STREET LAW 2003:
KEY DEVELOPMENTS AFFECTING LOCAL AUTHORITY TO MANAGE RIGHTS OF WAY AND PROTECT COMMUNITY INTERESTS.

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Introduction

This article examines the recent developments in communications law that have or will have an important impact on local authority to manage rights of way and local authority to respond to the proliferation of wireless telecommunications facilities. The article is divided into two broad sections, the first dealing with *wireline* communications and the second dealing with *wireless issues.* The wireline section primarily focuses on legal development related to telecommunications provider use of public rights-of-way, and public rights-of-way management and compensation development. The wireless section addresses zoning, tower siting, and public safety issues.

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I. KEY WIRELINE TELECOMMUNICATIONS ISSUES

A. Overview

Telecommunications law for municipalities is currently characterized by a basic underlying clash with respect to local governments' right to control and to gain the benefit of their property. As a general matter, local governments either own their public rights-of-way in fee, or at least are trustees for their use for the benefit of the whole community. In exercising this responsibility, they grant private parties, including communications companies, three distinct and valuable rights of use:

(1) The *option* to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way;
(2) The *actual* burden on the public rights-of-way created by the construction work to install and maintain such facilities, and by their continuing occupation of limited space in the streets; and
(3) The ability to *use* the public rights-of-way in doing business.

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As a general matter, it would appear reasonable that three kinds of compensation should correspond to these three valuable rights granted to telecommunications companies:

(1) An annual option 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 reflect the value realized by the user from use of the community's property.

This general perspective, however, is anything but uncontroversial. Three primary issues appear to be in play at this time with respect to local communities' control of this property.

(A) *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 there is a theoretical consensus on this point, but wide disagreement in practice.

(B) *Compensation.* Neither those who wish to use local communities' property for free, nor decision-makers at the federal level, are eager to recognize the property rights of local communities. There is a remarkable reluctance in the courts, at the FCC, and of course in the industry to admit that telecommunications companies are in fact receiving value from use of the public rights-of-way, which under normal free market principles they would owe compensation to the owners.

(C) *Control.* As a general matter, property owners enforce their rights to manage their property (A) and receive fair compensation (B) 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. However, there appears to be a strong sense in the courts, at the FCC, and in the industry that the exercise of any such control by local governments would constitute a "barrier to entry" and would hence be anticompetitive. The prevailing mind-set thus sees control of the public rights-of-way as an issue of *regulatory barriers to entry* rather than of *property rights*.

These issues have come to a head in the wake of the Telecommunications Act of 1996. In particular, the parity provisions of § 253(c) (discussed below) mean that the antediluvian rights asserted by incumbent local exchange carriers (ILECs), who originally entered the rights-of-way long ago as statutory monopolies under quite different understandings from those outlined above, create a serious

problem for localities that wish to treat modern telecommunications providers in a nondiscriminatory way. If, for example, state law permits the ILEC to use the public rights-of-way without paying compensation, competitive local exchange carriers (CLECs) and other telecommunications carriers will argue that they, too, should receive a free ride. The ILEC in effect becomes the entering wedge by which other right-of-way users seek to gain free and unrestricted use of the community's property.

Building owners face analogous problems 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 receive 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 Preemption of Local Zoning Regulation of Satellite Earth Stations, Implementation of Section 207 of the Telecommunications Act of 1996: Television Broadcast Service and Multichannel Multipoint Distribution Service,* 11 FCC Rcd 19276 (1996); *Implementation of Section 207 of the Telecommunications Act of 1996 – Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services,* 13 FCC Rcd 23874 (1998). In the "Competitive Networks" proceeding, however, the FCC also moved in the direction of extending similar rules to wiring that occupies what the Commission called "private rights-of-way" inside privately owned buildings. Thus far, these inside wiring

rules have not reached the Draconian levels achieved by the FCC in the OTARD rules. But the trend is of concern to private and public property owners alike.

Neither these new entrants, nor the incumbent LECs, have ever made a convincing case as to why they should have an innate right to use local communities' property for free. Allowing business entities to use a valuable asset without compensating the owners is not only unjust, but is also bad economic policy. Such cost-free use, which is in effect a public subsidy to the telecommunications carrier, distorts normal market incentives and tends to lead to inefficient allocation of economic resources. 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 (to the federal government) at auction, but the latter can take advantage of (local) public rights-of-way for free. Thus, both fundamental fairness and sound economics militate against the notion that local property can be given away to private parties by the federal government – aside from the unfavorable precedent such a policy would create with respect to private property in general.

Since the passage of the 1996 Act, the courts and the FCC have attempted to grapple with these issues. 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.

B. Right-of-Way Decisions Under Section 253

1. *Section 253*

The principal locus of judicial action on local public rights-of-way has been Section 253 of the 1996 Act, 47 U.S.C. § 253, titled "Removal of Barriers to Entry." 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." Subsections (b) and (c) of § 253, however, create "safe harbors" for certain types of state and local requirements. Even if a rule would "prohibit or have the effect of prohibiting" under subsection (a), it will not be preempted by § 253 if it falls within the scope of (b) or (c). Since § 253(b) deals with state authority only, the more significant safe harbor for local communities' purposes is § 253(c), which provides:

> (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.

Finally, subsection (d) of § 253 provides that the FCC has no jurisdiction over matters arising under § 253(c); such matters are properly reviewed only by the courts.

Thus, the source of federal authority regarding local public rights-of-way inherently acknowledges that local communities can manage their rights-of-way and receive "fair and reasonable" compensation "on a competitively neutral and nondiscriminatory basis" for their property. Nonetheless, local communities have experienced mixed results in bringing courts to recognize these limitations on § 253 preemption.

2. *Early Decisions Under Section 253*

The FCC has issued a number of orders pertaining to § 253. The first such decision was *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*, 11 FCC Rcd 13082 (1996), in which Classic was able to show that two cities' denial of a telephone franchise violated § 253(a). This was followed by *New England Public Communications Council*, 11 FCC Rcd 19713 (1996), *recon. denied*, 12 FCC Rcd 5215 (1997), in which the Commission preempted certain Connecticut restrictions regarding provision of payphone service. The following year, in addition to the FCC's refusal to preempt the Texas PURA referred to above, the Commission issued the much-awaited order in *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997), *aff'd*, 13 FCC Rcd 16400 (1998), generally referred to as the "Troy" decision. Here the FCC declined to address a local ordinance requiring telecommunications providers to obtain a separate franchise to use local public rights-of-way, although it held 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.

In 1999, the FCC struck down two state laws under § 253. *AVR, L.P. d/b/a Hyperion of Tennessee, L.P.*, 14 FCC Rcd 11064 (1999), saw the Commission preempting a Tennessee state law that protected small ILECs (those serving fewer than 100,000 access lines) from competitive entry. In *State of Minnesota*, Memorandum Opinion and Order, FCC 99-402 (1999), the FCC rejected a petition by Minnesota for approval of an exclusive agreement with a single provider for the use of state-owned rights-of-way.

Most decisions under § 253, however, have come from the courts. The first such result, in *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), found that there was no private right of action under § 253(c). (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.[1]) The next year, a Texas court granted a preliminary injunction against a telecommunications ordinance requiring franchise fees, application fees, disclosure of extensive information by the applicant, and EEO information, on the grounds that enforcement of these requirements by the city could result in a barrier to entry. *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 934 (W.D. Tex. 1997). 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. It also pointed out that the nondiscrimination requirement of § 253(c) did not require that the City treat differently situated providers identically. *AT&T Communications of the Southwest, Inc. v. City of Dallas, Texas*, 8 F. Supp. 2d 582, 1998 WL 309145 (N.D. Tex. June 8, 1998) ("*Dallas I*"). However, this result was qualified in a subsequent decision, *AT&T Communications of the Southwest, Inc. v. City of Dallas, Texas*, 52 F. Supp. 2d

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[1] In a recent case a federal district court in California reached the curious result that there was a private right of action under § 253(c), but *not* under §§ 253(a) or (b), because disputes under those sections were to be referred to the FCC. *Pacific Bell Telephone Co. v. City of Hawthorne*, No. CV 01-01862 CBM, Order Denying Defendants' Motion to Dismiss and Granting Plaintiffs' Request for Judicial Notice, slip op. at 4 (C.D. Cal. June 1, 2001).

756 (N.D. Tex. July 7, 1998) ("*Dallas II*"), which held that no such franchise could be required for wireless providers, or (as discussed below) for resellers, on the grounds that they did not physically "use" the public rights-of-way for their own facilities.

A decision of the Iowa Supreme Court in *City of Hawarden v. U S West Communications, Inc.*, No. 4/97-544 (Iowa 1999), introduced a major theme in the developing decisions: the logical leap from the requirement that compensation be "fair and reasonable" (to qualify for the § 253(c) safe harbor) to the logically unconnected notion that such compensation must be limited to a city's actual costs for the public rights-of-way, and hence that a city could not charge a fee based on gross revenues. Despite the fact that § 253(c) includes no such cost-based restriction, 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 (the third element of compensation as discussed above), but only recover their costs (the second element, reflecting the burden of actual usage). 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.[2]

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[2] A more recent Iowa case, *US West Communications, Inc. v. City of Coralville*, No. LACV 058956 (Iowa Dist. Ct., Johnson County, Apr. 16, 2001), struck down a number of provisions of the City of Coralville's 1998 telecommunications ordinance. Much of the opinion focused on the effects of Iowa law. Moreover, the opinion distinguished Iowa law from federal § 253 on the grounds that the latter (but not the former) allowed "compensation" for use of the public rights-of-way. *Id.*, slip op. at 5, 8. Nonetheless, the judge concluded without detailed discussion

A number of § 253 decisions in 1999 attended more closely to the actual language and meaning of § 253. For example, another state court decision upholding a city's five percent right-of-way fee clearly distinguished such a fee from a tax:

> 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.

BellSouth Telecommunications, Inc., v. City of Orangeburg, 337 S.C. 35, 522 S.E.2d 804 at § 1 (S.C. 1999). The court thus avoided another persistent confusion, 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.[3]

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that the licensing and fee requirements of the ordinance violated § 253. *Id.*, slip op. at 17-18.

[3] In *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. *Hawthorne*, slip op. at 9-10.

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 and not a tax. *Primeco Personal Communications, L.P., v. Illinois Commerce Commission*, 196 Ill. 2d 70, 2001 WL 312120 (Ill. 2001), *reh'g denied* (Ill. 2001). The court concluded, however, that wireless providers were not subject

More significantly, the First Circuit Court of Appeals in 1999 denied a preliminary injunction to a telecommunications provider that filed a claim alleging discriminatory treatment. The court ruled that the nondiscrimination requirement of § 253(c) applied only to compensation requirements, and that the section did not impose an affirmative obligation on local governments to "ensure a level playing field among telecommunications providers." *Cablevision of Boston, Inc., v. Public Improvement Commission of the City of Boston*, 184 F.3d 88, 104 (1st Cir. 1999). In *Omnipoint Communications, Inc., v. Port Authority of New York and New Jersey*, 1999 WL 494120 (S.D.N.Y. 1999), 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 § 253 or § 332. The court noted that "compensation" as the term is used in § 253(c) has long been understood to include rental fees for public property appropriated to private commercial uses, not merely costs, citing for this proposition the seminal case of *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893).[4]

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to the IMF because they did not use (physically occupy) the public rights-of-way.

[4] In this connection the OVS appeal decision, *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), 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 also* another *Dallas* case, *City of Dallas, Texas v. FCC*, 118 F.3d 393 (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).

Another state court, this time addressing a business license tax on telecommunications antenna rather than a right-of-way fee strictly speaking, held that such a tax did not violate § 253. *City of Sunset Hills v. Southwestern Bell Mobile Systems, Inc.*, 14 S.W. 3d 54, 1999 WL 1215880 (Mo. Ct. App. 1999). On the other hand, a federal district court in Pennsylvania held that a right-of-way ordinance did extend beyond the protections of § 253(c) and constituted a barrier to entry, on the grounds that the requirements of the ordinance extended beyond the "mere regulation of the public rights-of-way," that the compensation requirements were not likely to be directly related to use of the rights-of-way, and that the ordinance allowed the local government "apparently limitless discretion" to grant or deny a franchise. *PECO Energy Co. v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999).

A 1999 Ninth Circuit decision focused on § 253(b) rather than 253(c), but is significant for its general comments on preemption. 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. The carrier claimed that this prohibition violated § 253. In the course of rejecting the claim, the Ninth Circuit observed:

> The 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 occurs only in limited circumstances.

Communications Telesystems International v. California Public Utilities Commission, 196 F.3d 1011, 1017 (9th Cir. 1999). The court also noted that in this case preemption would affect an important state interest in regulating utilities. *Id.* 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 § 253.

More recent cases addressing § 253 have clarified some points, while highlighting more sharply the differences in the way the courts look at the implications of the "barriers to entry" provision – particularly with respect to compensation.

3. *The Sixth Circuit's Dearborn Decision*

The year 2000 saw a second court of appeals take the field. The Sixth Circuit, like the First, basically upheld the concept of a telecommunications franchise for use of a local community's property. Two years earlier the City of Dearborn, Michigan, had won summary judgment at the trial court level against TCG Detroit, a telecommunications provider, in the company's attack on the city's right-of-way ordinance. *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998). The Sixth Circuit's review upheld the district court's decision and vindicated the City's franchise requirement. 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": the question was whether the fee was "fair and reasonable" so as to bring the requirement within the safe harbor of § 253(c). The Sixth Circuit upheld the trial court's finding that the City's franchise fee of four percent of gross revenues was indeed fair and reasonable for purposes of § 253. Moreover, a further insight into the nondiscrimination language of § 253 emerged from the fact that the trial court had found (and the Sixth Circuit agreed) that under Michigan law the incumbent LEC, Ameritech, was immune from such a franchise fee. Both the trial court and the appeals court also concluded that this state-granted immunity for Ameritech did *not* render the fee as applied to TCG discriminatory for purposes of

§ 253(c). *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).[5]

4. *The Grant County Decision*

A federal district court in New Mexico reviewing a telecommunications ordinance adopted by Grant County took an approach somewhat similar to that of *White Plains*. *Board of County Commissioners of Grant County, New Mexico, v. US West Communications, Inc.*, No. Civ. 98-1354 JC/LCS (D.N.M. June 26, 2000). Here the court found that a "process for entry" involving "burdensome" application requirements could have the effect of prohibiting entry under § 253(a) and exceeded the scope of right-of-way management under § 253(c). *Id.*, slip op. at 8-11. While the court recognized, citing *Dearborn*, that a fair and reasonable franchise fee does not constitute a § 253(a) prohibition, 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 the county's expenses in managing the rights-of-way, to fall within the protection of § 253(c). The court preempted the affected parts of the county's ordinance, but in this case severed other sections that were preserved as lawful.

5. *The Silver Star Appeal*

Another appeals court decision in 2000 addressed § 253 preemption, but not local government rights-of-way. *Silver Star Telephone Co*., Inc., 12 FCC Rcd 15639 (1997), *recon. denied*, 13 FCC Rcd 16356 (1998), like the *Hyperion* case in Tennessee, involved a law allowing small ILECs to

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[5] A parallel state court proceeding is currently reviewing what compensation is permitted under state law, as distinct from § 253. *TCG Detroit v. City of Dearborn*, 98-803937-CK (Wayne County, MI, Circ. Ct.).

exclude competition – this time in Wyoming, for ILECs serving 30,000 or fewer access lines. The law was viewed as a transitional measure to smooth the change to a competitive market. The FCC ruled that this law created an obvious barrier to market entry and therefore was subject to federal preemption under § 253. The Tenth Circuit affirmed the FCC's order in *RT Communications, Inc., v. FCC*, 201 F.3d 1264 (10th Cir. 2000). The court, deferring under *Chevron* to the FCC's judgment in the matter, held that the prohibition on competitive entry under § 253(a) was not saved by the state law safe harbor in § 253(b) because it was not competitively neutral. With the FCC, the court rejected the notion that a statute was neutral as long as it treated all *new* carriers in the same way. 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*, discussed above, it is clear that there is a developing tension as to how that clause should be handled in dealing with ILECs and CLECs.

6. *The Chattanooga State Law Action*

Another 2000 decision again reflected the continuing procedural history of a case that began shortly after the 1996 Act. On Feb. 6, 1996, the City of Chattanooga passed a telecommunications ordinance including a five percent franchise fee. 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. The case was removed to federal court on diversity grounds. The federal court's initial decision leaped the logical gap noted above and concluded that, because the franchise fee resulted in revenues unrelated to costs, it must be a tax. The court then struck down the ordinance on the ground that under Tennessee state law, only the state, not cities, could tax telecommunications services. *City of Chattanooga, Tenn. v. BellSouth Telecommunications, Inc.*, 1997 U.S. Dist. LEXIS 17458

(E.D. Tenn. 1997). The City, however, pointed out that under the Tax Injunction Act, 28 U.S.C. § 1341, a federal court was the wrong place to address a state tax challenge. 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. *City of Chattanooga, Tenn. v. BellSouth Telecommunications, Inc.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998).

The state court's 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.

> 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.

City of Chattanooga, Tenn. v. BellSouth Telecommunications, Inc., 2000 Tenn. App. LEXIS 32 at 3-4, 2000 WL 122199 (Tenn. Ct. App. 2000). The court then held, however, that the Chattanooga ordinance could not be a proprietary function, but must be governmental, 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. *Id.* at 4. 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. *Id.* at 4-12. The court did acknowledge that the costs of right-of-way use extended beyond the mere repair of the street to include (for example) the added costs of more frequent repaving required by street cuts. *Id.* at 10-11. 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. *Id.* at 11-12.[6]

7. *Minimal Requirements in the Mobile Decision*

A number of Section 253 decisions emerged in the early part of 2001. One such case essentially marks one end of the spectrum of telecommunications ordinances. *BellSouth Telecommunications, Inc. v. City of Mobile*, 2001

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[6] Another state court decision in early 2001 dealt with the City of Denver's telecommunications ordinance as a matter of Colorado state law. The state's 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. 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. *City and County of Denver v. Qwest Corp.*, 2001 Colo. LEXIS 135 at 26-28 (Colo. 2001). The court rejected the City's argument that § 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). *Id.* at 30-34, 9. Unlike the court in *Chattanooga*, the court here also suggested that the City held the public rights-of-way in its governmental capacity and was not entitled to compensation. *Id.* at 37-38.

WL 394909 (S.D. Ala. Mar. 30 2001), upheld a city telecommunications *permit* ordinance against a challenge under § 253. Here, the City's permitting ordinance required only fees explicitly covering administrative costs. Moreover, its regulatory provisions were confined to quintessential right-of-way management issues. As noted above, however, such fees do not begin to recover the entire value of the public rights-of-way. Despite the cases described above, *Mobile* indicates that right-of-way management provisions needed to protect the community's interests do not conflict with § 253.

8. *The New Jersey Payphone Decision*

A somewhat different sort of issue arose in *New Jersey Payphone Association, Inc., v. Town of West New York*, 130 F. Supp. 2d 631 (D.N.J. 2001). The Town of West New York invited bids from private companies to provide pay telephones within the Town. The Town's action was challenged by an association of pay telephone providers. The court addressed the challenge on the basis of § 253 preemption, disagreeing with the Fourth Circuit's requirement that state law issues be addressed before reaching federal issues (in the *Prince George's County* case discussed below). 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. 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." *Id.* at 638.[7]

[7] It appears that this court's position on compensation may result in part from the court's opinion that under New

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. Also, the court interpreted § 253(c) as an affirmative restriction on local authority, rather than a safe harbor. That position, however, has not survived in the appellate courts. *See, e.g.*, the *Palm Beach* case, discussed below.

9. *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*, 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809, 70 U.S.L.W. 3281, 2002 WL 13258 (2002). 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 § 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*." *Id.* at 980 (emphasis added). Thus, from the beginning the opinion interpreted telecommunications franchising as a matter of regulation rather than in terms of property rights. The opinion assumed without discussion (and without reference to the contrary precedent cited above) that franchise fees must be based on costs. *Id.* at 981. As in *Austin* and *White Plains*, the court focused on the cities' detailed application requirements and the fact that they retained discretion to

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Jersey law a town does not own the land under the public streets in fee simple, but rather has only an easement in this property. *Id.*

refuse use of the public rights-of-way to an applicant. According to the opinion, "*each* of these requirements" had the effect of prohibiting entry. *Id., emphasis added*. 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. The fact that such requirements indirectly related to the use of the public rights-of-way was brushed aside by the court as "too tenuous a connection." *Id.* at 985.

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

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. *Id.*, Order and Amended Opinion, 260 F.3d 1160 (2001). 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*. *Id.*, Amendment No. 5. It also acknowledged that a franchise requirement *per se* is not preempted by the 1996 Act, and added a footnote reference to *Dearborn*, which precedent had been conspicuously absent from the original opinion. *Id.*, Amendments No. 5 and 6. The court denied, however, the petition for rehearing.

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. 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. Qwest had stopped paying such fees after the Ninth Circuit's decision in the *Auburn* case. 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, § 253 does not preempt the requirements and the court's inquiry is complete." *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250, slip op. at 8 (D. Or. 2002). The opinion correctly notes the obvious, but frequently ignored, fact that "[s]ection 253 does not address revenue-based fees, much less categorically forbid them." *Id.* at 10. As a result, the court arrives at an analysis of § 253 that parallels the one set forth above: 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 § 253(c) if they qualify as fair and reasonable compensation for use of the rights-of-way. *Id.* The *Portland* decision also upheld the cities' insistence on the providers' submitting 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. *Id.* at 9. Qwest appealed the *Portland* decision to the Ninth Circuit on May 8, 2002 (docket no. 02-35473).

This gradual clarification in understanding § 253 in the western courts is visible in the sequence of decisions in the *Berkeley* case. 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. *Qwest Communications Corp. v. City of Berkeley*, Order Granting Preliminary Injunction, 146 F. Supp. 2d 1081 (N.D. Cal. 2001).[8] Five months later, in an Order Granting Defendants' Motion to Dismiss Plaintiff's Second Claim for Relief, 202 F. Supp. 2d 1085 (N.D. Cal. 2001), the court conducted a detailed discussion of the legislative history of § 253 and concluded that there was no private right of action directly under § 253. An affected telecommunications company must instead bring a challenge under the Supremacy Clause. The court noted, however, that the remedy available under the Supremacy Clause was preemption, as opposed to the damages and attorney fees that a company might seek under § 253 itself. *Id.*, slip op. at 14. 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. Order Denying Motions for Judgment on the Pleadings and Denying Motion for Temporary Stay of Discovery, 208 F.R.D. 288 (N.D. Cal. 2002). Because Qwest had to show that an ordinance prohibits or has the effect of prohibiting service even to make an initial case under § 253(a), the court concluded that it could not decide the matter on the pleadings without the opportunity for a "fact-based inquiry." *Id.*, slip op. at 10. Citing *Portland*, the court ruled that "Qwest must present evidence to establish the effect of the Ordinances." *Id.* at 11. Thus the *Berkeley*

[8] In that decision, however, the district court also 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 5-6.

court's analysis of § 253 appeared to be moving toward a sound understanding of how to apply that section.[9]

10. *The Bristol Decision on Municipal Entry*

As noted above, the *Bristol* case (May 2001) found preemption under § 253, but this time in favor of municipal powers rather than in derogation.Judge James P. Jones held that the plain language of § 253(a) of the 1996 Act includes cities among those "entities" whose right to entry is protected by the Act. As a result, he held that federal law preempted a Virginia statute forbidding municipal entry. 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.[10]

11. *Palm Beach and Coral Springs*

May 2001 also brought a fourth federal circuit, the Eleventh, into the fray. BellSouth brought suit against telecommunications ordinances adopted by two Florida municipalities, the City of Coral Springs and the Town of Palm Beach. The trial courts reached mixed results, and review on appeal was consolidated by the Eleventh Circuit. *BellSouth Telecommunications, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. May 25, 2001). Applying Florida law that had actually changed twice since the original cases

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[9] Another Ninth Circuit district court decision appears to be inconclusive as to substantive results concerning § 253. *Qwest Corp. v. City of Globe*, No. CV 01-2500-PHX-JAT, 2002 WL 31203513 (D. Ariz. Aug. 15, 2002).

[10] *Appeal dismissed as moot, City of Bristol, Virginia v. Virginia Telecommunication*, No. 01-1741 (4th Cir. May 1, 2002).

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 § 253. It did, however, review BellSouth's federal preemption claims for other provisions of the ordinances that it found were not preempted by state law.

The court's crucial holding on § 253 was to recognize the structure of review required by the subsections of § 253, as outlined above. Sections 253(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 § 253(a). Thus, for example, the nondiscrimination requirement of § 253(c) is not even relevant unless a requirement has the force of a barrier to entry under § 253(a), making it necessary to determine whether it is exempted by the § 253(c) safe harbor. Among other things, the opinion noted that the FCC itself, in 1998 guidelines for filing petitions under § 253, acknowledged this structure. It also recognized that the purpose of subsection (d) is to direct disputes potentially implicating § 253(c) to the courts, not the FCC. Because the trial court decisions dealt with § 253(c) without ever determining whether the ordinances in question violated § 253(a), the Eleventh Circuit remanded to the courts below to determine (1) whether any of the provisions in question violated § 253(a), and (2) if so, whether the provisions were nonetheless saved under § 253(c). Thus, before an ordinance can be considered preempted, a court must conduct *both* the § 253(a) *and* the § 253(c) analyses.

12. *The Prince George's County Decision On Remand*

In July 2001, a federal district court in Maryland issued the next round in a proceeding with a somewhat checkered procedural history. 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. Bell Atlantic (now Verizon) sued to enjoin the ordinance. In its initial decision in 1999, the district court avoided addressing the federal constitutional and state law claims and held that the County "certainly is permitted under the FTA [the 1996 Act] to require . . . a County-issued franchise." *Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 816 (D. Md. 1999). However, the court 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)." The "[a]ppropriate 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." *Id.* at 818. 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. Finally, the court held that the technical, financial, and legal information required by the County to receive a franchise, coupled with the County's discretion to not issue a franchise, created a barrier to entry in violation of § 253(a) and exceeded the scope of the safe harbor right-of-way management authority under § 253(c). The court held that right-of-way management was limited to the types of activities described by prior FCC decisions, such as regulating traffic flow, underground placement of facilities, and cost of street repair and excavation. The trial court's decision, although later vacated on appeal, has been extensively cited in industry briefs and subsequent case law.

Both sides appealed the decision. In 2000, the Fourth Circuit vacated the district court decision and remanded with instruction back to the District Court. 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 raised constitutional issues. The District Court's failure to examine the four state law claims raised by Bell Atlantic before it reached the federal questions was reversible error. *Bell Atlantic-Maryland, Inc., v. Prince George's County, MD*, 212 F.3d 863 (4th Cir. 2000).

The trial judge's decision on remand (Civil No. CCB-98-4187, D. Md. July 23, 2001) again struck down the county's ordinance *in toto*. The reasons given in the new opinion closely paralleled the judge's earlier § 253 decision, but this time on the grounds that Maryland public utilities law had given exclusive jurisdiction to the Maryland Public Service Commission over *regulation of telecommunications companies*. The conclusion thus 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:

> 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.

Slip op. at 23. The opinion did recognize the County's right as a Maryland home rule county to grant franchises and to manage its public rights-of-way. *Id.* at 22. Its rationale for rejecting the ordinance was thus that the ordinance, rather

than doing these things, is really "an attempt to regulate the telecommunications companies." *Id.* at 26.

13. *The City of Eugene Cases*

A set of related decisions issued by an Oregon state court in late 2001 reflect a sound understanding of § 253, in particular regarding gross revenue-based right-of-way fees. The City of Eugene, Oregon adopted an ordinance in 1997 requiring telecommunications providers operating in the City to pay an annual registration fee of two percent of its 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. The proceeds were kept in a separate subfund, to be used not only for administrative costs but also for telecommunications-related construction projects. AT&T, Sprint, Qwest, and TCI Communications each asked the court to rule that the City's fees violated § 253 (along with other state law claims).

The court upheld the City's fees in each of four separate cases, reversing a lower court decision which had struck down the fees, with its principal opinion in *AT&T Communications Of The Pacific Northwest, Inc., et al v.City of Eugene*, 177 Ore. App. 379, 35 P.3d 1029 (Ore. App. Ct. 2001).[11] AT&T had argued that § 253 limits localities to

[11] The court dealt with the additional actions more briefly in three other opinions filed on the same date, Oct. 31, 2001: (1) *Sprint Spectrum, L.P., v. City of Eugene*, 177 Ore. App. 417, 35 P.3d 327 (Ore. App. Ct. 2001); (2) *TCI Cablevision of Oregon, Inc., v. City of Eugene*, 177 Ore. App. 433 (Ore. App. Ct. 2001); (3) *US West Communications, Inc. v. City of Eugene*, 177 Ore. App. 424 (Ore. App. Ct. 2001). On August 7, 2002, the Oregon

recovering costs associated with use of the rights of way. The court rejected that claim. 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 § 253, local laws are valid absent a showing that a challenged regulation actually prohibits or has the effect of prohibiting entry. The court found that AT&T had not shown that the City's ordinance had the effect of prohibiting service. 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," finding that such an argument "amounts to little more than speculation" that is "buttressed by no evidence about the actual or likely effect of the city's ordinance." *Id.*, slip op. at 17, § B.1. As a result, the court found that the City's requirements did not rise to the level of a prohibition under § 253(a), making it unnecessary to determine whether they fell within the safe harbors of subsections (b) or (c).[12]

14. *The San Marcos Case*

Preliminary results in a § 253 suit in California provided some detailed, if idiosyncratic, examples of how a court may perceive specific right-of-way conditions. The district court granted in part a plaintiff's preliminary injunction and simultaneously granted in part the city's motion to dismiss in *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 and 1272 (S.D. Cal. 2002). Here, Cox Communications, doing business as Sprint PCS, sought to install three wireless sites in public rights-of-way in

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Supreme Court issued an order declining to review the *AT&T*, *Sprint*, and *TCI* decisions.

[12] The court also rejected AT&T Wireless's claim of preemption under 47 U.S.C. § 332(c)(3)(A). *Id.*, slip op. at 18-21, § B.2.

the City of San Marcos. The City required Sprint to obtain a conditional use permit first, and Sprint challenged this requirement. 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. Those three were enjoined pending the court's review of the case on the merits. *Id.*, 204 F. Supp. 2d 1260 at 1271. 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 using a zoning law or code to "prevent injury to property" – hardly an intuitive result. In the second decision, the same day, the court dismissed several, but not all, of Sprint's claims on various grounds.

15. *Central Puget Sound*

Several useful distinctions were made in *Qwest Corp. v. Central Puget Sound Regional Transit Authority*, No. C02-155P (W.D. Wash. Aug. 6, 2002). 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. 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. Noting that Qwest was already providing service within the cities, the court noted that "it is clear that the relocation requirement does not constitute a 'barrier to entry.'" *Id.*, slip op. at 6. The court thus found that the relocation requirement did not violate § 253(a), but even if it had, it would have been shielded by § 253(c).

16. *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. Subsequently the FCC denied a similar petition on behalf of Missouri municipalities. *Missouri Municipal League*, 16 FCC Rcd 1157, 2001 WL 28068 (F.C.C. 2001). The outcome on appeal, however, was different this time. Following the reasoning of *Bristol*, the Eighth Circuit vacated and remanded the FCC's decision not to preempt the Missouri barrier statute. 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. *Missouri Municipal League v. FCC*, 299 F.3d 949, 954-55 (8th Cir. Aug. 14, 2002).

17. *Qwest v. Santa Fe*

In *Qwest v. Santa Fe*, 2002 WL 31163012 (D N.M. August 30, 2002), a district court granted Qwest partial summary judgement under a Sec. 253(a) federal preemption claim. The court rejected Qwest's claims that Section 253 limits cities to recovering costs from telecommunications providers, and appeared to conclude that a city could charge a fair market value rent for use of rights of way. It upheld a local registration process for telecommunications providers. However, the court found that some aspects of the ordinance were preempted by Section 253. Among other things, the City ordinance required a person wishing to use city property to enter into a lease for use of that property…whether a right of way or a building. In order to obtain a lease, a provider had to file a lease application with the City. The court concluded 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." The

City ordinance also required a telecommunications provider to pay a rent based on a third party appraisal of the value of the property used, and to install excess conduit and dedicate that conduit to the City whenever it installed conduit for its own use. The court treated both these requirements as "compensation" for use of the rights of way, and inferred that the combined requirements would result in a "30 to 59%" increase in the costs to the carrier. According to the judge, such an increase rose to the level of a prohibition of entry under § 253(a), and for the same reason, was unfair and unreasonable under § 253(c). The judge also concluded that the requirement was neither nondiscriminatory nor competitively neutral, because one entrant would have to install conduit, while the next could enter the market by paying to use excess conduit. 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. § 1983; Qwest's sole federal preemption claim lay under the Supremacy Clause. *Id.* at *7, *14. The significance of this conclusion is that it prevented Qwest from claiming attorney fees under § 1983. Both Qwest and the City have appealed the decision to the 10th Circuit, and briefing is still underway as of April, 2003.

18. *White Plains and Colonie*

The Second Circuit engaged the compensation issue based on a New York federal district court decision in 2000. *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) ("*White Plains I*"), held that burdensome application requirements plus a lengthy approval process could constitute a prohibition on entry triggering § 253(a). Passing beyond the regulatory framework, however, the court also held that fair and reasonable compensation extends

beyond mere costs.[13] In fact the court upheld compensation requirements reflecting at least two of the three categories of compensation identified above – 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.

On appeal to the Second Circuit, the case was complicated by the FCC's filing of an *amicus curiae* brief. In a footnote to the Commission's original brief, the Commission's attorneys opined that a gross revenues-based fee might be "problematic" under § 253(c). Brief of the Federal Communications Commission and the United States as *Amici Curiae* at 14 n.7 (June 12, 2001). Subsequently the court asked the FCC to make clear its views on the Commission's jurisdiction under § 253 and on "fair and reasonable compensation" for use of the public rights-of-way. In a supplemental brief, the FCC took an appropriately cautious view 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 § 253(c), in light of § 253(d), which grants the

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[13] Few of the reported § 253 decisions have focused on the fact that a requirement may impose a burden without thereby *prohibiting* entry. This distinction was noted in *U.S. West Communications, Inc., v. Arizona Corporation Commission*, 8 P.3d 396, 405 & n.9 (Ct. App. Ariz. 2000) ("increased regulatory complexity alone" does not prohibit entry).

FCC preemptive authority with respect to § 253(a) or (b) but *not* § 253(c). Moreover, noting the various open proceedings relating to the issue, the Commission declined to take any position on the propriety of possible right-of-way charges beyond its original footnote. Supplemental Brief of the Federal Communications Commission and the United States as *Amici Curiae* (March 11, 2002).

On September 12, 2002, the Second Circuit issued its decision. *TCG New York, Inc., et al. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert. den.* ___ U.S. ___, (March 24, 2003). The appeals court upheld the initial decision finding a § 253(a) violation in the city's application process and other factors. In addition, however, the Second Circuit reversed the lower court with respect to the franchise fee. It found this violation of § 253, however, for a particular reason: because the city's fee requirement had not been applied to Verizon. 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. *Id.* at 79. The opinion disagreed with *Dearborn* about the consequences of a state law immunizing the incumbent LEC from compensation requirements, and held that § 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.'" *Id.* at 80. The court did not seem to consider that the most fair solution might be 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. *Id*.

Most interesting, however, is the court's analysis of what "fair and reasonable compensation" means under

§ 253(c). The opinion addressed this question in terms that make clear the analogy to other forms of property and payment:

> 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.

Id. at 76. Observing that the term is also sometimes used to refer to costs, the Second Circuit noted the split between the Sixth Circuit's *Dearborn* decision and the Ninth's dicta in *Auburn*. *Id.* at 78. Having thus set the stage, however, the Second Circuit ultimately declined to reach the question of whether Section 253(c) would permit a gross revenue fee. *Id.* at 79.

Two weeks later, a follow-up decision at the district court level cast some illumination on the import of *White Plains*. In *TC Systems, Inc., v. Town of Colonie*, 1:00-CV-1972 (FJS/RFT) (N.D.N.Y. Sept. 30, 2002), Judge Scullin denied a motion by plaintiff TC Systems to dismiss a counterclaim by the city that TC Systems was using and occupying the town's public rights-of-way without a franchise. Beginning with the fact that New York law "requires a telephone corporation to obtain a town's permission before using its streets to install its facilities," the court quoted favorably the 2nd Circuit's language regarding the possibility that a gross revenues fee is permissible under Section 253. *Colonie*, slip op. at 4, 8 n.5. The court also found that because the Colonie ordinance on its face applied

to all carriers, including Verizon, it was not as a matter of law discriminatory and thus was "factually distinct from" *White Plains* as that matter had been understood by the Second Circuit. *Id.* at 9 n.6. Judge Scullin cautioned that applying sec. 253 "is extremely fact sensitive." *Id.* at 8.

19. *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. 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 benefitted [*sic*] the citizens of the State of Missouri." *XO Missouri, Inc. v. City of Maryland Heights*, No. 4:99-CV-1052 CEJ, slip op. at 8 (E.D. Mo. Sept. 23, 2002). 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. 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. 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. *Id.* at 18-19.

C. State Legislation

It is apparent from the above line of cases that § 253 is not a sure-fire tool that can be used by telecommunications providers to eliminate local right-of-way requirements. Thus, while these cases have been working their way through the courts, the industry has also begun intensive lobbying of state legislatures to pass laws cutting off local control of local property directly, in whole or in part. Legislation in states as diverse as Florida, Missouri, and Washington shows that it may yet be possible for telecommunications providers to gain by political action the free access to local communities' property that they failed to secure in Congress.

D. The Reseller Issue

Even where local communities have succeeded in upholding their property rights, there are complications in realizing the full value of the asset. One of the most noteworthy issues has to do with resellers.

Where a single company uses the public rights-of-way for a telecommunications system and realizes all the income from that system, the gross revenues of the company that owns the facilities in the rights-of-way may serve as an appropriate measure of the value of the rights-of-way. But in today's developing market, the facilities owner frequently leases capacity to other telecommunications companies, which use that capacity in turn to offer their own services to consumers at retail. In such a case, the full value of the underlying resource is reflected in the *combined* value of the revenues obtained by *both* facilities owners *and* resellers. Thus, the need to capture the *value* of the rights-of-way to the user creates a problem in determining how to deal with reseller revenues. This is made imperative not only by the responsibility of the local government as a trustee for the public to obtain full and fair value for its assets, but also by parity considerations. If fees are based only on the revenues

of the facilities owner, not on those of resellers, then the incidence of compensation on two technically identical systems could be very different, depending only on the business model adopted by the facilities owner – whether the owner uses all the capacity itself, or subleases some.

In the abstract, two possible approaches might be used to deal with reseller revenues. One would be to require that the reseller, as well as the facilities owner, obtain a franchise or similar authorization from the local government. This would make sense insofar as the reseller is in fact obtaining value from the use of the public rights-of-way, just as a subtenant in an office building gains value from the use of the landlord's property, obtained through the original tenant. The case law discussed above, however, renders this approach problematic. *Dallas II*, for example, held that the city lacked authority to require a franchise for resellers on the ground that the reseller did not "use" the public rights-of-way, even though "use" in any normal sense includes forms of use other than direct physical occupancy. Thus, the more conservative course for local communities may be to take the second possible approach and deal only with the facilities owner. Following the analogy of a real estate sublease, the community would hold the facilities owner responsible for all compensation, including that based on the gross revenue of resellers, leaving it to the facilities owner to recapture pro rata portions of that payment from the resellers through its contractual relationships with them. This approach has not generally found favor with facilities owners. It may, however, be the only practical way to avoid anomalies in compensation for the public rights-of-way.

E. Recent Developments and Related Issues

Right-of-Way Management. A number of related developments are currently adding to the fundamental issues regarding right-of-way use discussed above. For example, the mid-2001 series of manhole explosions in Georgetown in

the District of Columbia, while apparently associated primarily with an aging electric utility plant, point up the increasing burden placed on the public rights-of-way by multiple installations of competitive facilities, and the physical dangers that can result from that burden.

Noncable Services Over Cable Systems. Another pressing issue, as the impact of the 1996 Act on telecommunications use of the rights-of-way becomes clearer, is the question of how communities should authorize the use of the public rights-of-way for noncable services provided over cable systems. As a general matter, § 621 of the Federal Communications Act of 1934, as amended in 1996, prohibits a Title VI "franchising authority" from "imposing any requirement *under this title* [*i.e*., Title VI, the Cable Act] that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator . . . ." § 621(a)(3)(B), codified at 47 U.S.C. § 541(a)(3)(B). Since the 1996 amendment, some cable television operators have continued to assert that § 621 permits them to provide telecommunications service over the cable system while completely preempting local government franchising authority to require a franchise or other authorization requirements on the provision of such service. In fact, there are strong arguments that both the plain language of § 621 and its legislative history make it clear that the prohibition applies only to a local community's franchising authority under Title VI. Indeed, it appears that Congress did not intend to limit a municipality's authority to franchise telecommunication providers, including those who are also cable providers, under Title II, state, and/or local law, and that Congress preserved this authority in § 621(d) and § 253(c).

However, this issue continues to be hotly contested in cable television franchise renewal and franchise transfer

negotiations. The courts have not yet addressed the issue. The FCC nearly did so in its *Troy* decision, but declined to reach this point when TCI acknowledged that it did not plan to provide telecommunications service in Troy. *See* 12 F.C.C.R. 21396 at ¶ 7. Much has changed in the world of cable franchising since then, however. The major MSOs have set about the task of rebuilding newly acquired systems for the express purpose of offering bundled cable, telephony and Internet services over the cable systems. In the meantime, communities that wish to preserve local authority to require additional franchises (and compensation) if the cable system is used to provide non-cable services are inserting language in cable franchises designed to make it clear that the grant of a cable franchise does not include the grant of additional rights to use the rights-of-way to provide non-cable services.

Bankruptcy. The recent turbulence in the telecommunications industry has also raised issues relating to the bankruptcy of right-of-way users. During 2001 and 2002, increasing numbers of telecommunications companies, and cable MSO Adelphia, filed for bankruptcy. The threat of further business failures brings to the fore issues that were previously implicit, but now gain a new urgency. Can a bankruptcy court transfer to a new entity (such as a creditor) the right to occupy a community's public rights-of-way? Or does the franchise revert to the local government? If a facilities owner digs up the streets, then goes out of business, who is liable for restoring the rights-of-way? What happens to abandoned plant? What sort of security arrangements (such as bonds) may be needed to protect local communities' rights? And how will consumers be protected if they rely on defunct cable or telecommunications providers for service? Communities will need to grapple with these questions over the next several years.

Taxation. The growth of business opportunities associated with the Internet has resulted in a spate of federal and state legislation designed to curtail local taxation of Internet businesses or of Internet access. It may well be praiseworthy to undertake to ensure that online sales channels are not accidentally subjected to duplicate or excessive taxes, or to charges that would disadvantage them with respect to "bricks-and-mortar" competitors. At the same time, laws intended to prevent taxes on Internet transactions may turn out to be written so that they accidentally impact compensation for right-of-way use, which, as noted above, is quite different from taxation. It is thus important to look closely at how such tax moratoria are defined to ensure that they cannot be used illegitimately to deprive local communities of their property rights.

Building Owners. The right-of-way issues discussed above have many parallels with the issues affecting building owners and managers. Where a single building serves multiple tenants, as in an apartment building or an office building, telecommunications companies have agitated to override the landlord's preferences to gain access to the tenants, just as they have sought to occupy the property of local governments. This issue is addressed in part in the OTARD rulemaking, discussed above, with respect to wireless systems. The FCC's authority to make these rules was upheld by the D.C. Circuit in *Building Owners and Managers Association v. FCC*, 254 F.3d 89 (D.C. Cir. 2001). In addition, the issue of wireline connections through private property is addressed in the FCC's ongoing rulemaking under the title of Promotion of Competitive Networks, WT Docket 99-217, which asked for comments on whether local right-of-way management practices, as well as taxes, might be impeding competition. The FCC's initial order in this docket refrained from imposing extensive requirements on building owners' property, but it is unclear how this proceeding may further develop. *See Promotion of*

Competitive Networks in Local Telecommunications Markets, 15 FCC Rcd. 23874 (2000).[14]

At the same time, some courts have expressed reluctance to stretch private owners' grants of authority to use property beyond their original purposes in the name of public policy. For example, in *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc.*, 158 F. Supp. 2d 1178 (S.D. Cal. 2001), a cable operator sued a property developer that sought to charge the company a fee for installation in joint utility trenches while a development was under construction, but before its streets had been dedicated for public use under California law. The court, citing several prior precedents, held that § 621(a)(2) of the Cable Act did not automatically authorize access to private easements before dedication to the public. The constitutional issue of a taking of property figured significantly in the court's decision. *Id.* at 1184-88. Similarly, *Marcus Cable Associates, L.P. v. Krohn*, __ S.W. 3d ____, 2002 WL 31465361 (Tex. Nov. 5, 2002), found that a private easement originally granted for electric lines could not be extended by force of law to cable as well: "we may not circumvent the contracting parties' intent by disregarding the easement's express terms." *Id.*, slip op. at 6. This is so even if the new use does not materially increase the burden on the property: the intrusion is "an unauthorized presence on the land whether or not it results in any noticeable burden to the servient estate." *Id.*

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[14] At least one court has recently struck down regulations requiring access to buildings for telecommunications purposes on the grounds that they constitute a taking of property without just compensation, in violation of the Fifth Amendment. *See Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications and Energy*, No. 00-4909 (Suffolk County, Mass., Super. Ct. Dept. of Trial Ct., Jul. 27, 2001).

F. The Outlook for Control of Public Rights-of-Way

While the district courts have rendered somewhat diverse decisions under § 253, a degree of consensus appears to be emerging as those decisions reach the appeals courts – particularly with respect to compensation. Both the First Circuit (in *Cablevision of Boston*) and the Sixth (in *Dearborn*) explicitly recognized that "fair and reasonable compensation" under § 253 must reflect the market value of local communities' property. In addition, as noted above, the OVS and franchise fee decisions in the Fifth Circuit upheld the same principle of respect for local communities' property rights in non-Section 253 contexts. Moreover, neither the Eleventh Circuit (in *Palm Beach*) nor the Tenth (in *RT Communications*), in parsing § 253, suggested that that section was designed to give local property to telecommunications providers free of charge. The outlier in this respect is the Ninth Circuit, which in *Auburn* appears to have been seduced by the logically unfounded notion that compensation for local governments must only cover costs of administration. Even there, it is noteworthy that the lower courts applying the *Auburn* decision in *Portland* and *Berkeley* have found it necessary to read the Ninth Circuit's opinion narrowly, rejecting the industry's claim that non-cost-based compensation must somehow inherently be a barrier to entry.

The line of thought that entices some courts to focus exclusively on costs 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. *See, e.g.*, *Berkeley*, 2001 WL 641534 at 15. This approach fails to recognize that right-of-way fees are fundamentally rent for the use of property (and not merely indemnification for damage caused to that property). The unsoundness of the cost-based reasoning is indicated 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 for that matter that telecommunications companies may charge no more than the management costs of operating their systems. On the contrary, in a free-market system 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 cost of the nearest available substitute. Gross revenues are one way of measuring value to the user – particularly over the course of a long-term agreement of the sort that telecommunications companies tend to prefer, since 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 such compensation measures at least in part the value of the asset to the user. For this reason it is not central to the determination of 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 fair compensation for the use of the owner's property.

Under the influence of § 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 recently enacted state law 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. *See* Missouri Senate Bill No. 369, adding RSMo § 67.1836(3). Such a time limit deprives the community even of the opportunity for detailed consideration of any concerns that might arise in reviewing a permit application. (It is instructive to compare such a deadline with, for example, the FCC's consideration of the *Pasadena* petition referred to above for over a year and a half without issuing a decision.)

These 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. The key difficulty (aside from considerations of federalism and separation of powers) arises because, as noted above, 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 any depredations upon its property rights by those private users who profit from the use of that property.

II. KEY WIRELESS ISSUES

A. Overview

Municipal issues relating to wireless communications fall into two principal areas, governed by different provisions of federal law. Local regulation of cellular and PCS towers – "personal wireless services" (PWS) – are subject to local zoning authority, although the local community may not *prohibit* the provision of PWS. *See* 47 USC § 332(c)(7) and § 704(a) of the 1996 Act. On the other hand, local authority over video receive antennas less than one meter in size, such as DBS dishes and traditional TV mast antennas – "over-the-air reception devices" (OTARD) – is largely preempted by federal law. *See* § 207 of the 1996 Act (not codified) and the FCC's implementing regulations at 47 C.F.R. § 1.4000. In the recent cases in this area, local government authority has generally continued to be upheld with respect to PWS, but preempted with respect to OTARD. In addition, a separate set of issues has emerged with respect to wireless sites' RF radiation and interference with public safety radio.

B. Zoning of Personal Wireless Service Towers

1. *Section 332(c)(7)*

Section 332(c)(7), which governs PWS facilities, does not purport to replace traditional zoning criteria for approval of antenna towers. Rather, it establishes a set of ground rules and procedural requirements that must be observed by local communities in reviewing tower applications. One purpose of these requirements appears to be to ensure that the local decision is sufficiently well documented to allow for judicial review. Under § 332(c)(7):

- Local regulation of PWS must not "unreasonably discriminate among providers of functionally equivalent services." § 332(c)(7)(B)(i)(I).

- Local regulation of PWS must not "prohibit or have effect of prohibiting the provision of personal wireless services." § 332(c)(7)(B)(i)(II).

- A local community must act on any request for PWS siting authorization "within a reasonable period of time after the request is duly filed . . . taking into account the nature and scope of such request." § 332(c)(7)(B)(ii).

- Any decision to deny such a request "shall be in writing and supported by substantial evidence contained in a written record." § 332(c)(7)(B)(iii).

In addition, § 332(c)(7) provides that a local community is not permitted to regulate PWS facilities "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." § 332(c)(7)(B)(iv). In other words, determining the standards for health or environmental effects of radio frequency ("RF") emissions is within the exclusive jurisdiction of the FCC.

2. *Fourth Circuit Cases*

The most noteworthy decisions on these procedural requirements for zoning authority over PWS facilities have come from a line of cases in the Fourth Circuit. These begin with *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1997). Here the Fourth Circuit held that "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and that "[i]t is not only proper but even expected that a legislature and its members

will consider the views of their constituents to be particularly compelling forms of evidence." *Id*. at 430. Thus, comments from local residents, for example, may be taken into account in a tower zoning decision even if they do not constitute expert technical evidence. The Fourth Circuit further held that case-by-case denials of permits for particular sites cannot be construed as an overall prohibition of wireless services without additional evidence. *Id.* at 428-29. The crucial significance of *Virginia Beach* is to recognize that the new procedural requirements of § 332(c)(7) do not force local zoning boards to behave like federal administrative agencies: "substantial evidence contained in a written record" does *not* mean that a local zoning decision must include all the features of an FCC rulemaking order, but rather permits the use of more traditional zoning criteria and procedures as long as the basic standards noted above are followed.

Two years later the Fourth Circuit confirmed this understanding in *AT&T Wireless v. Winston-Salem Zoning Board*, 172 F.3d 307 (4th Cir. 1999). This decision generally followed the *Virginia Beach* reasoning with respect to the requirement of Section 332(c)(7)(B)(iii) that local zoning decisions be in writing and supported by substantial evidence. The panel noted that "The simple requirement of a decision in writing cannot reasonably be inflated into a requirement of a statement of findings and conclusions, and the reasons or basis therefor." In addition, the court faulted the U.S. District Court below for issuing a writ of mandamus compelling Winston-Salem to issue the tower zoning approval sought by the telecommunications carrier, indicating strong disfavor against a federal court's issuing compulsory process to a state or local government.

In 2000 the Fourth Circuit made a key distinction regarding what it means to "prohibit" service in *360° Communications Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). In this case it was

claimed that a conspicuous site on a mountaintop was the only reasonable alternative site (within the ambit of the costs and logistical difficulties the provider was willing to confront), but local guidelines made it impossible to use that site. The court held the provider had a "heavy burden in demonstrating that the . . . denial of a permit *for a particular site* amounts to a general *prohibition of service*." The fact that the Albemarle Board had approved 18 of 22 permit requests since 1990, including a few applications from the plaintiff in this case, was affirmative evidence that no such general prohibition was contemplated by the community. The fact that the denial of a permit might leave the company with gaps in coverage was not significant, the court concluded. "[Federal] regulations provide that 'cellular service is considered to be provided in all areas, including 'dead spots,' 47 C.F.R. § 22.911(b)." *Id.* at 22. It followed that an operator is not prohibited from providing service merely because it cannot achieve 100% coverage. The Fourth Circuit rejected the district court's finding that denial of a particular permit amounts to a prohibition of wireless services even if the provider cannot find another site that provides "a high level of wireless service" at a cost "within or close to the industry wide norm for establishing new service."

A somewhat more ambiguous result was reached in *Petersburg Cellular Partnership dba 360 Degrees Communications v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000). The county's denial of a special use permit was upheld by a majority of a three-judge panel on differing grounds: one judge believed that there was substantial evidence to support the County's decision, but another, who disagreed on this point, nonetheless agreed that the County's decision should be upheld on the grounds that § 332(c)(7) violated the Tenth Amendment. The decision also vacated a writ of mandamus below, following *Winston-Salem*.

In sum, the Fourth Circuit's cases carry out the mandate of the federal law – to *preserve* local zoning authority except with the specific exceptions identified in the statute. § 332(c)(7)(A).

3. *Other Circuits*

The results of § 332(c) cases in other jurisdictions have been more mixed. In *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999), the Seventh Circuit upheld the City's denial of a paging company's request to increase the height of a grandfathered antenna tower in a residential area. Without making the fine distinctions of *Virginia Beach* as to the procedural requirements, the *Aegerter* court essentially followed the same path in applying a substantial evidence standard and allowing the application of traditional zoning and aesthetic rationales. The court found no discrimination in treatment because pagers and cellular telephone services are not in the same market.

Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999) held that protected service is access to the national telephone network without significant gaps of coverage.

APT Pittsburgh, L.P. v. Penn Township, 1996 F.3d 469 (3d Cir. 1999), in contrast with *Albemarle*, held that denial of a permit for a site that is the least intrusive means to close a significant gap in service could amount to a denial of wireless services. The Third Circuit widened its gap with the Fourth in *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township*, 181 F.3d 403 (3d Cir. 1999). This finding of insubstantial evidence for denial of a tower zoning application is notable chiefly for its citation of legislative history (page 208 of the Congressional conference report on the Telecommunications Act of 1996) for its claim that zoning orders should be addressed under the same standard applied to federal administrative decisions. This appears to

put the decision squarely at odds with the Fourth Circuit view in *Virginia Beach* (discussed above) that zoning in all its facets, including the actual granting of permits, is a legislative activity where the more deferential standard of the Commonwealth's zoning law is to be allowed.

On the other hand, in *Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus,* 197 F.3d 64 (3d Cir 1999), over the vigorous objections of the carrier, the Court held that it is permissible for a local zoning authority to consider "quality" of wireless service, up to a point. The opinion defines a "gap" in service, but it does not define the critical term "significant gap" whose continuation might represent an effective prohibition of service. Instead, the Court remanded the case for further consideration of whether the local community's denial of zoning permits amounted to effective prohibition of service by refusing the only means to fill a significant gap in cellular service. Also notable in the panel opinion is the holding that the federal bar on "prohibition" in Section 332(c)(7)(B)(i) runs to "service" not "facilities," meaning that it may be entirely possible to "serve" a locality with facilities placed outside the jurisdictional boundaries. Remanding the case back through the District Court to the Board to determine whether the Board's denial would perpetuate "significant gaps" in service amounting to effective prohibition, the Court nevertheless reminded the carrier that providers still bear the burden of proving that a proposed facility is the *least* intrusive means of filling any gaps at a reasonable level of service.

In *Omnipoint Communications Enterprises v. Newtown Township* and consolidated cases, 219 F.3d 240 (3d Cir.), *cert. denied*, 121 S. Ct. 441 (2000), the carrier took to the U.S. Supreme Court the issue highlighted in *APT Pittsburgh* above: whether "effective prohibition" is to be applied provider by provider or whether it is to be measured

by the total service of *all* providers. On November 6, 2000, the high court denied Omnipoint's petition for certiorari, leaving in place the Third Circuit's conclusion that an applicant must show "that the area the new facility will serve is not already served by another provider" and that an "effective prohibition" of cellular or PCS service only when a zoning authority denies an application to fill a "significant gap" covered by no carrier.

The First Circuit took an approach more in harmony with that of the Fourth in *Town of Amherst, NH v. Omnipoint Communications Enterprises Inc.*, 173 F.3d 9 (1st Cir. 1999), *remanded sub nom, Omnipoint Communications Enterprises, Inc. v. Town of Amherst, NH*, 74 F.Supp. 2d 109 (D. N.H. 1998). Here, Omnipoint proposed a conventional multi-tower PCS system with towers tall enough to accommodate co-location by other radio users. Three of the sites were public and would generate revenue for the Town. The Town Selectmen endorsed the carrier's plan to the Board of Zoning Adjustment, but the Board denied the applications on grounds Omnipoint claimed were so vague as to amount to an effective prohibition. The applicant also asserted the denial was without substantial evidence and had been too long delayed. The U.S. District Court, on cross-motions for summary judgment, ordered the Board to grant the applications because of prohibitory effect. It did not reach the insubstantial evidence claim. However, the court of appeals reversed. Noting that "Omnipoint did not present serious alternatives to the Town," the First Circuit found that:

> At least on the summary judgment record, it has not been shown that the Board will inevitably reject an alternative Omnipoint proposal with lower towers.

The Court described the burden on a carrier claiming "effective prohibition" under 47 U.S.C.§332(c)(7)(B)(i) as follows:

> To show from the language or circumstances not just that *this* application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.

The District Court decision was vacated and the case remanded back to the Board of Zoning Adjustment, with a caveat that the Town act quickly.

In *Telespectrum v. Public Service Commission of Kentucky, et al.*, 227 F.3d 414 (6th Cir. 2000), after disposing of defenses that the local government officials in question were immune from Telespectrum's suit under the Eleventh Amendment, and that an individual dissenting Commissioner should be immune, the panel upheld the District Court's summary ruling for Telespectrum on the ground that evidence was insubstantial for the denial of a permit to erect a 199-foot tower on rural land. The judges said the testimony of nearby landholders concerning loss of property value, health threats from RF radiation and availability of alternate sites "was no more than unsupported opinion." With respect to siting alternatives, the panel said that KPSC's order "that Telespectrum should continue this case and seek other locations" was not enough to keep the order from being final and reviewable.

In *AT&T Wireless PCS, Inc. v. City of Atlanta*, 223 F.3d 1324 (11th Cir. 2000), the panel overturned the lower court's ruling that the Communications Act remedies for denials of personal wireless facilities siting were intended to preclude use of the "civil rights" relief in 42 U.S.C.§§ 1983 and 1988, including compensatory damages and attorneys fees. Four months later, however, the Court vacated its own decision after discovering that the trial judge had failed to rule on AT&T's substantive due process claims, thus making the appeal unripe and depriving the Eleventh Circuit of

jurisdiction. The discussion of the original decision suggests how such an issue might arise in the future. AT&T Wireless had been refused a special use permit for PCS construction. The denial was not in writing; nor, said the panel, was the refusal supported by substantial evidence in a written record. In vacating the District Court's decision on the Section 1983 issue, the panel placed great weight on the "no implied effect" statement in Section 601(c) of the 1996 Act, which reads: "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." In a special concurrence on the matter of the carrier's entitlement to attorney's fees, Judge Carnes observed that "AT&T is no civil rights victim."

4. *Recent § 332(c)(7) Cases*

A number of useful points were made in *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 2001 U.S. App. LEXIS 7909 (3d Cir. 2001). Here the Third Circuit reversed the trial court and upheld the township's denial of a zoning variance for a 110-foot antenna tower to be placed at a synagogue. The court re-emphasized the point made in *Newtown* that a community is not required to ensure that all providers, regardless of the systems they have chosen to construct, have no gaps. In addition, the court noted that zoning ordinances in Pennsylvania have a presumption of validity, and that the federal law did not change the basic zoning criteria applicable to antenna towers.

In June 2001, the federal district court in the District of Columbia upheld a moratorium on tower siting in *American Towers, Inc. v. Williams*, Civil Action No. 00-2436 (PLF) (D.D.C. June 14, 2001). The District had initially granted a building permit for a 756-foot broadcast tower for HDTV. Subsequently, however, the District passed legislation temporarily prohibiting the issuance of permits for

towers above 200 feet, and notified the owner, American Towers, of its intent to rescind the permit. The permit was cancelled on Oct. 10, 2000, and American Towers filed suit the next day. The court dismissed all the plaintiff's federal-law claims, including a claim under § 332, leaving open the option of filing in local court to pursue claims under the District's laws. The federal-law claims were held inapplicable because the tower was not fundamentally a PWS tower: even though the owners planned to place some PWS antennas on it as well, the reason for the tower's unusual height was the planned HDTV use, not the PWS use.

Nextel West v. Unity Township, 282 F.3d 257 (3d Cir. March 5, 2002), continued prior circuit holdings defining "prohibition" of wireless service under Section 332(c)(7)(B)(i) in terms of whether the local government's decision had the effect of barring the closure of a "significant gap" in the service of all carriers in the aggregate. As the Court stated (following its own precedent): "We defined this prong as requiring a gap from a user's perspective, rather than a particular provider's perspective." This appears to be the most favorable reading to that date of "prohibition of service" with respect to local governments' discretion.

In *Nextel Partners v. Kingston Township*, 286 F.3d 687 (3d Cir. April 11, 2002), the Third Circuit ruled that Section 332(c)(7) of the Communications Act did not give rise to relief under 42 U.S.C. § 1983. The court concluded that the Communications Act creates a "comprehensive remedial scheme that furnishes private judicial remedies." This is the first time since the *Atlanta* case that a federal appellate court has spoken to this point.

Similarly, a recent Eleventh Circuit case carried forward the deferential approach to local zoning decisions solidified in several of the above cases. The panel reversed and remanded the District Court's order, overturning a Board

of Zoning Appeals denial, that American Tower be awarded a siting exception and variance to erect a 180-foot tower in a residential neighborhood. Among several bases on which American Tower challenged the BZA denial, the lower court had ruled solely that the BZA opinion was not based on substantial evidence. The 11th Circuit panel confined its reversal to that issue and remanded as to the others. The opinion stated:

> Under the substantial evidence standard of Section 332, we cannot displace the Board's fair estimate of conflicting evidence and cannot freely re-weigh the evidence. We can only determine whether substantial evidence exists to support the local board's decision.

American Tower LP v. City of Huntsville (AL), 295 F.3d 1203, 1209 n.8 (11th Cir. June 25, 2002).

On the other hand, the same appellate court was less ready to accept citizen petitions in *Preferred Sites v. Troup County (GA)*, 296 F.3d 1210 (11th Cir. July 10, 2002). There, the minutes of the County's zoning board meeting failed to describe the discussion held at the meeting, and the Zoning Administrator's affidavit as to the content of the meeting was similarly unenlightening. The Court proceeded to discredit five citizen petitions against the tower. Two of the five contained only names and addresses, but bore no indication of the issue at hand or the position to which the signers were subscribing. A third was only partly completed. Even the two petitions that did indicate their purpose provided only "generalized objections with no articulated reasons for the opposition." On that basis, the Court could not find substantial evidence for the County's denial.

National Tower, LLC v. Plainville Zoning Board of Appeals, 297 F.3d 14 (1st Cir. July 18, 2002), also struck down a community's denial of a tower site primarily based

on the minimal nature of the reasons cited in the city's written decision.

Two 2002 district court cases decided on the same day provide a useful illustration of where courts will and will not uphold local zoning decisions. In *Omnipoint Holdings, Inc. v. Town of Westford*, 206 F. Supp. 2d 166 (D. Mass. June 17, 2002), a wireless carrier was able to show a significant gap in coverage and also presented detailed information about its attempts to acquire other sites as alternatives to the one the Town denied. The court concluded the plaintiff had shown that further efforts would be so likely to be fruitless that they would be a waste of time, granting summary judgment both on the Section 332 claim and on a § 1983 claim for attorney fees and costs. On the other hand, in *Voicestream Minneapolis, Inc. v. St. Croix County*, 212 F. Supp. 2d 914 (W.D. Wis. June 17, 2002), the carrier sought to build a 185-foot tower on National Park Service land overlooking a designated scenic waterway, and failed to show that other, less visually intrusive alternatives were unavailable. Here the court held for the County, pointing out that the aesthetic concerns in question were not merely vague and generalized but were supported by specific facts in the record regarding this specific tower proposal. The court did, however, note that the decision should not be interpreted as giving the County license to deny successive applications at will, and encouraged the County to work actively with the plaintiff and the Park Service to find a solution.

Following the path it laid out in the *Telespectrum* case, the Sixth Circuit ruled against a Michigan city on the grounds that its zoning decision was not "in writing." In *New Par v. City of Saginaw*, 301 F.3d 390 (6th Cir. Aug. 14, 2002), the court held that to be "in writing" a denial of permission had to be separate from the written record; describe the reasons for the denial; and contain a sufficient explanation of those reasons for appellate review. *Id.* at 395.

In this case, the City had issued a separate decision, but the court found it lacked an explanation of the reasons for denial. The Sixth Circuit also found that the City's decision was not supported by "substantial evidence contained in a written record," the traditional agency criterion used in *Telespectrum*. *Id.* at 396. The court felt that New Par met the criteria set forth in the zoning code, and concluded that the City had not identified specific concerns relevant to those criteria. *Id.* at 397. As a result, the Sixth Circuit affirmed the district court's injunction to the City to grant the company's variance request.

C. Video Receive Antennas

In the area of video receive antennas (the OTARD rules), there has been little change since the FCC issued its original rules extensively preempting local regulation of satellite dishes and similar antennas under one meter. A number of decisions issued by the Commission under these rules have almost invariably resulted in striking down local regulation, including property covenants established by homeowner associations. In 2000, the FCC extended this preemption to include antennas used for terrestrial wireless multichannel video. *Bell Atlantic Video Services Co., Petition for Declaratory Ruling Pursuant to 47 C.F.R. § 1.4000*, CSR 5398-0, Memorandum Opinion and Order, DA 00-927, 15 FCC Rcd 7366 (April 26, 2000).

D. Other Issues

1. *Radio Frequency (RF) Radiation*

The issue of RF emissions was raised in a Second Circuit appeal from the FCC's orders setting health and safety standards. *Cellular Phone Taskforce et al. v. FCC*, 217 F.3d 72 (2d Cir. 2000). The Court upheld the FCC's rules at 47 C.F.R.§1.1301 *et seq*. controlling human exposure

to radio frequency emissions from federally-licensed antennas. Among the issues in the challenge were the agency's interpretation of the scope of the preemptive language at Section 332(c)(7)(B)(iv), as well as the constitutionality of the statute, especially under the Tenth Amendment.

An unusual aspect of these rules is that the FCC admits to incompetence in evaluating the biohazards of RF emissions and thus depends on sister agencies such as EPA, FDA and OSHA for technical information. Although these agencies only participated in the initial round of the 1993-97 rulemaking, and not in the extended reconsideration round, the court concluded, among other findings, that the FCC was entitled to assume that if the expert agencies had been troubled by new evidence introduced in the reconsideration round, they would have intervened.

In November 2000, three years after the close of the comment cycle, the FCC issued a Report and Order in WT Docket 97-192 (FCC 00-408) setting ground rules for the hearing of complaints in the federally preemptive area of radio frequency (RF) radiation safety. The agency shares jurisdiction over such complaints with state and federal courts pursuant to Section 332(c)(7)(B)(v) of the Communications Act. The Report and Order said that such complaints should be filed as petitions for declaratory ruling and served on all interested parties. Taking note of the handbook on this issue jointly prepared by FCC staff and the Local and State Government Advisory Committee (LSGAC), the Commission expressed the hope that litigation would be minimal and said it would decide complaints on a case-by-case basis.

A significant distinction in this area was introduced in *Sprint Spectrum v. Mills*, No. 01-7116, 283 F.3d 404 (2d Cir. March 5, 2002). The Second Circuit ruled that when local

governments act in a "proprietary" fashion – that is, as owners in the marketplace – they can restrict RF radiation from antennas sited on their own land more narrowly than required by the federal safeguards on such emissions, even though Section 332(c)(7)(B)(iv) of the Communications Act normally would preempt such tighter restrictions. (*See* 47 C.F.R. § 1.1310.) The court found that the federal preemptive statute spoke to governments in their public roles, not as "private" lessors. The Court considered proprietary action as particularized and case-by-case in nature, in contrast to tower-siting ordinances with their generalized rules.

2. *Public Safety Radio*

A growing concern with the integrity of public safety radio frequencies surfaced in *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999). Johnson County had sought to empower its zoning administrator to shut down commercial wireless facilities interfering with public safety radio. The county defended its denial by citing the ample zoning deference contained in Section 332(c)(7)(A). The Court, however, held that that subsection was limited to "placement, construction and modification" of personal wireless facilities. Apparently the court's view was that the FCC was the sole forum for resolving such interference problems.

The following year, the Second Circuit also issued an order addressing the related issue of RF interference with public safety radio. In *Freeman v. Burlington Broadcasters*, 204 F.3d 311 (2d Cir. 2000), the Town of Charlotte, Vermont, conditioned the approval of a radio tower supporting FM radio, public safety radio and cellular telephone antennas on non-interference with appliances and devices in the homes of nearby residents. The Zoning Board of Adjustment found the condition unenforceable. This ruling effectively was upheld by the U.S. District Court for

Vermont, which dismissed the complaint of Charlotte citizens for lack of subject matter jurisdiction. The Second Circuit panel agreed with the outcome, striking down the interference condition, but based its substantive decision on Congress' grant of plenary power to the FCC to control broadcast interference to RF-vulnerable appliances and equipment.

It is unclear at this point whether the FCC's actions are in fact sufficient to protect public safety radio communications against destructive interference. Conflicts have been identified between FCC-approved public safety uses and FCC-approved cellular spectrum usage by carriers such as Nextel. On March 14, 2002, the FCC adopted a Notice of Proposed Rulemaking on a proposal by Nextel to resolve problems with public safety radio operations in the 800 MHz band. Comments and reply comments were filed in that proceeding, but as of January 2003, the Commission had not arrived at a solution. Instead, in at least one case a carrier petitioned the FCC to preempt a local zoning ordinance seeking to deal with public safety issues by requiring compliance with federal rules. *In the Matter of Federal Preemption of Anne Arundel County Ordinance*, WT 02-100, Petition for Declaratory Ruling filed by Cingular Wireless LLC Apr. 23, 2002 and supplemented April 29, 2002.

III. CONCLUSION

As the developments discussed above make clear, the implications of the 1996 Act for local communities are still being worked out in decisional law. It remains to be seen whether the Act's intent to encourage competition will ultimately be realized, or whether industry consolidation will result instead in a highly concentrated oligopoly of communications companies controlling the information their customers can access. Similarly, it has yet to be determined

to what extent local property rights will survive the clamor of the communications industries for favored treatment in the name of competition.