from ever entering the communications market!

Could the Legislature have conceivably intended to prevent local governments from obtaining loans to pay debt when private providers can do just that? No. The Legislature specifically intended local governments to be able to engage "in any other lawful business practice that its private-sector competitors are legally permitted to engage in."[3] Worse, could the Legislature have possibly intended to prevent local governments from entering the communications market altogether when it specifically stated that its intent was to "provide for the widest possible diversity of information and news sources to the general public," "advance the exercise of rights under the First Amendment," "enhance the development and widespread use of technological advances," "encourage improved customer service," and "ensure . . . [a] nondiscriminatory federal, state and local government framework?" The answer is most certainly NO. Yet, this is exactly what Naquin wants this Court to declare.

The provisions of the Act – and the very statements of the LPSC itself – support the City's positions. In short, the Court is faced with two interpretations of the Act with respect to loans – one that discriminates against local governments when compared to private providers, and creates a barrier to local governments' very entry into the market, and the other that prevents any below-market loans (as monitored by the LPSC) to prevent prohibited cross-subsidies, and will allow local government's entry into the market as intended by the Legislature. The latter is the only reasonable and correct interpretation.

1. **Naquin's interpretation of the Act leads to absurd results.**

At oral argument, Naquin argued that loans are only allowed for feasibility and start-up costs. This is false. The Third Circuit in both *Naquin* and *BellSouth* (as well as the LPSC) rejected this argument, and Naquin did not appeal this finding. It need not and should not be considered by this Court.

Naquin also argued that loans from any source, including a bank, could not be obtained to pay bond debt. This is also false and conflicts with the Act and the LPSC Rules, and could prevent any local government from even entering into the communications market. As succinctly stated by Justice

[3] La. R.S. 45:844.42(7).

Knoll, such an interpretation would be "self-defeating." By contrast, the position advanced by the City is not only a completely reasonable interpretation of the provisions of the Act and LPSC Rules, it is completely consistent with the Legislature's stated intent.

First, the *only* restriction in the Act regarding loans is found in La. R.S. 45:844.53(2), which prohibits "below-market" loans. Thus, affiliate loans at market rates are, by definition, not considered a prohibited cross-subsidy, and are perfectly permissible. Naquin's argument that the Act restricts the use of market based loans between the local government and the Communications System would effectively eliminate the phrase "below-market rate" from the Act's cross-subsidy rule.

Second, loans between a local government and its Communications System are considered "affiliate transactions." The LPSC routinely regulates similar affiliate transactions between *private* regulated public utilities and their *private* unregulated affiliate companies. It is for this very reason, the Legislature, in La. R.S. 45:844.55(D)(1), gave the LPSC the task of adopting "rules to define and govern equitable cost allocation, as well as safeguards to govern affiliate or inter-company transactions for purposes of application of R.S. 45:844.53(2)," the cross-subsidy rule that prohibits "*below market rate*" loans.

In accordance with its statutory duties, the LPSC did adopt such Rules, which are in the record of this case as City Exhibit 9. These Rules: (1) allow market rate affiliate loans on an ongoing basis for *any purpose*, which would include the payment of bond debt, (2) define what is considered to constitute a "market rate" loan if the loan is between the local government and the Communications System; and (3) mandate the reporting of the rates, terms and conditions of such loans, which will be subject to audit by the LPSC and Legislative Auditor to ensure compliance with the Act's cross-subsidy rule.

Any suggestion that the Act prohibits loans between the local government and its Communications System (except, of course, for *below-market* loans) is completely baseless and ignores the fundamental purpose of the LPSC's affiliate transaction Rules adopted to govern and monitor those very loans on an ongoing basis. The LPSC even took the extraordinary step of filing an *Amicus Curiae* Brief in this case to ensure that the courts clearly understood its regulations and monitoring procedures governing intergovernmental loans. As stated by the LPSC in its *Amicus Curiae Brief*, "[p]ursuant to this authority, the Commission issued its General Order dated October 4, 2005, adopting Cost Allocation and

Affiliate Transaction Rules . . ., which are final and non-appealable."[4] The LPSC further stated, "Plaintiffs attempt through this appeal to re-litigate and collaterally attack the 10/4/05 General Order . . ., **which allows loans by local governments for any purpose** *provided that the loans comply with Section 5 of the Allocation of Costs provisions in the Order.*"[5] The LPSC could not have been clearer.

Could a local government's Communications System also get loans from a bank? Yes. But, affiliate loans are also perfectly permissible provided they comply with the LPSC's Rules. What do the LPSC Rules provide? Section 5 of the LPSC Rules states:

> For loans made by a local government to the division providing covered services, the local government will charge the higher of the highest rate of interest earned on invested funds of similar maturity or the highest rate of interest paid on outstanding bonds of similar maturity and interest rate mode (variable rate or fixed rate). Upon request of the LPSC or Louisiana Legislative Auditor, the local government will disclose all terms and conditions of each arms-length loan arrangement including the stated interest rate, effective interest rate, and maturity date of the loan.[6]

The LPSC's Rules also provide for ongoing monitoring of any loans obtained, stating:

> The LPSC shall audit the initial twelve months of the local government's provision of covered services. Thereafter, the LPSC may order an audit performed no more frequently than on an annual basis of all matters deemed relevant by the selected auditor.[7]

2. Naquin's interpretation of La. R.S. 45:844.52(C)(1), which states that bonds "shall be secured and paid for solely from the revenues generated by the local government from providing covered services," requires this Court to ignore other provisions of the Act and thwarts the very intent of the Legislature.

Naquin also argues that La. R.S. 45:844.52(C)(1), which states that bonds issued "shall be secured and paid for solely from the revenues generated by the local government from providing covered services," only allows the City to pay the Bonds with the present revenues generated from its customers starting day-one of operation. Such an interpretation of the Act: (1) ignores the fact that the loans obtained to pay the Bonds must be paid back, plus interest, with *Communications System revenues*, and (2) ignores the many other provisions in the Act that acknowledge and sanction that a local government will not have sufficient communications revenues in its early years to pay all of its costs.

For example, La. R.S. 45:844.53(4)(c) states that a local government's rates for telephone, cable and internet services need only cover the costs of the Communications System "**over the**

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[4] LPSC Brief, p. 2.

[5] LPSC Brief, p. 5.

[6] See *Re City of Lafayette*, General Order (LPSC 10/4/05), 2005 WL 2931870, *6.

[7] *Id.*, at *12.

useful life of the facilities used to provide covered services."[8] Why? Because in a capital intensive business such as the communications market, it takes years before a company – public or private – is able to build up its customer base and bring in revenues that will cover all costs. The first customer cannot be charged the full cost of the bond debt!

La. R.S. 45:844.49(2) and (3) also make clear the Legislature clearly understood that, while the Bonds would have to be paid back with Communications System revenues over time,[9] that customer growth and revenue would not be sufficient to pay the bond debt from day one. First, the feasibility study required under the Act must contain the projected "break-even" date when revenues will be sufficient to pay the costs of providing the covered services, including the bonds. Second, in conducting the feasibility study, the feasibility consultant "shall assume" that the local government will price its services consistent with La. R.S. 45:844.53(4) – that is, at a level that will cover the costs of providing covered services, which includes the bond debt, **over the useful life of the facilities**.

When asked how the Legislature could have intended the "self-defeating" result that would occur under her interpretation, Naquin had no answer other than that the Act was simply "poorly drafted." This perfectly illustrates that Naquin's interpretation is not consistent with, nor facilitates, the purposes of the Act. The truth is that Naquin wants this Court to impose a twisted interpretation of La. R.S. 45:844.52(C)(1) to the exclusion of the many other sections of the Act that show the provision's true meaning. This Court should hold that market rate loans, whether from the local government or obtained on the open market from a private institution, by definition would not be a cross-subsidy under the Act and, consistent with the Act and LPSC's Rules, are permissible for any purposes, including for the payment of bond debt.

3. The right of the City to make loans does not flow from the Act; such right exists at general law, except as limited or regulated by the Act.

The Lafayette City-Parish Consolidated Government – of which the City is a part -- operates under a Home Rule Charter adopted pursuant to Article VI, Section 5 of Louisiana Constitution of 1974. Under Section 5(E), a "home rule charter adopted under this Section shall provide the structure and organization, powers, and functions of the government of the local governmental subdivision, which

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[8] La. R.S. 45:844.53(4)(c). Emphasis added.

[9] The Legislature also provided that the Bonds could be paid through a pledge of the resources of a local government's other utility services. See La. R.S. 45:844.52(C)(3). As discussed hereinafter, under the Supplemental Bond Ordinance, such pledge can only be accessed after a default, which also requires a shutdown of the Communications System to prevent any possibility of a prohibited cross-subsidy.

may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, *not denied by general law or inconsistent with this constitution.*"[10]

As a Home Rule Charter government, the City has "exclusive control over the operation, management and internal arrangement of the component parts of its local government."[11] "[A] municipality operating under a home rule charter possesses power as broad as that exercised by the State, except where limited by the Constitution, by laws permitted by the Constitution, and the charter itself."[12]

The City is authorized under its Home Rule Charter[13] and other laws of Louisiana,[14] to "construct, acquire, extend, or improve any revenue producing public utility and property necessary thereto, either within or without its boundaries, and may operate and maintain the utility in the interest of the public." These utility services include telecommunications, internet (advanced services) and cable television services (known herein and in the Act as "covered services").

The Act itself makes clear that the Legislature did not intend the Act to be a grant of authority to local governments, but only a regulation of the general power already vested in local governments.[15] The only restrictions upon the provision of "covered services" and upon the issuance of bonds are those imposed by the Act, and any power not regulated or denied by the Act still exists.

Considering the foregoing, the Act is not a *grant* of rights to Lafayette to make loans. Despite Naquin's suggestion that the Act does not authorize loans, the opposite is true – as a Home Rule Charter government, the City has the right and power to make loans, subject only to the extent that the Act limits or regulates that right. And the only limitation imposed by the LPSC Rules adopted pursuant to the Act is that loans must be not *below market rate*.

C. The City's Supplemental Bond Ordinance Corrected the Supposed Deficiencies Found by the Third Circuit in BellSouth:

In *BellSouth*, the Third Circuit held that "the failure of the City's ordinance to provide for a requirement of default before accessing Residual Revenues to repay bonds is not a pledge of assets and

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[10] Emphasis added.

[11] *Lafourche Parish Council v. Autin*, 94-CA-0985 (La. 12/9/94), 648 So.2d 343, 356.

[12] *Hudson v. City of Bossier City*, 2005-C-0351, -0352 (La. 4/17/06), 930 So.2d 881.

[13] See Sections 1-05 and 1-06, Home Rule Charter.

[14] La. R.S. 33:4161, *et seq.*

[15] See, e.g., La. R.S. 45:844.45(A)(1)("Nothing in this Chapter shall authorize any local government to . . . provide a covered service."); La. R.S. 45:844.52(C)(4)("Nothing in this Section provides a local governing authority bonding authority in addition to that provided under existing state law.")

is a prohibited cross-subsidization pursuant to La. R.S. 45:844.53(2)."[16] Although the Third Circuit's default requirement in *BellSouth* is incorrect, the City's Supplemental Bond Ordinance nevertheless requires a default and, thus, complies with the erroneously narrow view of "pledge" adopted in *BellSouth*. Further, even if this court somehow were to find that the City did not provide for a default in the Supplemental Bond Ordinance, the City inserted yet another fail-safe mechanism to prevent cross-subsidization – the City imposed upon itself a requirement that its new Communications Division be shut down if the pledged Residual Revenues are used to pay the subject bonds.

1. The Supplemental Bond Ordinance provides for a default.

To comply with *BellSouth*, the Supplemental Bond Ordinance provides for a requirement of a default before the pledge is implemented. Article XI of the Supplemental Bond Ordinance defines "events of default." Section 11.1(a) provides that "the occurrence of a Credit Event as described in Section 6.1(c)" is one of many "events of default."[17] Only if one of these "events of default" occurs – such as the "Credit Event" – would the pledge of the Residual Revenues of the Utilities System be triggered. See Supplemental Bond Ordinance Sections 4.1 and 4.2[18] and Section 11.1.

In *Naquin*, the Third Circuit held that the "Credit Event" cannot be an actual default, sufficient to trigger access to the pledged "Residual Revenues" of the Utilities System, because it does not involve an actual, direct failure to pay the bondholders. Without citation to authority, the Third Circuit held that the "Credit Event" "occurs in anticipation of a default and, as such, would allow prohibited access to resources generated by another division of the local government to serve as a primary source of payment for the bonds."[19] The Third Circuit's conclusion is illogical. The credit event IS a default, not something in anticipation of a default.

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[16] *BellSouth*, 919 So.2d at 857.

[17] Supplemental Bond Ordinance (City Exhibit 7), Section 11.1(a). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 24, Line 1570. Section 6.1(c) of the Supplemental Bond Ordinance (City Exhibit 7) defines the "Credit Event" as the failure of the Issuer of the bonds to transfer to the Paying Agent "an amount equal to the interest and principal falling due on the Bonds on [an] Interest Payment Date" by "the twenty-fourth day of the month" preceding that Interest Payment Date. This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 16. Lines 1013-1014.

[18] Section 4.1 provides: "The Bonds . . .shall be payable first, from the net income and Revenues of the Communications System and second, to the amount necessary, from a secondary or subordinate pledge of the revenues of the Utilities System." (emphasis added). Section 4.2 provides: "The payment of the . . . Bonds shall be secured [by] the Net Revenues to the payment of the principal of, premium, if any, and interest on the Bonds and, upon the occurrence of a Credit Event, to the extent of the insufficiency, the Residual Revenues . . . ." (emphasis added). Section 11.1 provides: Upon such a default as described in clause (a) or (b), the Issuer shall be required to pay any insufficiency from Residual Revenues . . . ." (emphasis added).

[19] *Naquin*, 937 So.2d at 910-911.

The Supplemental Bond Ordinance is a contract between the City and its future bondholders.[20] As such, the parties to this contract are free to contract in any lawful manner, including the contracting of stipulated events of default.[21] Further, it is clear that this contract does not give the City the option to decide whether to pay its bonds and thus trigger the "Credit Event," as Naquin suggests. To the contrary, the Supplemental Bond Ordinance imposes mandatory contractual duties upon the City to transfer sufficient money into the proper accounts to pay the subject bonds, using such terms as "the City shall deposit" and "the City shall cause to be transferred" the sum of money necessary to pay the subject bonds timely.[22] If the City does not, it is in default.

The concept of "default" can take many forms, only one of which is the payment of money. "*[D]efault* comprises the omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement, as well as delay in doing so."[23] Even if the City had not expressly declared that its failure to timely transfer sufficient funds to pay the bonds is an event of default, the mere passage of the deadline without the transfer of the funds could place the City in default. "When a term for the performance of an obligation is either fixed, or is clearly determinable by the circumstances, the obligor is put in default by the mere arrival of that term."[24]

The Third Circuit's holding that the parties to a contract may not stipulate events of default, or that a "default" may only comprise a non-payment of money, would wreak havoc on common commercial practice and custom. Indeed, even the Supplemental Bond Ordinance at issue herein provides for numerous "Events of Default" which do not involve timely payments to the bondholders. For example, the Supplemental Bond Ordinance stipulates, as a matter of contract, that the failure of the City to make "due and punctual performance"[25] of such obligations as employing "the necessary staff and

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[20] Supplemental Bond Ordinance (City Exhibit 7), Section 2.1 ("[T]his ordinance shall be deemed to be and shall constitute a contract between the Issuer and the Bondholders."). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 11, Line 720-721.

[21] "Parties are free to contract for any object that is lawful, possible, and determined or determinable." La. Civ. Code Art. 1971.

[22] Supplemental Bond Ordinance (City Exhibit 7), Section 6.1(c). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 16, Lines 994-995 and 1006-1007.

[23] Litvinoff, The Law of Obligations, 6 Louisiana Civil Law Treatise § 1.15.

[24] La. Civ. Code Art. 1990.

[25] Supplemental Bond Ordinance, Section 11.1(g) (City Exhibit 7). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 25, Lines 1608-1609.

employees ... to properly operate and protect the Communications System and the Utilities System,"[26] retaining "a Consulting Engineer for the purpose of providing the Issuer immediate and continuous counsel and advice regarding the Communications System and the Utilities System,"[27] and carrying "adequate fire, windstorm, explosion and other hazard insurance on the components of the Communications System and the Utilities System,"[28] all constitute "Events of Default."

If a bondholder cannot rely upon and enforce covenants in a Louisiana municipal bond offering which do not involve the payment of money, public confidence in such bond offerings is surely impaired. Such cannot be the intent of the Legislature under the Act.

2. The Supplemental Bond Ordinance prevents cross-subsidization by requiring the shutdown of the Communications System if the pledged Residual Revenues are used to pay the subject bonds.

In any event, the ultimate question before the Third Circuit in *BellSouth* and *Naquin* was not whether the use of Utilities System revenue was a permitted "pledge"—the ultimate question was whether the use of Utilities System revenue violated the cross-subsidization restrictions of the Act. The Supplemental Bond Ordinance goes far beyond the Original Bond Ordinance in conclusively establishing, in extraordinary terms, that the Communications System will not (and cannot) be cross-subsidized by the Utilities System. Cross-subsidization is impossible when there is nothing left for the triggered pledge to cross-subsidize.

Once the pledge of the Residual Revenues of the Utilities System is triggered, the Supplemental Bond Ordinance requires that the City "proceed to *discontinue its provision of Covered Services, as soon as reasonably practicable*...."[29] Thus, not only does an actual default occur before the pledged "Residual Revenues" may be accessed to pay the bonds; there can be no risk of cross-subsidization under the Act because there will be no Communications Division left to subsidize. This structure clearly satisfies the cross-subsidization prohibitions of the Act, even as interpreted by the Third Circuit in *BellSouth* and *Naquin*.

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[26] Supplemental Bond Ordinance, Section 8.1 (City Exhibit 7). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 19, Lines 1217-1218.

[27] Supplemental Bond Ordinance, Section 9.1 (City Exhibit 7). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 21, Lines 1360-1362.

[28] Supplemental Bond Ordinance, Section 8.7 (City Exhibit 7). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 21, Lines 1342-1326.

[29] Supplemental Bond Ordinance, Section 11.1 (City Exhibit 7), in the paragraph immediately following subsection (g). This also appears in the blackline version of the Supplemental Bond Ordinance distributed to the court at oral argument, at Page 25, Lines 1619-1624.

Thus, even if the Third Circuit's view of "pledge" as expressed in *BellSouth* and *Naquin* were to prevail in this matter, the Supplemental Bond Ordinance eliminates any possibility of cross-subsidization once Residual Revenues of the Utilities System are utilized to pay the FTTH Project Bonds. This is all that the Act requires, regardless of the view of "pledge" ultimately adopted by this Court.

D. Louisiana Law Allows The Pledge of a Revenue Stream, and Further Allows the Use of the Fruits of that Revenue Stream Prior To a Default:

The issue of "pledge" has been extensively briefed in these proceedings, but the City wishes to briefly respond to Naquin's persistent mischaracterization of the City's pledge of its Utilities System revenue stream, again demonstrated by Naquin at oral argument.

In oral argument, Naquin contended that what the City had established in its Supplemental Ordinance was an "assignment," not a "pledge." Based upon the facts of this case, Naquin attempts to create a distinction where none exists. Naquin's argument, as was demonstrated by Mr. Rubin on behalf of the Louisiana Municipal Association ("LMA"), is wrong as a matter of law, and this Court can dispose of the case by holding that *BellSouth* was wrong in prohibiting the use of cash that passes by in a pledged income stream to pay ongoing principal and interest payments prior to a default.

First, as Mr. Rubin showed with the numerous statutes that he handed out to the Court,[30] as well as by the many statutes cited in both the City's and LMA's previous briefs, Louisiana law today uses the terms "pledge" and "assignment" interchangeably. Whatever term is used, the Residual Revenues of the City's Utilities System are in the form of a security interest in support of the Bonds. As Mr. Rubin explained, using the word "assignment" to indicate a security interest is in line with the Legislature's adoption of common law definition of that term.[31] That common law definition employs

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[30] Those statutes included (emphasis supplied throughout) : Act 528 of 1988, the enactment that stated Louisiana's adoption of U.C.C. article 9; R.S. 10:9-102(b)(2) of that statute provides: "The provisions of this Chapter apply to ***security interests created by*** contract, including ***pledge, assignment***, chattel mortgage, chattel trust . . . . "; C.C. art. 3158(b): "***The pledge*** of a life insurance policy *must also be evidenced by a* ***written assignment*** thereof . . . . "; R.S. 9:5386(A): "A mortgage of immovable property may provide for the ***collateral assignment or pledge of the right to receive proceeds*** . . . . "; R.S. 10:9-309(5): "The following security interests are perfected when they attach: (5) ***a security interest*** *created by the* ***assignment*** *of a health-care insurance receivable* . . . . "; R.S. 6:312(E), concerning State Banks: "Notwithstanding any other law to the contrary, any federally insured financial institution may by contract prohibit or otherwise limit ***the pledge, assignment, collateral assignment, or granting of any other type of security interest*** in any deposit account . . . . "; identical language to R.S. 6:312(E) is contained in R.S. 6:664(E) concerning federally insured credit unions; R.S. 30:128(C) in the Mineral Code: "A transfer for purposes of this Section shall not be deemed to occur by the granting of a mortgage in, ***collateral assignment of production from, or other security interest in*** a mineral lease or sublease . . . . "; and R.S. 2:351(F), concerning the New Orleans International Airport, which talks about a security interest in the form of both "the pledge thereof as additional security" and the "***pledging and assignment*** of all or any part of the gross or net revenues."

[31] *See, e.g.*, Scott Christopher Shelly, "Bankruptcy--Assignment Of Rents," 23 Seton Hall L. Rev. 1257, 1260, discussing , *In Re Vienna Park Properties*, 976 F.2d 106 (2d Cir. 1992).which was decided under Virginia state law: "After examining the language of the security agreement, the court determined that the ***rent assignment*** clauses in the deeds of trust ***constituted a valid security agreement*** covering the post-petition rents. . . ." (emphasis supplied); Matthew T. Albaugh, "Indiana's Revised Article 9 And Other Developments In Commercial And Consumer Law,"

"assignment" as a form of security interest. As Mr. Rubin's statutory handouts proved, the Legislature has passed many statutes using the term "assignment" as a security interest, and thus Naquin's argument that assignment can "only" be a transfer of title and that pledge can "only" be a security interest is demonstrably false.[32]

Second, Naquin is demonstrably wrong when she argues that it somehow violates Louisiana law to "pledge" an income stream and to use the cash that passes by in the income stream to pay ongoing principal and interest payments. There are many statutes that specifically provide for just this, including those which require that bonds be "payable from" or even "solely from" an income stream[33] (meaning that payments on bonds must be made as principal and interest comes due) and those which permit pledges of income streams sufficient to pay the bond amounts coming due each year.[34] There is simply no way to read these statutes as doing anything other than permitting just what *BellSouth* erroneously contended was prohibited - - using portions of an income stream to pay ongoing principal and interest payments without having to declare a default and diverting the entire income stream.

Finally, Naquin's concern about the use of a portion of "pledged" income streams to pay principal and interest as they come due not only has been shown to be legally meritless, but the Supplemental Bond Ordinance in question here clearly and unequivocally provides for a firm, hard "default" before any or all of the pledged income stream can be utilized. The nature of the default is so strict that the entire telecommunications system must be shut down once this type of default occurs. For

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35 Indiana Law Review 1239, 1245 (2002): "Other important security interests that are automatically perfected include . . . ***assignments of accounts*** . . . ." (emphasis supplied); and Anderson, Culhane, and Wilson, "Attachment And Perfection Of Security Interests Under Revised Article 9: A 'Nuts And Bolts' Primer" 9 Am. Bankr. Inst. L. Rev. 179 (2001), footnote 209: " U.C.C. § 9-309. Section 9-309, entitled "Security Interest Perfected Upon Attachment," provides: The following ***security interests*** are perfected when they attach: * * * (5) ***a security interest*** created ***by the assignment of a health-care-insurance*** receivable to the provider of the health-care goods or services; * * * (12) ***an assignment for the benefit of all creditors*** of the transferor and subsequent transfers by the assignee thereunder; and (13) ***a security interest*** created by ***an assignment*** of a beneficial interest in a decedent's estate." (emphasis supplied).

[32] While it is true that the Civil Code defines "assignment" as a species of sale, the previous two footnotes prove beyond all doubt that the Legislature does not give the word such a confined meaning.

[33] *See*, emphasis supplied: R.S. 33:2737.5, concerning Ascension Parish School Board sales taxes ("the board may issue bonds ***payable solely from an irrevocable pledge*** and dedication of the avails or proceeds of the tax"); R.S. 33:2740.14 concerning St. Tammany Parish special recreation districts (granting the district the power to "incur debt and issue bonds ***payable from an irrevocable pledge*** and dedication of all or a portion of the proceeds of a parcel fee"); R.S. 33:2740.16, concerning Assumption Parish Gravity Drainage Districts (granting the district the power to "issue bonds ***payable from an irrevocable pledge*** and dedication of all or a portion of the proceeds . . ."); R.S. 33:3051 concerning bond refunding ("Any municipality, parish or parish school board which has heretofore issued or hereafter issues bonds ***payable from*** a pledge and dedication of . . .").

[34] *See*, emphasis supplied, R.S. 39:692 ("In addition, a parish school board, subject to the approval of the Louisiana State Board of Elementary and Secondary Education, shall secure the payment of refunding bonds issued under this Subpart by anticipation and ***pledge*** of its annual revenues ***in an amount sufficient to pay interest and principal falling due each year***").

Naquin to claim that the Ordinance violates either "pledge" law or constitutes a "fictitious" default has no basis in law or fact.

III. CONCLUSION

For reasons set forth in the City's Original Brief, and herein, and for the reasons urged in oral argument, the City respectfully prays that this Honorable Court effectuate the authority conferred at the bond Proposition election on July 16, 2005, and to enter an appropriate opinion and order, as follows:

(A) Vacating the decision of the Third Circuit herein and dismissing the Motion for Judgment filed by Naquin for lack of subject matter jurisdiction due to constitutional peremption;

(B) In the alternative, reversing the decision of the Third Circuit herein and vacating the injunction issued by the Third Circuit on the grounds that the City's Supplemental Bond Ordinance complies with the decision of the Third Circuit in *BellSouth*, and further finding, as set forth in the LPSC's Rules, that market rate loans are permissible for any purpose;

(C) In the further alternative, rejecting the decision in *BellSouth* and reversing the decision of the Third Circuit herein, and vacating the injunction issued by the Third Circuit, finding the Supplemental Bond Ordinance is compliant with Louisiana law.

Respectfully submitted:

Patrick S. Ottinger (#08727)
City-Parish Attorney
P. O. Box 4017-C
Lafayette, Louisiana 70502
Telephone: (337) 291-8015
Facsimile: (337) 232-7273

Michael D. Hebert, Lead Counsel (#17297)
Milling, Benson, Woodward, L.L.P.
101 La Rue France, Suite 200
Lafayette, Louisiana 70508
Telephone: (337) 232-3929
Facsimile: (337) 233-4957

G. William Jarman (#7238)
Gordon D. Polozola (#23900)
Kean, Miller, Hawthorne, D'Armond,
McCowan & Jarman, L.L.P.
One American Place, 22nd Floor
Post Office Box 3513
Baton Rouge, Louisiana 70825
Telephone: (225) 387-0999
Facsimile: (225) 388-9133

Attorneys for Applicants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Post-Argument Brief has been served this 7th day of December, 2006, by placing a copy of same in the United States mail, postage prepaid, upon the respondent judges and all counsel of record, all of whom are identified, as follows:

Honorable Edward D. Rubin
District Judge, 15th Judicial District
Lafayette Parish Courthouse
800 South Buchanan Street
Lafayette, Louisiana 70501

Honorable Charles K. McNeely
Clerk of Court, Third Circuit
P. O. Box 16577
Lake Charles, Louisiana 70616

Patrick W. Pendley, Esq.
Stan P. Baudin, Esq.
Pendley Law Firm
24110 Eden Street
Plaquemine, Louisiana 70764
(225) 687-6396

Christopher D. Shows, Esq.
Pierce & Shows, APLC
601 St. Joseph Street
Baton Rouge, Louisiana 70802
(225) 388-9574

Andre P. LaPlace, Esq.
2762 Continental Drive, Suite 103
Baton Rouge, Louisiana 70808
(225) 924-6898
Attorneys for Respondent, Elizabeth W. Naquin

Michael H. Rubin, Esq.
McGlinchey Stafford, PLLC
14th Floor, One American Place
Baton Rouge, Louisiana 70825
(225) 383-9000
Attorney for *Amicus Curiae*, Louisiana Municipal Association

Harry T. Lemmon
650 Poydras Street Suite 2335
New Orleans, Louisiana 70130
(504) 581-2155

James Baller
The Baller Herbst Law Group
2014 P Street, NW, Suite 200
Washington, D.C. 20036
(202) 833-1144
Attorneys for *Amicus Curiae*, Fiber to the Home Council

MICHAEL D. HEBERT