

## ARTICLES

### Property Rights, Federalism, and the Public Rights-of-Way

*Frederick E. Ellrod III & Nicholas P. Miller\**

#### TABLE OF CONTENTS

I. INTRODUCTION .....	477
A. <i>How Section 253 Works</i> .....	478
B. <i>The Importance of Maintaining Local Authority Has         Increased Since 1996</i> .....	481
II. WHAT IS AT STAKE: LOCAL COMMUNITIES' PROPERTY RIGHTS.....	483
A. <i>Local Communities Have a Property Interest in the         Public Rights-of-Way</i> .....	483
B. <i>Local Communities Authorize Private Parties to Use the         Public Rights-of-Way Through Franchises</i> .....	485
C. <i>Local Communities Should Charge Market Value for         Use of the Public Rights-of-Way by Private Parties</i> .....	488
1. <i>Local Communities Are Entitled to Recover the             Fair Market Value of Locally Owned Land</i> .....	489

---

\* Frederick E. Ellrod III is a member of Miller & Van Eaton, P.L.L.C. J.D., Harvard Law School, 1986; Ph.D., Boston University, 1979; M.A., Catholic University of America, 1976; B.A., Catholic University of America, 1975. Nicholas P. Miller is the Managing Director of Miller & Van Eaton, P.L.L.C. J.D., University of Washington, 1973; B.A., University of Washington, 1966. The authors practice before the Federal Communications Commission and have appeared as counsel for local governments in right-of-way cases in state and federal courts. Mr. Miller lobbied for a coalition of local governments during Congressional consideration of the 1996 Federal Telecommunications Act. The authors would like to thank Bill Malone, Laurie Gelman, and Betty Ann Kane for their assistance in developing this Article. The views expressed in this article are solely those of the authors and do not necessarily reflect those of Miller & Van Eaton, P.L.L.C., or its clients.

2.	Local Communities Incur Sizable Costs Due to Communications Use of the Public Rights-of-Way..	491
3.	The Value of the Public Rights-of-Way Is Not Confined to Costs.....	494
4.	Sound Economic Policy Supports Allowing Local Communities to Charge Fair Market Value for Property Used.....	497
5.	Reading Section 253 to Prevent Local Communities from Charging Fair Market Value Would Result in an Unconstitutional Taking.....	500
D.	<i>The Principle of Federalism Is Implemented by Upholding Local Property Rights</i> .....	501
III.	OPONENTS OF LOCAL AUTHORITY CONFUSE PROPERTY WITH REGULATION .....	504
A.	<i>Failure to Distinguish Property Rights from Regulation Leads to Mischaracterizations</i> .....	504
B.	<i>The FCC Has Confused Property Rights With Regulation</i> .....	505
C.	<i>Other Commentators Confuse Property Rights With Regulation</i> .....	506
IV.	THE LEGISLATIVE HISTORY OF SECTION 253 .....	513
A.	<i>The Senate Bill: S. 652</i> .....	513
B.	<i>The House Bill: H.R. 1555</i> .....	518
C.	<i>The Conference Agreement</i> .....	524
D.	<i>The Legislative History of Section 253 Supports a Property-Rights Approach</i> .....	525
E.	<i>Related Sections of the 1996 Act</i> .....	526
1.	Section 302: Open Video System.....	526
2.	Section 303(a): Telecommunications Services Under a Cable Franchise .....	528
3.	Section 303(b): Cable Franchise Fees .....	531
4.	Section 601(c): Restriction on Preemptive Effect.....	532
V.	SECTION 253 IN THE COURTS .....	533
A.	<i>The OVS Court Rebuffs the FCC's Attempt to Give Away Local Public Rights-of-Way</i> .....	534
B.	<i>Section 253 Decisions from a Property Rights Perspective</i> ..	535
1.	FCC Decisions Under Section 253.....	535
2.	Court Decisions Through 1999.....	537
3.	The Sixth Circuit's <i>Dearborn</i> Decision .....	541
4.	The <i>Grant County</i> Decision .....	543
5.	The <i>Silver Star</i> Appeal.....	544
6.	The Chattanooga State Law Action.....	545

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 477

7. Minimal Requirements in the <i>Mobile</i> Decision .....	546
8. <i>Denver v. Qwest</i> .....	547
9. The <i>New Jersey Payphone</i> Decision.....	548
10. The <i>Auburn</i> Decision and Its Ninth Circuit Progeny.....	549
11. The <i>Bristol</i> Decision on Municipal Entry .....	552
12. Palm Beach and Coral Springs .....	552
13. The <i>Prince George's County</i> Decisions .....	553
14. The <i>City of Eugene</i> Cases .....	555
15. The <i>San Marcos</i> Case .....	557
16. <i>Central Puget Sound</i> .....	558
17. Municipal Competition in the <i>Missouri Municipal</i> <i>League</i> Decisions .....	558
18. <i>Qwest v. Santa Fe</i> .....	559
19. <i>White Plains</i> and <i>Colonie</i> .....	560
20. Statewide Authority in the <i>Maryland Heights</i> Case ...	563
21. Summary: Judicial Results Depend on Acknowledgment of Property Rights .....	563
VI. CONCLUSION .....	564

## I. INTRODUCTION

When private communications companies use public rights-of-way to conduct their business, the conditions of use are often described as “regulation.” In fact, it is not regulation that is at issue, but rather property rights. In the last several years, this issue has been raised most forcefully in the context of section 253 of the Telecommunications Act of 1996 (“the Act”).<sup>1</sup> This Article proposes an analysis that recognizes the importance of local property rights, and reviews the court and agency decisions to date under section 253 from that standpoint.

The issue of property rights in the telecommunications context has been obscured because the property rights in question are those of local communities such as cities and counties, not those of private parties. Although property owned by local governments has the same constitutional protection as property owned by private parties, it is not customary to think about it in the same way. Moreover, it is often in the interest of litigants to present the problem as one of regulation, presumptively considered a bureaucratic interference with free enterprise, rather than as a matter of property, which is itself the medium

1. Telecommunications Act of 1996 § 253, Pub. L. No. 104-104, § 253, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 253 (2003)).

and driving engine of the free market. The aim of this Article is to show that section 253 must be understood in terms of property rights, and that a property rights perspective provides an effective tool for evaluating court and agency decisions with respect to that section.

This introductory section describes how section 253 works, and notes that the importance of local right-of-way management has increased since September 2001. Section II of the Article identifies the fundamental property rights at issue, their implications for compensation requirements, and their relationship to constitutional federalism. Section III then looks briefly at the characteristic mistake made by many analysts: construing local communities' control of their public rights-of-way as purely regulatory and ignoring the property aspect. Section IV explores in more depth the way in which section 253 fits into the structure of property rights, regulation, and federalism, by detailing the legislative history of the provision. Finally, Section V reviews the significant agency and judicial decisions to date in light of that analysis.

#### *A. How Section 253 Works*

Section 253 of the 1996 Act is titled "Removal of Barriers to Entry."<sup>2</sup> Although its structure is relatively straightforward, that structure has not always been fully understood by the courts. Section 253(a) forbids any state or local legal requirement that would "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>3</sup> Subsections (b) and (c) of section 253, however, create "safe harbors" for certain types of state and local requirements.<sup>4</sup> Even if a rule would "prohibit or have the effect of prohibiting" under subsection (a), it will not be preempted by section 253 if it falls within the scope of (b) or (c). Finally, subsection (d) grants the Federal Communications Commission (FCC) authority to review issues under subsections (a) and (b) alone, but not to review issues under subsection (c).<sup>5</sup>

The full text of section 253 is as follows:

§ 253 REMOVAL TO BARRIERS OF ENTRY.

(a) IN GENERAL. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the

---

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 479

effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [relating to universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

This language was adopted against the background of a long history of market restrictions (often federal) that prevented certain sorts of companies from entering into certain markets.<sup>6</sup> For example, prior to 1996, local exchange telephone companies were prohibited from owning cable companies in their service areas.<sup>7</sup> In section 253, however, Congress sought to remove these barriers so all communications providers could enter into all markets. In addition to directly removing federal barriers, Congress wished to eliminate state and local public utility licensing and regulatory practices that created legal monop-

---

6. See, e.g., JAMES C. GOODALE, *ALL ABOUT CABLE: LEGAL AND BUSINESS ASPECTS OF CABLE AND PAY TELEVISION* § 2.15 (Law Journal Seminars-Press 1998) for a brief discussion of some of the cable system cross-ownership requirements.

7. Section 533(b)(2) of the 1984 Act read:

It shall be unlawful for any common carrier, subject in whole or in part to subchapter II of [the Communications Act], to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

lies or protected incumbent operators from competition.<sup>8</sup> The revised Act presumes that all telecommunications can be competitive, and thus, subsection (a) generally preempts state and local regulations that prohibit, or have the effect of prohibiting, the offering of a telecommunications service.<sup>9</sup>

To prevent this preemptive force from sweeping too broadly and eliminating necessary and important rights, two “safe harbors” from this general prohibition were inserted in section 253. The first safe harbor, in subsection (b),<sup>10</sup> preserves state regulatory authority to impose requirements regarding universal service, public safety and welfare, and consumer protection, as long as they are competitively neutral and consistent with section 254.<sup>11</sup> The second safe harbor is subsection (c), which protects two key functions of state and local governments: managing the public rights-of-way, and obtaining compensation for the use of local public rights-of-way.<sup>12</sup> In order to qualify for the safe harbor under subsection (c), the Act requires that such compensation be received on a competitively neutral and nondiscriminatory basis, and that the compensation be publicly disclosed.<sup>13</sup>

Congress removed these questions from the FCC’s jurisdiction in an effort to avoid “federalizing” local public rights-of-way, which would have occurred if the FCC had been made the arbiter of whether local management and compensation conditions fell within the section 253(c) safe harbor.<sup>14</sup> This is reflected in the language introducing section 253(c) (“Nothing in this section affects . . .”), which is strongly reminiscent of that introducing section 2(b) of the 1934 Act (“Nothing in this act shall . . . apply . . .”).<sup>15</sup> Congress similarly restricted the FCC’s authority to grant review in section 253(d). But unlike subsection 253(b), the subsection (c) safe harbor does *not* fall within the authority given the FCC under subsection (d); thus, disputes under sub-

---

8. See, e.g., GOODALE, *supra* note 6, at § 1.16, pp. 1–37.

9. 47 U.S.C. § 253(a).

10. *Id.* § 253(b).

11. *Id.* § 254.

12. *Id.* § 253(c).

13. *Id.*

14. See *infra* Section IV.

15. Subsection (b) of section 2 (“Application of Act”) was originally added on the floor of the Senate to preserve prior existing nonfederal jurisdiction. This is the same “section 2(b)” that the drafters of section 243(e) of House Bill 1555 (part of the “MFS amendment,” discussed below) had thought necessary to expressly override in their attempt to give the FCC jurisdiction over such matters. Incidentally, the Supreme Court held this language to be an overriding denial of jurisdiction to the Commission. See *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 370, 374 (1986) (section 2(b) defines limits of FCC’s power to act and hence determines whether Congress intended to displace state law).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 481

section (c) are, by deliberate decision of Congress, to be settled in the courts.

*B. The Importance of Maintaining Local Authority Has Increased Since 1996*

The above outline of section 253 makes clear that in 1996 Congress intended to preserve local authority over local public rights-of-way. Since September 2001, the importance of that authority has increased due to the heightened awareness of the role communications plays in response to a variety of emergency situations. Communications systems serving a given area need to be able to survive both natural disasters and deliberate attacks. This is especially true of the systems that we rely on for public safety—primarily wireless mobile communications systems used by law-enforcement and rescue personnel, but also the systems that governments use to communicate with each other, their citizens, and key organizations such as rescue squads and hospitals. As has frequently been noted, such survivability requires both interoperability and redundancy.<sup>16</sup> Systems need to be able to both intercommunicate transparently and to operate independently. If a Verizon switch in New York City is out of action, for example, communications can be rerouted through other lines and control points. As FCC Media Bureau Chief W. Kenneth Ferree pointed out:

We can no longer rely on a one-wire world . . . 9/11 was not only a terrible human loss but the outages and domino effect from the collapse highlighted the importance of robustness and the need for redundancies in our communication infrastructure.<sup>17</sup>

The role of local communities in providing for this interoperability and redundancy is to address needs that private parties alone may not wholly fulfill. Left to themselves, private carriers have incentives to move in the opposite direction. A provider that wields market power may believe that it benefits from keeping its users in a “walled garden” and making it difficult for them to communicate with, or through, its competitors.<sup>18</sup> At the same time, a commercial provider,

---

16. See, e.g., Elizabeth V. Mooney, *Spectrum: The Problem and Solution for Emergency Communications*, RCR WIRELESS NEWS, Oct. 21, 2002, available at 2002 WL 10371857.

17. W. Kenneth Ferree, *Digital Connections: Creating a World Without Boundaries*, Remarks at the Meeting of the National Association of Minorities in Cable (Sept. 24, 2002) (transcript available at <http://www.fcc.gov/mb/namic.pdf>).

18. For example, it was only following a federal antitrust inquiry into its instant messaging technology that America Online submitted a proposal allowing open access to its Instant Mes-

on economic grounds alone, may also find it expedient to use parts of other providers' plants rather than building redundant facilities of its own, engaging in resale rather than facilities-based competition.

A local government may be able to take crucial steps to ensure redundant paths are available by negotiating with carriers over placement of facilities in the public rights-of-way, and balancing the efficiencies of joint trenching against the potential bottleneck of having all one's communications lines in one basket. Such detailed arrangements as to where lines are run cannot be made by a central federal authority; they are necessarily part of local right-of-way management. In contrast, many of the conditions for interoperability are likely to be best addressed at the federal or state level, such as in the context of setting technical standards that must be used by all providers for interconnection. But choosing actual *locations* for interconnection is the business of local government, particularly where the local government may be in the best position to provide a neutral meeting ground for competitors to connect. In some cases, it may even be essential for a local community to develop and own parts of the communications network to ensure that coverage is complete and that all the necessary connections (whether or not sufficiently lucrative to attract private investment) are made.

It should be noted that the Internet itself, which was designed to survive potential damage or attack, achieves survivability through a *decentralized* model. There is no central location or "Internet capital" controlling the entire system. Rather, the Internet functions through cooperative functioning by peers, creating multiple redundant paths that can automatically route around a problem. In a similar way, a robust national communications system can better be created by allowing appropriate responsibilities at each level—federal, state, and local—than by attempting to impose a top-down order from Washington alone.

Local communities have long performed signal services by requiring cable operators to make arrangements that enable better public safety response as part of their local franchise commitments.<sup>19</sup> In the

---

senger system. *AOL May Open IM Access*, CNN MONEY, June 15, 2000, available at <http://www.money.cnn.com/2000/06/15/news/aol>. Prior to opening access, AOL had controlled 90% of the IM market and only allowed its own registered customers to use its communications network. *Id.* In 2000, several other messaging systems providers submitted interoperability proposals to the Internet Engineering Task Force in response to intense public criticism. *Id.*

19. For example, many cable franchises require the cable operator to provide local governments with access to the Emergency Alert System to warn viewers of local emergencies. Some such franchises also provide for "institutional networks" to connect, among other locations, police, fire, and emergency management centers.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 483

more complex and interlocking world of modern communications systems, localities can perform this service on a broader scale through management of their public rights-of-way. Other right-of-way management functions may also turn out to be crucial in an emergency. For example, the local government is the logical place to coordinate maps that indicate exactly where communications lines are located—and they can do so only if they retain the power to acquire consistent GIS formatted maps from the providers.

## II. WHAT IS AT STAKE: LOCAL COMMUNITIES' PROPERTY RIGHTS

The fundamental fact about local communities' rights *vis-à-vis* telecommunications companies is this: the public rights-of-way belong to the community, and neither a private company nor the federal government can use that property without the owner's permission. It is important to set forth these basic facts plainly, given the degree to which they have been obscured by shoals of red herrings in the course of the right-of-way debate. Thus, this section outlines the basic property rights at stake in the controversy over section 253.

### A. *Local Communities Have a Property Interest in the Public Rights-of-Way*

Municipal corporations often own rights-of-way in fee.<sup>20</sup> Alternatively, they may own a right-of-way easement over property, with the underlying fee being held by the adjacent property owner.<sup>21</sup> While the form of the property rights involved may vary from state to state,<sup>22</sup> in almost every case the community remains responsible for the operational management of the rights-of-way. This involves both taking care of the property by ensuring that it remains usable for its primary purposes, and administering the use of that property by the various interested parties who may gain benefits from that use.

Local governments exercise this authority on behalf of their citizens. Under the American constitutional system, a government re-

---

20. See 64 C.J.S. *Municipal Corporations* § 1451 (1999) ("the fee to a street may be vested in the municipality"). See, e.g., *People ex rel. Hill v. Eakin*, 50 N.E.2d 474, 478 (Ill. 1943) ("The fee in streets and alleys is vested in the local municipality in trust for all the citizens of the State . . .").

21. See 64 C.J.S., *supra* note 20, at § 1451 ("Under this rule, the public or the municipality acquires only an easement."). See, e.g., *Miller County v. Groves*, 801 S.W.2d 777, 779 (Mo. Ct. App. 1991) ("The public has an easement in land held for public streets and the government holds title to such easement in trust for the public's use.").

22. See 64 C.J.S., *supra* note 20, at §§ 1451–1452 for a general discussion of the nature of title and ownership in the streets.

ceives its authority from the consent of the governed. Accordingly, no matter what the form of ownership, a local government holds property (such as the public rights-of-way) in trust for its people.<sup>23</sup> When a third party intrudes upon that property without permission, it is not merely occupying an amorphous commons, as would a fisherman dropping a line in a trackless ocean. Instead, a third-party intruder is violating the property rights of each individual represented by the local government.

A local community's property rights over its streets and roads are distinct from the regulatory authority it may exercise as part of its governmental powers. Thus, even where the federal government preempts state or local regulation of services, this does not prevent the exercise of state or local proprietary powers.<sup>24</sup> On the contrary, the federal government cannot deprive a state of the power to control the property within its own borders without infringing upon the state's sovereignty.<sup>25</sup> Similarly, a local community's right to obtain compensation for the use and occupancy of its property is distinct from its governmental power to tax, though the two are often confused (or deliberately conflated under the rubric of "revenue-raising measures").<sup>26</sup>

The fact that local governments exercise this proprietary authority as trustees in some sense for the public does not prevent them from obtaining fair compensation on behalf of their citizens. On the contrary, a trustee has a duty not to give away property it holds in trust.<sup>27</sup>

---

23. See, e.g., *Erie Telecomms. v. Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *affirmed on other grounds*, 853 F.2d 1084 (3d Cir. 1988); *Rheinberger v. Sec. Life Ins. Co. of Am.*, 146 F.2d 680 (7th Cir. 1944); *City of Colorado Springs v. Weiher*, 129 P.2d 988 (Colo. 1942); *Yellow Cab Taxi Serv. v. City of Twin Falls*, 190 P.2d 681 (Idaho 1948); *Miller County v. Groves*, 801 S.W.2d 777 (Mo. Ct. App. 1991).

24. See, e.g., *California v. FERC*, 495 U.S. 490, 496–99 (1990) (affirming construction of section 27 of the Federal Power Act to protect proprietary activities).

25. See, e.g., *United States v. Alaska*, 521 U.S. 1, 4 (1997) (ownership of lands is an essential attribute of sovereignty); *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845) (federal government's exercise of a power of municipal sovereignty over lands within a state would be "repugnant to the Constitution," *id.* at 224). See generally 10A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 30.39 (3d ed. rev. vol. 1990).

26. See, e.g., *City of Dallas v. FCC*, 118 F.3d 393, 397–98 (5th Cir. 1997) ("Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways."); *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893) (the fee paid to a municipality for the use of its rights-of-way is rent, not a tax).

27. Black defines "trustee" as "[o]ne who, having legal title to the property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary." *BLACK'S LAW DICTIONARY* 1519 (7th ed. 1999). Bouvier similarly states: "The duties of trustees have been said, in general terms, to be: 'to protect and preserve the trust property, and to see that it is employed solely for the benefit of the *cestui que trust* [beneficiary]." *II BOUVIER'S LAW DICTIONARY* 3336 (3d ed. 1914). "Trustees possess general power to lease trust property provided it be for the advantage and protection of the *cestui que trust*, and that the interests of the

Specifically, a trustee is required to charge reasonable rent, and the reasonableness of the rent is measured by the value of the property and local custom.<sup>28</sup> Courts have pointed out that localities, acting to protect citizens, have not just a right but also a duty to obtain fair value for public property used by private corporations.<sup>29</sup> This principle is further recognized in the anti-donation laws, which in many states forbid public officials to give away public property to private parties.<sup>30</sup>

In analyzing section 253, it is important to keep in mind that the fundamental power to charge a fee for use of the public rights-of-way derives from property rights under state and local law, not from any federal law. Despite the fact that cable franchise fees are provided for in the federal Cable Act, the ultimate basis for those fees lies in the fact that a cable operator is using a community's property. The same is true of other such fees for other users of the public rights-of-way.

#### *B. Local Communities Authorize Private Parties to Use the Public Rights-of-Way Through Franchises*

The principal means by which private entities are allowed to use public property is the franchise.<sup>31</sup> Historically, local and state governments had the primary responsibility for managing the public rights-of-way to serve the needs of pedestrians and vehicular traffic.<sup>32</sup> When public utilities began to emplace permanent facilities in those rights-of-way, communities required each utility to obtain a specific authorization. Such an authorization was classified as a franchise be-

---

remaindermen and those entitled to the property after termination of the trust." 90 C.J.S. *Trusts* § 472 (2002).

28. "A trustee is required to charge a reasonable rental for property of the trust which has been leased, and lease of trust property will be set aside where it is for a nominal rental. In determining whether or not a rent is reasonable, regard is to be had to the character of the rental spaces, the purposes of the trust, the local custom with respect to similar property, and all the conditions attending the execution of the lease." 90 C.J.S., *supra* note 27, at § 478.

29. See, e.g., *Erie Telecommunications*, 659 F. Supp. at 595.

30. See, e.g., ALASKA CONST. art. IX, § 6 ("No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose."). Cost-free grants to telephone companies were at times justified against these statutes on the ground that the benefits received by the community from a company functioning as a public utility could be considered sufficient to compensate the community fairly. See *Comtec, Inc. v. Mun. of Anchorage*, 710 P.2d 1004 (Alaska 1985) (telephone services through a utility promotes access and conveniences and fulfills a need for reliability, and therefore is not an unlawful use of public funds).

31. See, e.g., 12 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 34.07 (3d ed. rev. vol. 1995) ("In nearly every jurisdiction, with only a few exceptions, a grant to a public service company of the right to use streets for [various purposes] is a franchise.").

32. See HENK BRANDS & EVAN T. LEO, *THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS* 4 (Artech House 1999).

cause it represented a special privilege not enjoyed by other right-of-way users.<sup>33</sup> Pedestrians and vehicular traffic, for example, do not permanently occupy the streets, and their occupation is transitory, in contrast to that of public utilities and similar entities, which install their systems permanently in the rights-of-way.

To use and occupy the public rights-of-way, franchises have received various treatment: from special privileges granted to private parties to occupy what is ordinarily public property dedicated to transitory public uses, to “functions delegated to private individuals to be performed for the furtherance of the public welfare and subject to public control.”<sup>34</sup> In any case, a grant (either from the state or from the locality) is necessary because “[n]o private person can take another’s property, even for a public use,” except by virtue of a legislative grant from the entity with authority over the property.<sup>35</sup> An entity that places facilities in the public rights-of-way receives a special benefit by means of a special grant of authority, for which it can be expected to pay a special user fee.

Historically, however, such fees were often waived. In particular, local and state governments sought to encourage communications providers, along with other utilities, to bring services to their citizens.<sup>36</sup> These governments lacked the capital needed to fully exploit new technologies themselves and instead offered franchises to entrepreneurs to build utilities.<sup>37</sup> Even though local communities were impacted by the direct and incidental costs of the roadwork involved, local officials believed that the benefits of communications services were worth it. For this reason, many early franchises were informal and un-

---

33. Black defines “franchise” as a special privilege that does not belong to citizens of a country generally, conferred by a government on an individual or a corporation. BLACK’S LAW DICTIONARY 668 (7th ed. 1999).

34. 12 MCQUILLIN, *supra* note 31, at § 34.01.

35. *California v. Cent. Pac. R.R. Co.*, 127 U.S. 1, 40–41 (1888). *See also* *Tulsa v. Southwestern Bell Tel. Co.* 75 F.2d 343, 350 (10th Cir. 1935) (“franchise is a special privilege conferred by government upon individuals”); *United States v. King County*, 281 F. 686, 689 (9th Cir. 1922) (“To the commonwealth here, as to the king of England, belongs the franchise of every highway as a trustee for the public.”).

36. *See, e.g.*, Nicholas P. Miller, *Local Government: The Silent Investor in Wireline Telecommunications Networks*, in LOCAL GOVERNMENT ROLES AND CHOICES ON THE INFORMATION SUPERHIGHWAY: TENANTS OR ARCHITECTS OF THE TELECOMMUNICATIONS FUTURE? 20, 22 (Public Technology, Inc. 1994).

37. *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851, 898 (1996). *See also* Charles D. Cosson, *You Say You Want a Revolution? Fact and Fiction Regarding Broadband CMRS and Local Competition*, 7 COMM.LAW CONCEPTUS 233, 246 (1999) (citing ELI W. CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 72–74 (1950); HERBERT B. DORAU, *MATERIALS FOR THE STUDY OF PUBLIC UTILITY ECONOMICS* 2–8, 12–22, 31–49 (1930); JOSEPH ASBURY JOYCE, *A TREATISE ON FRANCHISES* 542–54 (1909)).

sophisticated.<sup>38</sup> Frequently, they also required little in the way of compensation, though it should be noted that the deal often involved a commitment to universal service and was made under the assumption that rates would be regulated either by state or by local authorities.<sup>39</sup> Because local governments wished to encourage these service providers to build telephone networks and similar infrastructure in their jurisdictions, many local governments imposed minimal fees.<sup>40</sup> Nonetheless, the principle of payment for use of property was not abandoned: many early telephone companies paid a portion of their proceeds to the government as a condition of a franchise.<sup>41</sup>

The right to grant a franchise for the use of public property is an attribute of a sovereign entity, derived from the property rights of the public.<sup>42</sup> A franchise establishes a particular type of relationship, distinct from those created by mere permits for work in the public rights-of-way. Generally, a franchise not only provides the authorization to occupy public property, but also specifies the general conditions that apply to such occupancy. A franchise does not hand over unlimited property rights to the recipient. Rather, users such as public utilities and cable companies obtain a right to an easement—a nonpossessory right to enter and use land that is in the possession of another.<sup>43</sup> The conditions imposed on such franchises may include: location and depth of placement, provisions for traffic safety and disruption, insurance for and indemnification to the local government for injuries to persons or property, relocation of facilities for public improvements,

---

38. Such franchise authorities might grant a license “merely upon a company’s application therefor. The document would authorize the cable system to use local streets, rights of way, easements, etc., for erecting poles and stringing wires, cable and conduits necessary for its operations.” S. REP. NO. 98-67, at 6 (1983).

39. See Jennifer L. Worstell, *Section 253 of the Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property that Must be Justly Compensated*, 50 FED. COMM. L. J. 441, 446 (1998); Miller, *supra* note 36, at 22.

40. See *supra* note 36 and accompanying text. See generally Worstell, *supra* note 39, at 446; Miller, *supra* note 36, at 22. Such initial agreements were sometimes perpetuated as “automatic franchises” and required no more than a nominal fee.

41. See HARVEY L. ZUCKMAN ET AL., *MODERN COMMUNICATIONS LAW* 1058, 1070 (West Publishing Co. 1998).

42. See *supra* Section II.A.

43. RESTATEMENT (THIRD) OF PROPERTY § 1.2 (1998). See, e.g., *United States v. Puget Sound Power & Light Co.*, 147 F.2d 953 (9th Cir. 1944) (applying Washington law); *Vill. of Blaine v. Indep. Sch. Dist. No. 12*, 121 N.W.2d 183 (Minn. 1963); *Northeast Sacramento County Sanitation Dist. v. Northridge Park County Water Dist. of Sacramento County*, 247 Cal. App. 2d 317 (Cal. Ct. App. 1966); *Dunmar Inv. Co. v. N. Natural Gas Co.*, 176 N.W.2d 4 (Neb. 1970); *In re Gillen Place*, 106 N.E.2d 897 (N.Y. 1952). Also, many states impose specific term limitations on the granting of a franchise so that there cannot be a franchise in perpetuity. See, e.g., ALA. CONST. art. XII, § 228 (thirty years); ARIZ. CONST. art. 2, § 9 (no law granting irrevocably any privilege, franchise, or immunity shall be enacted).

and provisions addressing the removal or abandonment in place of facilities, as well as compensation.

Throughout much of the history of communications franchising, a single telephone company was given an exclusive right to provide service using the public rights-of-way; all other companies were barred from that privilege.<sup>44</sup> This approach was based on an explicit or implicit assumption that a telephone system was a natural monopoly—only one provider could survive. This assumption was reversed in the 1996 Act, which assumed that it was economically viable for multiple providers to coexist and took steps (including section 253) to encourage such competition. Thus, franchises under the Act must be assumed to be nonexclusive.

*C. Local Communities Should Charge Market Value for Use of the Public Rights-of-Way by Private Parties*

As the owner/trustee of the public rights-of-way, a local government has property rights on par with those of a private property owner. Nonetheless, considerable controversy has developed because of an assumed tension between these local property rights and the interest in promoting competitive entry reflected in section 253. Three primary issues appear to be in play at this time with respect to local communities' property rights:

(1) *Management.* It is generally agreed that local governments are responsible for making sure that the numerous communications systems (as well as other facilities) in the public rights-of-way can smoothly coexist. No other candidates are apparent to take over this crucial function. At the same time, of course, no one user of the rights-of-way wishes to have its own operations restricted in any way. Thus, while consensus on this point exists in theory, disagreements abound in practice.

(2) *Compensation.* Neither those who wish to use local communities' property for free, nor decision makers at the federal level, are eager to recognize local communities' right to receive compensation for the use of their property. There is a striking reluctance to admit that under normal free market principles telecommunications companies that receive value from use of the public rights-of-way owe compensation to the owners.

(3) *Control.* As a general matter, property owners enforce their rights to both (1) manage their property, and (2) receive fair

---

44. See BRANDS & LEO, *supra* note 32, at 4.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 489

compensation by exercising the right to control who has access to that property. A landlord can obtain rent for a property because a potential user has to get the landlord's permission to enter and occupy the property. To some, however, the exercise of this control looks like a "barrier to entry" in section 253's sense: it could prevent a potential competitor (one who refused to pay fair compensation) from gaining access to the public rights-of-way so as to provide a service. Many of the section 253 cases turn on the recharacterization of a basic element of property rights—the right to exclude—as a *regulatory* barrier of the sort section 253 was created to preempt.<sup>45</sup>

Industry parties in litigation are generally unwilling to concede that fair market compensation can be required. They take the position that they do not oppose legitimate management of the public rights-of-way (although they disagree as to what sorts of requirements fall within the category of legitimate management). The control factor above is basically ancillary to the other two—one enforces one's property rights, where necessary, by controlling access to the property—and so will generally be considered subsumed in compensation and management (although the way in which control is exercised often seems to make a difference to a court reviewing right-of-way requirements). The core of the controversy has to do with compensation, which will be the primary focus in analyzing section 253 cases.

The following sections show why local communities not only can, but should, charge a fair market price for the use of the public rights-of-way.

### 1. Local Communities Are Entitled to Recover the Fair Market Value of Locally Owned Land

As a general matter, local right-of-way franchises grant private parties, such as communications companies, three distinct and valuable rights of use: (a) the *option* to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way; (b) the right to create *actual* burdens on the public rights-of-way through the construction work to install and maintain such facilities, and the continuing occupation of limited space in the streets; and, (c) the ability to *use* the public rights-of-way in doing business.

In a free market, a property owner has a right to charge a fair market price in exchange for such rights of use. One reasonable method for determining price might involve three kinds of compensation, corresponding to those three valuable rights: (1) an annual option

---

45. See *infra* Section V.

payment, probably in a fixed sum, reflecting the general potential burden imposed on the community's property by the private user's rights; (2) a payment related to the extent of the usage, probably based on a linear foot calculation or similar occupancy measure, reflecting the actual burden imposed; and (3) fair market value for the benefit derived by the private user from use of the public rights-of-way, probably in the form of a payment based on gross revenues, which reflects the value realized by the user from use of the community's property.

In actual practice, governments at all levels have sought to realize the benefits of ownership of public land through a variety of arrangements. For example, the state of Alaska charges a 12.5% royalty on crude oil pumped from state-owned lands.<sup>46</sup> Revenues from this state-owned asset fund state operations, making personal income taxes unnecessary in Alaska.<sup>47</sup> Some of these revenues are contributed to a "Permanent Fund" against the day when the oil supply is exhausted.<sup>48</sup> The federal government's spectrum auction policies, discussed below, form another example.

State and local authority to exact reasonable "rental" compensation from private commercial entities who operate on local public property for private economic gain is unambiguous, and it is not limited to the exploitation of mineral rights. In fact, public officials are under an affirmative duty to obtain fair market value compensation when disposing of valuable public property.<sup>49</sup> More specifically, a municipality cannot give away or grant for nominal or inadequate consideration a franchise for the use of its streets.<sup>50</sup> This is, of course, a special case of the anti-donation principle referred to previously in Section II.A.

One turn-of-the-century case construing the applicability of a federal law to a telegraph company's use of local public property framed the issue explicitly in terms of the parity of proprietary rights in private and public property:

---

46. ALASKA STAT. § 38.05.134 (2001).

47. *Id.* at § 36.10.005(a)(17).

48. ALASKA CONST. art. 9, § 15 (2001); ALASKA STAT. § 37.13.010 (2001).

49. *See, e.g.*, Heiner v. City of Mesa, 515 P.2d 355 (Ariz. Ct. App. 1973); Tedder v. Walker, 89 S.E. 840 (Ga. 1916); Watson v. City of East Point, 154 S.E.2d 15 (Ga. 1967); Hackett v. Trustees of Sch., 74 N.E.2d 869 (Ill. 1947); Club Jolliet, Inc. v. Manchester, 262 A.2d 844 (N.H. 1970); Ward v. City of Roswell, 281 P. 28 (N.M. 1929); Baier v. City of St. Albans, 39 S.E.2d 145 (W. Va. 1946).

50. *See People ex rel. Lapice v. Wolper*, 183 N.E. 451 (Ill. 1932); *Daly v. Georgia*, S. & F.R. Co., 7 S.E. 146 (Ga. 1888); *Clarke v. Evansville Boat Club*, 88 N.E. 100 (Ind. App. 1909).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 491

The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress . . . conferred on the defendant [telecommunications company] no right to use the streets and alleys of the city . . . which belonged to the municipality.<sup>51</sup>

## 2. Local Communities Incur Sizable Costs Due to Communications Use of the Public Rights-of-Way

The preceding discussion bases a local community's right to fair compensation on its rights as a property owner, irrespective of the costs it may incur. It is also instructive, however, to note that telecommunications companies' use of the public rights-of-way imposes substantial costs on the community. Compensation requirements provide a means of recovering those costs, although (just as in any other property context) fair compensation is not *confined* to cost recovery.

The American Public Works Association (APWA) has assembled a great deal of information about the costs and effects of work in the public rights-of-way by telecommunications companies. An online article by Timothy X. Sullivan summarizes the results of a number of studies in this area collected by AWPWA in August 1997.<sup>52</sup>

---

51. *Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903). See also *W. Union Tel. Co. v. City of Richmond*, 224 U.S. 160 (1912); *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893); *Postal Tel. Cable Co. v. City of Richmond*, 249 U.S. 252 (1919).

The one exception to the authority of state and local governments to obtain fair market value for the use of their publicly owned property proves the rule. The Tonnage Clause of the Constitution, U.S. CONST. art. I, § 10, cl. 2, has been construed to prohibit "all taxes and duties regardless of their name or form . . . which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261-66 (1935). This provision was added to the Constitution in part, according to the Supreme Court, because the Framers had "doubts whether the commerce clause would accomplish that purpose." *Id.* at 265. Owing to this constitutional impediment, in this one context states are limited to the recovery of costs associated with servicing vessels and policing their ports. Outside of that limited context, however, states have far greater discretion to require compensation for the use of public property.

52. Timothy X. Sullivan, *Accommodating New Telecommunications Providers in Public Rights-of-Way: A View from City Hall*, Municipal Research & Services Center available at <http://www.mrsc.org/legal/telecomm/sullivan.htm> (under the heading, "Preserving the Integrity and Useful Working Life of Public Rights-of-Way") (last visited March 5, 2003). Here, Sullivan refers primarily to AM. PUB. WORKS ASS'N, *MANAGING UTILITY CUTS* (1997) (available for purchase at <http://www.pubworks.org/bookstore>), updated in Walea E.I. Khogali & El Hussein Mohamed, *Managing Utility Cuts: Issues and Considerations*, APWA Int'l Pub. Works Congress, NRCC/CCWA Seminar Series "Innovations in Urban Infrastructure" (1999), at <http://www.nrc.ca/irc/fulltext/nrcc43713.pdf>. He also cites CINCINNATI INFRASTRUCTURE INST., DEPT. OF CIVIL & ENVTL. ENG'G, *IMPACT OF UTILITY CUTS ON PERFORMANCE OF STREET PAVEMENTS* (Univ. of Cincinnati 1995); AM. ASS'N OF STATE HIGHWAY & TRANS.,

The APWA compilation notes some of the interests communities have in the public rights-of-way, including traffic safety and convenience, and the need to preserve the public's investment in right-of-way improvements. In addition, it identifies some of the problems that can occur if communities do not effectively manage activity in the public rights-of-way, including:

- "Excavations made without notice to the community"<sup>53</sup>
- "Excavations and restorations carried out in violation of community standards"<sup>54</sup>
- "Use of improper materials and methods in restoring utility cuts"<sup>55</sup>
- "Slow repairs that inconvenience the traveling public"<sup>56</sup>
- "Poor workmanship in trench reinstatement and pavement restoration"<sup>57</sup>
- "Public dissatisfaction with traffic delays and interrupted utility service"<sup>58</sup>
- "Disruption of adjoining public facilities such as gutters and sidewalks"<sup>59</sup>
- "Damage to adjoining utility facilities disturbed by improper excavation"<sup>60</sup>
- "Increased maintenance costs from pavements repeatedly cut to access utilities"<sup>61</sup>
- "Increased danger for the public and the excavators."<sup>62</sup>

Local communities are particularly concerned with the financial impact when companies repeatedly cut into road surfaces, given the current pressures on budgets for road maintenance and improvement. For example, Santa Monica, California, found that the average life of street pavement was reduced by sixty-four percent due to utility work, resulting in an average cost of over \$190,000 for patching alone.<sup>63</sup> San Francisco determined similarly that the pavement aging process was significantly accelerated by increased levels of utility work. "Streets

---

GUIDE FOR ACCOMMODATING UTILITIES WITHIN HIGHWAY RIGHT-OF-WAY (1994) (available for purchase at <http://www.transportation.org/aashto/home.nsf/FrontPage>).

53. Sullivan, *supra* note 52.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 493

with three to nine utility cuts are expected to require resurfacing every eighteen years," representing a thirty percent reduction in service life when compared to streets with fewer than three cuts.<sup>64</sup>

Altogether, these costs involve far more than the direct costs of overseeing public right-of-way construction (for example, costs associated with permitting and inspecting), coordinating public right-of-way construction (police supervision and traffic control), and responding to construction-related complaints. Construction reduces the roadway life,<sup>65</sup> reduces space available in the roadway to others, makes coordination of public projects more difficult (and expensive), and often delays detection of damage to vital utility infrastructure. Moreover, construction imposes significant costs on the public. In some cases, those costs are as simple (and as significant) as those associated with traffic delays and vehicle damage.<sup>66</sup> In other cases, critical access routes to local businesses may be cut off, water lines broken, gas lines punctured, and existing communication services disrupted.<sup>67</sup> The University of Minnesota, among others, has concluded that utility infrastructure installation imposes substantial costs on the public.<sup>68</sup>

---

64. Ghassan Tarakji, San Francisco State University, *The Effect of Utility Cuts on the Service Life of Pavements in San Francisco, Volume 1: Study Procedure and Findings* 6 (1995).

65. See, e.g., Tarakji, *supra* note 64; INFRASTRUCTURE MGMT. SERVS., INC., ESTIMATED PAVEMENT CUT SURCHARGE FEES FOR THE CITY OF ANAHEIM, CALIFORNIA ARTERIAL HIGHWAY AND LOCAL STREETS (1994).

66. See, e.g., Lyndsey Layton, *Hidden Cost of Road Tear-ups: D.C. Taxpayers Stuck With Bill for Trench-Weakened Streets*, WASH. POST, Mar. 15, 2000, at A1.

67. See, e.g., Lyndsey Layton, *Despite Promises, Road Work Still Chaotic, Only 1 Cut Coordinated Out of 507 Permitted*, WASH. POST, Aug. 13, 2000, at C1; Lyndsey Layton, *Mayor Vows to Bring Order to Street Work: Longer Moratorium on Trenches Is Possible*, WASH. POST, Mar. 28, 2000, at B1; Joanna Glasner, *High Bandwidth Bureaucracy*, WIRED NEWS, Mar. 25, 1999, available at <http://www.wired.com/news/business/0,1367,18681,00.html>; Rachel Horton, *City Urges Conservation After Water Line Slashed*, IRVING NEWS, July 11-14, 1999, at 1A; Rani Cher Monson & Melissa Borden, *3,600 Lose Emergency Phone Service*, ARLINGTON MORNING NEWS, July 16, 1999, at 1A; Stephen C. Fehr, *Road Kill on the Information Highway*, WASH. POST, Mar. 21, 1999, at A1; Jim Hannah & Cindy Schroeder, *Fiber-Optic Cut Disrupts Business Computers Snarled in Kenton County*, CINCINNATI ENQUIRER, Feb. 28, 2001; Blake Morrison & Amy Mayron, *Buried Stone May Have Caused Break Submerged Block Diverted Auger to the Side, Piercing Gas Line*, ST. PAUL PIONEER PRESS, Dec. 13, 1998, at 1A.

68. Raymond L. Sterling, *Indirect Costs of Utility Placement and Repair Beneath Streets*, Report to the Minnesota Department of Transportation (1994). These costs have been described by local communities in comments at the FCC. See Comments of the Alliance of Local Organizations Against Preemption, *In Re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (GN Docket No. 00-185), Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities (CS Docket No. 02-52), filed June 17, 2002. The members of this coalition include the National League of Cities, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors.

### 3. The Value of the Public Rights-of-Way Is Not Confined to Costs

As noted in Section II.C., local communities' rights to compensation are not solely based on the disruption that occurs when a communications company installs facilities in the public rights-of-way. In a free market, an owner generally bases a portion of the charges to the property on how valuable that property is to the user. Both facilities-based and non-facilities-based wireline communications service providers use the public rights-of-way, directly or indirectly, to transmit signals and provide service. Because the use has value to these service providers, it is reasonable to expect them to pay a fair price for the privilege.

Revenues generated from that use are one measure of how valuable a company finds the community's asset, and some right-of-way franchises base compensation on the gross revenues derived from that use.<sup>69</sup> Another way of estimating value might be to look at the value of the private property abutting a right-of-way and consider what it would cost a company to acquire the necessary rights to use that alternate route. Either way, it is clear that a potential right-of-way user gains a significant advantage by dealing only with one lessor: the local government. This "one-stop shopping" approach enables the user to avoid the transaction costs that would otherwise be involved in striking numerous deals with numerous individual property owners.

Examination of analogous transactions and prices is another way of gauging the reasonableness of a value for the public rights-of-way. A useful reference point for speaking of public assets of any kind may be the 12.5% royalty on Alaska North Slope oil previously mentioned.<sup>70</sup> A similar type of transaction is leasing retail space in shopping malls (representing "space rental," though most frequently in the private rather than the public sector), where the lessee commonly pays the lessor fifteen percent of gross revenues for the use of that space.<sup>71</sup>

At first, cable franchising may seem more analogous to communications use of the public rights-of-way because of the five percent cap the Cable Act places on gross revenues in the form of a franchise

---

69. Compare cable franchise fees, which are generally based on gross revenues. See 47 U.S.C. § 542(b) (2002).

70. See *supra* note 46.

71. See 1 M.R. FRIEDMAN, LEASES § 6.1, at 158–59 (2d ed. 1983) ([A] percentage lease "gives [the] landlord an opportunity to share in [the] tenant's success without being saddled with long-term low rental agreements. In leases of shopping center stores its use is virtually universal. In other retail establishments its use is hardly less."); *In re Adoption of N.J.A.C. 13:38-1.3(f)* by the State Bd. of Optometrists, 775 A.2d 629, 635 (N.J. Super. Ct. App. Div. 2001) ("A percentage lease is an efficient device for figuring the actual value of rented space . . ."); Note, *The Percentage Lease—Its Functions and Drafting Problems*, 61 HARV. L. REV. 317, 318–20 (1948).

fee.<sup>72</sup> However, since the Cable Act also allows local communities to require benefits in a cable franchise over and above the franchise fee, this five percent cap does not in fact limit the total compensation that may be received from a cable operator when both franchise fees and in-kind benefits are taken into account. Thus, the cable compensation level is actually closer to the other analogues mentioned here than may seem at first to be the case.

More than fifty class actions have been filed alleging that local property owners' rights were violated when telecommunications companies obtained access, without permission, from the owners of the land under or adjacent to railroad rights-of-way.<sup>73</sup> These cases usefully illustrate the real value of these rights-of-way. In Indiana, for example, AT&T agreed to pay \$3.6 million to landowners for laying fiber in abandoned PennCentral rights-of-way, equivalent to \$45,000 per linear mile for eighty miles, plus costs and attorneys' fees.<sup>74</sup> In another pending Indiana case, State Court Judge William Hughes, calling MCI Worldcom's actions a "willful trespass," awarded plaintiff a temporary injunction, and ordered the company to "remove all equipment and supplies."<sup>75</sup> MCI WorldCom placed the cost of the injunction at \$30,000 to \$60,000 per fiber per month—at least \$8 million per month.<sup>76</sup>

The federal government, when acting through agencies tasked with managing public assets, has also commanded market prices for communications uses of public property. For example,

[t]he National Oceanographic and Atmospheric Administration [NOAA], which is required by law to charge market rates for use of federal lands it controls, estimates that the telecommunications boom sent the price for using 5 or more miles of contigu-

---

72. 47 U.S.C. § 542(b).

73. Mark Allan Calhoun, *The Price of Progress: Defending Lawsuits Brought Against Railroads and Telecommunications Companies Who Contract to Allow Installation of Fiber Optic Cable in Railroad Rights-of-Way*, Law Seminar International's Fourth Annual Local Telecommunications Infrastructure (Aug. 23–24, 2001).

74. *AT&T Settles Class Action Alleging Trespass*, 1 TELECOM LAND MGMT. LAW REP. no. 7, at 11–12 (May 1999).

75. Findings of Fact, Conclusions of Law and Order, *Peeler v. MCI WorldCom Network Serv., Inc.*, No. 29D03-0106-MI-448, ¶ 13 (Hamilton Sup. Ct., Ind.) (filed June 28, 2001), available at <http://www.ackersonlaw.com/peelerorder.010628.pdf>.

76. Press Release, The Ackerson Group, *MCI WorldCom Claims Losses of Eight Million Per Month From Fiber Build Injunction* (July 6, 2001) available at <http://www.ackersonlaw.com/010706.worldcom.pdf>.

ous right of way soaring from around \$8,000 per mile in 1987 to over \$100,000 in 1997.<sup>77</sup>

In mid-2002, NOAA applied a fair market value approach for installation of fiber in National Marine Sanctuaries, citing comparable transactions at \$40,000 to \$100,000 per mile of fiber (declining to adopt a more aggressive \$240,000-per-mile methodology used by the California State Land Commission).<sup>78</sup>

The federal government's spectrum auction policy is a particularly interesting example of the right and duty to obtain fair value for public assets. When spectrum was originally designated for radio and television broadcast applications in the early twentieth century, the "airwaves" were treated as national public property, but specific compensation was not demanded from the users. Only a somewhat vague and further attenuated obligation to operate "in the public interest" was placed on these broadcasters.<sup>79</sup> In more recent years, however, the FCC has taken to using auctions of spectrum allocations as a way to obtain fair value from their users. Potential users bid on specified allocations, based on the value they expect to realize, and the FCC awards the allocation based on those bids.<sup>80</sup>

The auction method has generally been endorsed by the federal government as a means of realizing appropriate compensation for the use of public assets. A 2001 FCC study, for example, noted that one of the goals of spectrum assignment is "revenue for the public," and reported that as of that period "[t]he 32 auctions conducted by the FCC have raised over \$32 billion for the U.S. Treasury."<sup>81</sup> The Commission noted that such auctions serve sound economic policy purposes:

---

77. Christopher Conte, *The Great Broadband Heist*, GOVERNING, Aug. 2002, at 34, available at <http://governing.com/8broad.htm>.

78. COMMUNICATIONS DAILY (Warren Communications News Subscriber Service, Washington, D.C.), Aug. 29, 2002, at 8.

79. See *NBC v. United States*, 319 U.S. 190, 215 (1943) ("The criterion governing the Commission's licensing power is the 'public interest, convenience, or necessity.'"), citing 47 U.S.C. §§ 307(a)(d), 309(a), 310, 312 (1934); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) (the public interest is a criterion "as concrete as the complicated factors for judgment in such a field of delegated authority permit").

80. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 2348 (1994), *on recons.*, Second Memorandum Opinion and Order *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 7245 (1994), *amended by*, Amendment of Part I of the Commission's Rules—Competitive Bidding Proceeding, WT Docket No. 97-82, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, F.C.C. 97-60 (rel. Feb. 28, 1997) (Part I Order).

81. Evan Kwerel & Walt Strack, FCC, *Auctioning Spectrum Rights* 3 (Feb. 20, 2001), at <http://wireless.fcc.gov/auctions/data/papersAndStudies/aucspec.pdf>.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 497

Our experience has been that auctions are superior to the alternatives because they are more likely to award licenses fairly and efficiently. Auctions assign licenses quickly to those who value them the most, employ objective, transparent criteria, reduce wasteful private expenditures on obtaining licenses, and raise revenue for the public.<sup>82</sup>

In a 1997 report to Congress, the FCC declared as follows: “The Commission’s auctions program has demonstrated the ability to award licenses to productive users, to encourage the emergence of innovative firms and technologies, to generate valuable market information, and to raise revenues for the public.”<sup>83</sup> Congress’s view is that the FCC is not only permitted, but also expected, to gain fair value for the air-waves as a federal asset.<sup>84</sup>

Just as private property owners are permitted to require users of their property to pay fair market value for that use, users of government property are also required to pay a fair price. In this context, the only mystery is why objections are raised to this broad principle when it is applied to local communities’ public rights-of-way. This anomaly frequently arises when a court or a commentator fails to recognize the property interest involved and insists on regarding right-of-way authority solely as “regulation.”<sup>85</sup>

#### 4. Sound Economic Policy Supports Allowing Local Communities to Charge Fair Market Value for Property Used

The preceding discussion explains how allowing business entities to use a valuable asset without fully compensating the owners would be unjust and contrary to law. It would also be bad economic policy.

From the standpoint of economic efficiency, it is incorrect to suggest that charging compensation that represents the value of the

---

82. *Id.* at 1.

83. FCC, *Report to Congress on Spectrum Auctions 2*, F.C.C. 97-353 (1997), available at 1997 WL 629251.

84. In response to reports that a settlement with a wireless carrier might result in less than full payment of auction amounts, Senator John McCain was quoted as objecting in October 2001:

“The expected \$17 billion . . . in receipts from January’s re-auction would have provided revenue desperately needed to address the recent terrorist attacks upon this country, and I am disturbed that an American company would force American taxpayers to forgo some of that money by exploiting legal technicalities,” he added. “But if this does happen, then this Congress must use its oversight authority to ensure that this matter is resolved upon terms that protect the American people from being short-changed once again.”

TELECOMMUNICATIONS REPORTS DAILY (www.tr.com Subscriber News Service), Oct. 26, 2001.

85. See *infra* Section V.

property used is somehow a barrier to entry. In a free-market economy, market entrants in every industry are normally expected to pay fair market value for the property they use. If some resources are sold at artificially low prices, this subsidy tends to distort the market by attracting investment to alternatives (e.g., types of telecommunications networks) that actually cost more than their apparent price would indicate. The result is a misallocation of resources. Cost-free or drastically below-market availability of resources<sup>86</sup> distorts normal market incentives and tends to lead to inefficient allocation of economic resources.<sup>87</sup> For example, the incentives to invest in satellite delivery systems as opposed to wireline systems will be skewed if the former require spectrum to be paid for at auction, but the latter can take advantage of (local) public rights-of-way for free.

In other contexts, the FCC has long recognized that requiring communications companies to pay fair market value for the inputs used in their business *encourages* competition and economic deployment of resources. For example, the Commission's spectrum auction generated huge revenues for the Treasury, but the effect was to encourage competition and deployment rather than discourage it.<sup>88</sup> The Commission concluded:

[T]he competitive bidding process provides incentives for licensees of spectrum to compete vigorously with existing services, develop innovative technologies, and provide improved products to realize expected earnings. In this way, awarding spectrum using competitive bidding aligns the licensees' interests with the public interest in efficient utilization of the spectrum. As one commenter observes, "Successful bidders are those that not only place a high value on the property relative to other auction par-

---

86. Generally industry advocates assert that they are not demanding *free* use of the public rights-of-way because they are willing to pay the administrative costs of managing the right-of-way use—in effect, the cost of issuing permits. Since these administrative costs will in almost all cases be far below market value, this qualification is trivial. For simplicity's sake, the discussion herein does not distinguish between the position that localities must allow use of their rights-of-way for free, and the position that they must allow such use at a nominal administrative cost.

87. "Classical economic theory holds that subsidies distort the market outcome that would have occurred absent the subsidy, thereby creating inefficiencies in resource allocation which lower global welfare." Robert H. Lantz, *The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws*, 10 AM. U.J. INT'L L. & POL'Y 993, 1009 (Spring 1995) (citing Jeffrey E. Garten, *New Challenges in the World Economy: The Antidumping Law and U.S. Trade Policy*, Remarks Before the U.S. Chamber of Commerce, Washington, D.C. (Apr. 7, 1994) (quoting JAGDISH N. BHAGWATI, *PROTECTIONISM* (1988)).

88. See *supra* Section II.C.3.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 499

ticipants, but also have the financial capability to support their bids.”<sup>89</sup>

The same is true with respect to charging for use of public rights-of-way. Allowing communities to charge fair market value will not discourage use of the public rights-of-way if an enterprise is sound, but it will discourage uneconomic uses.<sup>90</sup> Charging a fair price for the use of rights-of-way will help companies make more rational investment decisions.

In other words, forcing local communities to give away access to their property at below-market rates would be the same as forcing them to subsidize the telecommunications companies that use the rights-of-way.<sup>91</sup> Charging market-level fees for use of the public rights-of-way prevents what would otherwise be substantial subsidies running from the public to communications providers. Unless local governments, as trustees of the public rights-of-way, can charge a fair market rent for cable operators’ use and occupancy of the public rights-of-way, a direct subsidy will run from consumers to the industry. There is no good reason for citizens to pay such a subsidy in favor of telecommunications companies and their customers.

These points must be kept clearly in mind when dealing with the frequently repeated claim that giving away communities’ property is necessary to promote the development of broadband communications. It is not at all clear that federal subsidies are the best way to promote such development. More importantly, if the federal government *did* wish to subsidize broadband carriers, candor and accountability require that it do so through explicit, deliberate, and temporary appropriations. Otherwise, reading section 253 to require cost-free use of local communities’ property by private businesses would result in permanent, covert subsidies using other people’s money.

---

89. See FCC, *Report to Congress on Spectrum Auctions*, *supra* note 83, at 18.

90. Indeed, the recent problems in the broadband industry generally have been exacerbated by overinvestment. The last thing the industry needs is a further incentive to misallocate resources. See, e.g., Brian Leaf, *Battling Waves of Woe: Once High-Flying Industry Getting Swamped*, CRAIN’S CHI. BUS., Feb. 25, 2002 (“As companies rushed to install fiber optic cables—the autobahn of the new economy—they went overboard. Now, the capacity glut has cost telecom companies billions of dollars, with no foreseeable [sic] return on their investment.”).

91. The companies, not their customers, are subsidized, because most such companies are not required to pass through cost-savings to their customers. Old-time monopoly telephone companies subject to rate-of-return regulation might have been required to pass through such savings; contemporary competing providers are not.

5. Reading Section 253 to Prevent Local Communities from Charging Fair Market Value Would Result in an Unconstitutional Taking

The inviolability of state and local property rights against federal depredation is reflected in the Fifth Amendment's prohibition on unjustly compensated federal takings of state and local property.<sup>92</sup> The Fifth Amendment "encompass[es] the property of state and local governments when it is condemned by the United States."<sup>93</sup> As the Supreme Court pointed out in *St. Louis v. Western Union Tel. Co.*<sup>94</sup> over a century ago:

No matter how broad and comprehensive might be the terms in which the franchise was granted [by the national government], it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. . . . *This rule extends to streets and highways . . . .* When an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same of another state or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated . . . . [W]hile permission to a telegraph company to occupy the streets is not technically a lease and does not in terms create the relation of landlord and tenant, yet it is the giving of exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.<sup>95</sup>

For this reason federal law must be read to respect rather than to violate local communities' property rights. As a general rule, statutes are to be interpreted in such a way as not to raise constitutional problems.<sup>96</sup> If section 253 can be read in a way that is consistent with local

---

92. U.S. CONST. amend. V.

93. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

94. *Western Union*, 148 U.S. 92 (1893).

95. *Id.* at 101–02, 99 (emphasis added). See also *50 Acres*, 469 U.S. at 25; *United States v. Miller*, 317 U.S. 369 (1943).

96. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). See also *I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341,

property rights, courts should follow that reading, rather than create a construction that would require a Fifth Amendment taking. Since section 253 can indeed be read to preserve, rather than infringe, local property rights,<sup>97</sup> the statutory language should not be construed to require communities to accept less than fair market value for the use of their public rights-of-way.<sup>98</sup>

In sum, both fundamental fairness and sound economics militate against the notion that local property could be given away to private parties by section 253.<sup>99</sup>

#### *D. The Principle of Federalism Is Implemented by Upholding Local Property Rights*

As shown above, local communities' authority over their public rights-of-way is supported both by the Fifth Amendment and by the common law of property. In the context of potential federal preemption, however, these local property rights also emerge as linked to a central structural principle of our political and legal system. A reading of section 253 that rides roughshod over local property rights would undermine the basic principle of federalism.

In the preeminent case on federalism, *M'Culloch v. Maryland*, the Supreme Court announced the doctrine of enumerated powers: the federal government may exercise only the powers delegated to it in the Constitution, and the states and the people reserve all powers not enumerated as federal powers, or reasonably implied as part of such an enumerated power.<sup>100</sup> Forty years later, the Court further explained the fundamental notion of federalism: dual sovereignty.<sup>101</sup> State and local governments are not mere creatures of the nation-state, whose authority can be altered at will. Even as members of the federal union, they retain the authority and the power to act independently of the

345–48 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 407–08 (1909).

97. See *supra* Section I.A.

98. This approach would preserve a reasonable interpretation—in fact, as shown below, the intended interpretation—of § 253, while avoiding the problems delineated by Jennifer L. Worstell, *supra* note 39. Worstell concludes that § 253 *does* create a taking of local community property and hence is unconstitutional. This Article, however, concludes that § 253 should instead be read *not* to create such a taking.

99. This is even aside from the unfavorable precedent such a policy would create with respect to private property in general.

100. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 384–88 (1819).

101. “The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.” *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858).

federal government, except where the Constitution must be read to preempt them.<sup>102</sup>

In particular, state and local governments remain the key players in dealing with local affairs. The Supreme Court “has emphasized the importance in a democratic society of preserving local control of local matters.”<sup>103</sup> It is difficult to conceive of a matter more quintessentially local than authority over a city’s streets and roads. Even where some aspects of the systems that inhabit local public rights-of-way are of national scope,<sup>104</sup> those aspects that are addressed and preserved by section 253(c)—management of and compensation for the rights-of-way—have to do with property that is located in a particular place and governed by historically local rules. In these matters, centralized federal authority is both impotent and out of place.

The independent sovereignty of the states creates an environment in which various solutions to a problem can be tried out in multiple “laboratories of democracy.” Local communities can experiment with different ways of meeting needs; they can observe the results of these different methods and adopt those that seem promising. Just as the free market, with a million independent decision makers, functions economically better than a centralized command economy; just as the Internet with its distributed processing is more robust and flexible than a classic mainframe system; so too a society in which state and local governments can direct their own affairs as much as possible will be healthier and more efficient than one in which centralized federal agencies seek to micromanage local affairs.

The overarching concept of federalism appears in several forms in American law. The Tenth Amendment embodies a rule that the historic police powers of the states cannot be preempted by the federal government unless Congress enacts a law stating that preemption is a

---

102. Ultimately, federalism may be seen as a specific expression of the general principle of subsidiarity, which has been discussed in a number of contexts over the last several hundred years. Briefly, it may be stated as follows: “[L]arger associations should not assume functions which can be performed efficiently by smaller associations.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 146-47 (Clarendon Press 1980). A recent formulation makes the connection with political federalism clear: “[N]o unit of society should perform functions more appropriately performed by a smaller entity. The neighborhood should not usurp the normal function of the family; the city the function of the neighborhood; the state the function of the city; or the federal government the function of the state.” *Delivery of Social Services Through Faith-Based Organizations*, George Washington Univ. Inst. for Communitarian Pol’y Studies, ¶ 7, available at <http://www.gwu.edu/~icps/faithb.html> (last visited Mar. 15, 2003). A more detailed analysis of the principle of subsidiarity is beyond the scope of this Article.

103. *City of Rome v. United States*, 446 U.S. 156, 201 n.12 (1980) (Powell, J., dissenting) (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)).

104. For example, the technical standards that allow for interconnection among communications systems.

“clear and manifest purpose” of its act.<sup>105</sup> Similarly, “Congress may not enact any law that would direct the functioning of the States’ executives or legislatures.”<sup>106</sup>

This last point—preserving a realm of independence from federal direction for state executives and legislatures—is also embodied in the Unfunded Mandates Reform Act of 1995 (UMRA).<sup>107</sup> This Act forbids the federal government to attempt to commandeer local property or local decision makers for federal purposes.<sup>108</sup> In doing so, it also allocates financial responsibility: the federal government may not pursue its purposes by overtly or covertly imposing the fiscal burdens of federal programs on state or local communities.<sup>109</sup>

In this context, the prohibition against uncompensated takings, when applied to state and local government property, as discussed in Section II.C.5., becomes a further bulwark against federal trespasses over the boundaries set by federalism. The Fifth Amendment ensures that Congress cannot deprive state and local governments of their independent power to act by depriving them of the resources necessary to do so. Conversely, it ensures that the federal government cannot force state and local governments to bear the burden of federal programs through seizure of state and local property. By protecting the independent property base of state and local communities, the Takings Clause helps make sure that the sovereign freedom of action reserved to the states is not merely theoretical, but practical.

It is clear that prior to any consideration of the 1996 Act or section 253, local communities had the right to manage and obtain compensation for the public rights-of-way based on inviolable property

---

105. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hillsborough County v. Auto. Med. Lab., Inc.*, 471 U.S. 707, 715–16 (1985); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

106. *Condon v. Reno*, 155 F.3d 453, 458 (4th Cir. 1998).

107. Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. § 1501).

108. *Id.*

109. See *New York*, 505 U.S. at 161 (commandeering of public property in service of a federal regulatory program is no less offensive to the sovereignty of state government than the commandeering of its legislative processes). As more fully discussed below, the UMRA was at issue in the development of § 253 itself. Early versions of § 253 raised concerns that the provision would be read to force communities to grant cost-free access to their property, depriving them of reasonable compensation. Advocates for local communities pointed out that if it were read as limiting compensation to costs, the bill that became the 1996 Act would have been subject to a point of order under section 2(6) of the UMRA. The language that ultimately developed into § 253(c) was introduced specifically to avoid that problem—in the wider context, to ensure that the 1996 Act did *not* become a vehicle for commandeering local resources in the service of federal purposes. Under § 253(c), it remains up to state and local governments how far they may wish to subsidize telecommunications development by holding in abeyance their right to full compensation.

rights and supported by the constitutional principle of federalism. That includes the right to charge a fair market price for the use of the public rights-of-way by communications providers. Local communities' right to authorize use of the public rights-of-way through franchises flows from those underlying rights and represents a normal and appropriate means for allowing private entities to use public property in a fair and orderly fashion.

### III. OPPONENTS OF LOCAL AUTHORITY CONFUSE PROPERTY WITH REGULATION

#### A. *Failure to Distinguish Property Rights from Regulation Leads to Mischaracterizations*

Section 253 has placed the use of local public rights-of-way in the spotlight of telecommunications policy. Since the passage of the 1996 Act, the courts and the FCC have attempted to grapple with the proper interpretation of this provision. However, the strong tendency in both venues to characterize local property rights as regulatory restrictions has led to an unnecessary level of confusion and misinterpretation in the developing law.

Local governments wear two hats: they are both regulators and property owners. For this reason, it is easy to confuse the two functions and interpret a property-based action as if it were a regulatory action. For example, when one pays money to a government, the tendency is to assume it is a tax, but that is not always the case. If one buys a book from the Government Printing Office, one is engaging in a commercial transaction, just as if one were buying from Barnes & Noble. The payment for the book does not become a tax merely because it is paid to government. Similarly, if one rents retail space in a building that happens to be owned by the government, the rent is not a tax, because it is being paid in exchange for a specific economic benefit, just as it would be to a private party. Similarly, conditions imposed on the lessee by the government *as a landlord* are not regulations when they correspond to the kinds of conditions any landlord might impose on any lessee.

When an observer misunderstands the transaction at issue, he or she is likely to mischaracterize compensation and other conditions. Rents will be misidentified as taxes; lease terms will be misconstrued as governmental regulations. It may even be to the advantage of an observer to encourage this mischaracterization, because "tax" and "regulation" tend to have negative connotations, and misdescribing the transaction may gain one party a significant rhetorical advantage.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 505

Indeed, if different legal standards apply to taxes and to rent transactions, then the mischaracterization may have substantive legal consequences.

Confusion between property rights and regulation is widespread in the debate over section 253. Many commentators, and many decision makers, tend to describe right-of-way transactions purely in regulatory terms, without acknowledging the role of property rights. This way of looking at the matter makes market-level compensation look like onerous taxes, and it makes lease conditions look like regulatory red tape. It sees a local community's control of its public rights-of-way as an issue of *regulatory barriers to entry* rather than of *an owner's right to control use of its property*. There is a strong incentive for plaintiffs<sup>110</sup> under section 253 to focus solely on regulation and to ignore property rights. Judges are likely to look sympathetically on a plea to eliminate regulatory barriers; they are less likely to approve a candid demand to invade another party's property rights.

#### B. *The FCC Has Confused Property Rights With Regulation*

The "regulation" approach to rights-of-way is frequently expressed at the FCC. On the same day that Senator McCain was reported as emphasizing the need to recover full value in spectrum auctions,<sup>111</sup> Commissioner Martin of the Commission was describing local right-of-way conditions in terms of taxes and regulations: "We need to change the way government *taxes* broadband services and [creates] *regulatory* financial disincentives," he said.<sup>112</sup> He specifically singled out state and local government burdens such as franchise fees, right-of-way fees, and permitting processes. The Commissioner's web page further stated:

At every level of government, we ought to work to remove *regulatory* underbrush—burdensome *regulations* that may be impeding deployment. For competitive carriers, many of these hurdles occur at the state and local levels. These include local rights of way, permits for zoning and tower siting, and franchise fees that I have already discussed.<sup>113</sup>

---

110. Typically, under § 253, plaintiffs are those who wish to avoid paying compensation or complying with conditions for right-of-way use.

111. October 26, 2001. See TELECOMMUNICATIONS REPORTS DAILY, *supra* note 84.

112. TELECOMMUNICATIONS REPORTS DAILY (www.tr.com Subscriber News Service), Oct. 26, 2001 (emphases added).

113. Commissioner Kevin J. Martin, Framework for Broadband Development: Remarks at the National Summit on Broadband Deployment (Oct. 26, 2001), available at <http://www.fcc.gov/speeches/Martin/2001/spkjm101.html> (emphases added).

The same attitude infects FCC decisions in a variety of areas. In a decision regarding cable franchise fees, the Commission called such fees “a unique class of external costs.”<sup>114</sup> Yet such franchise fees appear to be “unique” only on the assumption that they represent some peculiar sort of governmental exaction. Given that they correspond closely to rent for the use of the public rights-of-way, it is hard to see where their “uniqueness” lies, or why they should be treated differently from other types of rent a cable operator pays.<sup>115</sup>

The Commission’s position on this issue has been systematically inconsistent. When the Commission charges “rent” for radio frequency spectrum, it is proud of the rents realized and does not regard such a charge as taxation.<sup>116</sup> On the other hand, when local communities charge “rent” for their public rights-of-way, the Commission is strongly suspicious of this as a potential barrier to entry.<sup>117</sup> No reason has yet been suggested why the *federal* spectrum resource should be made available only at the best price bid, while *local* public right-of-way resources should be given away at below-market prices. Nor has the Commission taken the position that its own spectrum auctions slow the development of competitive networks by requiring a fair price. By its own practice and pronouncements, the Commission is committed to the position that *fair compensation for use of a resource does not impede competition*. Yet it has been reluctant to apply that principle with respect to local public rights-of-way. This is the very reverse of a federalist approach to the various levels of rights.<sup>118</sup> It would be inconsistent for the Commission to suppress local rights while claiming those same rights for itself at the federal level.

### C. Other Commentators Confuse Property Rights With Regulation

A number of recent articles fall victim to the same fallacy of reducing property rights to regulation. This confusion is characteristically associated with the claim that compensation for use of the public rights-of-way is limited by section 253 to the cost of administering that use. For example, Christopher R. Day argued in May 2002 that “Lack of Local Rights-of-Way Access Is Killing Competitive Local

---

114. Memorandum Opinion and Order *In re* Petitions for Declaratory Rulings on Franchise Fee Pass Through Issues for the City of Pasadena, CSR-5441-R; City of Nashville, CSR-5373; and City of Virginia Beach, CSR-5282-R, F.C.C. 01-289, 16 F.C.C.R. 18, 192 (Oct. 4, 2001), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-01-289A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-289A1.pdf).

115. Other types of rent may include: rent for office space, or for a building to accommodate a cable system headend.

116. See *supra* notes 81 and 82.

117. See *infra* Section V.B.1.

118. See *supra* Section II.D.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 507

Exchange Carriers.”<sup>119</sup> Day describes the exercise of local rights as “a patchwork of local *regulation* governing rights-of-way access.”<sup>120</sup> He refers to section 253(c) as creating “a limited ‘safe harbor’ for municipalities to *regulate* carefully defined rights-of-way management functions.”<sup>121</sup> In line with this point of view, Day fails to see the point of the dispute over right-of-way compensation. He assumes that compensation should be limited to costs, without ever discussing the matter—even though there is no reference at all to costs in the statutory provision.<sup>122</sup> This approach, which is wholly implausible based on the statute and legislative history itself, appears more plausible if one makes the unstated assumption that only the costs of regulation need to be considered, as distinct from the real market value of an asset. As a result, outraged by the claims of local communities to compensation over and above costs, Day criticizes the FCC for not taking strong steps in section 253 matters to suppress local communities.<sup>123</sup> He makes this criticism without noticing that section 253(d) removes section 253(c) from the FCC’s jurisdiction altogether, and thus renders his proposed solution impossible.<sup>124</sup>

Similarly, another May 2002 article by Qwest attorneys David Goodnight and Roy Adkins focuses on regulation and makes a series of unfounded assumptions about section 253.<sup>125</sup> Goodnight and Adkins castigate local communities for clinging to “comprehensive *regulatory* roles of a prior era.”<sup>126</sup> They do not address the importance of localities’ property rights. The article, presenting itself as an exposition of the Ninth Circuit’s *Auburn* decision,<sup>127</sup> takes for granted that “compensation” can only mean cost—without making an argument to

---

119. Christopher R. Day, *The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access Is Killing Competitive Local Exchange Carriers*, 54 FED. COMM. L.J. 461 (2002).

120. *Id.* at 463 (emphasis added). The phrase “rights-of-way access” is itself indicative of a point of view that ignores local property rights. If telecommunications industry problems were attributed to the high prices charged by manufacturers of fiber-optic cable, it would still be unlikely for an article on the problem to be headlined “Lack of Access to Fiber” and to propose confiscation of the fiber without payment as a solution.

121. *Id.* at 467 (emphasis added).

122. *Id.* at 470.

123. *Id.* at 479.

124. See *supra* note 15 and accompanying text. A detailed rebuttal to Day’s article may be found in William Malone, *Access to Local Rights-of-Way: A Rebuttal*, 55 FED. COMM. L.J. 101 (forthcoming 2003).

125. David Goodnight & Roy Adkins, *The Federal Telecommunications Act of 1996: Section 253, Cooperative Federalism, and the Role of the Federal Courts*, WASH. STATE BAR NEWS (May 2002), available at <http://www.wsba.org/barnews/2002/05/goodnight-adkins.htm>.

126. *Id.* at 1 (emphasis added).

127. *City of Auburn v. Qwest Corp.*, 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002). See *infra* Section V.B.10.

that effect, other than an invocation of the 1996 Act's pro-competitive purposes under the heading "Effects of Gross-Receipts Fees on Competition."<sup>128</sup> Similarly, Goodnight and Adkins declare that fees based on gross revenues "have no relationship to the use of the right-of-way."<sup>129</sup> Apparently this conclusion arises from the notion that new services, and hence new revenues, may be added using existing facilities without additional construction in the public rights-of-way. The point is moot, however, once one realizes that the owner of an asset may charge for its use based on the value the user derives from that use—market value—not merely on the "impact costs" of the usage.<sup>130</sup>

A similar bent may be found in an article by Barbara Esbin, a senior FCC staff member who worked for several years for a Washington, D.C. law firm that represents cable companies, and Gary Lutzker, a colleague from the same firm.<sup>131</sup> The primary focus of this piece is on the open access debate, but the article includes a detailed review of many section 253 cases. Like Day, Goodnight, and Adkins, Esbin and Lutzker refer to local communities' interest in their public rights-of-way primarily in terms of "regulation."<sup>132</sup> Although they briefly mention the notion of rent for local rights-of-way,<sup>133</sup> they largely ignore property rights in their substantive discussion. Their rejection of local communities' property rights is conclusory, and ap-

---

128. Goodnight & Adkins, *supra* note 125, at 6. Goodnight and Adkins claim later in the piece that "cost-based fees are fair and reasonable" because "[e]ach carrier pays for actual costs related to its use of the right-of-way." *Id.* at 8. This does not show, however, that non-cost-based fees cannot also be fair and reasonable.

129. *Id.* at 7. *See also id.* at 9.

130. It is not clear whether the Goodnight and Adkins article addresses the "cooperative federalism" referred to in the title. The term "federalism" occurs exactly once, in the first sentence. The only role played by the concept of relations between federal and state or local governments appears to be in the frequent, but ungrounded, assertion that "Congress carved out a very limited, circumscribed role for local municipal government," a relationship that does not *prima facie* appear to be very cooperative. *Id.* at 1.

131. Barbara S. Esbin & Gary S. Lutzker, *Poles, Holes and Cable Open Access: Where the Global Information Superhighway Meets the Local Right-of-Way*, 10 COMMLAW CONSPICUUS 23 (2001).

132. *Id.* at 27–29, 35 (quoting the FCC's *Troy* decision, cited *infra* note 143 and discussed *infra* Section V.B.1.), 39 n.135, 41, 49, 77. Arguing against any requirement that a cable operator must obtain additional authority to use the public rights-of-way for non-cable purposes, Esbin & Lutzker tie local "regulation of telecommunications services" to the local interest in "managing the rights-of-way"—invoking one of the local rights specifically preserved by § 253(c) (management) without mentioning the other (compensation)—and, remarkably, conclude that once right-of-way management is fully addressed, "no other interests remain to be addressed" for local governments. *Id.* at 51–52.

133. *Id.* at 44–45.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 509

pears to be based on invoking “the pro-competitive policy goals of the 1996 Act.”<sup>134</sup>

This shifting of the ground of discussion is significant. If suppressing local property rights is “the better view”<sup>135</sup> because of a policy goal of promoting facilities-based competition, then what Esbin and Lutzker are saying is that local property rights may be overridden in order to promote a federal goal: encouraging the construction of communications systems. In effect, this is to say that local property should be used to subsidize communications companies. While an *explicit* subsidy in pursuit of federal policies, with compensation to those whose property is taken, might be argued to be within the power of the federal government,<sup>136</sup> this cannot be a reason to deny the *existence* of local property rights.

Esbin and Lutzker’s treatment forms a useful illustration of the inconsistency in industry treatment of property rights. For example, the article touches on the “no additional burden” argument,<sup>137</sup> which holds that there should be no additional compensation, as long as the additional use of local community property does not impose additional physical burdens on the public rights-of-way.<sup>138</sup> This argument, however, is never applied to industry property. It is not generally suggested that cable modem service should be free to subscribers because it traverses the same cable the company has already installed for other purposes.<sup>139</sup> Nor, on the telephone side, is it commonly proposed that DSL subscribers should not need to pay for that service because it rides the same copper wires the telephone company has already put in place. Rather, it is assumed that the owner can sell the use of its property at a higher market price because the user is gaining greater value from it through the new service. That same assumption is not ex-

---

134. *Id.* at 46. It is noteworthy that Esbin and Lutzker are far more sensitive when the property rights of cable operators are in question. They suggest that a rule requiring cable operators to allow other parties to transmit over their systems “effectively takes and physically occupies significant portions of the operator’s facilities” and thus raises constitutional concerns. *Id.* at 78. Yet they are unconcerned about the constitutional ramifications of the direct physical invasion of local public property by communications companies. (Indeed, the same kind of transmission by a third party that is described as a “*physical occupation*” of a cable company’s system is dismissed, when it applies to local communities’ property, as not even amounting to a “use” of the property. *See id.* at 50–51 (emphasis added).)

135. *Id.* at 50–51.

136. *As noted supra* Section II.C.4.

137. Esbin & Lutzker, *supra* note 131, at 44.

138. *See id.* at 50 (“the mere passage of additional electrons through a previously authorized wire that lines in a public right-of-way does not ‘use’ the right-of-way and therefore does not vest the local authority with jurisdiction over a service provider that is simply using the existing wire”).

139. On the contrary, Esbin and Lutzker see a constitutional problem in any interconnection responsibilities associated with that service. *See supra* note 134.

tended to local communities' property. By failing to acknowledge that local communities have the same rights the companies do, industry apologists in effect refuse to admit the communities' property rights. They see the public rights-of-way as a commons, a free good, which communication providers may use at will without paying a price.

Thus, Esbin and Lutzker generally ignore local property rights in analyzing the extant section 253 cases. Rather than addressing the issue in detail, they simply group the judicial decisions they find favorable as constituting "[t]he majority of federal courts"<sup>140</sup> and extract from these an appearance of consensus, then dismiss the judicial decisions that do not fit that model as "squarely at odds with congressional intent."<sup>141</sup> For similar reasons, while the article mentions the FCC jurisdictional issue posed by section 253(d),<sup>142</sup> it ignores the FCC's lack of jurisdiction over section 253(c) when it lays great stress on whether a court has followed "FCC precedent" and assigns great weight to what are essentially dicta in Commission decisions such as the *Troy* ruling.<sup>143</sup>

One industry treatment actually does try to dispose of the property issue. Gardner F. Gillespie of Hogan & Hartson argues that local governments have no property rights; they only tax and regulate.<sup>144</sup> Like Esbin and Lutzker, he therefore prefers the language of regulation and taxation when he characterizes what local communities do with the streets.<sup>145</sup> He seeks to trivialize the permanent occupation of the public rights-of-way by communications facilities, and prefers to redescribe cable franchise fees as fees for the privilege of providing service rather than the rents they in fact represent.<sup>146</sup>

Gillespie's analysis gives the appearance of tackling the property rights issue. He makes a variety of distinctions about how localities hold property under state law, though exclusively from the standpoint of Dillon's Rule, which is valid in some states but not others.<sup>147</sup> And he does discuss the compensation issue in section 253 cases, although this discussion focuses primarily on labeling unfavorable decisions as

---

140. *Id.* at 38 n.129.

141. *Id.* at 47.

142. *Id.* at 37.

143. *In Re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (1997), *aff'd*, 13 F.C.C.R. 16400 (1998) [hereinafter *Troy*]. See *infra* Section V.B.1.

144. Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209 (2002).

145. See, e.g., *id.* at 209, 220, 227–28.

146. *Id.* at 238, 246.

147. *Id.* at 212–14, 227, 235. Dillon's Rule holds that local governments have only those powers expressly granted by states, or necessarily implied by those expressly granted, as opposed to powers that may be more generally implied or reserved.

“poorly reasoned” or “clearly wrong”<sup>148</sup> and claiming a growing consensus in the court decisions (although he also claims those decisions are “wildly inconsistent”).<sup>149</sup> The centerpiece of his analysis is a sustained attempt to discredit the *Western Union*<sup>150</sup> case, and cannot be dealt with here in detail.<sup>151</sup>

In addressing section 253, Gillespie recites the usual claim that the statute restricts compensation to cost recovery, despite the lack of any textual support for this notion.<sup>152</sup> He attempts to manufacture support by referring to legislative history, although his sole discussion of the legislative history consists of an attempt to take one floor statement out of context.<sup>153</sup> He even seeks to argue that “compensation” really means reimbursement for damages, and no more.<sup>154</sup>

In the end, Gillespie fails to come to grips with the real underlying issues. Why are the local streets not the property of the local community? If the streets do not belong to the local community, then who does own them? Clearly the public rights-of-way belong to *someone*. They do not belong to AT&T, Worldcom, or Comcast. Yet those companies use the public rights-of-way, and benefit from that use, in a way that the average citizen does not. Therefore the companies must owe compensation to *someone*. And unless Gillespie is proposing a scheme of direct payments to the states (and he is not), that someone must be the local communities, who hold the public rights-of-way on behalf of their citizens.

---

148. *Id.* at 223, 234 n.157.

149. Compare *id.* at 211–12, 219 n.64, 221 n.73, with *id.* at 210–11.

150. *Western Union*, 148 U.S. 92.

151. Gillespie, *supra* note 144, at 217–24. For a detailed discussion of Gillespie’s analysis of *Western Union*, see William Malone, *Municipalities’ Right to Full Compensation for Telecommunications Providers’ Uses of the Public Rights-of-Way*, DICK. L. REV. (forthcoming 2003).

152. Gillespie, *supra* note 144, at 251.

153. *Id.* at 243. Gillespie quotes a statement of Representative Stupak, the sponsor of an amendment to the language that became § 253(c), to the effect that communities must be able to distinguish among telecommunications providers based on their use of the rights-of-way. 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak). Gillespie cites this statement to support Gillespie’s claim that gross revenues-based compensation is excluded by § 253 because such a fee is not directly tied to the particular use of the rights-of-way. However, Representative Stupak did not suggest in the quoted passage or elsewhere that fees based on gross revenues would not be permitted. On the contrary, the discussion of Stupak’s amendment proceeded on the understanding that it would indeed allow revenue-based compensation. See *infra* Section IV.B.

154. Gillespie, *supra* note 144, at 240–41 (“The word ‘compensation’ suggests a reference to the damage to be caused the holder of the underlying *property right*.”) (emphasis added). One would assume, for example, that Gillespie himself probably receives a compensation package from his firm, and that it is probably not limited to reimbursement for workplace injuries. But in normal usage, “compensation” does not refer exclusively to making up for damage. The courts have noted that the term has much broader application than Gillespie admits. See *infra* Section V.B.19.

This is the conclusion that Gillespie is at pains to avoid, because he wishes to convert the public rights-of-way into a free good that can be appropriated at will by telecommunications companies. Gillespie is emphatic in claiming that telecommunications companies cannot be excluded from use of the rights-of-way.<sup>155</sup> He admits that franchises may be necessary, but claims that no compensation may be required except for recovery of minimal “regulatory costs.”<sup>156</sup> In addition, he claims that even if there were grounds for charging compensation in the past, new federal policies, embodied in section 253, have changed all that.<sup>157</sup> Thus, as indicated above, Gillespie’s underlying position is that section 253 was intended to hand over local public rights-of-way to telecommunications companies for essentially free use. This basic point is obscured but not altered by the extended discussion of state and federal law, and Gillespie does not really defend that point. The telecommunications companies have never explained why they should have the privilege of using public property for free—unless one counts the subsidy claim as such an argument.<sup>158</sup>

---

155. See Gillespie, *supra* note 144, at 226, 229–30, 251. The corresponding claim on behalf of cable operators is that they have an “expectation of renewal” that prevents them from being evicted. *Id.* at 248.

156. *Id.* at 233–34 (although Gillespie has just argued that requiring a franchise prior to construction violates § 253, *id.* at 232); 227. Gillespie warns that there will be increased resistance to payments of any kind by the cable industry as well as telecommunications providers. See *id.* at 247–48.

157. *Id.* at 226, 238–39.

158. Private building owners face analogous problems in some degree with respect to their own property. Generally, a landlord’s property rights allow the landlord to specify as part of a rental contract the conditions under which a tenant may use the landlord’s property. However, acting under provisions of the 1996 Act, the FCC has taken several steps to override the landlord’s rights in the name of federal telecommunications policy. Thus, the Commission first ruled that neither local regulations nor covenants running with the land could be invoked to “impair” an owner’s right in a multiple dwelling unit (MDU) building to use video receiver antennas or “over-the-air reception devices” (“OTARD”). It then extended this proscription to tenants, to the extent the property on which the antenna was placed was under the exclusive control of the tenant. See *In re* Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996: Television Broad. Serv. and Multichannel Multipoint Distrib. Serv., 11 F.C.C.R. 19276 (1996); *In re* Implementation of Section 207 of the Telecommunications Act of 1996—Restrictions on Over-the-Air Reception Devices: Television Broad., Multichannel Multipoint Distrib. and Direct Broad. Satellite Serv., 13 F.C.C.R. 23874 (1998). In the “Competitive Networks” proceeding, the FCC also moved in the direction of extending similar rules to wiring that occupies “rights-of-way” inside privately owned buildings. See, e.g., *In re* Promotion of Competitive Networks in Local Telecomm. Mkts., 15 F.C.C.R. 22983 (2000), available at 2000 WL 1593327. On the other hand, thus far these inside wiring rules have not reached the Draconian levels achieved by the FCC in the OTARD rules. It appears that there is more resistance to giving away *private* property to telecommunications carriers than to giving away *public* property, because we are less used to thinking of local communities’ property as something to be protected against (federal) government intrusion.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 513

It is clear from these misinterpretations that a systematic confusion about the purpose and meaning of section 253 is being built up. To correct this confusion, it is necessary to go back to the legislative history and see how the various parts of section 253, and certain related provisions of the 1996 Act, came about.

#### IV. THE LEGISLATIVE HISTORY OF SECTION 253

Section 253(c) was intended to protect local governments' authority to manage their public rights-of-way and to receive fair and reasonable compensation from telecommunications companies that occupy those rights-of-way. This protection is related to four additional provisions in the 1996 Act that must be read together: section 302 (adding section 653, Establishment of Open Video Systems); subsection 303(a) (amending section 621(b), Preemption of Franchising Authority Regulation of Telecommunications Services); subsection 303(b) (amending section 622(b)); and subsection 601(c) (Federal, State and Local Law). The legislative history of these sections is crucial in understanding the intent of Congress with regard to section 253.

The following discussion traces the development of section 253 through the Senate passage of S. 652, the Telecommunications Competition and Deregulation Act of 1995; the House's substitution of House Bill 1555; the Communications Act of 1995; and culminating in the adoption by both houses of final language in the conference agreement on the bills. The genesis of the four additional sections mentioned above will then be briefly described.

##### A. *The Senate Bill: S. 652*

A draft of S. 652, the Telecommunications Competition and Deregulation Act of 1995, was circulated by Senator Larry Pressler (R-S.D.) on January 31, 1995.<sup>159</sup> A draft Democratic alternative, the Universal Service Telecommunications Act of 1995, was circulated by Senator Hollings (D-S.C.) on February 14, 1995.<sup>160</sup> At hearings held on January 9, March 2, and March 21, 1995, no local government representatives were invited to testify.<sup>161</sup>

At the hearings, Senator Kay Bailey Hutchison (R-Tex.) raised the concern that local governments have in preserving their right to manage and receive compensation for use of public rights-of-way by

---

159. S. REP. NO. 104-23 (1995).

160. *Id.*

161. *Id.*

telecommunications providers.<sup>162</sup> The Commerce Committee marked up S. 652 on March 23, 1995,<sup>163</sup> and the bill as reported included an amendment by Senator Hutchison to new section 254 (which ultimately became section 253) as follows:

(c) LOCAL GOVERNMENT AUTHORITY. Nothing in this section affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

The language of section 253(c) was thus inserted specifically to protect local communities' right to do two things: (i) to manage the public rights-of-way; and (ii) to require compensation for the use of the public rights-of-way. Certain protective qualifications were included (for example, "competitively neutral and nondiscriminatory"); however, the core concern was to protect not only management but also compensation.

At this stage, S. 652 also acquired a new subsection (d), the development of which is highly important in understanding the intent of Congress.<sup>164</sup> In its original form, subsection (d), which corresponds to section 253(d) of the statute as passed, gave the FCC the authority to preempt local government exercise of its authority under subsection (c), as well as to preempt state regulation under subsection (b) and state and local authority under subsection (a). It read:

(d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The Committee Report<sup>165</sup> "explained" this language by merely repeating it.<sup>166</sup>

---

162. 141 CONG. REC. S 8424, S 8431 (1995).

163. S. REP. NO. 104-23 (1995).

164. This amendment in the bill as reported by the Commerce, Science, and Transportation Committee was not sought by Senator Hutchison, and no Senator or committee staff member has publicly claimed responsibility for it.

165. S. REP. NO. 104-23 (1995).

166. "New section 254(d) requires the FCC, after notice and an opportunity for public comment, to preempt enforcement of any state or local statutes, regulations or legal requirements

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 515

The language of Senator Hutchison's amendment is virtually identical to that finally enacted in 1996. But the language of the stealth amendment in subsection (d) as offered in 1995 differs significantly from the language finally enacted in 1996. Over the course of the legislative process, Congress deliberately rejected the attempt to give the FCC authority to rule on issues regarding management of and compensation for local public rights-of-way.

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c). They were very concerned, however, that the broad provision for FCC preemption under subsection (d) could act to wipe out that authority. The provision for FCC preemption of local right-of-way management and compensation authority in subsection (d) became the focus of local government concerns about S. 652 as it moved to the Senate floor in 1995.

The National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors mounted a major campaign to forestall FCC preemption of local right-of-way management and compensation authority. They were supported by the National Governors Association and the National Conference of State Legislatures, as well as by numerous individual cities and counties.

The Senate debated S. 652 in June 1995. Senators Dianne Feinstein (D-Cal.) and Dirk Kempthorne (R-Idaho) offered a floor amendment to strike subsection (d) entirely. This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthorne amendment failed on a narrow vote of 44-56 on June 14. The Senate then adopted, by voice vote, a substitute amendment offered by Senator Slade Gorton (R-Wash.) and supported by Senators Feinstein and Kempthorne. The substitute was developed after negotiations between the committee members and Senators Feinstein and Kempthorne. The Gorton amendment as adopted read as follows:

(d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal re-

---

that violate or are inconsistent with the prohibition on entry barriers contained in subsection (a) or other provisions of section 254." *Id.* at 35.

quirement to the extent necessary to correct such violation or inconsistency.

The purpose of the Gorton amendment was to preclude FCC jurisdiction over disputes involving local government authority over rights-of-way management and compensation, while preserving FCC jurisdiction over telecommunications business regulation by state or local regulators. Thus, the structure of section 253 itself reflects the distinction between governmental regulation—the subject of section 253(b)—and local governments' property-related rights regarding compensation for and management of the rights-of-way.

The floor debate over the Feinstein-Kempthorne amendment, together with the debate over the subsequently adopted substitute Gorton amendment, makes clear that the Senate's intent in adopting the Gorton amendment was to completely remove FCC jurisdiction over subsection (c) disputes about whether local government management of compensation requirements for rights-of-way are competitively neutral or nondiscriminatory. For example, in explaining the Feinstein-Kempthorne amendment, Senator Feinstein stated:

[T]he FCC lacks the expertise to address the cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.<sup>167</sup>

Senator Kempthorne also gave an example:

When I was the mayor of Boise, Idaho, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.<sup>168</sup>

Senator Feinstein also raised some theoretical questions about the likely effect of subsection (d) if it were not so limited:

---

167. 141 CONG. REC. S8134, S8171 (1995) (daily ed. June 12, 1995) (statement of Sen. Feinstein).

168. *Id.* at S8173 (statement of Sen. Kempthorne).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 517

[I]s a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?<sup>169</sup>

In explaining his amendment, which was ultimately adopted, Senator Gorton made clear that the amendment was intended to remove FCC jurisdiction over the kinds of management and compensation issues that Senators Feinstein and Kempthorne had referred to. He stated:

[T]he Feinstein amendment . . . does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. . . . I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give . . . [a]nd the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.<sup>170</sup>

He added, “Once again, the alternative proposal [the Gorton amendment] . . . retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.”<sup>171</sup>

Senator Gorton also made clear that the kinds of actions that would remain subject to FCC preemption authority under subsections (a) and (b) were very different. The Commission was given jurisdic-

---

169. *Id.* at S8305 (statement of Sen. Feinstein).

170. *Id.* at S8306 (statement of Sen. Gorton).

171. *Id.* at S8308 (statement of Sen. Gorton). This distinction as to venue is similar to the distinction between section 402(a) appeals, which may be taken to courts where the party appealing resides, and section 402(b) appeals concerning federally issued radio licenses and the like, which have been taken to the court of appeals in the District of Columbia since 1927.

tion over grants of monopoly or exclusive rights in violation of subsection (a),<sup>172</sup> or anticompetitive actions under subsection (b).<sup>173</sup>

Senator Gorton summarized: "So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will *not* be jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances."<sup>174</sup> The Senate language, including the Gorton amendment, was ultimately adopted as the language of section 253.

### *B. The House Bill: H.R. 1555*

House Bill 1555, the Communications Act of 1995, was introduced on May 3, 1995. Section 101 was similar to language in a predecessor bill, House Bill 4103, which had been passed by the House in the 103rd Congress. House Bill 1555 contained the following language on rights-of-way management and compensation:

#### Section 243. Preemption.

(a) REMOVAL OF BARRIERS TO ENTRY. Except as provided in subsection (b) of this section, no State or local statute, regulation, or other legal requirement shall— (1) effectively prohibit any carrier or other person from entering the business of providing interstate or intrastate telecommunications services or information service; or (2) effectively prohibit any carrier or other person providing interstate or intrastate telecommunications services or information services from exercising the access and interconnection rights provided under this part.

(b) STATE AND LOCAL AUTHORITY. Nothing in this section shall affect the ability of State or local officials to impose, on a nondiscriminatory basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, ensure that a provider's business practices are consistent with consumer protection laws and regulations, and ensure just and reasonable rates, provided that such requirements do not effectively prohibit any carrier or person from providing interstate or intrastate telecommunications services or information services.

---

172. *Id.* at S8306. ("This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider . . .").

173. *Id.* ("when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers").

174. *Id.* (emphasis added).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 519

(c) CONSTRUCTION PERMITS. Subsection (a) shall not be construed to prohibit a local government from requiring a person or carrier to obtain ordinary and usual construction or similar permits for its operations if—(1) such permit is required without regard to the nature of the business; and (2) requiring such permit does not effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service.

(d) EXCEPTION. In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

(e) PARITY OF FRANCHISE AND OTHER CHARGES. Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

Subsection (e), which did not appear in S. 652, is particularly worthy of note. If enacted, this clause could have threatened the introduction of competition by encouraging entrenched incumbents to challenge *any* differences in a potential competitor's authorization to use the public rights-of-way no matter that corresponding differences in circumstances, lapse of time, financial qualifications, or the like, might give good reason to set up different conditions for different entities.<sup>175</sup>

The chief proponent of subsections (c) and (e) of section 243 was Congressman Dan Schaefer (R-Colo.). The language in subsections

---

175. Arguably, a superficially plausible nondiscrimination provision has the perhaps unintended effect of *slowing* the development of competition. While it sounds eminently plausible to require evenhanded treatment, in practice this requirement can be employed by an incumbent to delay competitive entry. This is because it provides incumbents with material for threats or actual legal action based on any differences at all that can be made out to be "discriminatory." Moreover, a nondiscrimination provision prevents localities *of their own volition* from offering the kind of incentives for new competitors that federal agencies, as indicated above, may seek to provide by giving away rights to *others'* property (*viz.* local public rights-of-way).

(c) and (e) was generally referred to as the “MFS amendment” because telecommunications company Metropolitan Fiber Systems (MFS) had successfully sought inclusion of similar language in House Bill 4103 in the 103rd Congress.<sup>176</sup>

The full Commerce Committee marked up House Bill 1555 in May 1995. At the full Commerce Committee mark-up on May 25, Congressman Bart Stupak (D-Mich.) raised concerns about the impact on local governments of the language in section 243. Congressman Stupak offered and then withdrew an amendment to section 243 that was similar to the language adopted by the Senate Committee; however, Stupak’s amendment lacked the pre-Gorton amendment provision for both FCC preemption of local government right-of-way management and compensation authority.<sup>177</sup>

Congressman Stupak withdrew his amendment amid assurances by the committee leadership that before the bill was reported to the floor efforts would be made to work out language that would respond to the concerns of local governments over the limiting effect of subsections (c) and (e). Congressman Joe Barton (R-Tex.) took the lead on the majority side on behalf of local governments. Attempts were made to reach agreement in talks and negotiations with the chief proponent of the section 243 language, Congressman Schaefer. The considered alternatives included a proposal to explicitly invalidate existing below-market telephone franchises that hindered the application of reasonable right-of-way compensation fees, and another proposal to specifi-

---

176. Hearings were held on House Bill 1555 on May 10, 11, and 12, 1995. Local government representatives testified on May 11 and strongly opposed the language in new section 243—particularly that in the MFS amendment. The Telecommunications and Finance Subcommittee marked up House Bill 1555 on May 17, 1995. No amendments were made to section 243 at the markup and the Subcommittee reported the bill with the same language in section 243 as introduced.

177. The language of the proposed Stupak amendment was as follows:

STRIKE NEW SECTION 243 (a), (b), (c), and (e) beginning on Page 12, Line 6,  
AND INSERT THE FOLLOWING NEW SECTION:

*Section 243. Removal of Barriers to Entry.*

(a) IN GENERAL. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.

(b) STATE AND LOCAL AUTHORITY. Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 253, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) LOCAL GOVERNMENT AUTHORITY. Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 521

cally authorize fees at a level not to exceed eight percent. However, all versions offered by Congressman Schaefer continued to include the objectionable parity language of paragraph (e) and were rejected by Congressmen Stupak and Barton. Stupak and Barton determined to take the matter to the full House.

The Committee Report on House Bill 1555, filed July 24, 1995, describes the relevant portions of section 243 as follows:

Section 243(c) makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way. This provision clarifies that local control over construction on public rights-of-way is not disturbed. . . . Section 243(e) prohibits a local government from imposing a franchise fee or its equivalent for access to public rights-of-way in any manner that discriminates among providers of telecommunications services (including the LEC). The purpose of this provision is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity. It is not the intent of the Committee to deny local governments their authority to impose franchise fees, but rather simply to require such fees be imposed in a nondiscriminatory manner. This paragraph is not intended to affect local governments' franchise powers under Title VI of the Communications Act. Local governments can remedy any situation in which a fee structure violates this section by expanding the application of their fees to all providers of telecommunications services, including the LECs. Moreover, this section does not invalidate any general imposition that does not distinguish between or among providers of telecommunications services, nor does it apply to any lawfully imposed tax.<sup>178</sup>

The House debated House Bill 1555 on August 3 and 4, 1995. The manager's amendment, adopted by the House, included a revision to section 243(b) in an attempt to head off adoption of a Barton-Stupak amendment by striking the words "or local" and inserting a new subsection, (c)(2), as follows:

MANAGEMENT OF RIGHTS-OF-WAY. Nothing in subsection (a) shall affect the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-

---

178. H.R. REP. NO. 104-204, at 75-76 (1995), *reprinted in* 1996 U.S.C.C.A.N 40-42.

way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

This language was the same as part of the Hutchison amendment adopted by the Senate Committee, and introduced the same notion of protecting local authority to require compensation and to manage the public rights-of-way. It left in place, however, the problematic parity language of the Schaefer-MFS provision in subsection (e).<sup>179</sup>

The Barton-Stupak amendment was one of very few amendments permitted by the House Rules Committee under the rule governing debate on House Bill 1555. The Barton-Stupak amendment proposed to strike *all* of section 243 as reported by the House Committee and to substitute new language. The new language was essentially the same as that of the Senate Committee, with three qualifications: (1) it would extend the safe harbor of subsection (b) to local as well as State governments; (2) it would apply the safe harbor in subsection (c) to the entire Act, not just that section; and (3) it would eliminate any reference to FCC preemption jurisdiction over State or local actions.

The Barton-Stupak amendment read as follows:

Section 243. Removal of Barriers to Entry.

(a) IN GENERAL. No State or local statute, regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services.

(b) STATE AND LOCAL AUTHORITY. Nothing in this section shall affect the ability of State or local officials to impose, on a competitively neutral basis and consistent with section 247 (relating to universal service), requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) LOCAL GOVERNMENT AUTHORITY. Nothing in this Act affects the authority of a local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

---

179. See *supra* Section IV.B (quoting subsection (e)).

(d) EXCEPTION. In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.<sup>180</sup>

In his remarks on the House floor during the debate on House Bill 1555, Congressman Stupak particularly stressed that the Barton-Stupak amendment would delete the requirement for parity between the incumbent local exchange carrier (LEC) and other providers, and instead could allow for different compensation from different providers for use of the rights-of-way. Stupak stated:

Local governments must be able to distinguish between different telecommunications providers . . . . The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize telecommunications companies . . . .<sup>181</sup>

Congressman Barton stated a similar intent:

[The amendment] explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way . . . . The Chairman's [Manager's] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way.<sup>182</sup>

It was thus clear that the Barton-Stupak language was intended to allow local communities to charge fees to telecommunications companies, including the local exchange carriers, to avoid forcing local communities to subsidize these companies, and to allow the community to "set the compensation level."<sup>183</sup>

In arguing strongly (and unsuccessfully) against the Barton-Stupak amendment, Congressman Schaefer and others made many of

---

180. 141 CONG. REC. H8460 (daily ed. Aug. 14, 1995) (personal explanation of Rep. Stupak).

181. *Id.* (statement of Rep. Stupak).

182. *Id.* (statement of Rep. Barton).

183. *Id.*

the same arguments that the telecommunications industry has since made in petitions to the FCC and the courts. For example, Congressman Schaefer claimed that acceptance of the Barton-Stupak amendment “is going to allow the local governments to slow down and even derail the movement to real competition.”<sup>184</sup> Congressman Fields claimed:

[Cities are allowed to charge incumbent telephone companies little or nothing because of] a century-old charter . . . which may even predate the incorporation of the city itself. . . . [T]hey threaten to Balkanize the development of our national telecommunications infrastructure. . . . When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of rights-of-way, that fee becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anticompetitive . . . . [W]hat does control of rights-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.<sup>185</sup>

It is significant that the objections assumed that the Barton-Stupak language would allow a fee based on a percentage of gross revenues, not merely on cost recovery.

After hearing these arguments, the House rejected them and adopted the Barton-Stupak amendment by a vote of 338–86. Additionally, by adopting Barton-Stupak, the House strongly rejected the Schaefer-Fields arguments for the MFS parity language. By adopting Barton-Stupak, which was the same as the Senate language with respect to fair and reasonable compensation for right-of-way use, the House overwhelmingly endorsed the propositions that the local government is the appropriate body to make compensation decisions, and also that differential compensation based on market valuation is not discriminatory. There is no trace of an assumption that the compensation determined by a local community would be limited to costs. On the contrary, as pointed out above, the discussion assumed it would not.

### *C. The Conference Agreement*

Despite the overwhelming House vote for the Barton-Stupak amendment, the close vote on Feinstein-Kempthorne, and the unanimous adoption of the Gorton amendment in the Senate, the debate over right-of-way management and compensation language continued into the conference process. The final conference agreement on Senate

---

184. *Id.*

185. *Id.* at H8461 (statement of Rep. Fields).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 525

Bill 652/House Bill 1555 as adopted by both houses incorporates the Senate language of section 253. The final law thus preserves the recognition that “fair and reasonable” market-level compensation need not be identical for differently situated users of the public rights-of-way. It also preserves the safe harbor protecting the authority of local governments over rights-of-way management and compensation and reflects the clear intent of Congress that the FCC is to have no jurisdiction over subsection (c) disputes, leaving them to the courts.

*D. The Legislative History of Section 253 Supports a Property-Rights Approach*

The language of section 253 is consistent with treating compensation for use of public rights-of-way as rent. And the language is broad enough to encompass all forms of compensation—in-kind as well as cash. However, the compensation does not have to be exactly the same for all users. Just as office building tenants or apartment building tenants—even tenants in the same line of business—may pay different rents, right-of-way rental rates may depend on the nature and scope of the space occupied, the services provided to the tenant, the length of the lease, the market conditions at the time the lease was signed, and other relevant, reasonable distinctions.

A deregulatory approach assumes that companies are free to set prices and other conditions for use of their property unless there are reasons why regulation is necessary. In the same way, section 253 recognizes that local communities are *also* free to set prices and management conditions, unless and until a court concludes that such terms are inconsistent with the requirements of section 253(c) and form a barrier to entry under section 253(a).

Section 253 thus creates a two-step hurdle for any telecommunications provider seeking to challenge a right-of-way management or compensation requirement imposed by a local government. The first hurdle is that local governments’ conditions are not preempted unless they fall within subsection (a)—that is, they “prohibit or have the effect of prohibiting the ability of any entity to provide” any telecommunications service. Even if a right-of-way management or compensation requirement is discriminatory or not competitively neutral under subsection (c), a company that objects to the requirement must first prove that the requirement actually “prohibits” or has “the effect of prohibiting” the service before section 253(c) even comes into play.<sup>186</sup> If a local requirement does fall within the scope of section

---

186. It should be evident that “prohibits” here must mean more than “inconveniences” or “reduces the profits of.”

253(a), the second hurdle is then to prove that the local government has not acted “on a competitively neutral and nondiscriminatory basis.” The local government enjoys a safe harbor if the local rights-of-way requirement is consistent with subsection (c).

In other words, a local government may manage its public rights-of-way and may require fair and reasonable compensation, even if its actions would otherwise be considered to be a barrier to entry under subsection (a). Moreover, only a court—not the FCC—has jurisdiction to consider whether a particular local right-of-way management or compensation requirement falls within the safe harbor of subsection (c).

Section 253(a) generally prohibits legal restrictions on new competitive entry to any telecommunications business. But subsections (b) and (c) in section 253 limit the reach of the section 253(a) prohibition. They clarify that subsection (a) only refers to the authority to license entry into the business. State and local governments retain their authority both to manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers for their use of public rights-of-way. That authority is rooted in property rights in the rights-of-way, and in the federalist structure that preserves such local rights against suppression by overarching authorities at the federal level.

#### *E. Related Sections of the 1996 Act*

Four additional sections of the 1996 Act cast further light on the intent of Congress with respect to preemption of local communities’ control over their public rights-of-way. These four sections fill out an overall approach that carefully locates local control over the public rights-of-way in the context of the fundamental local property rights that antedate federal cable and telecommunications law.

##### 1. Section 302: Open Video System

Section 302 of the Telecommunications Act of 1996 adds a new section 653 to the Communications Act of 1934.<sup>187</sup> That section creates a new regulatory classification, “Open Video System” (OVS). OVS was created to encourage competition by providing an alternate regulatory structure through which telephone companies could offer cable services.<sup>188</sup>

---

187. Now codified at 47 U.S.C. § 573 (2002).

188. Subsection (c), REDUCED REGULATORY BURDENS FOR OPEN VIDEO SYSTEMS, of § 653 (now codified as 47 U.S.C. § 573 (2002)) states:

(1) IN GENERAL. Any provision that applies to a cable operator under

Section 653, which provides for open video systems, sprang forth in the conference agreement, and replaced provisions in House Bill 1555 and Senate Bill 652 that were based on the earlier “video dialtone” model created by the FCC for telephone company entry into the multichannel video market.<sup>189</sup> No real legislative history other than the conference report exists, but to the extent that OVS has some similarities to earlier video dialtone or video platform provisions of the two bills, there is some guidance as to intent.

As with section 253, local governments were concerned about protecting their authority over their public rights-of-way when they saw drafts of the OVS provisions. As a result of intense lobbying and the insistence of the Barton-Stupak and Feinstein-Kempthorne sponsors, language was included in the conference report in the section on OVS that echoes the language of section 253.<sup>190</sup> The Conference Report also clarified what sort of compensation was involved: “Open video systems may be subject to fees imposed by local franchising au-

---

(A) sections 613 (other than subsection (a) thereof), 616, 623(f), 628, 631, and 634 of this title, shall apply,

(B) sections 611, 614, and 615 of this title, and section 325 of title III, shall apply in accordance with the regulations prescribed under paragraph (2), and sections 612 and 617, and parts III and IV (other than sections 623(f), 628, 631, and 634), of this title shall not apply, to any operator of an open video system for which the Commission has approved a certification under this section.

(2) IMPLEMENTATION.

(A) COMMISSION ACTION. In the rulemaking proceeding to prescribe the regulations required by subsection (b)(1), the Commission shall, to the extent possible, impose obligations that are no greater or lesser than the obligations contained in the provisions described in paragraph (1)(B) of this subsection. The Commission shall complete all action (including any reconsideration) to prescribe such regulations no later than 6 months after the date of enactment of the Telecommunications Act of 1996.

(B) FEES. An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area, as determined in accordance with regulations prescribed by the Commission. An operator of an open video system may designate that portion of a subscriber’s bill attributable to the fee under this subparagraph as a separate item on the bill.

(3) REGULATORY STREAMLINING. With respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of title II.

189. See Telephone Company-Cable Television Cross-Ownership Rules, §§ 63.54–63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 F.C.C.R. 300 (1991).

190. “The Conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner.” H.R. REP. NO. 104-458, at 178 (1995).

thorities, but such fees are in lieu of fees required under section 622 [cable franchise fees].<sup>191</sup> Open video systems were also made subject to the same kind of in-kind compensation that can be required of cable operators under section 611 (public, educational and government access and institutional networks).<sup>192</sup> Thus, an OVS using the public rights-of-way would typically be subject to fees based on a percentage of gross revenues, like a cable operator, in addition to in-kind benefits.

The significance of the OVS provision is heightened by its subsequent history. When the FCC made rules to implement section 653, the Commission sought to bypass local right-of-way authority and to claim that an OVS operator could *automatically* use any local public rights-of-way. The Fifth Circuit decisively rejected this attempt by the FCC to give away local property, and thus established a telling precedent with respect to interpretations of section 253 that would involve the same sort of end run.<sup>193</sup>

## 2. Section 303(a): Telecommunications Services Under a Cable Franchise

Section 303 (Preemption of Franchising Authority Regulation of Telecommunications Services) as adopted in the 1996 Act reads as follows:

(a) PROVISION OF TELECOMMUNICATIONS SERVICES BY A CABLE OPERATOR. Section 621(b) (47 U.S.C. § 541(b)) is amended by adding at the end thereof the following new paragraph:

(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services-

(i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services; and

(ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.

---

191. *Id.* See 47 U.S.C. § 573(c)(2)(B) (2002).

192. The statute indicated that an OVS would be subject to the public, educational, and governmental (PEG) access requirements of the Cable Act, found in § 611, according to rules set by the FCC. See 47 U.S.C. § 573(c)(1)(B) (2002). The FCC interpreted this to mean that OVS operators must provide PEG support comparable to that of the cable operator. See 47 C.F.R. § 76.1505 (2002).

193. See *infra* Section V.A. for a detailed discussion of the OVS appeal.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 529

(B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof

(i) to discontinue the provision of a telecommunications service; or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by section[s] 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

(b) FRANCHISE FEES. Section 622(b) (47 U.S.C. § 542(b)) is amended by inserting 'to provide cable services' immediately before the period at the end of the first sentence thereof.

Section 303(a) complements section 302. Section 302 removes the prohibitions that had previously existed in federal law against the provision of video programming by telephone companies directly to subscribers in their own service areas, and also establishes OVS.<sup>194</sup> Section 303(a) preempts local franchising authorities' regulation of telecommunications services *through a cable franchise*. Both sections, however, also make clear that these requirements do not exempt a company from local property rights. As noted above, when telephone companies provide video, either as cable operators or as operators of an open video system, they are subject to the same right-of-way management and compensation authority as are cable operators. Conversely, when cable companies provide telecommunications services, they are subject to the same right-of-way management and compensation authority as are other telecommunications providers.

---

194. As noted *supra* Section IV.E.1.

For purposes of understanding the intent of section 253, the key step in the development of section 303(a) is the one taken in conference, when section 201(b) of Senate Bill 652 and section 107 of House Bill 1555 were combined into section 303 of the Conference Agreement. Local governments were concerned that the language in the combined section should not be read to undermine local government authority over right-of-way management and compensation with respect to *all* telecommunications providers, including cable operators that offered non-cable services. The sponsors of the Barton-Stupak amendment and the sponsors of the Feinstein-Kempthorne amendment were concerned that a misreading of the prohibition on “franchising” for telecommunications services provided by cable operators might be taken to undermine the protection of local government authority that their amendments had achieved in section 253. This concern was so significant that they threatened to use the newly enacted Unfunded Mandates Reform Act (UMRA) to stop the bill if the language in what became sections 302 and 303 was not clarified to fully protect local government right-of-way management and compensation authority over all telecommunications service providers. Application of the Unfunded Mandates Reform Act would have spotlighted—and shot down—the lurking potential for commandeering local property that was buried in the original language.

Following an intense effort in the last stages of the conference, section 303(a) was redrafted so that the limiting phrase “under this title” (referring to Title VI, the Cable Act) was added in the one place where it did not already appear—to subsection (B) from House Bill 1555. As a result, the prohibition on requiring telecommunications as part of a “franchise” referred only to *cable* franchises under Title VI of the Communications Act. The effect of this amendment was highly significant. The fact that *cable* franchises were prevented from addressing telecommunications issues by the new language did *not* deprive local communities of other preexisting authority, including consumer protection authority as well as property rights in the public rights-of-way. It simply meant that such authority could not be exercised through, or derived from, a *cable* franchise. By distinguishing between cable (Title VI) franchises and other local authority, the provision could apply the desired prohibition to the former without affecting any authority a community might have under the latter. The insertion of the words “under this title” thus made it clear that telecommunications franchises or other forms of agreements or requirements under authority other than the Cable Act were not prohibited by the 1996 Act.

Thus, under this section as well as under section 253, local governments retain whatever ability they might have under their preexisting powers to require or use *non-cable* franchises as their means of managing telecommunications providers' use of and payment for rights-of-way.

### 3. Section 303(b): Cable Franchise Fees

The change in the other subsection of section 303, 303(b) (amending section 622(b), 47 U.S.C. section 542(b)), is significant here for similar reasons. Section 622(b) sets a cap of five percent of gross revenues on cable (Title VI) franchise fees.<sup>195</sup> The addition of the words "to provide cable services" limited that cap to the gross revenues from cable services only.<sup>196</sup> If a cable franchise were the only instrument available through which a local community could claim compensation from a company using the community's property for both cable and non-cable purposes, the result would have been a windfall gain and a subsidy for cable operators: they could use local property for both cable and non-cable purposes, yet pay only on the cable revenues. But in fact the language does not yield that inequitable result, because the statute leaves *non-cable* franchises (or other local authorizations) available as a separate means of dealing with the non-cable uses of the public rights-of-way.

The Conference Report summarized the result with respect to section 303, both (a) and (b):

The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a nondiscriminatory and competitively neutral way, manage its public rights of way and charge fair and reasonable fees.<sup>197</sup>

The reappearance of language echoing that of section 253 is not by accident. The various sections described above incorporate a careful separation between cable and non-cable authority. Cable franchises govern cable matters and involve compensation for the use of the public rights-of-way for cable services. Non-cable (*i.e.*, not "under Title VI") authority governs non-cable matters and involves compensation for non-cable uses of the public rights-of-way. And, contrary to the claims of the commentators briefly discussed in Section

---

195. See 47 U.S.C. § 572(b) (2002).

196. *Id.*

197. H.R. REP. NO. 104-458, at 180 (1995).

III, the 1996 Act did not seek to suppress local authority of the non-cable type. Rather, it carefully preserved that authority.

#### 4. Section 601(c): Restriction on Preemptive Effect

The final ancillary section of the 1996 Act discussed here, section 601(c), sets the overall framework for construing the meaning of the Act and the intent of Congress in regard to state and local authority. Section 601(c)(1) provides:

(c) FEDERAL, STATE, AND LOCAL LAW.

(1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.<sup>198</sup>

This language originated in House Bill 1555, which, as introduced, contained in section 401(c) a general savings clause:

(c) FEDERAL, STATE, AND LOCAL LAW. (1) Except as provided in paragraph (2), parts II and III of title II of the Communications Act of 1934 shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such part. (2) Parts II and III of title II of the Communications Act of 1934 shall supersede State and local law to the extent that such law would impair or prevent the operation of such part.<sup>199</sup>

This language remained the same through Subcommittee and full Committee mark-up. The House Committee report explains: "This subsection also contains a savings clause for State and local law, except 'to the extent such law would impair or prevent the operation of this Act.'"<sup>200</sup>

The conferees retained the general savings provision of the House language. The conference report states that "[t]he conferee agreement adopts the House provision *stating that the bill does not have any effect on any other Federal, State, or local law unless the bill expressly so provides.*"<sup>201</sup> The conference report makes Congress's intent

---

198. Subsection 601(c)(2) contains an additional, specific savings clause regarding state and local taxation, which is not relevant here.

199. Communications Act of 1995, H.R. 1555, 104th Cong. § 401(c) (1995) (as introduced).

200. H.R. REP. NO. 104-204, at 124 (1995), *reprinted in* 1996 U.S.C.C.A.N. 91-92.

201. H.R. REP. NO. 104-458, at 201 (1995) (emphasis added), *reprinted in* 1996 U.S.C.C.A.N. 215-16.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 533

clear: “*This provision prevents affected parties from asserting that the bill impliedly preempts other laws.*”<sup>202</sup>

Section 601 thus establishes that a preemption in *any* provision of the 1996 Act must be express and explicit. Congress specifically barred vague claims of the sort described earlier in Section III, arguing that state or local authority should be preempted on the basis of broad federal policies. In the 1996 Act, preemption must be read narrowly. It may not be construed beyond the specific statements of preemption found in the Act.

The above analysis makes clear that Congress intended to preserve, not preempt, local authority over the public rights-of-way. As the Telecommunications Act of 1996 passed through the various stages of the legislative process en route to its final enactment, Congress arrived at a coherent stance in favor of (1) preserving local authority with respect to right-of-way management and compensation, and (2) ensuring that any disputes would be resolved in the courts rather than at the FCC. The lengthy debate regarding the preservation of local rights, and their ultimate inclusion in the 1996 Act, demonstrates that the 1996 Act embodies a deliberate policy decision by Congress to protect local communities’ property rights and the central democratic value of federalism.

#### V. SECTION 253 IN THE COURTS

In light of the legislative history of section 253, it is remarkable that any objective decisionmaker could fail to recognize that the 1996 Act preserves and protects local rights to management and compensation in the public rights-of-way. Nonetheless, local communities striving for courts to recognize these limitations on section 253 preemption have experienced mixed results. One reason for these mixed results is that courts and other decision makers have been frequently misled by discussions that ignore the roots of local authority in local property rights. When a court perceives public rights-of-way as compensable property belonging to a local community, the court correctly interprets section 253. When a court is distracted by the notion that compensation and management requirements are a form of entry regulation, the court gets the interpretation wrong.

The following discussion seeks to demonstrate this analysis by reviewing the case law on section 253 from the point of view of property rights. The OVS decision is reviewed first, as a key precursor to

---

202. *Id.* (emphasis added).

the correct understanding of the 1996 Act. The section 253 decisions to date are then reviewed in light of the above analysis.

A. *The OVS Court Rebuffs the FCC's Attempt to Give Away Local Public Rights-of-Way*

The 1996 Act introduced a new regulatory category, "Open Video Systems," to encourage entry into the multichannel video market.<sup>203</sup> The statute required the FCC to prescribe regulations to implement this regulatory construct within six months, including any reconsideration.<sup>204</sup> Accordingly, on March 11, 1996, the FCC released a Report and Order and Notice of Proposed Rulemaking on open video systems.<sup>205</sup> Appeals were filed by various parties, challenging the Orders on constitutional and statutory grounds, and consolidated in the Fifth Circuit.<sup>206</sup>

On appeal, local communities argued that the FCC implemented the OVS provisions by taking steps that Congress did not mandate and which were inconsistent with the statute.<sup>207</sup> The Commission claimed the authority to grant OVS operators an "enforceable right" to use public rights-of-way without local authorization.<sup>208</sup> It also purported to limit the compensation paid for use of the rights-of-way to a specific percentage of gross revenues derived by the OVS operator and its affiliates.<sup>209</sup> The local community appellants argued that the FCC lacked authority to give away local property in this fashion.<sup>210</sup> Local rights over local rights-of-way were not, as the Commission claimed, derived solely from federal law and terminable by federal fiat.<sup>211</sup> Rather, those rights preceded federal law, and local property could not be commandeered at will for federal purposes.<sup>212</sup>

The Fifth Circuit struck down the FCC's claim to exempt OVS operators from local franchising.<sup>213</sup> Without reaching the Fifth and Tenth Amendment issues raised by the appellants, the court relied on

---

203. See *supra* Section IV.E.1.

204. See 47 U.S.C. § 573(c)(2)(A) (2002).

205. The Second Order, on reconsideration, was released less than three months later, on June 3, 1996, and a final round of reconsideration, resulting in a Third Report and Order, concluded on August 8, 1996. *In re* Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, 11 F.C.C.R. 14639 (1996); 11 F.C.C.R. 18223 (1996); 11 F.C.C.R. 20227 (1996).

206. See *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

207. *Id.* at 347.

208. *Id.*

209. *Id.* at 349.

210. *Id.* at 347.

211. *Id.* at 348.

212. *Id.*

213. *Id.* at 345.

the plain meaning of the statute.<sup>214</sup> Because local franchising authority predated the Cable Act, an affirmative preemption by the FCC would be necessary to override that authority.<sup>215</sup> The court found such a claim of preemption to be at odds with the 1996 Act's preservation of state and local authority.<sup>216</sup>

Thus, the OVS decision, while it does not deal with section 253, goes directly to a key issue in the conflict over that provision: local right-of-way authority is not a federal gift—it predates federal law. The FCC cannot preempt that local authority without specific statutory authorization. No claim of implied preemption can stand in light of section 601. These conclusions establish a sizable part of the foundation for sound analysis of section 253 cases.

### B. Section 253 Decisions from a Property Rights Perspective

The following discussion addresses first those section 253 decisions that have come from the FCC, and then those from the courts. In each group the decisions are reviewed generally in chronological order to trace the sequence of developments.

#### 1. FCC Decisions Under Section 253

The FCC has issued a number of orders pertaining to section 253. The first was *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*,<sup>217</sup> in which Classic was able to show that two cities' denial of a telephone franchise violated section 253(a).<sup>218</sup> While the Commission ruled against the cities in this case, it did observe, with the legislative history of the Act fresh in its mind, that section 253 was not intended to eliminate local franchising authority:

We do not believe that Congress intended to remove franchising authority from State and local governments. Nothing in the language of the 1996 Act or the legislative history reflects this intention. In fact, as discussed below, section 253(b) and 253(c) recognize the authority of States and localities (including the Cities) to impose franchise requirements for certain purposes,

214. *Id.* at 347.

215. *Id.* at 348. (“The Commission could come to a contrary conclusion only by reading its preemptive authority broadly. But § 601(c) precludes a broad reading of preemptive authority, as does [*Gregory v. Ashcroft*], 501 U.S. [452,] at 460 [(1991)] . . . *Chevron* deference is not appropriate here, for Congress, in § 601(c), already has resolved the issue of preemption of local franchising authority.”)

216. *Id.*

217. *In re Classic Tel. Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 F.C.C.R. 13082 (1996). *Order issued by* 12 F.C.C.R. 15619 (1997), *pet. dismissed*, 14 F.C.C.R. 960 (1999), *recons. den.*, 14 F.C.C.R. 19974 (1999).

218. *Classic*, 11 F.C.C.R. at 13092–93.

and as such, these sections preserve the authority of States and localities to deny a franchise application until such time the applicant complies with these permitted legal requirements.<sup>219</sup>

*Classic Telephone* was followed by *New England Public Communications Council*, in which the Commission preempted certain Connecticut restrictions regarding provision of payphone service.<sup>220</sup>

In these early section 253 decisions the Commission did not have to confront the issue of local community compensation from telecommunications right-of-way users. There were, however, signs that the FCC was less open to local governments' rights than to those of private parties. For example, in 1997 the Commission was asked to apply section 253 to preempt a state law that prohibited *municipal* telecommunications systems from competing with privately owned systems.<sup>221</sup> The Texas Public Utility Commission asked the FCC to rule that the prohibition on municipal entry contained in the Texas Public Utility Regulatory Act of 1995 (PURA) violated the 1996 Act.<sup>222</sup> The FCC rejected this petition, holding that municipalities are creatures of the state and the state (through legislation) had authority to keep them out of the telecommunications market.<sup>223</sup> The Commission's rejection was affirmed by the D.C. Circuit.<sup>224</sup>

The issue of localities' right to set requirements for right-of-way use finally came before the FCC in the *Troy* matter.<sup>225</sup> In 1997, the Commission issued a much-anticipated order,<sup>226</sup> and declined to address whether an ordinance of the City of Troy, Michigan, requiring telecommunications providers to obtain a separate franchise to use local public rights-of-way was compatible with section 253.<sup>227</sup> The Commission did hold that the city could not make such telecommunications requirements a condition of permits issued under the city's *cable* franchise, underlining the sharp distinction in federal law between the laws governing cable and those governing telecommunications.<sup>228</sup>

219. *Id.* at ¶ 28.

220. *In re* New England Pub. Communications Council Petition for Preemption Pursuant to Section 253, 11 F.C.C.R. 19713 (1996), *recons. den.*, 12 F.C.C.R. 5215 (1997).

221. *See In re* Pub. Util. Comm'n of Texas, 13 F.C.C.R. 3460 (1997).

222. *Id.* at ¶ 5.

223. *Id.* at ¶ 16.

224. *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999). The opposite fate of a second FCC order regarding municipal entry is discussed below. *See infra* Section V.B.17.

225. *Troy*, 12 F.C.C.R. 21396 (1997). *See supra* note 143 for full case name.

226. *Id.*

227. It was consistent with the jurisdictional barrier discussed above for the FCC not to rule on a matter implicating § 253(c). The Commission's declared reason for declining to rule, however, was that the record failed to demonstrate that the Troy ordinance had had the "impermissible effect of prohibiting" TCI from providing telecommunications service. *Id.* at ¶ 99.

228. *Id.* at ¶ 100.

The FCC's order also included dicta expressing concern about local communities' possible creation of what the Commission described as "an unnecessary 'third tier' of regulation" and about possible discriminatory requirements favoring incumbents.<sup>229</sup>

In 1999, the FCC struck down two state laws under section 253: the Commission preempted a Tennessee state law that protected small local exchange carriers (those serving fewer than 100,000 access lines) from competitive entry,<sup>230</sup> and rejected a petition by Minnesota for approval of an exclusive agreement with a single provider for the use of state-owned rights-of-way.<sup>231</sup>

Since 1999, the Commission appears to have been relatively restrained in its dealings with claims under section 253.<sup>232</sup> In general, the FCC seems to have shunned the issue of local community property rights in actual section 253 matters, and to the extent the Commission's views can be ascertained, it must be from positions taken in non-253 cases, such as the OVS matter discussed above.<sup>233</sup>

## 2. Court Decisions Through 1999

Not surprisingly, most decisions under section 253 have come from the courts.<sup>234</sup> The first such result, in *GST Tucson Lightwave*,<sup>235</sup> found that there was no private right of action under section 253(c).<sup>236</sup> The next year, a Texas court granted a preliminary injunction against an Austin telecommunications ordinance said to require franchise fees, application fees, disclosure of extensive information by the applicant, and EEO information, because enforcement of these requirements by

---

229. *Id.* at ¶¶ 103, 105, 107. These observations have been extensively quoted by the telecommunications industry in § 253 contexts.

230. *In re AVR, L.P.*, 14 F.C.C.R. 11064 (1999).

231. *In re* Petition of the State of Minn. for a Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way, 14 F.C.C.R. 21697 (1999).

232. The FCC has, however, applied for certiorari to preserve its municipal entry decision in the *Missouri Municipal League* case. See Section V.B.17., *infra*.

233. See *supra* Section V.A. See also *infra* note 257 (in which the FCC stubbornly opposed the notion that franchise fees constituted rent for right-of-way use); see also FCC's amicus brief in *White Plains*, *infra* note 453.

234. This is appropriate in light of § 253(d).

235. *GST Tucson Lightwave, Inc. v. City of Tucson*, 950 F. Supp. 968 (D. Ariz. 1996), appeal dismissed and remanded, 134 F.3d 377 (9th Cir. 1998).

236. *Tucson*, 950 F. Supp. at 969. This holding, however, was not generally upheld in later decisions and may best be regarded as making the point that § 253(c), with its nondiscrimination requirement, represents merely a safe harbor against potential actions under § 253(a), not an independent ground for complaint. See *Pac. Bell Tel. Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169 (C.D. Cal. June 1, 2001) (Order Denying Defendants' Motion to Dismiss and Granting Plaintiffs' Request for Judicial Notice).

the city could result in a barrier to entry.<sup>237</sup> The *Austin* court viewed these requirements as focused on “determining whether a particular entity is fit to provide telecommunications services in Texas”—not on right-of-way management or compensation—and hence as essentially duplicating state Public Utility Commission regulation.<sup>238</sup> The court therefore enjoined the city’s ordinance primarily on state law grounds.<sup>239</sup>

Another district court held that the city of Dallas could require a telecommunications provider to obtain a franchise, but only conditioned on compliance with reasonable right-of-way regulations and fees.<sup>240</sup> *Dallas I* also pointed out that the nondiscrimination requirement of section 253(c) did not require that the City treat differently situated providers identically.<sup>241</sup> However, this result was qualified in a subsequent decision holding no such franchise could be required for wireless providers, or for resellers, on the grounds that they did not physically “use” the public rights-of-way for their own facilities.<sup>242</sup> The City’s authority over its public rights-of-way forms the basis, in the *Dallas* decisions, for the right to require a franchise and associated fees.<sup>243</sup>

A decision of the Iowa Supreme Court in *City of Hawarden v. US West Communications, Inc.*,<sup>244</sup> introduced a major theme in the developing decisions: the leap from the logical requirement that compensation be “fair and reasonable” (to qualify for the section 253(c) safe harbor) to the unconnected notion that such compensation must be limited to a city’s actual costs for the public rights-of-way, and so a city could not charge a fee based on gross revenues.<sup>245</sup> This result may be related to the fact that Iowa law has long denied local communities a property interest in the public rights-of-way and hence a proprietary right to obtain compensation for right-of-way use.<sup>246</sup> Despite the fact that section 253(c) includes no such cost-based restriction as is suggested in

---

237. *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 934 (W.D. Tex. 1997).

238. *Id.* at 941. The court noted that both parties agreed that under the 1996 Act, “municipalities retain their traditional power to regulate and demand compensation for the physical use of their public rights-of-way.” *Id.* at 939.

239. *Id.* at 940.

240. *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, (N.D. Tex. June 8, 1998) [hereinafter *Dallas I*].

241. *Id.*

242. *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 756 (N.D. Tex. July 7, 1998) [hereinafter *Dallas II*].

243. *See supra* nn.237–39.

244. 590 N.W.2d 504 (Iowa 1999).

245. *Id.* at 509.

246. *See, e.g., City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323 (Iowa 1917).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 539

*Hawarden*, it has been a persistent theme in industry lobbying and litigation to claim that local communities cannot receive payment for the full value of their assets, but may only recover their costs.<sup>247</sup> In the most extreme formulations, the argument is that a community may receive only the incremental costs of *administration*, leaving aside even the costs of acquiring and maintaining the public rights-of-way, much less its actual value.<sup>248</sup>

A number of section 253 decisions in 1999 attend more closely to the actual language and meaning of the section. For example, another state court decision upholding a city's five percent right-of-way fee clearly distinguished such a fee from a tax.<sup>249</sup> In so doing, the South Carolina Supreme Court avoided the assumption that any payment that generates revenues for a local government must be a tax, even if it arises from a market transaction in which the payer receives valuable use of an asset in exchange for the payment.<sup>250</sup>

More significantly, the First Circuit Court of Appeals in 1999 denied a preliminary injunction under section 253 to a cable operator that filed a claim alleging discriminatory treatment.<sup>251</sup> In *Cablevision of Boston*, the court addressed Cablevision's claim that the City had applied different rules to Cablevision and to Boston Edison, which was installing conduit for telecommunications purposes.<sup>252</sup> The claim of discrimination was apparently made in light of Cablevision's intent to expand from cable into telecommunications service.<sup>253</sup> In reviewing Cablevision's claim, the First Circuit ruled that the nondiscrimination requirement of section 253(c) applied only to compensation requirements, not to right-of-way management.<sup>254</sup> Hence, section 253 did not impose an

---

247. *Hawarden*, 590 N.W.2d at 508.

248. *Id.*

249. *BellSouth Telecomm., Inc. v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999) ("Generally, a tax is an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular benefit to the payer." *Id.* at 806).

250. In *Pacific Bell Telephone Co. v. City of Hawthorne*, the court concluded that the Tax Injunction Act did not apply to right-of-way fees because such fees were not taxes. However, the court appeared to believe that the alternative was for these charges to be "regulatory fees," ignoring the category of rents. 188 F. Supp. 2d 1169, 1176 (C.D. Cal. 2001).

An Illinois state court in 2001 concluded that the state's "infrastructure maintenance fee" (IMF), which was implemented in 1998 to take the place of local franchise fees, represented compensation for use of the public rights-of-way rather than a tax. *Primeco Personal Communications, L.P. v. Illinois Commerce Comm'n*, 750 N.E.2d 202, 212 (Ill. 2001), *reh'g denied*, 748 N.E.2d 195 (Ill. 2001). The court concluded, however, that wireless providers were not subject to the IMF because they did not use (physically occupy) the public rights-of-way. *Id.*

251. See *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88 (1st Cir. 1999).

252. *Id.*

253. *Id.* at 90.

254. *Id.* at 100.

affirmative obligation on local governments to “ensure a level playing field among telecommunications providers.”<sup>255</sup> Moreover, while fees were not specifically in question, the court did point out that section 253 preserved local governments’ authority “to manage and demand compensation for the use of their rights of way.”<sup>256</sup> Although neither compensation nor property rights were directly at issue in that case, the court allowed for the property-rights approach by recognizing that section 253 preserves local rights to both compensation and management.

In *Omnipoint Communications, Inc. v. Port Authority of New York and New Jersey*,<sup>257</sup> a court again denied a preliminary injunction requested by a telecommunications provider, holding that requirements imposed on the use by a wireless carrier of public rights-of-way in tunnels did not appear to violate either section 253 or section 332.<sup>258</sup> The court, citing the seminal *Western Union* case, noted that “compensation,” as the term is used in section 253(c), has long been understood to include rental fees for public property appropriated to private commercial uses, not merely costs.<sup>259</sup>

While not strictly dealing with rights-of-way, a state court in Sunset Hills, Missouri, held that a business license tax on telecommunications antennas did not violate section 253.<sup>260</sup> On the other hand, a federal district court in Pennsylvania held that a right-of-way ordinance did extend beyond the protections of section 253(c) and constituted a barrier to entry<sup>261</sup> on several grounds: the requirements of the ordinance were unduly “broad and vague”; they extended beyond the “mere regulation of the public rights-of-way”; the compensation requirements were not likely to be directly related to use of the rights-of-way; and, the ordinance allowed the local government “apparently limitless discretion” to grant or deny a franchise.<sup>262</sup> The degree of dis-

---

255. *Id.* at 104.

256. *Id.* at 98.

257. 1999 WL 494120 (S.D.N.Y. July 13, 1999).

258. *Id.* at \*7.

259. *Id.* at \*6 (citing *Western Union*, 148 U.S. at 99). In this connection the OVS appeal decision cited above should also be noted, as it too holds that local communities can charge fees in the nature of rent for the use of their public rights-of-way. *See supra* note 205. *See also* *City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997) (franchise fees are in the nature of rent paid by the cable operator and thus are not excluded from the gross revenues on which franchise fees themselves are calculated).

260. *City of Sunset Hills v. Southwestern Bell Mobile Sys., Inc.*, 14 S.W.3d 54 (Mo. Ct. App. 1999).

261. *PECO Energy Co. v. Township of Haverford*, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999).

262. *Id.* at \*\*6-7.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 541

cretion left open by the ordinance appeared to be central in the court's decision.<sup>263</sup>

A 1999 Ninth Circuit decision focused on section 253(b) rather than section 253(c), but it is significant for its general comments on preemption.<sup>264</sup> The California Public Utilities Commission (CPUC) penalized a telecommunications carrier for "slamming" long-distance customers by imposing a three-year prohibition on the carrier's provision of intrastate long-distance services in California.<sup>265</sup> The carrier claimed that this prohibition violated section 253.<sup>266</sup> In the course of rejecting the claim, the Ninth Circuit observed that "[t]he United States Supreme Court and the Ninth Circuit have held that federal preemption of state regulation in the area of telecommunications must be clear and [occur] only in limited circumstances."<sup>267</sup> The court also noted that in this case preemption would affect an important state interest in regulating utilities.<sup>268</sup> Since such utility regulation normally occurs at the state PUC level, however, it is rare that this particular issue will be relevant in local government actions under section 253.

These early section 253 cases established the beginning of a split between courts that recognized local property rights and those that bypassed property rights in favor of other issues, such as PUC-like regulation or discretion to deny entry.

### 3. The Sixth Circuit's *Dearborn* Decision

The year 2000 saw another Circuit Court of Appeals take the field. The Sixth Circuit, much more explicitly than the First, essentially upheld the concept of a telecommunications franchise for use of a local community's property.<sup>269</sup>

Two years earlier, the city of Dearborn, Michigan, won summary judgment at the trial court level against TCG Detroit, a telecommunications provider, in the company's challenge to the City's right-of-way

---

263. The *PECO* court depended heavily on the initial trial court decision in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999) *vacated by* 212 F.3d 863 (4th Cir. 2000), which sounded this same theme of suspicion as to local community discretion. *PECO*, 1999 WL 1240941, at \*\*7-8. A consistent approach that denied all discretion to local communities would, however, be contrary to the constitutional value of federalism.

264. *Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011 (9th Cir. 1999).

265. *Id.*

266. *Id.* at 1014.

267. *Id.* at 1017.

268. *Id.*

269. *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) [hereinafter *Dearborn II*].

ordinance.<sup>270</sup> The Sixth Circuit's review upheld the district court's decision and vindicated the City's franchise requirement.<sup>271</sup> As the court pointed out, TCG's claim that the City's requirement of a franchise fee was itself a barrier to entry was "sophistry."<sup>272</sup> "The provider must apply for a franchise; the City assesses a franchise fee; no fee paid, no franchise given. That cannot 'be described as a prohibition [within the meaning of section 253(a)].'"<sup>273</sup> The question under section 253, then, was whether the fee was "fair and reasonable" so as to bring the requirement within the safe harbor of section 253(c).<sup>274</sup>

The Sixth Circuit upheld the trial court's finding that the City's franchise fee of four percent of gross revenues was fair and reasonable for purposes of section 253.<sup>275</sup> The two courts based this conclusion on "the amount of use contemplated (twenty-seven miles), the amount that other providers would be willing to pay (three others had agreed to similar fees), and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it was now challenging as unfair."<sup>276</sup> Thus, while the Sixth Circuit considered compensation *related* to usage, it did not jump to the conclusion that this meant the *costs imposed* by usage.<sup>277</sup> Moreover, citing what other providers (and TCG itself) had agreed to immediately placed the matter in a market context, where actual transactions establish a measure of value.<sup>278</sup>

A further insight into the nondiscrimination language of section 253 emerged from the fact that the trial court found, and the Sixth Circuit agreed, that under Michigan law the incumbent local exchange carrier, Ameritech, was immune from such a franchise fee.<sup>279</sup> The courts found that Michigan had granted Ameritech a statewide franchise and as a result, the City could manage its public rights-of-way, but not impose franchise fees.<sup>280</sup> The City retained regulatory powers, but not the compensation rights of an owner.<sup>281</sup> TCG claimed that if Ameritech were not required to pay, the resulting disparity of pay-

---

270. TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998) [hereinafter *Dearborn I*].

271. *Dearborn II*, 206 F.3d at 626.

272. *Id.* at 624.

273. *Id.* See also *Dearborn I*, 16 F. Supp. 2d at 793 ("The City is not prohibiting the TCG from entry, rather, TCG has chosen not to pay for its access.").

274. *Dearborn II*, 206 F.3d at 624.

275. *Id.* at 625.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 626.

280. *Dearborn I*, 16 F. Supp. 2d at 794.

281. *Id.*

ment would constitute “discrimination” under section 253(c).<sup>282</sup> The appeals court found, however, as had the trial court before it, that this state-granted vested right held by Ameritech did *not* render the fee as applied to TCG discriminatory for purposes of section 253(c).<sup>283</sup> If Ameritech had received a grant of authority to use the public rights-of-way from the state, and state law prohibited the City from charging Ameritech the same price as TCG, this did not mean the City was discriminating.<sup>284</sup> As the trial court had noted, the legislative history of section 253 explicitly rejected the proposition that all comers must be charged exactly the same fees.<sup>285</sup> Thus, TCG, which had not made the same century-old deal with the State, could not use Ameritech’s prior rights as leverage to force the city to allow use of its property for free by all comers.<sup>286</sup>

#### 4. The *Grant County* Decision

A federal district court in New Mexico cited *Dearborn* for the central proposition that a community could charge a reasonable fee for right-of-way use, but reached a different result as to how the fee could be calculated.<sup>287</sup> Here the court found that a “process for entry” involving “burdensome” application requirements under a telecommunications ordinance adopted by Grant County could have the effect of prohibiting entry under section 253(a) and exceeding the scope of right-of-way management under section 253(c).<sup>288</sup> Citing *Dearborn*, the court recognized that a fair and reasonable franchise fee does not constitute a section 253(a) prohibition,<sup>289</sup> yet it opined (contrary to the *Dearborn* decision) that a fee based on a percentage of gross revenues was not sufficiently related to physical use of the rights-of-way, or to

---

282. *Id.* at 791.

283. *Dearborn II*, 206 F.3d at 625.

284. *Id.*

285. *Dearborn I*, 16 F. Supp. 2d at 792.

286. Three state proceedings followed, addressing the city’s compensation and other rights under state law once it was clear that § 253 did not preempt such rights. An initial decision at the trial court level, *TCG Detroit v. City of Dearborn*, No. 98-803937-CK (Cir. Ct. of Wayne County, Mich.), was appealed to the Michigan Court of Appeals (No. 232609). The Michigan Public Service Commission also issued a decision under the title *MFN v. City of Dearborn*, No. U-12797; that decision is also on appeal to the Michigan Court of Appeals (No. 236722). In addition, in September 2002 the Michigan Supreme Court declined to respond to a related certified question regarding the constitutionality of the telecommunications right-of-way legislation passed by the Michigan legislature in the spring of 2002, leaving the matter to be “resolved in the traditional manner.” *In re* 2002 PA 48, 652 N.W.2d 667, 667 (Mich. 2002).

287. Board of County Comm’rs of Grant County, N.M. v. US West Communications, Inc., No. Civ. 98-1354 JC/LCS (D.N.M. June 26, 2000) (Memorandum Opinion and Order (*Doc. 66*)).

288. *Id.*, slip op. at 8–11.

289. *Id.*

the County's expenses in managing the rights-of-way, to fall within the protection of section 253(c).<sup>290</sup> As a result, the court preempted the affected parts of the County's ordinance, but in this case severed other sections that were preserved as lawful.<sup>291</sup>

The *Grant County* focus on application process suggests an approach that is regulatory rather than property-oriented. Even in evaluating other property issues, such as a lease, the central issue tends to be price, rather than how to fill out the application form. One corollary to this phenomenon is that extensive application requirements may divert a court from the issue of using a community's property to considering the case instead in terms of "access" and "entry." That sort of language is not typically used in a rental context because it is assumed that the terms and conditions of "access to the property" (i.e., the lease), most notably the price, will be worked out in negotiations between the parties. Thus, it appears that a court preoccupied with the application process may never get back to the standpoint of considering whether a telecommunications provider has a right to "access" the community's property for free. Rather, the court may come to take for granted that the community's requirements constitute a set of "barriers to entry" and that the price should be treated as just one more potential barrier. A similar pattern can be seen in several of the cases discussed below.

### 5. The *Silver Star* Appeal

Another year 2000 appeals court decision addressed section 253 preemption, but not local government rights-of-way.<sup>292</sup> *Silver Star Telephone Co., Inc.*,<sup>293</sup> like the *Hyperion* case in Tennessee,<sup>294</sup> involved a law allowing small incumbent local exchange carriers (ILECs) to exclude competition.<sup>295</sup> The law was viewed as a transitional measure to smooth the change to a competitive market.<sup>296</sup> The FCC ruled that this law created an obvious barrier to market entry and therefore was subject to federal preemption under section 253.<sup>297</sup> The Tenth Circuit affirmed the FCC's order in *RT Communications, Inc.*<sup>298</sup> The court

---

290. *Id.*

291. *Id.*

292. *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

293. *In re Silver Star Tel. Co.*, Petition for Preemption and Declaratory Ruling, 12 F.C.C.R. 15639 (1997), *recons. denied*, 13 F.C.C.R. 16356 (1998).

294. *See supra* note 230 and accompanying text.

295. *Silver Star*, 13 F.C.C.R. at 15646. This case arose in Wyoming, and involved ILECs serving 30,000 or fewer access lines.

296. *Id.*

297. *Id.* at 15657.

298. *RT Communications*, 201 F.3d at 1266.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 545

gave *Chevron* deference to the FCC's judgment in the matter,<sup>299</sup> holding that the prohibition on competitive entry under section 253(a) was not saved by the state law safe harbor in section 253(b) because it was not competitively neutral.<sup>300</sup> Like the FCC, the court rejected the notion that a statute was neutral as long as it treated all *new* carriers in the same way.<sup>301</sup> While the Tenth Circuit appears to have viewed this result as consistent with the First Circuit's position on competitive neutrality in *Cablevision of Boston*, it is clear that there is a developing tension as to how that clause should be handled in dealing with ILECs and competitive local exchange carriers (CLECs).

For purposes of this analysis, cases such as *Silver Star* form a useful illustration of an actual "barrier to entry" in the true sense of the term—a legal prohibition—as opposed to price and other terms that may be viewed by some as "barriers" in a much less stringent sense because they may be simply considered onerous or bothersome.

## 6. The Chattanooga State Law Action

The developing process for how to bring cases that fall within the 1996 Act is also reflected in another 2000 decision.<sup>302</sup> On February 6, 1996, the City of Chattanooga passed a telecommunications ordinance including a five percent franchise fee.<sup>303</sup> The City filed a declaratory judgment action in state court, naming as defendants various telecommunications providers and seeking to have the court declare the rights of the parties.<sup>304</sup> The case was removed to federal court on diversity grounds.<sup>305</sup> The federal court's initial decision leaped the logical gap from "reasonable compensation" to "costs" noted with respect to *Hawarden*,<sup>306</sup> and it concluded that the franchise fee must be a tax because it resulted in revenues unrelated to costs.<sup>307</sup> The court then struck down the ordinance on the ground that under Tennessee state law, only the state, not cities, could tax telecommunications services.<sup>308</sup> The City, however, pointed out that under the Tax Injunction Act,<sup>309</sup>

---

299. *Id.* at 1268.

300. *Id.*

301. *Id.*

302. *City of Chattanooga v. BellSouth Telecomms., Inc.*, 2000 WL 122199, at \*1 (Tenn. Ct. App. Jan. 26, 2000) [hereinafter *Chattanooga II*].

303. *Id.* at \*1.

304. *Id.*

305. *City of Chattanooga v. BellSouth Telecomms., Inc.*, 1 F. Supp. 2d 809, 811 (E.D. Tenn. 1998) [hereinafter *Chattanooga I*].

306. See *supra* notes 244-248 and accompanying text.

307. *Chattanooga I*, 1 F. Supp. 2d at 814.

308. *City of Chattanooga v. BellSouth Telecomms., Inc.*, 1997 U.S. Dist. LEXIS 17458 (E.D. Tenn. 1997) (motion on summary judgment).

309. Tax Injunction Act, 28 U.S.C. § 1341 (2002).

a federal court was the wrong place to address a state tax challenge.<sup>310</sup> The federal district court, after repeating its argument that the ordinance represented a tax, agreed that it did not have subject matter jurisdiction, vacated its earlier order, and remanded the case to Tennessee state court.<sup>311</sup>

The state court's subsequent decision took note of a central distinction between two roles a local government may play with respect to a right-of-way user: that of an owner or landlord, and that of a governmental regulator.<sup>312</sup>

The state court then held, however, that the Chattanooga ordinance could not be a proprietary function, but must be governmental (i.e., regulatory), because two of the defendants already held prior franchises granted to their predecessors, and the City could not, under its proprietary function, revoke or impair rights previously granted.<sup>313</sup> Since the franchise fee also could not be a tax, the court concluded that it must be an exercise of police powers, and that a right-of-way charge imposed under police powers must "bear a reasonable relation" to the use of the public rights-of-way.<sup>314</sup> The court did acknowledge that the costs of right-of-way use extended beyond the mere repair of the street and could include the added costs of more frequent repaving required by street cuts.<sup>315</sup> But it struck down the five percent fee on the grounds that the City had not shown any relationship between that gross revenues-based fee and any of its costs.<sup>316</sup> Thus, in *Chattanooga* the initial error of regarding a revenue-based fee as *ipso facto* a tax gave rise to a series of errors ending in an inappropriate focus on costs.

### 7. Minimal Requirements in the *Mobile* Decision

A number of section 253 decisions emerged in the early part of 2001. One such case, *BellSouth Telecommunications, Inc. v. City of Mobile*,<sup>317</sup> essentially marks one end on a spectrum of possible outcomes by upholding a city telecommunications permit ordinance

310. *Chattanooga I*, 1 F. Supp. 2d at 812.

311. *Id.* at 815–16.

312. "A municipality has authority to act in either its proprietary capacity or its governmental capacity. . . . Acting in its proprietary capacity, a municipality may exact a charge for the use of its rights-of-way unrelated to the cost of maintaining its rights-of-way, but in its governmental capacity, it may only act through an exercise of its police power to regulate specific activity or to defray the cost of providing services or benefit to the party paying the fee." *Chattanooga II*, 2000 WL 122199, at \*1.

313. *Id.*

314. *Id.* at \*2.

315. *Id.* at \*3.

316. *Id.* at \*4.

317. *BellSouth Telecomms., Inc. v. City of Mobile*, 171 F. Supp. 2d 1261 (S.D. Ala. Mar. 30, 2001).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 547

against a challenge under section 253.<sup>318</sup> Here, the City's permitting ordinance required only fees explicitly covering administrative costs.<sup>319</sup> Moreover, its regulatory provisions were confined to quintessential right-of-way management issues.<sup>320</sup> As noted above in discussing *Hawarden*,<sup>321</sup> however, such fees do not begin to recover the entire value of the public rights-of-way.<sup>322</sup> Despite the cases described above, *Mobile* indicates that right-of-way management provisions needed to protect the community's interests do not conflict with section 253.<sup>323</sup>

Although compensation issues were minimal (the only fees involved were administrative), the court did acknowledge the dual interests of the City in its public rights-of-way.<sup>324</sup> Against a property rights claim by BellSouth, the court upheld the City's governmental right-of-way management authority.<sup>325</sup> But the court also rejected BellSouth's property claim on the ground that the streets were the City's property.<sup>326</sup> Thus, the *Mobile* court upheld the city's rights, albeit primarily noncompensation rights, while keeping the City's property interest in view.

#### 8. *Denver v. Qwest*

A state court decision in early 2001 dealt with the City of Denver's telecommunications ordinance as a matter of Colorado state law.<sup>327</sup> The Colorado Supreme Court upheld a 1996 state law giving telecommunications providers the right to use public rights-of-way without compensation to local governments, although technical consent by the local community could be required.<sup>328</sup> A challenge was raised based on anti-donation principles.<sup>329</sup> The court concluded that the state law did not constitute a giveaway of public property to private corporations because it furthered public purposes such as encouraging competition and ensuring benefits to consumers.<sup>330</sup> The court

---

318. *Id.* at 1272.

319. *Id.* at 1264.

320. *Id.* at 1264, 1270.

321. *See supra* notes 244–248 and accompanying text.

322. *Id.*

323. *City of Mobile*, 171 F. Supp. 2d at 1270.

324. *Id.* at 1276.

325. “BellSouth’s use of the City’s rights-of-way is subject to the continuing authority of the City to manage its rights-of-way in the exercise of its police powers.” *Id.*

326. “The Ordinance relates to the use of the City’s property, the public streets and rights-of-way, and not BellSouth’s own private property.” *Id.*

327. *City and County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001).

328. *Id.* at 751.

329. *See supra* note 30 and accompanying text.

330. *Denver*, 18 P.3d at 758–59.

rejected the City's argument that section 253 preempted the *state* law (although it also noted that the trial court below had held the City's ordinance was *not* preempted by the federal Act).<sup>331</sup> While the court here suggested that the City held the public rights-of-way in its governmental capacity, unlike the court in *Chattanooga*, it held the City was not entitled to compensation.<sup>332</sup>

The *Denver* court's defense of the legislature's right to give away public property to private entities appears to prove far too much. All private companies compete in a non-monopoly market, and all provide some sort of benefit to consumers by virtue of the fact that they can sell their products or services. If simply helping out private companies is seen as sufficient justification for donations of public property, it is difficult to conceive of a gift to a private entity that would *not* qualify.

### 9. The New Jersey Payphone Decision

A somewhat different sort of issue arose in *New Jersey Payphone Association, Inc. v. Town of West New York*.<sup>333</sup> The Town of West New York invited bids from private companies to provide pay telephones within the Town.<sup>334</sup> The Town's action was challenged by an association of pay telephone providers.<sup>335</sup> The court addressed the challenge on the basis of section 253 preemption, disagreeing with the Fourth Circuit's requirement that state law issues be addressed before reaching federal issues (as in the *Prince George's County* case discussed below).<sup>336</sup> Because the Town's bidding procedure for the payphone contracts apparently contemplated an exclusive agreement with a single provider in a given area, the court concluded that the ordinance was a barrier to entry.<sup>337</sup> In dicta, the court went on to question whether a process that evaluated bidders based on the fees they were willing to pay would yield "fair and reasonable compensation," suggesting that any "fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry."<sup>338</sup>

---

331. *Id.* at 759.

332. *Id.* at 761.

333. 130 F. Supp. 2d 631 (D. N.J. 2001).

334. *Id.* at 632.

335. *Id.*

336. *Id.* at 635.

337. *Id.* at 636.

338. *Id.* at 638. It appears that this court's position on compensation may result in part from the court's opinion that under New Jersey law a town does not own the land under the public streets in fee simple, but rather has only an easement in the property. *Id.*

This decision should be read with skepticism as to the applicability of its rationale in other matters. The court here was dealing with a specific New Jersey statute that it believed limited the compensation available.<sup>339</sup> Also, the court interpreted section 253(c) as an affirmative restriction on local authority, rather than a safe harbor.<sup>340</sup> That position, however, has not survived in the appellate courts.<sup>341</sup>

#### 10. The *Auburn* Decision and Its Ninth Circuit Progeny

In the wake of the First and Sixth Circuit decisions described above, the Ninth Circuit struck a distinctly discordant note in *City of Auburn v. Qwest Corporation*.<sup>342</sup> The *Auburn* case arose out of an issue relating to the cost of facility relocation made necessary by right-of-way improvements, but expanded to involve section 253 issues when Qwest claimed that right-of-way ordinances passed by a number of Washington cities were preempted by federal law.

The Ninth Circuit's original opinion began from the premise that section 253's preemption was "virtually absolute"—apparently with respect to "telecommunications regulation."<sup>343</sup> Thus, from the beginning, the opinion interpreted telecommunications franchising as a matter of regulation rather than in terms of property rights.<sup>344</sup> The opinion assumed without discussion (and without reference to the contrary precedent cited above) that franchise fees must be based on costs.<sup>345</sup> As in *Austin*, *White Plains*,<sup>346</sup> and *Grant County*, the court focused on the Cities' detailed application requirements and the fact that they retained discretion to refuse use of the public rights-of-way to an applicant.<sup>347</sup> According to the original opinion (later revised, as noted below), "each of these requirements" had the effect of prohibiting entry.<sup>348</sup> The court then concluded that various requirements—such as financial, legal, and technical qualifications for holding a franchise—regulated the companies themselves because they did not *directly* relate to right-of-way management.<sup>349</sup> The fact that such requirements indi-

---

339. "Certain local government fees, taxes, levies, or assessments prohibited" at N.J. REV. STAT. § 54:30A-124 (2002).

340. *Id.* at 649.

341. See, e.g., *infra* Section V.B.12 (the *Palm Beach* case).

342. 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 534 U.S. 1079 (2002).

343. *Id.* at 980 (emphasis added).

344. *Id.*

345. *Id.* at 981.

346. For discussion of *White Plains*, see *infra* Section V.B.19.

347. *Auburn*, 247 F.3d at 981.

348. *Id.* (emphasis added).

349. *Id.* at 984–85.

rectly related to the use of the public rights-of-way was brushed aside by the court as “too tenuous a connection.”<sup>350</sup>

In July 2001, after a motion for rehearing, the Ninth Circuit amended eight passages in its opinion in such a way as to hedge some of the more sweeping claims in the original.<sup>351</sup> Most notably, the amended opinion avoided claiming that *each* requirement formed a barrier to entry and restricted that claim to the effect of the requirements taken *together*.<sup>352</sup> It also acknowledged that a franchise requirement *per se* is not preempted by the 1996 Act, and added a footnote reference to *Dearborn*, precedent conspicuously absent from the original opinion.<sup>353</sup> However, the court denied the petition for rehearing, without explanation.<sup>354</sup>

Significantly, more recent district court decisions in the Ninth Circuit have applied *Auburn* narrowly, in such a way as not to preclude revenue-based right-of-way fees, where a telecommunications provider has not shown that such fees have the effect of prohibiting service. In July 2001, Qwest brought an action against the City of Portland challenging that City’s telecommunications ordinance and right-of-way fee.<sup>355</sup> On March 22, 2002, Magistrate Judge Jelderks, sitting in the U.S. District Court in Portland, ordered Qwest to resume paying a percentage of its gross receipts to Oregon cities as compensation for its use of their rights-of-way.<sup>356</sup> Qwest had stopped paying such fees after the Ninth Circuit’s decision in the *Auburn* case.<sup>357</sup> The court pointed out that Qwest had failed to prove that the fees had the effect of prohibiting Qwest from providing telecommunications services, stating concisely: “If the challenged requirements do not prohibit or have the effect of prohibiting the ability of an entity to provide a telecommunications service, section 253 does not preempt the requirements and the court’s inquiry is complete.”<sup>358</sup>

Judge Jelderks’s opinion correctly notes the obvious, but frequently ignored, fact that “[s]ection 253 does not address revenue-

---

350. *Id.* at 985. It should be noted that the issue of fees was not strictly before the court at all in *Auburn* (hence the court’s references to fees are dicta). Washington State replaces the collection of rents by local governments with a 6% gross receipts tax, which was not at issue in this case. *See id.* at n.11.

351. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. July 2001) (amended decision).

352. *Id.* at 1165 (Amendment No. 5).

353. *Id.* (Amendment Nos. 5 and 6).

354. *Id.*

355. *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, 1255-56 (D. Or. 2002).

356. *Id.* at 1254.

357. *Id.*

358. *Id.* at 1255-56.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 551

based fees, much less categorically forbid them.”<sup>359</sup> As a result, the court arrives at an analysis of section 253 parallel to that of the property-rights model as discussed in Part II of this Article: section 253 preempts right-of-way fees only if they would effectively prohibit provision of a telecommunications service, and *even then* such fees are not preempted by section 253(c) if they qualify as fair and reasonable compensation for use of the rights-of-way.<sup>360</sup> The *Portland* decision also upheld the cities’ insistence on the providers’ submittal of financial and other information necessary to the cities’ administration of their right-of-way ordinances, distinguishing the cities’ requirements from those struck down in *Auburn*, on the grounds that these franchises and ordinances did not give the cities “unfettered discretion” to deny entry.<sup>361</sup>

This gradual clarification in understanding section 253 in the Western courts is visible in the sequence of decisions in the *Berkeley* case.<sup>362</sup> Relying heavily on the original *Auburn* decision, a federal district court in California issued an order on May 23, 2001, granting a preliminary injunction against another local telecommunications ordinance.<sup>363</sup> Five months later, the court conducted a detailed discussion of the legislative history of section 253 and concluded that there was no private right of action directly under section 253.<sup>364</sup> An affected telecommunications company must instead bring a challenge under the Supremacy Clause.<sup>365</sup> The court noted, however, that the remedy available under the Supremacy Clause was preemption, not the damages and attorney fees that a company might seek under section 253 itself.<sup>366</sup> Then, at the end of April 2002, the court accepted the basic reasoning in *Portland* when it denied Qwest’s motion for judgment on the pleadings.<sup>367</sup> Because Qwest had to show that an ordinance pro-

---

359. *Id.* at 1256.

360. *Id.* (emphasis added).

361. *Id.* Qwest appealed the *Portland* decision to the Ninth Circuit on May 8, 2002 (Docket No. 02-35473).

362. *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (Order Granting Preliminary Injunction).

363. *Id.* at 1087. In that decision, however, the district court also correctly held among other things that neither cost recovery fees, nor annual rent charges that do not relate to costs, constitute taxes (though in the end it did not determine the lawfulness of either type of charge). *Id.* at 1092–93.

364. *Qwest Communications Corp. v. City of Berkeley*, 202 F. Supp. 2d 1085, 1096 (N.D. Cal. 2001) (Order Granting Defendants’ Motion to Dismiss Plaintiff’s Second Claim for Relief).

365. *Id.* at 1096.

366. *Id.*

367. *Qwest Communications Corp. v. City of Berkeley*, 208 F.R.D. 288 (N.D. Cal. 2002) (Order Denying Motions for Judgment on the Pleadings and Denying Motion for Temporary Stay of Discovery).

hibits, or has the effect of prohibiting, service even to make an initial case under section 253(a), the court concluded that it could not decide the matter on the pleadings without the opportunity for a “fact-based inquiry.”<sup>368</sup> Citing *Portland*, the court ruled that “Qwest must present evidence to establish the effect of the Ordinances.”<sup>369</sup> Thus, the *Berkeley* court’s analysis of section 253 appears to be moving toward a sound understanding of how to apply that section.<sup>370</sup>

### 11. The *Bristol* Decision on Municipal Entry

In *City of Bristol v. Earley*,<sup>371</sup> Judge James P. Jones held that the plain language of section 253(a) of the 1996 Act includes cities among those “entities” whose right to entry is protected by the Act.<sup>372</sup> As a result, he held that federal law preempted a Virginia statute forbidding municipal entry.<sup>373</sup> This decision was appealed to the Fourth Circuit, but the appeal was dismissed on May 1, 2002, after the Virginia legislature relaxed the statutory prohibition.<sup>374</sup> Compensation for right-of-way use was not involved in this case.

### 12. Palm Beach and Coral Springs

In May 2001, a fourth federal circuit, the Eleventh, entered the fray.<sup>375</sup> Applying a Florida law (which had actually changed twice since the original cases were filed), the court found that the Cities’ franchise and license fees for telecommunications companies were controlled by state law, and hence did not reach the question of their status under section 253.<sup>376</sup> It did, however, review BellSouth’s federal

---

368. *Id.* at 294.

369. *Id.* at 295.

370. Another Ninth Circuit district court decision appears to be inconclusive as to substantive results concerning § 253. *Qwest Corp. v. City of Globe*, 237 F. Supp. 2d 1115 (D. Ariz. Aug. 15, 2002).

371. *City of Bristol v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001).

372. *Id.* at 747.

373. *Id.*

374. Appeal Dismissed as Moot, *City of Bristol, Virginia v. Virginia Telecomm.*, No. 01-1741 (4th Cir. May 1, 2002). Judge Jones later concluded that in Virginia, a Dillon Rule state, the state had not explicitly granted cities the power to provide *cable* service, and thus Bristol’s system could not offer cable service without further legislative action. *Marcus Cable Assoc. v. City of Bristol*, 237 F. Supp. 2d 675, 681 (W.D. Va. Dec. 12, 2002).

375. *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001). BellSouth brought suit against telecommunications ordinances adopted by two Florida municipalities: the City of Coral Springs and the Town of Palm Beach. *Id.* at 1175. The trial courts reached mixed results, and review on appeal was consolidated by the Eleventh Circuit. *Id.* at 1176.

376. *Id.* at 1183–85.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 553

preemption claims for other provisions of the ordinances that it found were not preempted by state law.<sup>377</sup>

The court's crucial holding on section 253 was to recognize the structure of review required by the subsections of section 253.<sup>378</sup> Subsections (b) and (c) do not impose affirmative substantive requirements on localities; rather, they serve *only* as safe harbors preserving certain legal requirements from the affirmative requirements of section 253(a).<sup>379</sup> Thus, for example, the nondiscrimination requirement of section 253(c) is not even relevant unless a requirement has the force of a barrier to entry under section 253(a), making it necessary to determine whether it is exempted by the section 253(c) safe harbor. Among other things, the opinion noted that the FCC itself, in 1998 guidelines for filing petitions under section 253, acknowledged this structure.<sup>380</sup> It also recognized that the purpose of subsection (d) is to direct disputes potentially implicating section 253(c) to the courts, not the FCC.<sup>381</sup> Because the trial court decisions dealt with section 253(c) without ever determining whether the ordinances in question violated section 253(a), the Eleventh Circuit remanded to the courts below to determine (1) whether any of the provisions in question violated section 253(a), and (2) if so, whether the provisions were nonetheless saved under section 253(c).<sup>382</sup> Thus, before an ordinance can be considered preempted, a court must conduct *both* the section 253(a) *and* the section 253(c) analyses.

### 13. The *Prince George's County* Decisions

In July 2001, a federal district court in Maryland issued the final ruling in a proceeding with a somewhat checkered procedural history.<sup>383</sup> Prince George's County, Maryland, adopted an ordinance imposing a three percent gross revenue fee on all telecommunications companies operating through facilities in the rights-of-way.<sup>384</sup> Bell Atlantic (now Verizon) sued to enjoin the ordinance.<sup>385</sup>

---

377. *Id.* at 1185–86.

378. *Id.* at 1191. *See also supra* Section I.A.

379. *Palm Beach*, 252 F.3d at 1187.

380. *Id.* at 1188 (Suggested Guidelines for Petitions for Ruling under § 253 of the Communications Act, available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Public\\_Notices/1998/fcc98295.txt](http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1998/fcc98295.txt)).

381. *Id.* at 1191.

382. *Id.* at 1192.

383. *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 155 F. Supp. 2d 465 (D. Md. 2001) [hereinafter *Prince George's County III*].

384. *Id.* at 469.

385. *Id.* at 466.

In its initial decision in 1999, the district court avoided addressing Verizon's federal constitutional and state law claims and moved directly to section 253.<sup>386</sup> Judge Blake held that the County "certainly is permitted under the FTA [the 1996 Act] to require . . . a County-issued franchise."<sup>387</sup> However, she ruled that the franchise fee "must be directly related to companies' use of their local rights-of-way, otherwise the fees constitute an unlawful economic barrier to entry under § 253(a)."<sup>388</sup> The "appropriate benchmark is not the 'value' of Bell Atlantic's 'privilege' of using the County's public rights-of-way . . . . Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way . . . . [T]hese costs must be apportioned to Bell Atlantic based on its degree of use, not its overall level of profitability."<sup>389</sup> Furthermore, the district court defined "use" as "physical impact"—thus resellers and other non-facilities-based providers could not be required to obtain a local franchise.<sup>390</sup> Finally, the court held that the technical, financial, and legal information required by the County to grant a franchise, coupled with the County's discretion to not issue a franchise, created a barrier to entry in violation of section 253(a) and exceeded the scope of the safe harbor right-of-way management authority under section 253(c).<sup>391</sup> The court held that right-of-way management was limited to the types of activities described by prior FCC decisions, such as regulation of traffic flow, underground placement of facilities, and cost of street repair and excavation.<sup>392</sup>

This initial trial court decision, although later vacated on appeal, has been extensively cited in industry briefs and subsequent case law.<sup>393</sup> Both sides appealed the decision.<sup>394</sup> In 2000, the Fourth Circuit vacated the district court decision and remanded with instruction back to the district court.<sup>395</sup> Reaffirming the duty of federal courts to avoid constitutional questions if possible, the Fourth Circuit held that the district court's determination that state law was preempted by federal law did

---

386. Bell Atlantic-Maryland, Inc. v. Prince George's County, 49 F. Supp. 2d 805, 814 (D. Md. 1999) [hereinafter *Prince George's County I*].

387. *Id.* at 816.

388. *Id.* at 817.

389. *Id.* at 818.

390. *Id.* at 819.

391. *Id.* at 817.

392. *Id.* at 815–16.

393. See, e.g., *Auburn*, 260 F.3d at 1175; *Cablevision of Boston*, 184 F.3d at 99.

394. Bell Atlantic-Maryland, Inc. v. Prince George's County, 212 F.3d 863 (4th Cir. 2000) [hereinafter *Prince George's County II*].

395. *Id.*

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 555

raise constitutional issues.<sup>396</sup> The district court's failure to examine the four state law claims raised by Bell Atlantic before it reached the federal questions was thus reversible error.<sup>397</sup> The Fourth Circuit revealed an awareness of the fact that a federal law granting unfettered use of local communities' property, free of charge, raises constitutional issues.

The trial judge's decision on remand again struck down the County's ordinance *in toto*.<sup>398</sup> The reasons given in the new opinion closely paralleled the judge's earlier section 253 decision, but this time rested on the grounds that Maryland public utilities law had given exclusive jurisdiction to the Maryland Public Service Commission over *regulation* of telecommunications companies.<sup>399</sup> The conclusion depended on the judge's continuing belief that the detailed application requirements and other provisions of the County's ordinance had to mean that the County was really regulating telecommunications *service*, rather than use of its public rights-of-way.<sup>400</sup>

The final *Prince George's County* opinion did recognize the County's right as a Maryland home rule county to grant franchises and to manage its public rights-of-way.<sup>401</sup> Its rationale for rejecting the ordinance was that the ordinance, rather than doing these things, was really "an attempt to regulate the telecommunications companies."<sup>402</sup> The decision thus depended on the judge's analysis of the ordinance as regulation rather than as a way to implement property rights.

#### 14. The *City of Eugene* Cases

A set of related decisions issued by an Oregon state court in late 2001 reflect a sounder understanding of section 253, in particular regarding revenue-based right-of-way fees.<sup>403</sup> The *City of Eugene*, Ore-

---

396. *Id.* at 865.

397. *Id.* at 865–66.

398. *Prince George's County III*, 155 F. Supp. 2d at 472.

399. *Id.* at 478.

400. The court made the following statement:

Thus, the question of preemption by state law depends on a characterization of the ordinance. If the ordinance simply regulates the rights-of-way in the County, it would follow that the ordinance was a valid exercise of County authority and not preempted by Maryland law. Upon analysis, however, it appears that the ordinance—in particular the application process and required submissions—exceed the scope of mere right-of-way regulation.

*Id.* at 476.

401. *Id.* at 475–76.

402. *Id.* at 477.

403. *AT&T Communications of the Pac. Northwest, Inc. v. City of Eugene*, 35 P.3d 1029 (Or. Ct. App. 2001) [hereinafter *Eugene I*]; *US West Communications, Inc. v. City of Eugene*,

gon, adopted an ordinance in 1997 requiring telecommunications providers operating in the City to pay an annual registration fee of two percent of their gross revenues. Telecommunications facilities owners (other than those grandfathered under existing agreements) were required to pay a licensing fee of seven percent of gross revenues.<sup>404</sup> The proceeds were kept in a separate subfund, to be used not only for administrative costs but also for telecommunications-related construction projects.<sup>405</sup> AT&T, Sprint, Qwest, and TCI Communications each asked the court to rule that the City's fees violated section 253 (along with other state law claims).<sup>406</sup>

The court upheld the City's fees in each of four separate cases, and reversed a lower court decision striking down the fees.<sup>407</sup> AT&T had argued that section 253 limits localities to recovering costs associated with use of the rights-of-way.<sup>408</sup> The court rejected that claim.<sup>409</sup> In this case, the court did not engage in an explicit property rights analysis, but apparently reached its conclusion based on the reasoning in *Dearborn*, already discussed, focusing on the fact that a fee alone was not a prohibition under section 253(a).<sup>410</sup>

The court also dismissed AT&T's argument that the City could not establish licensing and regulation requirements and its claim that localities are limited to right-of-way regulations. Under section 253, local laws are valid absent a showing that a challenged regulation actually prohibits or has the effect of prohibiting entry.<sup>411</sup> The court found that AT&T had not shown that the City's ordinance had the effect of prohibiting service.<sup>412</sup> The court was not convinced by AT&T's claims that such regulations provide a redundant third layer of regulation that "will lead to a 'patchwork' of varying local regulations," find-

---

37 P.3d 1001 (Or. Ct. App. 2001); TCI Cablevision of Oregon, Inc. v. City of Eugene, 38 P.3d 269 (Or. Ct. App. 2001); Sprint Spectrum v. City of Eugene, 35 P.3d 327 (Or. Ct. App. 2001).

404. *Eugene I*, 35 P.3d at 1033-34.

405. *Id.*

406. *Id.*

407. Its principal opinion was in *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, 35 P.3d 1029. The court dealt with the additional actions more briefly in three other opinions filed on the same date, October 31, 2001. See *supra* note 403. On August 7, 2002, the Oregon Supreme Court issued an order declining to review the *AT&T*, *Sprint*, and *TCI* decisions. See Supreme Court of Oregon Petitions for Review, 52 P.3d 1056, 1056-57 (Or. 2002).

408. *Eugene I*, 35 P.3d at 1043.

409. *Id.* at 1051.

410. *Id.* at 1045. The *Eugene* court did appear, erroneously, to confuse user fees with taxes. See *id.* at 1035-36. However, it also distinguished taxes on subscribers from taxes on telephone providers themselves, which are one step closer to user fees for the providers' use of the public rights-of-way. *Id.* at 1038.

411. See, e.g., *id.* at 1044.

412. *Id.* at 1048.

ing that such an argument “amounts to little more than speculation” that is “buttressed by no evidence about the actual or likely effect of the [C]ity’s ordinance.”<sup>413</sup> As a result, the court found that the City’s requirements did not rise to the level of a prohibition under section 253(a), making it unnecessary to determine whether they fell within the safe harbors of subsections (b) or (c).<sup>414</sup>

### 15. The *San Marcos* Case

Preliminary results in a section 253 suit in California provide some detailed, if idiosyncratic, examples of how a court may perceive specific right-of-way conditions.<sup>415</sup> The district court granted in part a plaintiff’s preliminary injunction,<sup>416</sup> and simultaneously granted in part the City’s motion to dismiss in *Cox Communications PCS v. City of San Marcos*.<sup>417</sup> Here, Cox Communications, doing business as Sprint PCS, sought to install three wireless sites in public rights-of-way in the City of San Marcos.<sup>418</sup> The City required Sprint to obtain a conditional use permit first, and Sprint challenged this requirement.<sup>419</sup>

In the first decision, the court reviewed the City’s requirements one by one, upholding all but “three minor portions” of the ordinance, two of which were objected to as reserving “unfettered discretion” to the City.<sup>420</sup> Those three were enjoined pending the court’s review of the case on the merits.<sup>421</sup> In reviewing these provisions, the court curiously seemed to conclude that the city lacked “the authority to protect the public safety and welfare,” unless that power was delegated by the state, but on the other hand concluded that the city could use a zoning law or code to “prevent injury to property”<sup>422</sup>—hardly an intuitive result. In the second decision, reached on the same day, the court dismissed several, but not all, of Sprint’s claims on various grounds.<sup>423</sup> The court’s emphasis on the burden of “a lengthy application proc-

---

413. *Id.*

414. *Id.* The court also rejected AT&T Wireless’s claim of preemption under 47 U.S.C. § 332(c)(3)(A). *Id.* at 1050.

415. See *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 (S.D. Cal. 2002) (Order Granting in Part, Denying in Part, Plaintiff’s Motion for Preliminary Injunction) [hereinafter *Cox I*]; *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1272 (S.D. Cal. 2002) (Order Granting in Part, Denying in Part, Defendant’s Motion to Dismiss) [hereinafter *Cox II*].

416. *Cox I*, 204 F. Supp. 2d at 1271.

417. *Cox II*, 204 F. Supp. 2d at 1285.

418. *Id.* at 1274–75.

419. *Id.* at 1275.

420. *Cox I*, 204 F. Supp. 2d at 1271.

421. *Id.*

422. *Id.* at 1267.

423. *Cox II*, 204 F. Supp. 2d at 1285.

ess”<sup>424</sup> places it in line with those tribunals that have focused on entry procedures as a form of regulation, rather than on use of property.

### 16. Central Puget Sound

Several useful distinctions were made in *Qwest Corporation v. Central Puget Sound Regional Transit Authority*.<sup>425</sup> This decision upheld the authority of the cities of Tacoma and Seattle to require relocation of Qwest’s lines to accommodate a light rail system, at Qwest’s cost.<sup>426</sup> The court classified this requirement as an exercise of the cities’ police power and their authority to manage the public rights-of-way, entirely distinct from compensation.<sup>427</sup> Noting that Qwest was already providing service within the two cities, the court stated, “[I]t is clear that the relocation requirement does not constitute a ‘barrier to entry.’”<sup>428</sup> The court thus found that the relocation requirement did not violate section 253(a), but even if it had, it would have been shielded by section 253(c).<sup>429</sup>

### 17. Municipal Competition in the Missouri Municipal League Decisions

As noted above, the FCC declined to apply section 253 to preempt a Texas state law that erected an outright legal barrier to entry by municipally owned utilities.<sup>430</sup> Subsequently, the FCC denied a similar petition on behalf of Missouri municipalities.<sup>431</sup> The outcome on appeal, however, was different in this case.<sup>432</sup> Following the reasoning of *Bristol*, the Eighth Circuit vacated and remanded the FCC’s decision not to preempt the Missouri barrier statute.<sup>433</sup> Citing to a long series of Supreme Court holdings that “any” (as in “any entity”) prevented a narrowing construction, the Eighth Circuit did not find the D.C. Circuit’s *City of Abilene* conclusion persuasive.<sup>434</sup>

---

424. *Cox I*, 204 F. Supp. 2d at 1265.

425. No. C02-155P (W.D. Wash. Aug. 6, 2002) (Order on Motions for Summary Judgment).

426. *Id.*, slip op. at 1.

427. *Id.* at 3.

428. *Id.* at 6.

429. *Id.* at 7.

430. See *supra* note 221 and accompanying text.

431. *In re Missouri Mun. League*, Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, 16 F.C.C.R. 1157 (2001).

432. *Missouri Mun. League v. FCC*, 299 F.3d 949 (8th Cir. 2002).

433. *Id.* at 955–56.

434. *Id.* at 955. The FCC has shown remarkable persistence in seeking to prevent the application of § 253 in favor of municipal entities. Following the Eighth Circuit’s decision on appeal, the Commission petitioned for rehearing or rehearing *en banc*. The court denied that peti-

18. *Qwest v. Santa Fe*

In *Qwest v. Santa Fe*,<sup>435</sup> the court granted Qwest partial summary judgment under a section 253(a) federal preemption claim, finding that the ordinance in question allowed “essentially unfettered discretion” to accept or reject applications based on vague and broad factors such as “the public interest.”<sup>436</sup> The court also found that the City’s combined requirements—a lease payment, the appraisal fee of the facilities to be used, a dedication to the City of the fiber deployed, and a requirement for excess fiber deployment—would result in a “30 to 59%” increase in the costs to the carrier.<sup>437</sup> Such an increase rose to the level of a prohibition of entry under section 253(a).<sup>438</sup> The court thus appeared to be evaluating whether the charges were “fair and reasonable” in some sense.<sup>439</sup> It did not specifically refer to market value, but it also avoided the common trap of confining compensation to costs.

The court found that the City’s ordinance did not violate section 253 by requiring permits and fees for access to the rights-of-way, as state law had conferred that authority on the City.<sup>440</sup> The court also held there was no private right of action available to Qwest under section 253 of the Telecommunications Act or 42 U.S.C. section 1983;<sup>441</sup> Qwest’s sole federal preemption claim lay under the Supremacy Clause.<sup>442</sup> The significance of this apparently technical distinction is that it prevented Qwest from claiming attorneys’ fees under section 1983.<sup>443</sup> The court concluded in this respect that the administrative remedies provided in the statute reflect “a carefully crafted balance between deregulating the telecommunications market at the federal level and preserving state and local authority to regulate in certain prescribed areas.”<sup>444</sup> To award attorneys’ fees would upset the balance that Congress sought to create in crafting section 253.<sup>445</sup>

---

tion on October 22, 2002, then rescinded that denial pending correction of a procedural glitch. *Missouri Mun. League v. FCC*, No. 01-1379 (8th Cir. Oct. 24, 2002).

435. *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305 (D. N.M. Aug. 30, 2002).

436. *Id.* at 1323–24.

437. *Id.* at 1324–25.

438. *Id.* at 1325.

439. *Id.*

440. *Id.* at 1327–28.

441. *Id.* at 1314, 1316.

442. *Id.* at 1312.

443. *Id.* at 1315.

444. *Id.*

445. *Id.* at 1315–16.

19. *White Plains* and *Colonie*

The Second Circuit faced the compensation issue arising from a New York federal district court decision in 2000.<sup>446</sup> *White Plains I* held that burdensome application requirements plus a lengthy approval process could constitute a prohibition on entry triggering section 253(a).<sup>447</sup> Looking beyond the regulatory framework, however, the court also held that fair and reasonable compensation extends beyond mere costs.<sup>448</sup> In fact, the court upheld compensation requirements reflecting at least two of the three categories of compensation<sup>449</sup>—a gross revenues fee and a fixed annual fee:

- (a) five percent of gross revenues;
- (b) a minimum annual fee starting at \$5,000 and gradually increasing to \$10,000;
- (c) reimbursement for the cost of third parties, including attorneys and consultants;
- (d) an in-kind requirement for conduit constructed for the City by TCG.<sup>450</sup>

The trial court held that the City did not discriminate by charging such fees to TCG and not to the incumbent LEC, Verizon (formerly known as Bell Atlantic, NYNEX, and New York Telephone) because the latter had historically provided in-kind compensation in the form of “an extensive underground conduit network throughout the City” and other benefits.<sup>451</sup>

On appeal, the case was complicated by the FCC’s filing of a spontaneous *amicus curiae* brief.<sup>452</sup> In a footnote to this brief, the Commission’s attorneys opined that a gross revenues-based fee might be “problematic” under section 253(c).<sup>453</sup> The court asked the FCC to make clear its views on the Commission’s jurisdiction under section 253 and on “fair and reasonable compensation” for use of the

---

446. TCG New York, Inc. v. City of White Plains, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) [hereinafter *White Plains I*].

447. *Id.* at 89.

448. *Id.* at 96–98.

449. *Identified supra* Section II.C.

450. *Id.* at 95.

451. *Id.* at 99.

452. TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 74 (2d Cir. 2002) [hereinafter *White Plains II*].

453. See Brief of the FCC and the United States as *Amici Curiae*, TCG New York, Inc. v. City of White Plains, No. 01-7213(L), slip op. at 14 n.7 (2d Cir. June 12, 2001).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 561

public rights-of-way.<sup>454</sup> In a supplemental brief, the FCC took an appropriately cautious view (in light of section 253(d)) of its own jurisdiction where there is an issue as to local communities' right to exercise right-of-way management and require fair and reasonable compensation pursuant to section 253(c).<sup>455</sup> Moreover, noting the various open proceedings relating to the issue, the Commission declined to take any position on the propriety of possible rights-of-way charges beyond the text of its original footnote.<sup>456</sup>

On September 12, 2002, the Second Circuit issued its decision.<sup>457</sup> The appeals court upheld the initial decision finding a section 253(a) violation in the City's application process and other factors.<sup>458</sup> But, in addition, the Second Circuit reversed the lower court with respect to the franchise fee.<sup>459</sup> It found this violation of section 253, however, for the particular reason that the City's fee requirement had not been applied to Verizon.<sup>460</sup> The court found that Verizon's in-kind benefits to the city were "sunk costs incurred in the past," and concluded that they would not affect the cost burden on Verizon in the future.<sup>461</sup> The opinion disagreed with *Dearborn* about the consequences of a state law immunizing the incumbent LEC from compensation requirements, and held that section 253(c) could not save a compensation requirement "[w]here state laws and local ordinances combine to create a fee that is not 'competitively neutral.'"<sup>462</sup> The court does not seem to have considered that the appropriate solution might have been to preempt the alleged prior state grant to the incumbent, rather than to use such an archaic grant as an opening wedge to give away local property to other telecommunications companies. The court did, however, emphasize that nondiscriminatory compensation requirements need not be exactly equivalent, as long as a "rough parity between competitors" is achieved.<sup>463</sup>

Most interesting, however, is the court's analysis of what "fair and reasonable compensation" means under section 253(c). The opinion addressed this question in terms that make clear the analogy to other forms of property and payment:

---

454. *Id.*

455. See Supp. Brief of the FCC and the United States as *Amici Curiae*, TCG New York v. City of White Plains, No. 01-7255(XAP) (2d Cir. Mar. 11, 2002).

456. *Id.* See *White Plains II*, 305 F.3d at 74-75.

457. *White Plains II*, 305 F.3d at 67.

458. *Id.* at 76-77.

459. *Id.* at 79-80.

460. *Id.* at 80.

461. *Id.* at 79.

462. *Id.* at 80.

463. *Id.*

As ordinarily understood, “compensation” often extends to more than costs. Thus, when we discuss wages and salary as “compensation,” *see, e.g.*, I.R.C. § 61(a)(1), the term is not limited to costs. Similarly, discussing the payment of rent as “compensation” for the use of property does not strain the ordinary meanings of any of the words. And commercial rental agreements commonly use gross revenue fees as part of the price term.<sup>464</sup>

Observing that the word “compensation” is also sometimes used to refer to costs, the Second Circuit noted the split between the Sixth Circuit’s *Dearborn* decision and the Ninth Circuit’s dicta in *Auburn*.<sup>465</sup> Having set the stage, however, the Second Circuit ultimately declined to reach the question of whether section 253(c) would permit a gross revenue fee.<sup>466</sup> While the court appears to have recognized the importance of property rights in the context of section 253, its decision did not turn on that analysis.

Two weeks later, a follow-up decision at the district court level illuminated the import of *White Plains*.<sup>467</sup> In *Colonie*, Judge Scullin denied a motion by plaintiff TC Systems (another subsidiary, with TCG, of AT&T) to dismiss a counterclaim by the Town of Colonie that TC Systems used and occupied the Town’s public rights-of-way without a franchise.<sup>468</sup> Beginning with New York law “requir[ing] a telephone corporation to obtain a town’s permission before using its streets to install its facilities,”<sup>469</sup> the court favorably quoted the Second Circuit’s language regarding the possibility that a gross revenues fee is permissible under section 253.<sup>470</sup> The court also found that because the Colonie ordinance on its face applied to all carriers, including Verizon, it was not discriminatory as a matter of law and thus was “factually distinct” from *White Plains* as understood by the Second Circuit.<sup>471</sup> Judge Scullin cautioned that applying section 253 “is extremely fact sensitive.”<sup>472</sup>

---

464. *Id.* at 77.

465. *Id.* at 78. The court also noted that although compensation can sometimes be used as a synonym for costs, the term “costs” itself here “can refer either to the actual out-of-pocket expenses incurred or more broadly to the costs of capital and the ‘opportunity cost’ of forgone alternative uses of resources.” *Id.* at 77.

466. *Id.* at 79.

467. *TC Systems, Inc. v. Town of Colonie*, No. 1:00-CV-1972 (FJS/RFT) (N.D.N.Y. Sept. 30, 2002) (Memorandum-Decision and Order) [hereinafter *Colonie*].

468. *Id.*, slip op. at 10.

469. *Id.* at 4.

470. *Id.* at 8 n.5.

471. *Id.* at 9 n.6.

472. *Id.* at 8. Another district court decision in New York struck down a set of local telecommunications franchise terms, comprehensively relying on references to *White Plains* but even

## 20. Statewide Authority in the *Maryland Heights* Case

As noted above, one of the persistent complications in local communities' attempts to deal with telecommunications providers on a consistent basis is the unique historic position of the ILECs. The incumbent's claim to have special rights granted by the state in the distant past appeared, but was not addressed, in *Prince George's County*, and played a role in *Dearborn*.

This issue surfaced again in an action brought by telecommunications carriers SBC and XO Missouri against the City of Maryland Heights, Missouri.<sup>473</sup> On September 23, 2002, a district court found that the State of Missouri had "tendered an offer" by statute in 1879 to telegraph and telephone companies, and by accepting that offer, SBC's predecessor had created a valid contract, whose consideration was "establishing and maintaining adequate telecommunications services which benefited [*sic*] the citizens of the State of Missouri."<sup>474</sup> In light of this contract, the City could not impose the requirements of a telecommunications ordinance on SBC, other than to specify certain placements and alterations of facilities as provided in Missouri law.<sup>475</sup> The second plaintiff, XO Missouri, however, had no such antediluvian rights. The court cited *Dearborn* to the effect that nondiscrimination need not imply identical treatment for the two providers.<sup>476</sup> However, it was not faced with the question of whether the differences involved would constitute a barrier to entry, and declined to reach that point.<sup>477</sup>

## 21. Summary: Judicial Results Depend on Acknowledgment of Property Rights

Thus far, the ongoing interpretation of the 1996 Act by the courts has resulted in a divergence of views among federal courts of appeals that have dealt with section 253. In particular, since the *Auburn* decision there is a distinct conflict among the circuits with respect

---

more to *Auburn*. Without actually conducting a substantive analysis of whether any of the provisions at issue in fact prohibited or had the effect of prohibiting service, Judge Hurd in *City of Rome v. Verizon Communications, Inc.*, No. 02-CV-0748 (N.D.N.Y. Jan. 17, 2003), concluded that franchise terms dealing with matters such as customer service, universal service, transfers, compliance with other laws, fraud or bankruptcy, and even removal or relocation of facilities (a quintessential right-of-way management issue) all fell outside the sphere of right-of-way management and compensation protected by § 253(c). *Rome*, slip op. at 7–10. Because he disposed of the case on those grounds, the judge did not reach the compensation issue. *Id.* at 10 n.2.

473. *XO Missouri, Inc. v. City of Maryland Heights*, No. 4:99-CV-1052 CEJ (E.D. Mo. Sept. 23, 2002) (Memorandum and Order).

474. *Id.*, slip op. at 8.

475. *Id.* at 9 (citing MO. REV. STAT. § 888 (1879)).

476. *Id.* at 18–19.

477. *Id.* at 19.

to compensation. The Sixth, Second, and First Circuits<sup>478</sup> have recognized that “fair and reasonable compensation” under section 253 reflects the market value of local communities’ property. By contrast, the Ninth Circuit<sup>479</sup> appears to have been seduced by the logically unfounded notion that compensation for local governments must only cover costs.<sup>480</sup> Thus, it seems likely that the Supreme Court may eventually take up this issue to resolve the conflict among the circuits.

As suggested at the outset, the cases appear to fall into a pattern indicating courts may misinterpret section 253 (as it was explicated above in terms of the legislative history) if they fail to think of it in terms of preserving local communities’ property rights. In *Dearborn*, as well as *Dallas*, *Omnipoint*, *Mobile*, and *Portland*, an analysis sensitive to such property rights led to a favorable result with respect to local communities’ right to compensation for right-of-way use.<sup>481</sup> Conversely, in *Auburn*, as well as *Austin*, *Hawarden*, *PECO*, *Grant County*, *Chattanooga*, *Prince George’s County*, *San Marcos*, and *Rome*, the courts essentially ignored property issues and reached negative results with regard to local rights and compensation.<sup>482</sup> Thus, it is significant whether a court or other decision maker starts from a “regulation” standpoint or from a “property rights” standpoint in approaching a section 253 case.

## VI. CONCLUSION

The survey of court decisions leads to the conclusion that the outcome of a section 253 case depends a great deal on whether the court acknowledges the role of a local community’s property rights over the public rights-of-way. This connection is understandable in light of how the analysis is likely to proceed. When a court acknowledges that property is involved, it will tend to find reasonable the notion that the owner can require market value compensation for that property’s use. On the other hand, if a court ignores property issues

---

478. In *Dearborn*, *White Plains*, and *Cablevision of Boston*, respectively.

479. In *Auburn*.

480. Although it is significant that trial courts in the Ninth Circuit have not, in fact, treated the *Auburn* dicta on compensation as preventing market-value rental fees for telecommunications use of public rights-of-way. This issue was not directly addressed by the Eleventh Circuit, in *Palm Beach*, or the Tenth Circuit, in *RT Communications*.

481. In *White Plains*, the court discussed property rights perceptively, but did not decide the issue due to its conclusion regarding discriminatory treatment. In *Denver*, on the other hand, the court appears to have reached a contrary conclusion despite acknowledging local property rights.

482. In other cases discussed above, it does not seem to be clear whether or not the courts clearly recognized the importance of local property rights, or else the holdings did not clearly uphold or strike down local rights to compensation.

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 565

and concentrates on regulatory factors or on procedural issues such as application processes, the court is more likely to think of compensation as a potential barrier to entry and as reducible to a recovery of administrative costs. For this reason, litigants who wish to occupy the public rights-of-way at no cost tend to cast their arguments in terms of regulation and not property. It would be useful for any decision maker faced with this issue to confront, and require the parties to address, the question: If a telecommunications company is expected to pay a fair market price for the resources it uses generally, why should the owner of one such resource—the public rights-of-way—be required to give it to the company for free?

The line of thought that entices some courts to focus exclusively on costs as constituting “compensation” appears to involve the following steps: fees for use of the public rights-of-way should be directly related to a given telecommunications company’s physical usage of the rights-of-way (ignoring, for example, inchoate usage such as the option to build anywhere in the rights-of-way); this physical occupation imposes burdens on the rights-of-way; those burdens are reflected in the costs incurred by the local government; therefore the fees should not exceed the costs caused by physical occupancy.<sup>483</sup> This approach fails to recognize that right-of-way fees are fundamentally rent for the use of property, not merely indemnification for damage caused to that property.

The unsoundness of this cost-based reasoning is illustrated by the fact that one would not apply it in any other case involving property rights. No one, for example, argues that a landlord may charge only enough rent to cover the incremental costs of managing the property, or that telecommunications companies may charge their customers no more than the management costs of operating their systems. On the contrary, free-market compensation for the use of property is based not only on the cost of that property, but also on the value of the property to the user and the price of the nearest available substitute. Gross revenues are one way of measuring this value to the user—particularly over the course of a long-term agreement of the sort that telecommunications companies tend to prefer—because in today’s rapidly developing technological environment the usage, and the resulting value, may change radically over the course of ten or fifteen years. Thus, the essential insight for a court reviewing the compensation issue is that revenue-based compensation partially measures the value of the asset to the user. It is not central to the determination of

---

483. See, e.g., *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, at 1100 (N.D. Cal. 2001) (Order Granting Preliminary Injunction).

value whether or not a given use increases the impact on the rights-of-way (meaning the costs incurred by the owner). Rather, the key question is whether the owner will be allowed to require market-value compensation for the use of the owner's property.

Under section 253, this issue tends to play out in terms of *control* over use of the public rights-of-way. Traditionally, local communities exercised considerable control over how their public rights-of-way were used, even when only a few monopoly users were involved (principally public utilities). Recent developments, however, show a remarkable willingness to deprive local communities of the ability to control right-of-way use. For example, a state law recently enacted in Missouri imposes, among other restrictive conditions, a requirement that local governments issue all permits for right-of-way use by telecommunications companies within thirty-one days.<sup>484</sup> This time limit deprives the community even of the opportunity for detailed consideration of any concerns that might arise in reviewing a permit application.

Restrictions on local property use are invariably justified in terms of competition. The laudable national goal of facilitating competitive entry is taken as a basis for preempting local control over local property. Such preemption subsidizes telecommunications providers by giving them cost-free use of public property. The key difficulty with this position arises because property owners have generally enforced their control over how their property is used through their power to exclude. If a tenant does not agree to a property owner's terms and conditions for property use, the owner may generally evict, or refuse entry to the tenant in the first place. However, because any potential for exclusion by a local community from the rights-of-way tends to be seen as a barrier to competition, there is a considerable danger that the local community will be left defenseless to depredations upon its property rights by those private users who profit from the use of that property.

Telecommunications policy involves many important concerns, including the advantages of competition and the benefits of broadband deployment. In some circumstances section 253 may be a useful tool in achieving such goals. But in applying section 253, local property rights—both those of the local community as well as those of private owners—must be respected. A sound understanding of how to apply section 253, one consistent with legislative history and the constitu-

---

484. See SB 369, 91st Gen. Assem., Reg. Sess. (Mo. 2001), adding MO. REV. STAT. § 67.1836(3) (2002).

2003] *Property Rights, Federalism, and the Public Rights-of-Way* 567

tional principle of federalism, requires attention to the property rights of the local community.