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# AN UPDATE ON FEDERAL LITIGATION ARISING OUT OF SECTION 253 OF THE COMMUNICATIONS ACT

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## I. INTRODUCTION

Telecommunications law for municipalities is currently characterized by an on-going clash between local governments' right to control and to gain the benefit of their property, and telecommunications providers' desire to burden and use such property at no (or minimal) cost. At the center of this clash lies the interpretation of Section 253 of the Communications Act. This article explores this dispute, and provides an update on Section 253 litigation occurring throughout the nation.[1]

## II. LOCAL GOVERNMENT AUTHORITY TO MANAGE THE RIGHTS-OF-WAY.

As with all property law, a local government's authority over its rights-of-way is determined by state law. 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. Localities grant private parties, including communications companies, valuable rights to use and occupy those rights-of-way including:

> (1) The *option* to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way;
>
> (2) A right to *burden* the public rights-of-way through construction work, and then on an ongoing basis through repairing and maintaining facilities in the limited space within the streets and public utility easements; and
>
> (3) The ability to *use* the public rights-of-way in doing business.

## III. FEDERAL LAW: 47 U.S.C. § 253 AND 47 U.S.C. § 152 NT.

Section 253 of the 1996 Act, 47 U.S.C. § 253, titled "Removal of Barriers to Entry," has been the principal focus of federal judicial decisions since 1996. Sections 253(a)-(c) provide:

> (a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service,

[1] Additional information on this topic can be found at www.millervaneaton.com.

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

Also critical, but less litigated, is Section 601 of the Telecommunications Act, which appears at 47 US.C. § 152 nt. Section 601 provides:

> (c) FEDERAL, STATE AND LOCAL LAW.
>
> (1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.
>
> (2) STATE TAX SAVINGS PROVISION.- Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

Six basic principles emerge from Section 601 and Section 253:

- A local law should only be subject to preemption if it prohibits or has the effect of prohibiting service.

- Even if a local law prohibits or effectively prohibits an entity from providing service, a local law should only be preempted if it falls outside the safe harbors of Section 253(b) or (c).
- Local authority to obtain reasonable compensation for use of public rights-of-way, consistent with applicable state law, is preserved.
- Local authority to manage the rights-of-way, consistent with applicable state law, is protected.
- Local police powers, exercised consistent with state law limits, are also protected.
- State and local taxing authority is completely protected from preemption under Section 253, and a telecommunications provider challenge to a tax (as opposed to a rent levied in return for the right to use the rights-of-way to provide service) should be dismissed.[2]

[2] The only case to address the issue so holds. *Qwest Corporation v. City of Globe*, 237 F. Supp. 2d 1115, 1118 (D.Az. 2003), *affirmed by*, 434 F.3d 1176, 1184 (9th Cir. 2006).

There is substantial confusion in the case law on each of the first five points.

## IV. THE INTERPRETATION OF SECTION 253.

Section 253(a) and (c) lie at the heart of the dispute between local governments and telecommunications providers with respect to the use of local government rights-of-way.[3] According to the plain language of the statute, Section 253(a) operates as the only preemptive provision of Section 253, while Section 253(c) operates as a safe harbor to protect local governments from such preemption. Some courts have departed from this plain language and suggested that even if there is *no* prohibition within the meaning of Section 253(a), a local law is preempted if it falls outside the safe harbors of Section 253(b)-(c). *Compare Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 816 (D. Md. 1999), *vacated* 212 F.3d 863 (4th Cir. 2000) with *City of Auburn v. Qwest Corporation*, 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *BellSouth Telecommunications, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. May 25, 2001). However, most appeals courts have rejected this approach, finding that Section 253(c) only functions as a safe harbor to preemption under Section 253(a). *See, e.g., Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007).[4]

We consider both Section 253(a) and Section 253(c) in turn.

Section 253(a)

On its face, Section 253(a) only bars a narrow class of local laws: those that "prohibit or have the effect of prohibiting the ability" of an entity to provide telecommunications service. Interpreting this language, the FCC has adopted an approach to Section 253(a) that is generally favorable to localities. *In re California Payphone Ass'n*, Opinion and Order, 12 FCC Rcd. 14,191 (1997), states that the first question in any Section 253(a) analysis is whether there is an *explicit* prohibition on entry. If there is none, "[w]e then consider whether the Ordinance has the *practical effect* of prohibiting the ability of any entity to provide any interstate or intrastate

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[3] While Section 253(b) refers only to the authority of a "State," the FCC has concluded that the subsection also protects the exercise of authority delegated by the state to a locality. *In re Classic Telephone*, 11 F.C.C.R. 13802 at ¶34 (1996). As responsibility for "public safety and welfare" is often at least in part the responsibility of local governments, this exception may prove quite important, although it has not been much-litigated to this point. Subsection (d) of § 253 gives the FCC authority to determine whether a particular requirement prohibits entry, but provides that the FCC has no jurisdiction to determine whether a particular provision is protected by the safe harbor of § 253(c). *See* 141 Cong. Rec. S8308 (1995) (statement of Sen. Gorton).

[4] *See also Illinois Bell Telephone Co. v. Village of Itasca, Ill.*, 2007 WL 1560263, *8 (N.D. Ill. 2007).

telecommunications service." *Id.* at 14,204 ¶ 27. Another decision, *In re Public Utility Comm'n of Texas,* 13 FCC Rcd. 3460, emphasizes that there is no effective prohibition unless challenged requirements "materially inhibit or limit the ability" of an entity to compete. *Id.* at 3470 ¶ 22.[5] It also indicates that in determining whether a Section 253 violation has occurred, the key is "implementation," not speculation. *Id*. at 3465 ¶ 10. The burden is on the telecommunications service provider to prove that there is a prohibition. If that burden is not met, the case is over. If the burden is met (according to the FCC), the burden then shifts to the locality to explain why it believes that a challenged provision falls within the ambit of the safe harbors of Sections 253(b)-(c). *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers,* 11 FCC Rcd 13082 (1996).

In a decision handed down last year, the Eighth Circuit followed these FCC decisions in rejecting a Section 253 challenge brought by Level 3 Communications. *Level 3 Communications v. City of St. Louis,* 477 F.3d 528 (2007). The company had been operating in the City since 1998, and did not make any factual showing that the City's laws had prohibited it from providing any service in the City. Instead, the company's claim rested on the contention that the City's ordinance "may" (*i.e.*, might) prohibit or effectively prohibit it from providing service. *Id.* at 533. The Court declared: "No reading [of Section 253] results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services…" *Id*. Instead, the Court held:

> [A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.

*Id.* (citing *Cal. Payphone Ass'n,* 12 FCC Rcd. 14,206 (1997)) (internal citations omitted). The decision also suggests that Section 253(a) analysis should be limited to the impact on the plaintiff itself, and should not extend more generally to the impact on "any" entity:

> Level 3 further admits in its response to interrogatories that it "cannot state with specificity what additional services *it* might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." This admission establishes that Level 3 has not carried its burden of proof on the record we have before us.

*Id.* at 533-534 (emphasis added). In an earlier decision, the Second Circuit appears to have adopted a similar approach, requiring a plaintiff to show that a regulation materially inhibits or limits its ability to enter the market. *TCG New York, Inc., et al. v. City of White Plains,* 305 F.3d 67 (2d Cir. 2002).

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[5] Even this test may be more generous to the telecommunications industry than is warranted by the law.

Other circuit courts, including the First Circuit and the Ninth Circuit, have read Section 253(a) slightly differently. The Ninth Circuit has held that a plaintiff need not show that any particular service has been effectively prohibited:

> The district court noted that Qwest has not pointed to a single telecommunications service that it, or any other entity, is effectively prohibited from providing because of the Cities' revenue-based fees or any of the other challenged requirements. We do not agree that Qwest was required to make an actual showing of a single telecommunications service that it…is effectively prohibited from providing. We have previously ruled that regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted.

*Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (citations and quotations marks omitted); *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006). A recent Ninth Circuit decision, *Sprint Technology v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007), applied that Circuit's precedent to preempt a County wireless telecommunications zoning ordinance on its face. *Id.* at 716. The Court found that the requirements of the County's ordinances "add[ed] submission requirements to an already voluminous list," and allowed for "open-ended discretion and threat of criminal penalties." *Id.* The Court rejected the argument that a zoning ordinance could not be challenged under Section 253.[6] *Id.*

Meanwhile, the First Circuit has suggested that Section 253(a) analysis is not limited to the burdens imposed by the *challenged municipality*'s regulation, but may be satisfied by showing the burdens which would follow if the same regulation were adopted by "multiple municipalities." *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 17 (1st

[6] The case presented the question of whether another provision of the Communications Act, Section 332, 47 U.S.C. § 332, provided the exclusive means to challenge a wireless zoning ordinance. The Ninth Circuit noted that while Section 332 governs challenges to individual zoning decisions, cellular telephone companies are providing a telecommunications service and thus, Section 253 is applicable. *Id.* at 712. Shortly before *San Diego*, the district court for the District of New Mexico likewise held that Section 332(c)(7) is not the "exclusive vehicle" to challenge a zoning ordinance; instead, cell phone companies "may bring a facial challenge to the Ordinance under § 253 and § 332(c)(3)." *Verizon Wireless LLC v. City of Rio Rancho*, 476 F. Supp. 2d 1325, 1339 (D.N.M. 2007). The decisions are highly questionable. First, Section 332 assumes standard zoning rules will apply to wireless tower applications; yet *San Diego* indicates a telecommunications-specific zoning ordinance is defective under Section 253 if it applies such standard rules. Moreover, the decision in *San Diego* reverses the basic rule that an ordinance can survive a facial challenge if it could be legally applied in any set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). The cases thus raise significant constitutional and statutory questions – but until those questions are resolved, municipal attorneys can expect to see more cases that combine Section 253 and Section 332 challenges.

Cir. 2006). Both of these approaches are problematic: the Ninth Circuit's approach because it departs so clearly from the plain language of the statute, while the First Circuit's standard seems inconsistent with basic rules of standing and statutory interpretation.

Despite the superficial differences between the approaches taken by the Eighth Circuit, on the one hand, and the First Circuit and Ninth Circuit on the other, there is a reading of the FCC and Circuit court cases that brings them closer in result, if not in rhetoric. In fact, recent district court decisions within the Ninth Circuit suggest such a reading. They hold that while the "may prohibit" test does not require an "actual prohibition," it does require a showing of "material impact" on the telecommunications provider.[7] In *Pacific Bell Telephone Co. v. California Dept. of Transp.*, 365 F. Supp. 2d 1085, 1088 (N.D.Cal. 2005), the district court suggested that a "may prohibit" test requires a plaintiff to show a significant economic impact. To the same effect are *City of Portland, Or. v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 1061 (D. Or. 2005), and *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1093, (D.Or. 2006). *Time Warner* emphasizes that the impact must be the result of the regulatory scheme, and not competition.

The case of *Qwest Corp. v. City of Portland* is indicative. Qwest challenged local franchising requirements, as well as local franchise fee and tax requirements. The district court granted summary judgment to defendant cities on the ground that Qwest had failed to show that any of the regulations it challenged "prohibited or had the effect of prohibiting" Qwest from providing service.[8] In *Portland*, 385 F.3d at 1241-43, the Ninth Circuit affirmed the district court's holding with respect to the fee requirements, ruling that Qwest was barred by doctrine of claim preclusion from challenging ordinances of several Oregon cities, which imposed revenue-based fees for use of public rights-of-ways. The Ninth Circuit remanded the case to the district court in other respects, directing it to (a) apply the "may prohibit" test; (b) conduct an individualized and cumulative analysis of each challenged provision; and (c) to distinguish between laws that were telecommunications-specific, and those which are not, noting that the latter are not generally subject to Section 253.[9] The district court dismissed Qwest's claims on remand, finding that the

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[7] This appears to be the test adopted by *Qwest v. Santa Fe*, 224 F. Supp. 2d 1305 (D. N.M. 2002), *aff'd in part, Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004) (refusing to find that rules that had long applied to Qwest were prohibitory, but finding that a regulation that substantially increased the amount Qwest had to pay to use the rights-of-way was effectively prohibitory within the meaning of Section 253(a), based on evidence presented by Qwest in that case). *See also Illinois Bell Telephone Co. v. Village of Itasca, Ill.*, 2007 WL 1560263, *9 (N.D.Ill. 2007) (finding Section 253(a) violation where "the Village … seeks to prevent AT & T Illinois from accessing the public rights-of-way altogether").

[8] 200 F. Supp.2d 1250 (D. Or. 2002). The district court also concluded, *inter alia*, that Qwest could not challenge the fee requirements, as it had challenged the fee requirements in state courts, and lost.

[9] The Ninth Circuit noted: "[w]e doubt whether City of Auburn can be read so broadly as to apply to ordinances that are not specific to the telecommunications permitting process. Based on the record before us, there is no indication that Portland or the other Cities, with the

company had not satisfied the "may prohibit" test. Qwest had argued the test could be satisfied by speculation. The district court ruled:

> [A] plaintiff challenging a city's telecommunications franchise provisions must rely on more than speculation to show a potential prohibitory effect. A telecommunications provider must at least demonstrate that that requirement is or may be a 'barrier to entry' into the City's telecommunications market.

*Qwest Corp. v. City of Portland*, 2006 WL 2679543 (D. Or. 2006).[10] Qwest failed to do so.

At this point, it is unclear what standards ultimately will govern Section 253(a) cases, and how those standards will be applied. However, a review of the cases shows one possible difference between cases where localities prevail and those cases where they do not. In the latter case, the locality often concedes that its regulations are burdensome (*Berkeley*); does not raise a real Section 253(a) defense (*Auburn*); does not present facts to support its position (*Guyanilla*); or fails to rebut facts presented by the telecommunications provider (*Santa Fe*). By contrast, where a locality has prevailed, it often submits a significant factual case in support of the challenged regulations (*Level 3*, *Qwest-Portland*, *Time Warner*), including a showing that the City's policies have led to competition in fact. In addition, courts appear to take a more skeptical view of new, telecommunications-specific laws – particularly those which give a locality broad discretion[11] to grant or deny franchises – as compared to laws that simply require telecommunications companies to comply with long-standing rules and requirements.

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exception of Ashland, Eugene, and Springfield, have passed ordinances that are specific to the telecommunications process and apply to all telecommunications providers attempting to enter the market. Therefore, to the extent that Qwest challenges these ordinance provisions, it is questionable whether § 253 even applies." *Id.* at 1242.

[10] The district court decision is currently on appeal to the Ninth Circuit.

[11] Telecommunications providers sometimes argue that any law that leaves a locality with any discretion is inherently prohibitory within the meaning of Section 253. That is because (they argue) a locality with "unfettered discretion" is in a position to prohibit entry, and that is itself a barrier to entry. The "unfettered discretion" issue is raised in many cases, and those cases (and in particular, *Auburn* and *White Plains*) should be reviewed by any municipal attorney writing a telecommunications ordinance. However, there is reason to believe that the arguments of telecommunications providers go too far. The Supreme Court of Virginia rejected the notion that "discretion" inherently violates Section 253, drawing a distinction between that standard as applied in the context of Section 253(b) and that standard as applied in the context of Section 253(c*). Level 3 Communications of Virginia, Inc. v. State Corp. Comm'n*, 604 S.E.2d 71 (Va. 2004). The *White Plains* court only found the test significant in determining whether a challenged regulation was protected by the safe harbors of Section 253(b)-(c), and did not apply the test to determine whether there was a prohibition under Section 253(a).

## Section 253(c)

The breadth of the safe harbors under Section 253(c) is also in dispute. While there is no question that local governments can require some compensation for use of their rights-of-way,[12] telecommunications providers argue that compensation is limited to the marginal cost of issuing permits, while municipalities argue that the law permits them to charge a rent that is not confined to recovering costs. *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla*, 283 F.Supp.2d 534 (D.P.R. 2003) summarizes the then-existing case law on point, and notes that the trend favors the municipal view. However, on appeal, the First Circuit found that the municipality's gross revenue fee was not saved by the subsection (c) safe harbor:

> We need not decide whether fees imposed on telecommunications providers by state and local governments must be *limited* to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, *related* to the actual use of rights of way and that the costs of maintaining those rights of way are an essential part of the equation. In this case, the appellants have presented no evidence of the Municipality's costs of maintaining the public right of way. …[A]bsent evidence of costs, the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing.

*Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (9th Cir. 2006) (internal citations and quotation marks omitted).[13] If read to require a locality to base the price it charges for rights-of-way on costs, the decision is misguided: competitive prices are often set without explicit consideration of cost. The value of a property purchased in 1900 is not based on its costs, but on the value of similar properties in the marketplace. The case is better understood as meaning that it is up to the locality to show that the price it charges is a reasonable price, and not a monopoly price. This could be done (as was the case in *Level 3*), by showing how the charges levied compare to charges for similar private properties. In the *Portland* cases, the City showed that the cost of managing and acquiring the rights-of-way significantly exceeded the rents it was receiving from utility companies, and also showed that the fee charged for use of the rights of way was consistent with charges for public and private rights-of-way.

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[12] *See White Plains*, 305 F.3d at 82 (finding a regulation "might permit rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed fees for use of rights-of-way"); *Global Network Communications, Inc. v. City of New York*, 2007 WL 2471813, 5 (S.D.N.Y. 2007) (noting that "the City's right to require compensation from telecommunications providers includes the reasonable expectation that its compensation will be paid accurately in full, on time, and without criminal involvement or fraud").

[13] The district court in *Level 3* Communications *v. City of St. Louis* also struck down the City's linear-foot based right-of-way fees because they were not based on the actual costs incurred by the City, and hence, the court held, were not "fair and reasonable" within the meaning of 47 U.S.C. § 253(c). *Level 3 Communications v. City of St. Louis*, 405 F.Supp. 2d 1047, 1057-58 (E.D. Mo. 2005). However, the district court decision is not good law in light of the Eighth Circuit decision reversing the district court's finding of a prohibition under 47 U.S.C. § 253(a). 477 F.3d 528.

Recent case law also emphasizes that compensation must be "nondiscriminatory" and "competitively neutral." In some states, the incumbent local telephone company claims to operate pursuant to a state or pre-statehood franchise, and asserts the right to operate pursuant to that franchise without making any payment to localities. The ancient grants may not protect new entrants, however, and so the question arises as to whether one can charge a fee for use of the rights-of-way to a new entrant if the incumbent is not subject to such a requirement. The Sixth Circuit has recognized that differences in state law can justify different treatment of providers, at least in cases where the local government is willing to apply the fee to all providers, but state law prevents it (and the state law is not challenged). *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). The Second Circuit has questioned that analysis, but held explicitly that Section 253(c) "does not require precise parity of treatment" and that franchise fees "need not be equal." *TCG New York v. City of White Plains*, 305 F.3d 67, 80 (2d Cir. 2002).[14] Finally, there is the issue of *who* must be treated in a nondiscriminatory manner. If a local government treats itself one way, must it treat others comparably? Or can a local government take advantage of the benefits that every landlord enjoys vis-à-vis his tenants?

It is also not clear what constitutes protected "management of the rights-of-way" within the meaning of Section 253(c). As to some matters, there is little dispute. The FCC has indicated that:

> Section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of- way.... The types of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

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[14] In *White Plains*, the locality had voluntarily chosen not to apply an ordinance requiring payment of rents to the incumbent. The fee provisions in the ordinance were struck down on the ground that they were discriminatory and not competitively neutral, although the Court also emphasized that it was not ruling that the same charge had to be applied to all market participants. In *Dearborn*, the court ruled that the City *could not* apply its fee to the incumbent consistent with state law. It is not clear how the *White Plains* court would have ruled if presented with the same facts presented to the *Dearborn* court, although the Second Circuit clearly criticized the Sixth Circuit's analysis.

*In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997), P103, 1997 WL 580831. The FCC based its analysis on statements by Senator Diane Feinstein, who read into the Congressional record a letter that urged Congress to protect local authority over rights-of-way, including the authority to:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation.'"

*In re Classic Telephone, Inc*. 11 FCC Rcd 13082, 1996 WL 554531 (1996), P39 (*quoting* 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

Some courts have suggested that right-of-way management encompasses only these specified activities, *see Prince Georges*. *Auburn* suggests that the distinction is between a regulation aimed at the rights-of-way, and a regulation of the provider (a line that is far from clear); *White Plains* made a similar distinction, but went on to suggest that the issue is whether the challenged requirement is "reasonably related to regulating the use of the rights-of-way." In order to fall within the "management" safe harbor, it appears a locality must at least be able to articulate a credible nexus between the proposed regulation and rights-of-way management. *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 and 1272 (S.D. Cal. 2002) (noting that provisions which have simply too tenuous a connection to the 'management of the rights-of-way' will not be saved under 253(c)). Courts are concerned that unless *some* line is drawn, almost any requirement could be justified as a rights-of-way management requirement. On the other hand, second-guessing the manner in which the rights-of-way is regulated should not be appropriate under Section 253(c), which was designed to protect municipal rights-of-way discretion and choices related to conflicting demands on rights-of-way.[15] The district court in the *Level 3/St. Louis* case upheld a variety of right-of-way management provisions, including a license application and revocation process, conduit installation requirements, reporting requirements, indemnification, city consent prior to transfer, and minimum technical requirements. 405 F.Supp. 1059-63.

* * *

[15] A recent district court case, *Southwestern Bell Telephone, L.P. v. City of Houston*, 2007 WL 954744 (S.D. Tex. March 29, 2007), dealt with a challenge to a City ordinance requiring owners of facilities in the rights-of-way to relocate those facilities at their own expense. The Court held that the relocation requirement fell within the safe harbor provision of Section 253(c) because it related to the City's management of its public rights-of-way. *Id*. at *4.

While the ultimate interpretation of Section 253 is still in doubt on many key points, there is federal case law that recognizes the right of localities to charge rents for use of the rights-of-way (and not just recover costs), and increasingly courts are upholding reasonable rules for use of the rights-of-way. However, that does not mean that local authority is unlimited. In the case of cable regulation, the law has tended to place significant regulatory authority at the local level. In the case of telecommunications providers, the reverse is true. Since early in the 20th century, most rate, service, and facilities regulation has occurred at the state level. Courts have tended to be willing to protect traditional local authority, but unwilling to allow localities to leverage this traditional authority into broader regulation of telecommunications services.

## V. RECENT DEVELOPMENTS

The battle over the interpretation and application of Section 253 continues in the federal courts.

After losing before the Eighth Circuit in its case against the City of St. Louis, Level 3 initially threatened to file a petition for certiorari to the United States Supreme Court. However, Level 3 allowed the deadline to pass without taking any action. Instead Level 3 asked the District Court to reopen the case so that it could attempt to present evidence that it had been actually or effectively prohibited from providing telecommunications service under the Eighth Circuit standard. The City of St. Louis opposed Level 3's motion and requested that the District Court enter summary judgment in favor of the City. The District Court denied Level 3's request to reopen the case and granted the City's motion for summary judgment, finding that Level 3 had failed to produce any evidence showing that it had been actually or effectively prohibited from providing service. Level 3 has since appealed the District Court's decision to the Eight Circuit. Briefing has been completed and oral argument has not yet been set.

Meanwhile, on August 31, 2007, Verizon Business Services filed a Complaint for Declaratory and Injunctive Relief against the City of St. Louis in the Eastern District of Missouri. Relying on Section 253, Verizon is challenging many of the legal requirements that have already been challenged by Level 3. The parties are currently engaged in settlement discussions and for now that case is on hold.

In addition, on August 30, 2007, the City of Tulsa, Oklahoma, filed a Complaint against Verizon Business Services in the Northern District of Oklahoma seeking a declaration that Verizon is required to pay the City occupancy fees under the City's right-of-way ordinance. Verizon has cross-complained against the City and asserted that the City's right-of-way ordinance, including the occupancy fees, violate Section 253. That case is currently entering into the discovery phase and dispositive motions are due in October, 2008.

Level 3 and the Massachusetts Turnpike Authority are involved in active litigation in the District of Massachusetts in which Level 3 has challenged the validity of a linear foot fee it agreed to pay to the Turnpike Authority in a contract entered into several years ago. Dispositive motions were filed in March, 2008 and a decision can be expected later in the year.

In *NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49 (2nd Cir. 2008) the Second Circuit recently remanded a case to the District Court for further proceedings on the issue of whether the City of New York's franchise requirements violated Section 253. The District Court for the Southern District of New York had earlier denied NextG's claims for a declaratory and injunctive relief on the grounds that one of the ordinances challenged had expired, and hence, the challenge was moot, and because NextG had an available claim for money damages under 22 U.S.C. § 1983. 2006 WL 538189. The District Court also rejected NextG's Section 1983 claim after determining that NextG had failed to show evidence that the City's requirements resulted in a prohibition within the meaning of Section 253. The Court found that NextG had failed to provide any evidence of the prohibitive effects of the City's requirements, relying instead on wholly conclusory statements. The Second Circuit affirmed the District Court's dismissal of NextG's claims for damages, but on different grounds. The Second Circuit held that there was no private right to damages under 42 U.S.C. § 1983 for a violation under 47 U.S.C. § 253. 513 F.3d at 53. Based on that ruling the Second Circuit held that the District Court's dismissal of the declaratory relief and injunctive relief claims was in error because in fact NextG did not have a Section 1983 claim for damages. The Second Circuit remanded the case for further proceedings to consider whether the City's franchising requirements violated Section 253. However, based on the District Court's earlier conclusions that NextG had failed to provide evidence on the record that it had been actually or effectively prohibited from providing service, one can fairly expect that the result will be the same.