

Section 253 of the Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property that Must Be Justly Compensated

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I. Introduction 442

II. Interaction and Conflict Between Local and Federal Governments and Telecommunications Concerns 446

A. From Cooperation to Conflict 446

B. The Four Provisions of Section 253 448

C. Section 253 Jurisprudence: The First Three Decisions 450

1. Classic Telephone, Inc. 450

2. TCI Cablevision of Oakland County, Inc. 455

3. GST Tucson Lightwave 458

D. The Matter of Fees 459

III. How Section 253 Will Harm Municipalities 462

A. Direct and Indirect Harms 462

B. The Future of Municipal and Private Investment 466

IV. Section 253 Takes Private Property for Public Use 467

A. Section 253 Violates the Takings Clause 467

B. What Is a Taking? 468

C. Permanent Takings Case History and Loretto as

the Key Precedent 469

V. Fair vs. Just Compensation: How Should Municipalities Determine the Appropriate Value To Place on Their Rights-of-Way? 475

A. "Fair Compensation" 475

B. "Just Compensation" 477

C. Methods Municipalities Should Consider for

Right-of-Way Valuation 478

1. Fair Market or Rental Value 479

2. Opportunity Cost 480

3. Option Value 480

"[I]f regulation goes too far it will be recognized as a taking."

—Justice Oliver Wendell Holmes, Jr.¹

I. Introduction

The Telecommunications Act of 1996² (Act or 1996 Act) was signed into law by President William J. Clinton on February 8, 1996. In addition to being the largest comprehensive rewrite of federal telecommunications law in decades, its framers argue that the Act promises to increase the options available to consumers and to open up previously monopolized or oligopolized markets to all telecommunications carriers in this, the age of fiber optics. The President stated that the 1996 Act "fulfills [his] Administration's promise to reform our telecommunications laws."³ He also noted that the Act "seeks to remove unnecessary regulation"⁴ and "opens up competition between local telephone companies, long distance providers, and cable companies."⁵

While on its face this appears to be a noble objective, many local governments⁶ complain that their management responsibilities are being usurped as they lose control over who can occupy their property and how much they can charge for the use of their rights-of-way. More importantly, the 1996 Act so appropriates the rights of local governments to exclude others, that at least one of its provisions, section 253,⁷ violates the Fifth Amendment of the United States Constitution.⁸ Thus, municipalities should be justly compensated for that which has been, or will be, taken from them pursuant to section 253.

Using an analogy familiar to law students, when the government is found to have taken one of the most essential sticks in the bundle of rights that are commonly characterized as property—such as the right to exclude others—there is immediately a compensable taking.⁹ Municipalities are experiencing such a seizure under section 253, Removal of Barriers to Entry, which provides in relevant part:

(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 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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

(d) Preemption.—If, after the notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.¹⁰

Section 253 prohibits local governments from denying competitive telecommunications carriers the right to use their rights-of-way. While the language of section 253(c) purports to give municipalities the ability to continue to manage their rights-of-way, cities are only allowed to discriminate between competitive carriers in a manner that is "competitively neutral."¹¹ As a result, serious questions are raised as to the true ability of municipalities to manage

their right-of-way infrastructure. Further, the Act only allows cities to exact from telecommunications providers "fair and reasonable compensation," not the "just compensation" mandated by the Constitution. Section 253 was written to appear reasonable on its face. However, the ramifications of the competitive neutrality and antidiscrimination mandates, and of the "fair compensation" fee ceiling is daunting for cities. Municipal management will be thwarted if telecommunications carriers choose to litigate the matter of cities charging fair rental value, granting permits and franchises, and protecting their citizens from unsafe or financially unsound enterprises.

In retaliation, and in an attempt to preserve their management sovereignty, municipalities are in the process of fighting to win back their appropriated rights.¹² While Congress has purported to give municipalities a safe harbor with section 253(c), this Note will demonstrate the toothlessness of that "protective" clause, and show that section 253 as a whole prohibits cities from managing their rights-of-way. Congress's drafting failure amounts to a taking of private property for public use, and cities must be justly compensated. This compensation could be paid either by the federal government or by the firms that are the beneficiaries of the appropriation.

Telecommunications attorney Nicholas P. Miller contends that regardless of the impressive asset value on telecommunications firms' balance sheets, the most valuable property used by them is obtained at almost no cost at all: the public rights-of-way.¹³ Furthermore, Miller asserted in 1994:

There is little awareness that . . . [T]he telephone and cable television industries are pushing the White House and Congress to a quick and fundamental preemption of local governments' property rights. Congress is moving now to deprive local government of current real estate rights that will be worth hundreds of billions of dollars . . . Congress is proposing to transfer these rights essentially cost-free to private investors seeking to use the public rights-of-way for wireline telecommunications networks.¹⁴

It appears that Miller's predictions came true with startling accuracy in the promulgation of section 253. Since local government is the citizenry's trustee for the rights-of-way,¹⁵ Miller contends that municipalities have an absolute obligation to use those rights-of-way to best benefit the community. The ultimate goal, of course, would be to retain basic property rights, such as the right to exclude others and the revenue-generating opportunities that accompany those rights. The implication for municipalities is that they must do all they can to retain control of their property and the area above, beneath, and around it, by receiving just compensation for the use of their rights-of-way.¹⁶

Part II of this Note examines the historical and current interaction and conflict between the federal and local governments and telecommunications providers. It also examines more closely the provisions of section 253. Finally, Part II describes the first three cases involving section 253 and discusses how they might affect municipalities in the years to come. Part III lists the direct and indirect harms to municipalities inherent in section 253 and highlights how they outweigh the benefits of this piece of legislation, particularly from the standpoint of future investment. Part IV discusses what a taking is under the Fifth Amendment, and explains how section 253 violates well-settled takings jurisprudence. Part V compares the concept of "fair" compensation found in section 253(c) with the "just" compensation mandated by the Fifth Amendment. It ends with a discussion of rudimentary valuation methods municipalities should consider when placing a just compensation dollar amount on their rights-of-way.

II. Interaction and Conflict Between Local and Federal Governments and Telecommunications Concerns

A. *From Cooperation to Conflict*

Early in this century, local governments encouraged entrepreneurs to build a telephone network, and later a broadcasting infrastructure, that could provide for the communications needs of their constituents. In the hope of encouraging investment, agreements between cities and the small number of service providers in existence were drafted requiring few, if any, rental fees or conditions.¹⁷ In the following years, these local telephone providers had "automatic franchises" and did not pay cities more than a nominal fee for the privilege of physically occupying and cutting into the rights-of-way. With the advent of cable television franchises in the 1960s, municipalities began to realize the value and revenue opportunities inherent in franchising. Thus, they charged fees and awarded franchises on

a competitive-bid basis.¹⁸

As bid amounts, fees, and competition increased throughout the 1970s and 1980s, cable and other telecommunications industries approached Congress, which since has been limiting the conditions imposed and the fees municipalities can charge for right-of-way franchises.¹⁹ Thus, cable television and long-distance companies usually were, and still are, the only providers to pay anything more than nominal fees to counties and cities for right-of-way access; local telephone, satellite, and cellular providers typically did not, and do not, pay.²⁰ Further, it appears that few providers, if any, pay the "fair market" or rental value for use of the rights-of-way. Indeed, industry coalitions agree that fees were initially set low to encourage young, utility-based industries.²¹ The current fair market value should include a healthy return to municipalities, and must be at least enough to cover direct costs; the risks to the populace of excess digging; and the psychological and societal costs of additional construction, road repair congestion, and disruption of and damage to the facilities of other service providers.

Section 253 forces local governments to allow all telecommunications firms to use their rights-of-way with a self-regulating frequency. In the interest of increased competition, private investment, and flexible government regulations,²² Congress has enjoined municipalities from disallowing any telecommunications firm from taking the precious raw material that they need to exist: space. Any management activities that the 1996 Act allows cities to continue are only to be exercised on a competitively neutral, nondiscriminatory basis.²³ Instead of allowing monopoly and antitrust matters to be addressed by statutes that are already in place (such as the Clayton and Sherman Acts), Congress has given away cities' property in the absence of any stated municipal wrongdoing. This prevents city managers from exercising their honed ability to judge which firms are best to provide particular services and thus, which should be allowed to permanently occupy their most valuable asset.²⁴

Congress should have assumed, in the absence of conspicuous or repeated municipal impropriety, that most cities' management decisions are rational. City officials are elected by a populace which carefully scrutinizes how local leaders determine the balance between new service providers and the direct and indirect costs to that entry. Clearly, the national legislature is not comfortable entrusting the next era of telecommunications expansion to our local leaders. While our system of government is based upon the federalist notion that state and local governments are closer to the nation's citizens, Congress believes that local leaders' actions will not accurately reflect the needs and desires of both their constituents and global telecommunications networks. Local officials are elected (in part because of their rational evaluative process through city council meetings and public hearings) to issue permits and franchises so that city residents and customers benefit in terms of price, variety of services offered, and public safety concerns. If Congress would allow these managers to continue making the best decisions for America's citizens, city residents could hold their local elected officials accountable for telecommunications issues rather than unelected remote Federal Communications Commission (FCC or Commission) bureaucrats. The ramifications of this legislation will affect local governments in a way that a responsible Congress surely could not have envisioned.

B. The Four Provisions of Section 253

The 1996 Act is a congressional attempt to address the increasing concentration and Balkanization of cable and telecommunications markets.²⁵ Section 253(a) is Congress's main check on local governments getting in the way of its plans for a superior American telecommunications infrastructure. The prohibition on local governments' interference with even the slightest competitive action under section 253(a) gives the FCC or the courts the power to nullify local rules. These rules—which have or may have the effect of hindering competition, no matter how slightly²⁶—are the one mechanism by which local governments have been able to exercise management control over their rights-of-way.

Proponents of the legislation counter the cities' arguments against section 253(a) by rallying around section 253(b),²⁷ which states: "Nothing shall affect the ability of a state to impose on a competitively neutral basis requirements necessary to . . . protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,"²⁸ and section 253(c),²⁹ which states: "Nothing in this section affects the authority of a state or local government to manage the public rights-of-way . . . on a competitively neutral and

nondiscriminatory basis"³⁰ Lawmakers insist that these two provisions will continue to allow city officials to maintain their rights-of-way as they traditionally have. However, the "competitively neutral" and "nondiscriminatory" terms found in these two subsections revoke any power that proponents of section 253 were trying to leave to municipalities. While the legislative history of the Act shows that a few members of Congress tried to address maintaining a balance between local autonomy over right-of-way management and increased competition,³¹ section 253(c) fails to reserve an acceptable level of management authority to cities. The local governments' inability to distinguish between telecommunications carriers on their own terms renders them powerless against preemption petitions filed by scorned service providers when they are asked to pay fair rental value (e.g., more than the simple cost of repaving the streets when they are finished laying cable).

This preemption power is found in section 253(d), in which the FCC is given the power to consider any preemption request on a case-by-case basis.³² Thus, whenever a local government enacts a statute which either is adverse to a telecommunications concern or denies a franchise to one of them, the provider may be able to file a preemption request with the FCC. This will ultimately void any safe harbor hoped for by city-friendly Congressional members. In fact, Michele C. Farquhar, Chief of the FCC's Wireless Telecommunications Bureau (WTB), has noted that as of December 5, 1996, less than one year after passage of the Act, the FCC already had ten petitions for preemption pending under section 253.³³ Concerning section 704 (which preserves the authority of state and local governments over the placement, construction, and modification of personal wireless facilities—land use issues that traditionally have rested with the states), Farquhar stated that local governments will find that cooperating with communications providers will help cities realize greater revenues and enhanced service sooner.³⁴ However, she failed to mention any instances of pre-section 253 local governments not cooperating or availing themselves of the benefits of increased telecommunications competition. Notably, Congress and telecommunications commentators have also failed to mention any evidence of a local government that did not operate in the best interest of either its constituents or the global telecommunications infrastructure before the promulgation of the 1996 Act.

C. Section 253 Jurisprudence: The First Three Decisions

1. Classic Telephone, Inc.

Several important controversies have reached the FCC or the courts in the wake of section 253.³⁵ The first of these, *Classic Telephone, Inc.*, was brought against two small Kansas cities—Hill City (population 1798), and Bogue (population 191)—which denied requests for franchises from Classic Telephone, Inc.³⁶ Bogue had previously permitted a competing telecommunications service provider, Rural Telephone Service Company (Rural), to enter into the market and serve the customers residing there.³⁷ Similarly, Hill City (population 1989) opted to turn to Rural because the firm had recently invested between 5.5 to 6 million dollars in fiber optic cable installation and had guaranteed one-party phone lines and Internet access for all customers. Further, Rural had over forty years of providing telecommunications services in the area.³⁸ The cities in part based their denial on the fact that Classic planned to buy out United, a small telecommunications provider with an antiquated system (so antiquated, in fact, that it still provided four-party lines to one-half of its subscribers).³⁹ Incidentally, "Hill City had terminated United's franchise in 1993 on the ground that it was dissatisfied with the quality of United's local telephone service."⁴⁰ Hill City has asserted that it has "no desire or intention to limit qualified or trustworthy entities from providing telecommunications services,"⁴¹ but that it should be permitted "to deny the request of an unqualified company for a franchise to operate a telephone system and business."⁴²

The cities alleged that Classic's franchise application was denied on consumer protection grounds, which is within the clear purview of the municipal management powers contained in section 253(b) and (c).⁴³ Hill City and Bogue also stated to the FCC that they did not grant a franchising permit to Classic because they wanted to: (1) protect their citizens from a harmful service provider; (2) preclude unqualified and untrustworthy entities from providing inadequate services; and (3) eliminate from competition a firm which was unable to exist over the long run due to poor financial performance.⁴⁴ In fact, the cities explicitly stated that: (1) Rural was a local company with a good reputation for telecommunications services whereas Classic was headquartered in Texas and had no established reputation for

furnishing telephone services; (2) Rural's subscribers were its owners while Classic's owners were unknown; and (3) Rural had shown that it had the financial resources with which to build an advanced telecommunications network, whereas Classic had only claimed that it was financially secure without revealing its financial statements.⁴⁵

These appear to be concrete criteria that can be applied to all firms in a competitively neutral and nondiscriminatory manner, putting municipal managers within the section 253(c) safe harbor.⁴⁶ Not surprisingly, in its *Memorandum Opinion and Order*, the FCC said these reasons were not enough, finding that they were a "prohibition on entry" prohibited by section 253(a).⁴⁷ Strangely, later in the *Memorandum Opinion and Order*, the FCC stated that characteristics such as a firm's: (1) record as a cable operator; (2) promises to upgrade existing systems; and (3) marketing practices; "are all actions the Cities may legitimately regulate"⁴⁸ by requiring all otherwise qualified entities to have them, as long as the cities abide by the same "competitively neutral" requirements.⁴⁹ Perhaps if the municipalities had written down the criteria that they had used in granting a franchise to Rural, or if they had told Classic what its criteria were for franchise approval (and if those criteria were approved by a governmental body designated to determine their legitimacy), they would have been permitted to use them without being in violation of section 253.

The cities' criteria appear to be of a type that can be applied to all firms in a competitively neutral and nondiscriminatory manner. However, the FCC's *Memorandum Opinion and Order* declared that the cities' decisions were preempted. In its first decision on the balancing of federal preemption and local authority, the FCC stated that Hill City and Bogue had expressly violated section 253, and the cities were given sixty days to "expeditiously reconsider" Classic's franchise requests.⁵⁰ Of course, this decision simply directs the cities to grant Classic a franchise. While Congress may believe that the FCC is qualified to second-guess the cities' judgment and franchise-granting processes, the litigious situations in which this new policy threatens to put municipalities will be costly and time-consuming.

Anticipating these arguments, the *Classic Memorandum Opinion and Order* stated: "[C]ontrary to [the cities'] arguments, the plain language of section 253 does not exempt from the scope of federal preemption purely local matters of franchising authority."⁵¹ This patently states that the FCC has authority to preempt and overturn very local decisions, even though the FCC decision makers are not elected by the residents of municipalities. Thus, only the FCC is to determine whether a local government has made a wise decision by disallowing a telecommunications firm from occupying the space beneath its rights-of-way. Paradoxically, the *Classic* opinion then stated that denying a franchise is a perfectly legitimate action for a city to take and certainly within the scope of the powers reserved in section 253(b).⁵² Unfortunately, the FCC seems to believe that a city is only complying with the 1996 Act when it grants franchises to all telecommunications companies, as it later reminds the cities that Congress expressly allows such a preemption of their authority (and a rejection of federalism), deeming it "consistent with the overriding goals of the Act."⁵³ These paradoxical statements combined are at best contradictory, and at worst a flagrant disregard for the autonomy of cities.

In addition, the *Classic Memorandum Opinion and Order* states that section 253(a) was "intended to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well."⁵⁴ Certainly, those four types of obstructions cover almost any possible municipal regulation: what municipal actions—aside from determining festival days or parade routes—are not statutory, regulatory, economic, or operational? The *Classic* decision implies that the "perfectly legitimate action" of denying a franchise is exactly the kind of activity that Congress wanted to thwart in an effort to aid lobbying firms trying to maintain their foothold or initially get into the telecommunications industry. However, while this determination should end the argument in favor of the FCC, it is clear that such a reading of the statute will render municipalities powerless in their management functions.

Turning to the meaning of "competitive neutrality," the FCC stated in the *Classic Memorandum Opinion and Order*: "At the very least, this mandate of competitive neutrality requires the Cities to treat similarly situated entities in the same manner."⁵⁵ However, this "definition" does not go far in clearing up confusion. It is easy to see how AT&T and Ameritech are "similarly situated," but how are an Internet service provider or a local cable concern and AT&T or Ameritech at all similar, except in that they provide telecommunications services and require access to rights-of-way?

It is difficult to imagine that Congress (even a Republican one) could place a fledgling firm and a *Fortune 50* company on similar financial footing. Municipalities cannot effectively function if they are not allowed to objectively differentiate between all of the groups that want to use their most valuable resource. City managers must retain the ability to exercise their discretion in holding differently sized companies to appropriate standards and to reject access to their rights-of-way if those companies do not meet certain objective requirements. These elected officials are better able to determine what their constituents want, how their franchises and permits should be granted, and how otherwise to use their streets.

Classic demonstrates the immense burden the competitive neutrality mandate will place on cities. A municipality must meticulously document every factor that figured into its decision and ensure that all companies are judged by the exact same standards—even though the differences between the large conglomerates and the small, upstart companies are remarkable. City managers must then hope that every limit and condition they set that is brought before the FCC will be approved.

Finally, concerning section 253(d), the *Classic Memorandum Opinion and Order* stated that pursuant to its authority under section 257 of the Act,⁵⁶ the FCC had been chosen by Congress to identify and eliminate market entry barriers.⁵⁷ It stated that this authority complimented its even broader reach under section 253 to "preempt legal requirements that 'may prohibit or have the effect of prohibiting' the provision of telecommunications services."⁵⁸ Hill City and Bogue each argued that their refusal to allow *Classic* to serve their communities was not necessarily a prohibition on entry, but was rather the denial of a franchise to a company who was ill-equipped and objectively unqualified to provide service. Despite evidence to that effect, the FCC refused to believe the cities' arguments, choosing instead to find that they were trying to maintain a lucrative monopoly situation in two cities with a combined population of less than 2000 people.⁵⁹

The *Classic* decision appears, at least on the facts provided, to be internally paradoxical. There is absolutely no evidence that the cities were judging *Classic* or other potential market entrants by different standards than they had judged *Rural*, or that they had judged *Rural* using a more lenient level of scrutiny.⁶⁰ Further, the FCC acknowledged in the *Classic Memorandum Opinion and Order* that sections 253(b) and (c) "recognize the authority of States and localities . . . to impose entry requirements for certain purposes . . ."⁶¹ However, the decision reiterates the fact that municipalities are essentially powerless in deciding the form and substance of such "purposes." The 1995 Congressional House and Senate debates give little doubt that the allowable instances in which municipal managers can impose regulations on telecommunications carriers are few and of a largely impotent sort.⁶²

Finally, it is interesting to note that *Rural* received its franchise permit on March 7, 1994; over two years before the Act mandated that cities behave with perfect competitive neutrality toward a new influx of cable, phone, and other telecommunications providers. Further, *Classic* applied for the franchise petition in May 1995, over a year before "competitive neutrality" was to be the standard in franchising selection processes. How could the cities have been expected to be on notice, thirteen months before the Act was promulgated, that they should meticulously screen franchising applicants—no matter their size, reputation, or financial information—to prepare for potential federal administrative proceedings two years in the future? It is clear that *Classic* only marks the beginning of the loss of municipal control over rights-of-way.⁶³

2. TCI Cablevision of Oakland County, Inc.

The *TCI Cablevision* decision⁶⁴ dealt with an ordinance written by the City Council of Troy, Michigan, which generally required companies providing telephone service to obtain a local franchise. TCI Cable sought permission from the City of Troy to upgrade its cable system. However, the company wanted to route fiber through a business park that was not served by cable television.⁶⁵ Due to the rapid convergence of different telecommunications industries and the cross-capabilities afforded to all firms with fiber optics and other wireline and wireless advances, Troy officials decided that because TCI was installing telecommunications facilities, it needed a telecommunications franchise—unless it could justify its cable-specific need to route through the business park. Because TCI could not explain the need for the detour, Troy assumed that the firm was trying to get around the city's access controls on ducts

and conduits and avoid paying reasonable compensation for its use of Troy's property.⁶⁶ TCI contended that under the 1996 Act, "municipal franchising of telephone companies is eliminated, [and] that it can provide *telephone* service under its *cable* franchise."⁶⁷ Thus, the company believed that it need not pay a telephone franchise fee based on a percentage of its telephone revenues, and should have been able to begin providing telephone service while paying no additional fees at all.⁶⁸

An FCC hearing was called in the wake of this predicament, with TCI urging the FCC to void Troy's ordinance.⁶⁹ The National League of Cities, on behalf of Troy and in response to MCI's petition, filed a reply urging the FCC to find that the City of Troy had the power, pursuant to sections 253(b) and (c), to adopt an ordinance requiring service providers to obtain licenses or franchises for each segment of the telecommunications arena in which they operate.⁷⁰ Moreover, the petition argued that the TCI petition ignored the Stupak-Barton amendment to the Act (basically, section 253(c)), which appears to prevent the FCC from ruling on matters relating to rights-of-way and compensation.⁷¹

In a surprising turn of events in March 1997, then FCC Chairman Reed Hundt appeared ready to back Troy's petition, which would have given cities the ability to regulate cable operators as new telecommunications providers.⁷² In fact, a senior FCC source at the time said that the agency has clear authority to preempt the Troy ordinance whether or not TCI sought a franchise.⁷³ While TCI argued that the ordinance was a barrier to entry and in violation of section 253(a), the cities averred that the ordinance simply fell within section 253(b) and (c) allowances for local governments to manage themselves while adhering to the nondiscrimination and competitive neutrality mandates.

By July 1997, the FCC had still not issued a decision in *TCI Cablevision*, perhaps primarily because its value as a test case was weakened by TCI's acknowledgment that it did not actually plan to begin telecommunications service in Troy after all.⁷⁴ The FCC Local and State Government Advisory Committee expressed concern about cases like *TCI Cablevision*, stating that the 1996 Act "designates state and local governments as the primary entities" for right-of-way issues, and "regulation, preemption, and formal legal action against another level of government should be the last, not the first, recourse to resolving conflicting interests."⁷⁵

On September 19, 1997, the FCC issued a *Memorandum Opinion and Order* in *TCI Cablevision*,⁷⁶ which discussed section 621, the franchising provisions of the 1996 Act, and summarily mentioned section 253. Limiting this situation to its facts, the FCC determined that the City of Troy interfered with TCI's operation of its cable system in a manner that violated the limitations placed on cities' franchising powers.⁷⁷ Specifically, the FCC found that the City violated the 1996 Act's franchising provisions by placing a telecommunications condition on its grant of cable permits. However, the Commission found that TCI lacked standing to bring suit pursuant to section 253 because it has no present intention of offering telecommunications services in the city. Further, the FCC declined to issue a declaratory or advisory ruling as to whether Troy's telecommunications ordinance should be preempted, in whole or in part, under section 253(d).⁷⁸

However, the FCC did state that it was "concerned that Troy may be creating an unnecessary third tier of telecommunications regulation that extends far beyond the statutorily protected municipal interests in managing the public rights-of-way and protecting public safety and welfare."⁷⁹ The FCC's concern was not misplaced, as the City of Troy seemed intent on creating an extra echelon of regulation which "aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunication service is offered to the public."⁸⁰ In addition, the FCC found "especially troubling" the discriminatory application of telecommunications regulation practiced in the City of Troy, including granting the incumbent providers "most favored nation" status⁸¹ and inexplicably failing to respond to permit applications within a reasonable time.⁸²

While these municipal activities are indeed egregious, a single city's improper actions cannot be imputed to all municipalities, particularly as there is no indication that this is anything more than an isolated case. One municipality's abuse of its local franchising and management powers is not reason enough to abridge the property rights of all of our nation's cities. Unfortunately, the FCC did not address the substance of section 253's reserved municipal management powers; instead it admonished one particular city for its admittedly intolerable actions. While the Commission warned

cities not to take their management duties too far, it did not specify limits, nor did it place a dollar value on the amount that local governments can properly charge for their rights-of-way. As a result, it remains impossible to discern what course of action the FCC or the courts will take regarding the ability of municipalities to obtain the fair rental value for the use of their property.

3. GST Tucson Lightwave

Another recent case, *GST Tucson Lightwave v. City of Tucson*,⁸³ does not involve the FCC at all. Plaintiff GST Tucson Lightwave brought suit against the City of Tucson because it did not require US West to pay a 5.5 percent franchise fee required of other telecommunications providers. The United States District Court for the District of Arizona did not reach the merits, however, and granted the city's motion for judgment on the pleadings. The court found that Congress did not intend for section 253(c) to be an enforcement provision for telecommunications providers, but rather it was intended to be a defense for municipalities against claims that they had erected barriers to entry.⁸⁴ Reiterating the fact that Congress had deemed section 253(c) a safe harbor, the court found "that the regulation of public rights-of-way must be done on a competitively neutral and nondiscriminatory basis is a condition of the defense, not an element of a violation."⁸⁵ Recalling the Stupak-Barton amendment, the court noted that congressional intent was to allow states and municipalities to retain control over local rights-of-way. Further, the court cited dicta from *Classic* declaring that section 253(c) was intended to benefit state and local governments as a defense mechanism.⁸⁶

Moreover, the court found that section 253(d) allows the FCC to preempt enforcement of state and local regulations which violate section 253(a) or (b), but not subsection (c), noting that section 253(d) makes no mention of subsection (c). In addition, the court found that exclusion under subsection (c), although deliberately omitted in order to give fair compensation for the use of municipal property, was not intended to provide for private enforcement of section 253(c) by telecommunications providers. Rather, the exclusion simply prevented FCC preemption for a municipal violation. Thus, the court held that a carrier cannot sue a state or local government for charging "discriminatory" licensing or franchise fees because there exists no private right of action pursuant to section 253(c).⁸⁷ Of course, GST Tucson Lightwave plans to take the decision to the Ninth Circuit according to its Vice-President of Legal and Regulatory Affairs, Jeffrey Mayhook.⁸⁸ However, the court, by injecting some common sense into section 253's enforcement, has at least temporarily made subsection (c) a true safe harbor, which classifies the decision as a minor, but important victory for municipalities.⁸⁹

D. The Matter of Fees

Under section 253, municipalities may be forced to change their fee structures for franchises, licenses, and the like to comply with the "fair and reasonable compensation" standard forwarded in section 253(c). Currently, there is no statistical database comparing fees across local governments, and the figures that are disclosed usually have no common denominator. There is certainly no universal revenue percentage or flat fee structure in place, and each state, county, and municipality has its own method of determining compensation from telecommunications concerns. Larger telecommunications firms frequently find these differences confusing because the number of local governments employing different fee structures are as varied as the physical, economic, and societal costs of utilizing the rights-of-way. However, for municipalities to retain autonomy and managerial control over their most precious resource, it is imperative that they are allowed to implement flexible and differentiated fee-rate structures, perhaps on a firm-by-firm basis.

Some members of Congress, calling singular percentage of gross revenue structures anticompetitive, have been vehemently opposed to their assessment.⁹⁰ The rationale behind this notion seems to be that small telecommunications "upstarts" cannot afford to relinquish their earnings to pay cities for the use of city property. Fees currently range from zero to about eleven percent of gross annual revenue, with the average being around four to five percent.⁹¹ Recent examples of these fees include those of the City of Tucson, which charges most licensees/franchisees 5.5 percent of gross annual revenue from customers served within the city's limits.⁹² Further, the City of Denver reports that although it spends 500 million dollars annually to maintain its rights-of-way, it receives only 38

million dollars from telecommunications and cable providers in compensation.⁹³ Moreover, it estimates that its rights-of-way have a fair rental value of 483 million dollars.⁹⁴ However, Denver city officials are probably well aware that after the passage of the 1996 Act, talk of fee hikes may induce telecommunications providers to file preemptions with the FCC, placing city managers out of the "fair and reasonable compensation" range of section 253(c).

According to news reports, most local governments in the Orange and Seminole Counties of Florida have ordinances assessing upon telecommunications companies a one percent annual franchise fee. Lake County raised the fee to five percent in 1994; the telephone companies refused to pay, and still have not paid.⁹⁵ In general, figures provided by Congressman Stupak indicate that municipalities alone spend 100 billion dollars per year on rights-of-way management, while they only receive about three percent of that figure from all firms combined, including remittances from gas, electric, private water, telephone, and cable companies.⁹⁶

The only similarity between these different cities is that the fees are low when one considers the myriad direct and indirect costs that cities incur as a direct result of street cuts and utility damage.⁹⁷ However, a trend has recently developed among local governments to charge additional fees that will allow them to cover their costs and realize the "true value" of the area beneath their rights-of-way.⁹⁸ Unfortunately, with the 1996 Act, that effort is being thwarted by a legislature determined to undermine the power of cities to properly manage their rights-of-way and by a network of lobbyists determined to procure low-cost access to that property.⁹⁹

A Florida city proposed an ordinance to charge annual fees on construction permits for wireless facilities and modifications to such structures.¹⁰⁰ The Wireless Telecommunications Bureau immediately concluded that the ordinance would be in violation of section 253 if it had the effect of prohibiting entry of a provider or of regulating either the entry of a provider or the placement, construction, or modification of wireless facilities. The Bureau found this to be an example of a fee that was separate from a tax. The FCC is also reviewing this due to a petition before it asking for preemption of a property tax assessed by the State of Oregon based partly on the license fee a PCS provider paid the FCC.¹⁰¹

Neither the FCC nor Congress has explained why it would not also be discriminatory for cities to charge firms a flat fee. If a flat fee were to be charged, it could not be very large. Logically, only a veteran firm like AT&T would be able to absorb a high amount without difficulty and a smaller upstart firm would be financially handicapped by it. While this would be a neutral, objective way of asking for fees, doing so might present a "barrier to entry" for the smaller firm. Therefore, a city has no choice but to consistently charge that which the "lowest common denominator" firm can feasibly pay. As usual, the real loser here is the local government, which is told only that it is allowed to manage its rights-of-way by charging "fair compensation." However, the competitive neutrality mandate in section 253 dictates that whatever dollar amount is attached to the term "fair compensation," it cannot be so high that cities financially endanger a firm and run the risk of forcing it out of business. This would certainly be seen as an "anti-competitive" tactic by the FCC.

Therefore, as municipalities are left to decide how much to charge as fair compensation, many questions remain unanswered. For instance, Congress cannot expect that each municipality—from Hill City to New York City—has the ability or manpower to scrutinize the financial statements of each telecommunications firm who desires to provide service, in order to determine exactly how much each could pay while maintaining a competitively neutral stance as compared to other firms. These record-keeping tasks will leave municipal managers little time for any other management functions, one of the many harms promulgated by section 253.

III. How Section 253 Will Harm Municipalities

A. *Direct and Indirect Harms*

Section 253 must be modified by Congress, if not to avoid a taking, then to allow cities to avoid some of the serious problems that have already surfaced in the telecommunications companies' rush to exploit section 253 and similar provisions of the 1996 Act. The influx of telecommunications firms increasing the amount and frequency of digging beneath a city's streets creates expense and inconvenience on a scale that is just now being realized. According to

Frank Shafroth, Director of Policy and Federal Relations for the National League of Cities, the quality of the streets and sidewalks, the cost to repair them, and the potential loss of revenue will indeed be problems for cities and taxpayers.¹⁰² Additionally, municipalities increasingly report damaged grass and landscaping, sinkholes created by the shoddy workmanship of inexperienced company repair crews, and broken water mains and gas lines (the latter of which has potentially lethal effects).¹⁰³ It is therefore not surprising that municipal managers are frustrated by the effects of section 253 and are concerned for their cities' futures. Comments such as those from Troy, Michigan, City Attorney Peter Letzman are not uncommon: "Mr. Reed Hundt, you come out here and fix one of these broken water mains and fight your way through all this cable and see what the little communities face!"¹⁰⁴

The harms that some municipalities have already experienced are sobering. For instance, in a study commissioned by the City of San Francisco,¹⁰⁵ researchers found that the pavement aging process is significantly accelerated by increased levels of utility cuts. Three to nine utility cuts cause a thirty percent reduction in service life compared to streets with less than three cuts. Streets with more than nine cuts have a fifty percent-plus reduction in service life.¹⁰⁶ Furthermore, arterial streets (where the majority of digs occur) exhibited the most severe reduction in service life and right-of-way safety. The direct and indirect costs of these cuts will increase exponentially as companies begin fully exploiting the permissiveness of section 253.

With each additional entrant into the rights-of-way, municipalities will face increased road replacement and other costs. In addition, their constituents will also face increased travel time, loss of access and trade to local businesses, increased noise pollution, and visual intrusion—not to mention accidents from improper installation or repair (particularly by inexperienced workers with newer companies).¹⁰⁷ A catalog of true and recent occurrences tells the tale:

- In Denver, two houses were leveled and another ten damaged in an explosion caused when a construction crew cut an eleven-inch hole in a natural gas line while installing a cable television conduit;
- In San Francisco, where there had been *over a dozen* similar explosions in the preceding twelve months, a company ruptured a steam pipe underneath a downtown office building. If the explosion had occurred while the building had been occupied, hundreds of people would have been scalded;
- In Batavia, NY, telephone service for the entire city (presumably including 911 emergency service) was cut for over twenty-four hours when an inexperienced phone crew severed the main telephone cable serving the city.¹⁰⁸

Cities are especially concerned with the problems of potential accidents and accompanying liability they will face when they want to access a utility line blocked by the many wires laid by telecommunications providers.¹⁰⁹

One of the most distressing harms for cities to endure will be the loss of control over their rights-of-way. Under section 253, no factor—neither firm size nor probability of continued service nor market share—will be able to stop a telecommunications company from digging beneath a right-of-way and commingling its cable with gas mains and other installed lines. The only recourse for a municipality is to instigate a suit (or become the defendant in such a proceeding) before the FCC or in court. Congress has given no indication that the financial viability of a firm,¹¹⁰ the reputation of a firm, or community support or disdain for a firm, can be any major part of a city's decision to prohibit a firm from occupying its rights-of-way. This may lead to strange results. For example, even if a city treated every firm equally with regard to an annual revenue requirement, there would necessarily be "discrimination"¹¹¹ between the larger, higher revenue firms and smaller, break-even firms. Such a requirement would not only be impermissible under the competitive neutrality mandate of section 253(c), but would also impede the access of some firms to the city's right-of-way infrastructure, violating section 253(a). Although proponents of the Act insist that they have preserved the rights of states and municipalities to manage their rights-of-way through the "safe harbor" of section 253(c), the poorly defined competitive neutrality provision will prove to be a difficult challenge for cities.

In addition, cities are overwhelmed by new demands the Act has dealt them.¹¹² Describing section 253 and similar Act mandates as bringing on conditions "like the Oklahoma land rush," Florida city officials receive a barrage of new

visitors each day, including MCI, Intermedia, BellSouth, Ameritech, Sprint, and others, all demanding information on every public road and right-of-way.¹¹³ Cities have been forced to form alliances, hire expensive telecommunications attorneys, and redraft major sections of their municipal codes to regulate and set guidelines for the use of rights-of-way. Other cities, too inundated with demands, have placed moratoria on telecommunications construction until they can redraft their ordinances.¹¹⁴ For instance, the City Council of Pico Rivera, California, has enacted a yearlong moratorium on "the acceptance, process, or issuance of any permit for siting antennas for wireless communications."¹¹⁵ Further, according to the Cellular Telecommunications Industry Association (CTIA), nine Minnesota cities have adopted moratoria on tower siting, thanks to a state statute which permits cities to adopt ordinances prohibiting construction of new tower sites.¹¹⁶ The statute is designed to protect the planning process and the health, safety, and welfare of Minnesota's citizens. The CTIA, however, looks to the FCC to follow an aggressive implementation of the competitive policies found in the 1996 Act, such as section 253, to quell these delays.¹¹⁷

As a result of these foreseeable and unforeseeable burdens and inconveniences, cities have recently begun levying higher fees, attempting to approximate what they believe is the fair rental value for the area above, beneath, and around their rights-of-way.¹¹⁸ Many no-nonsense city officials are adamant about these new fee structures. According to Dearborn, Michigan Mayor Michael Guido, President of the Michigan Municipal League, "Cities have property. It's called rights of way. The public paid for them. They should be compensated."¹¹⁹ It is true that firms in the regulated cable television and long-distance industries—particularly new "upstarts"—stand to lose substantial revenues in fees to local governments. On the other hand, telecommunications behemoths such as AT&T, Ameritech, and MCI, continue to be protected by no-fee or nominal-fee contracts that have been in place for almost 100 years—usually drafted before the cities themselves were incorporated.¹²⁰ Undoubtedly, these telecommunications firms funded (at least in part) congressional support for section 253, knowing that having free run of the rights-of-way will keep their low-fee or no-fee contracts intact. It is difficult to imagine that this is the competitive paradigm Congress had envisioned. However, while it is unfair to smaller companies which have to pay fees while larger, existing monopolies do not have to pay, it is less fair—and unconstitutional—to force cities to give up their property rights to accommodate every firm that wants to get into the telecommunications game. Warning of this situation three years ago, Mr. Miller stated:

Local governments own valuable property that telecommunications companies want to use for their own profit, and at no charge. Local authorities must be free to balance the issues surrounding fair compensation to the community for use of its public rights-of-way, and free to set the terms, conditions, and value of that use.¹²¹

While local governments traditionally have been allowed to decide what is best for their constituents, it is clear that Congress has been lulled into an absurd sense of fairness concerning local autonomy and right-of-way management.

B. The Future of Municipal and Private Investment

What if a federal agency or branch of government, instead of giving to telecommunications companies something which ordinarily is not seen or of which few are aware, took away recreational areas from state or local governments without just compensation? The federal government could argue, as it has with section 253 right-of-way provisions, that telecommunications companies need the park space provided to them without interference from the property owner. These companies would need places to erect towers and park their vehicles, and where better than on valuable municipal ground? While this example seems outrageous, so should the fact that section 253 effectively "donates" municipal property, held in trust for tax-paying citizens, to telecommunications companies without just compensation. Cities are not eleemosynary institutions; rather they operate on strict budgets. As modern jurisprudential standards require just compensation, fairness also mandates it.

On a practical level, according to Professor Susan Rose-Ackerman, takings law should be predictable over time so that private actors can confidently commit resources to capital projects.¹²² One can infer from her analysis that the formalization of takings law, as it has occurred in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹²³ and which directly applies in the case of section 253, is a correct result. If section 253 were changed so as not to take municipal

property, both municipal and industry investors would be able to make more informed choices because the Court has provided clear standards to determine exactly when compensation will be paid.¹²⁴ Section 253 will be a speculative mandate if allowed to stand, and a dangerous precedent if its provisions are ever upheld in a court of law.

If cities are told that their most valuable resources can be given away without their approval, investment in public works most certainly will diminish. This may lead to a general apathy about developing areas which the government may have its eye on for development by other rapidly evolving industries. These costs of public policy are massive and harmful to municipalities. Courts in many jurisdictions now allow public and municipal fear of government regulation or other factors to be figured into the fair market value of appropriated property.¹²⁵ As the value of property is driven down by such elements, municipalities and their constituents will suffer. Regardless of the economic and political arguments against section 253, and despite the public safety issues and the problems of excess pollution, noise, and road repair that will increase in municipalities (largely without their permission), these are compensable where there is a constitutionally impermissible taking. Part IV addresses the history of takings law and the 1982 *Loretto* decision, in which the Supreme Court found that permanent physical appropriations, such as those which occur under section 253, must be justly compensated.

IV. Section 253 Takes Private Property for Public Use

A. Section 253 Violates the Takings Clause

The Fifth Amendment expressly mandates that if private property is taken for a public use, it must be justly compensated.¹²⁶ State governments are accordingly prohibited from taking individual or municipal property through the Due Process Clause of the Fourteenth Amendment.¹²⁷ The appropriation of municipal property under section 253, which is held in trust for the citizenry, clearly violates the Takings Clause. Government interference with property rights, such as environmental or zoning regulations, often triggers procedural and substantive due process issues. In these situations, courts typically examine three factors: (1) the character of the governmental activity; (2) the action's economic impact on an individual's property rights; and (3) the extent to which that action interferes with property owners' investment-backed expectations.¹²⁸ These cases require a legitimate purpose that is rationally related to the goal of the regulation. However, where there has been a permanent physical appropriation, such as when municipalities' property has been "given" to telecommunications carriers, a taking is immediately established.¹²⁹ In such a situation, it is the finder of fact who determines the just compensation due. The following analysis will demonstrate that when applying Supreme Court case law, a taking is clearly inherent in Congress's section 253 mandate.

B. What Is a Taking?

Two hundred years of Fifth Amendment jurisprudence has allowed the modern Supreme Court to develop a bifurcated takings doctrine.¹³⁰ In essence, the doctrine consists of a legitimacy test, which focuses on the benefits to society of the governmental action, and an impact test, which examines the harms to the landowner as part of the analysis.¹³¹ The legitimacy test requires that the action substantially advance a legitimate government interest. An action fulfilling this requirement must also pass the impact test, which adds the landowner's injury into the inquiry.

Further, the impact test is broken down into two subtests aimed at discovering whether the governmental action is extreme enough to mandate just compensation pursuant to the Fifth Amendment.¹³² The first of these determines whether the action is regulatory in nature or if it is a physical invasion. Regulatory takings reduce either the monetary value of the appropriated property or its historical value (i.e., how reasonable investment-backed expectations are or will be affected by the action).¹³³ As the United States became urbanized and residents became concerned with noxious land use and other nuisances involving governmental regulation, courts upheld statutes regulating which activities could be performed on certain parcels of land.¹³⁴ Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*,¹³⁵ has become a leading opinion supporting the proposition of awarding monetary damages for regulatory takings.¹³⁶ Justice Brennan stated that police power regulations can "destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of

property."¹³⁷ Justice Brennan went on to state:

It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.¹³⁸

Section 253 could be evaluated as a regulatory taking as Congress does not expressly prevent local governments from making use of some part of their property as part of a zoning regulation. However, because it is clear that the instant legislation works a physical invasion, section 253 is more easily evaluated as a per se physical appropriation.

Physical appropriations can be separated into temporary and permanent takings. Temporary takings began with wartime seizures,¹³⁹ and arise in situations where a legislative initiative requires property owners to part with their property for a statutorily mandated period of time.¹⁴⁰ Section 253 clearly does not fit within this category of takings as the 1996 Act does not state when municipalities can resume their "normal" managerial functions. There is nothing "temporary" about the nature of section 253. Its mandates, lacking explicit language to the contrary, are eternal in nature. Therefore, section 253 is a permanent physical taking. The history of this Supreme Court doctrine and the key cases that have marked its development are discussed in the next section.

C. Permanent Takings Case History and Loretto as

the Key Precedent

Beginning with *Pumpelly v. Green Bay Co.*,¹⁴¹ in which the State of Wisconsin built a dam which infringed upon the property rights of an individual by permanently flooding his land, the Supreme Court ruled that even though the government did not take title to Pumpelly's property, the action still required that just compensation be paid to him.¹⁴² Following that decision, the Supreme Court considered other situations dealing with takings and local governments' rights-of-way. In one such case, *St. Louis v. Western Union Telegraph Co.*,¹⁴³ the Court held that the City of St. Louis could collect reasonable compensation for a telegraph company's use of telegraph poles already located on the city's streets. The Court declared:

It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.¹⁴⁴

While this opinion allows local forms of government to exact monetary compensation directly from firms that use its rights-of-way, many of *St. Louis v. Western Union Telegraph's* progeny have held that it also applies to those cases where the government takes the property of an individual or municipality. Thus, the fair market value of that which has been taken from municipalities and given to communications firms should be calculated so cities can be compensated.

Modern courts have also relied on a 1904 Supreme Court case, *Western Union Telegraph Co. v. Pennsylvania Railroad*,¹⁴⁵ where the Court found that telephone lines actually invaded municipal property, amounting to a compensable taking.¹⁴⁶ It is interesting to note that during the time of this case and *St. Louis v. Western Union Telegraph*, local governments actively recruited entrepreneurs to connect their towns to telephone systems.¹⁴⁷

About forty years later, in *Kaiser Aetna v. United States*,¹⁴⁸ the Supreme Court found that the government had physically appropriated petitioner's marina by allowing free public access to a channel connecting the marina to navigable water.¹⁴⁹ The Court found that the government's attempt to create a public right of access to the marina was a physical invasion. Further, the Court found that this access interfered with Kaiser Aetna's reasonable, investment-backed expectations, going "so far beyond ordinary regulation . . . as to amount to a taking" ¹⁵⁰ Further, *Kaiser Aetna* referenced the aforementioned *San Diego Gas & Electric* case, in which Justice Brennan's dissent definitively

stated that just compensation is required in a regulatory situation: "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and the "self-executing character of the constitutional provision with respect to compensation" is triggered."¹⁵¹

While these cases set the stage for modern physical takings jurisprudence, one of their progeny, the landmark case of *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁵² best explains how courts should rule when the constitutionality of section 253 is addressed. In *Loretto*, a New York state statute provided that a landlord must permit a cable television company to install its facilities, in this case small hardware equipment, on and from the roof of a building located on her property. The statute further directed that a landlord may not demand payment from the company for installing its equipment on her property in excess of a one-time fee of one dollar. All of the New York courts upheld the statute, holding that it served legitimate police powers and state interests for the purpose of eliminating landlord fees and other conditions which would prohibit the development of cable television. However, the United States Supreme Court found that the New York statute worked a taking of a portion of appellant's property for which she was entitled to just compensation under the Fifth Amendment.¹⁵³ The Court unequivocally stated: "[w]e conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."¹⁵⁴

It is clear that the language of section 253 will trigger the same court reaction as did the New York statute in *Loretto* because it authorizes a permanent physical occupation of that which rightfully belongs to a municipality: the area around its rights-of-way. The language of section 253(a), "No State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service,"¹⁵⁵ clearly forbids municipalities from excluding a telecommunications provider from laying cable under the streets or from using new or existing poles. Assuming local governments own (in trust) the rights-of-way in fee, section 253 prohibits local governments from denying access to the streets, which is clearly an appropriation of their right to exclude others—one of the sticks in their bundle of property rights. Thus, there exists a permanent physical occupation and a compensable taking.

In *Loretto*, the Court found that private property was taken for a public use simply by looking at the nature of the cable company's physical invasion. The cable installation on the owner's building was a taking under the traditional physical test as it involved the attachment of hardware, and thus, occupied space. Also, property was taken for public use as the entire community received the benefit of receiving cable television signals. Similarly, section 253 appropriates municipal property, giving it to telecommunications concerns with almost no restriction, in the name of "furthering the telecommunications infrastructure for all" and "eliminating competition." The public use requirement is satisfied if nonowners will actually use the appropriated property.¹⁵⁶ Some of the beneficiaries of section 253 are non-owners, particularly the telecommunications industries. Therefore, no matter how beneficial such a network might be, the American public must receive just compensation for the value of their appropriated property.¹⁵⁷

While the Supreme Court often upholds even substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest,¹⁵⁸ section 253 goes significantly beyond the judicially permissible arena of legislation and subjects municipalities to a physical intrusion by government. This is, in the words of the *Loretto* Court, "[an invasion] of an unusually serious character for purposes of the Takings Clause."¹⁵⁹

In *Loretto*, the Court noted the similarities between *Western Union Telegraph* and *Loretto*. It also noted the significance of post-*Western Union Telegraph* cases which:

relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.¹⁶⁰

This even more specific description of the circumstances in which there is a taking directly applies to the situation at hand, where Congress has "given" telecommunications concerns the right to physically and permanently occupy the

property of municipalities. While the amount of space taken by section 253, as in *Loretto*, may seem "insubstantial," that fact is inconsequential. The *Loretto* Court noted:

[A]n owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury.¹⁶¹

While section 253 does not expressly give telecommunications concerns complete dominion over the entire area beneath a local government's rights-of-way, it appropriates space that city managers could use, if they wished, for other purposes. Whether or not they would actually do so or have other options for use of the rights-of-way is inconsequential. The New York cable company did not seize Mrs. Loretto's entire apartment building. There was only a small, but direct physical attachment of plates, boxes, wires, bolts, and screws occupying space on and above her roof and along the exterior wall of the building.¹⁶² The Supreme Court, in *Loretto*, explained why the size and the magnitude of the permanent physical appropriation should not make a difference to the takings analysis:

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. . . . But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.¹⁶³

Loretto indicates that governmental actions which amount to permanent physical appropriations are particularly serious and actionable offenses. The Supreme Court contended that a permanent physical occupation is perhaps the most serious form of governmental invasion because it does not simply take a single stick from the bundle of property rights, but "chops through the bundle, taking a slice of every strand."¹⁶⁴ Further, the *Loretto* Court appreciated the helplessness of a property owner in such situations, stating: "the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, *but can make no nonpossessory use of the property.*"¹⁶⁵ If section 253 is allowed to stand as written, the government effectively precludes municipalities from using the rights-of-way for another purpose. As the federal government forces cities to give up a portion of the limited area beneath their rights-of-way, it necessarily prevents them from leasing to others space which is rightfully theirs to lease or not to lease at all.

The Supreme Court is not alone in addressing the takings issue. Constitutional scholars, particularly in the eminent domain arena, have addressed the subject with zeal. Early in this century, astute legal observers, basing their comments on opinions culled from the highest courts, established that, "[a]ny invasion of property . . . either upon, above or below the surface, and whether temporary or permanent, is a *taking*: as by constructing a ditch through it, passing under it . . . or extending structures over it, [such] as a bridge or telephone wire."¹⁶⁶ Further, Professor Frank Michelman has commented, "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership."¹⁶⁷ While it is not clear if Professor Michelman's reference to "private ownership" would be applied by him in the instant situation, the taking inherent in Section 253 certainly seems to comport with the prohibition forwarded in his and other analyses. Thus, regardless of Supreme Court precedent and other scholarly analysis, Congress has written a piece of legislation allowing telecommunications firms to permanently occupy the rights-of-way of municipalities, which amounts to a Fifth Amendment taking requiring just compensation. This Note concludes with a discussion of why "fair" compensation, which was superficially discussed by Congress, is not the same as the "just" compensation mandated by the Supreme Court where there is, as here, a taking.

V. Fair vs. Just Compensation: How Should Municipalities Determine the Appropriate Value To Place on Their Rights-of-Way?

With section 253 clearly in violation of the Fifth Amendment, Congress has two options. It can repeal and rewrite section 253 so that municipalities and their constituents can determine which and how many carriers will occupy their rights-of-way and also allow them to charge the fair rental value for that area. Congress could also, admitting the existence of a taking, pay local governments just compensation either from the government's own coffers, or by extracting fees or taxes from the telecommunications service provider, the primary beneficiary of the legislation. This last Part briefly discusses "fair" and "just" compensation and how the two differ. It then suggests several valuation methods that a city might employ to determine the value of its own right-of-way infrastructure.

A. "Fair Compensation"

As with the issue of fees,¹⁶⁸ Congress has not suggested anything definitive or even helpful vis-à-vis the appropriate "fair compensation" figure for municipalities' rights-of-way. It may be suggested that Congress purposely does not supply a definition in order to give municipalities that management control. However, with the FCC adjudicating matters as it did in *Classic*, it is clear that a fee structure that does not take into account each financial factor pertaining to every telecommunications provider would be taken before the FCC as a barrier to entry, a discriminatory action, or a franchise decision not made with competitive neutrality in mind.

Congress provided few clues as to what it thought were appropriate guidelines for municipal fee structures. Congressman Stupak decried the amount that cities have been receiving from all utilities on an annual basis (three percent) yet failed to suggest what figure he thought would be more fair.¹⁶⁹ Congressman Fields' ruminations, that in many cities, incumbent telephone companies pay nothing because of century-old contracts which cities have never tried to "correct," seem to imply that contracts between large telecommunications carriers and cities are voidable or breachable at will, a notion which obviously does not comport with traditional contract theory. Knowing the deep pockets of large telecommunications providers and the power they wield in congressional circles, it is not surprising that municipalities have not tried to nullify these long-standing contracts. On the whole, Congress did not give any indication of what it thought was "fair compensation," purporting to leave the matter to municipalities. However, it is certain that this ambiguous mandate will be among the first brought to the FCC by disgruntled telecommunications carriers, large and small, looking to avoid any municipal control of rights-of-way.

While Congress believes that "fair" compensation should be enough to satisfy municipalities who have some of their most significant property rights taken away, it is understandable why many municipalities do not see "fair compensation" as fair at all. While congressmen in legislative debate repeatedly stated that the terms of the Stupak-Barton amendment were "supported by cities," they failed to mention that the amendment might have been supported only because the other option on the floor was an unfunded mandate allowing cities to charge only a one-time flat fee to telecommunications providers.¹⁷⁰ As that mandate threatened to appropriate over 100 billion dollars from local governments,¹⁷¹ it is not surprising that municipalities threw their support behind the Stupak-Barton amendment. Cities are not satisfied with merely recouping the cost of tending the rights-of-way, but believe—and rightfully so—that users of municipally-controlled rights-of-way should also pay "rent" in the form of fees that reflect market value. Congress, which is composed largely of lawyers, should understand that just compensation is the appropriate remedy when land is taken for public or recreational purposes, such as for a park. Why should takings under section 253 be any different?

It is clear that advocates of municipality rights, such as Frank Shafroth of the National League of Cities, are unhappy with recent congressional forays into the issue of fees and taxes:

For city leaders, the proposal marks not only one of the most severe threats to federalism—in a year when at least one candidate for the Presidency claims to carry a copy of the 10th Amendment with him in his inside coat pocket, and leaders in Congress have talked non-stop about devolution, turning over greater power and authority to state and local governments, but also it would result in unprecedented power in a federal agency [the FCC] that, . . . has been largely non-responsive to municipal issues and concerns.¹⁷²

Attorney Nicholas Miller, representing municipalities, has stated that industry representatives and lobbyists will continue to induce states to establish rules requiring zero compensation for right-of-way usage and to eliminate local

taxes and franchise fees, which could amount to a 20 billion dollar loss to cities.¹⁷³ Without an immediate call for just compensation to be paid by governments, or for fair rental value to be paid by telecommunications concerns, this lobbying perhaps could take the appropriation mentality behind section 253 to these aforementioned extremes. Cities contend they are not "gold-digging," but are simply seeking compensation for experiencing property damage, enduring the constant harassment of telecommunications firms, and losing control over their rights-of-way. Cities also state that they want to value the area beneath their rights-of-way in terms of "just compensation" which, considering the language of the Fifth Amendment, is a reasonable request.¹⁷⁴

B. "Just Compensation"

While the concept of "just compensation" has been analyzed more than that of "fair compensation" (the latter of which is particular to section 253), courts and commentators still have not come to a consensus about what it comprises in many circumstances. Unfortunately, the most peculiar of these valuation situations usually occurs in the context of valuing rights-of-way. There are, however, judicial decisions and economic opinions that provide a starting point for analysis.

In *United States v. 563.54 Acres of Land*, the Court stated that market value is generally a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole.¹⁷⁵ Further, in *United States v. 50 Acres of Land*, Justice Stevens stated that the Fifth Amendment requires the United States government to pay "just compensation," which is normally measured by fair market value, whenever it takes private property for public use.¹⁷⁶ This concept is exemplified by a phrase the Court used in describing just compensation in terms of fair market value forty years hence in *United States v. Miller*: "what a willing buyer would pay in cash to a willing seller."¹⁷⁷

The Supreme Court also has stated that just compensation could be measured by calculating "the market value of the property at the time of the taking contemporaneously paid in money."¹⁷⁸ These methods of valuing rights-of-way suggest that fair market value is the determinative factor in placing a number on just compensation. It is obvious from the competitive neutrality and nondiscrimination mandates in section 253 that municipalities will not be allowed, without FCC or court interference, to use fair market value in pricing their rights-of-way. With section 253 in place, the compensatory scheme that will arise out of the telecommunications companies' complaints will undoubtedly be a windfall to the telephone and cable industries and a loss to municipalities.

Some local governments have already begun taking action in revaluing their rights-of-way. Orange and Seminole Counties in Florida have begun writing ordinances allowing their municipalities to exact fees more approximate of fair market value. Those particular counties are looking at fees based on the number of linear feet of public property each company uses,¹⁷⁹ a practice that is becoming standard for most municipalities. If appropriately priced, market-based methods will be fairer to municipalities in collecting a fair rental value for their rights-of-way. The next section details ways in which municipalities might calculate this amount.

C. Methods Municipalities Should Consider for

Right-of-Way Valuation

It is difficult to value the area comprising the rights-of-way because it is seldom, if ever, traded on any sort of market. However, local governments have begun an attempt to place a dollar value on the area beneath their rights-of-way. Municipalities should take the initiative and begin using cost accounting principles to allocate their right-of-way management costs to telecommunications concerns. Using rudimentary cost accounting methodology, cities should put precise direct costs (e.g., a certain utility cut on a certain day) into a different "bucket" for each firm. Indirect costs should then be apportioned in a similar manner. For instance, if a sidewalk buckles, the firms who had been digging in the area during the relevant period will be assessed a pro rata portion of the repair cost. Cities will be forced to think about the differences between telecommunications providers and others who use the area beneath the rights-of-way (e.g., water and gas providers) to determine whether they want to begin charging all users of the rights-of-way on a pro rata basis.

The methods of right-of-way valuation are varied and the one a municipality will use will depend on the sophistication and number of municipal managers, their computer and spreadsheet capabilities, the number of right-of-way occupants in a city, the relevant population base, and the location of the local government in the national telecommunications infrastructure.

1. Fair Market or Rental Value

One method for municipalities to consider in valuing their rights-of-way is simply to add up the direct and indirect maintenance costs to municipalities and the nuisances imparted on the citizens (e.g., noise and traffic problems). This is similar to the aforementioned "bucket" method used in cost accounting. To calculate direct costs, municipalities should aggregate all of their right-of-way management costs and assess them on the various utilities on a pro rata basis. For instance, if a city could determine that it spent fifty percent of its management dollars resurfacing roads as a direct result of repeated utility digs, it could discern which utilities and telecommunications service providers cut into certain rights-of-way, how profoundly it did so, and how many times it did so, assessing that fifty percent on a pro rata basis among the relevant players.

It has been suggested that the best way to calculate indirect costs of use of the rights-of-way (such as accidents, an increase in vehicle operating costs, and psychological costs) is to rate areas being used according to the potential for societal impact caused by increased utility digs.¹⁸⁰ Although somewhat subjective, the rating would directly impact how utility projects would be assigned fees and would build into that fee structure incentives for telecommunications firms to use methods with the lowest total societal costs.¹⁸¹

The fair rental value method assumes a hypothetical lease arrangement between the telecommunications provider and the local government, which would use the difficult-to-discern "fair market value" of the space occupied, or the opportunity cost of not having the space available for its own use. Rental value figures would be based on assumed future uses and value.¹⁸² The calculations could be based upon the property value at its actual level of use prior to the taking, the value at the most restrictive level of use (the constitutionally-permissible floor), or the value at all available uses (the highest and best use).¹⁸³ The latter value is the one preferred by eminent domain theorists and jurists.¹⁸⁴

2. Opportunity Cost

The value of a right-of-way can be determined by the lost opportunity of having it available. However, using that valuation method forces an assumption that there are other utilities or services that would otherwise use the right-of-way. These hypothetical utilities and services would either be those whose revenue completely accrued to the municipality, or those which would be willing to pay a given value to which the telecommunications provider's payment could be compared. This probably would be a difficult valuation method in many American towns and cities as there is often only one water company, one gas company, and one electric company. That simple fact would drive down the value of having the right-of-way available because there would be few opportunities inherent in such a situation. The space that would have been taken up by the telecommunications carrier would simply stand idle.¹⁸⁵ Thus, local governments might want to value their rights-of-way based on the highest or marginal amount a telecommunications provider would pay before laying their cable elsewhere.¹⁸⁶ Thus, fair market value could be viewed as the opportunity cost to a telecommunications concern for using municipal rights-of-way instead of those belonging to a railroad or other private entity.

3. Option Value¹⁸⁷

Some courts "have determined that compensation for a temporary regulatory taking is the value of an option to purchase the property for the period of time during which the regulation was in effect."¹⁸⁸ However, as discussed earlier, with section 253, the time period is eternal because it is a permanent physical appropriation. Thus, option value might be treated like a perpetuity and capitalized at the market rate of return. By treating property as having option characteristics, municipalities can calculate the hypothetical value of keeping vacant the space appropriated by telecommunications companies, much like the opportunity cost situation. Municipalities would be asked, in theory, to "bet," as do options traders on an exchange, on what the chances are that a better rental opportunity would exist but for

the presence of the telecommunications service providers in the rights-of-way. Unfortunately, the esoteric nature of the right-of-way option situation, for which there is no formalized market or exchange (yet), would make it unattractive for municipalities both in terms of calculation and governmental approval.

VI. The Immediate Future

As matters currently stand, and with many questions about section 253 and the 1996 Act long from being settled, most cities should supplement existing telecommunications ordinances with amendments covering situations barred by section 253. These ordinances would be best if kept simple, perhaps specifying the minimum financial and physical requirements necessary for a firm to use the city streets. In this way, municipalities would avoid snaring themselves in the section 253(a) or (b) traps that captured Hill City and Bogue, Kansas, in the *Classic* decision. Currently, some states are fighting back, angry about how cities and towns are losing their local management powers and are being mistreated by Congress and telecommunications providers.¹⁸⁹ Municipalities and states must continue to band together to fight the preemption petitions filed with the FCC and the complaints filed in United States District Court. Through commendable federal court action like that in *GST Tucson Lightwave*, perhaps local governments can enable Congress to see section 253 for what it really is: a permanent physical appropriation which must be compensated. With the unprecedented building of telecommunications infrastructures, communities will continue to fight the federal government and telecommunications companies over the extent of their management powers pursuant to section 253. As one attorney has noted: "We are looking at perhaps the largest public works project ever over the next 20 years. The cities can't simply step aside."¹⁹⁰

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1. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) Regulatory versus per se takings will be discussed *infra* Part IV.B.

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

3. Statement by President William J. Clinton Upon Signing S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 8, 1996), *reprinted in* 1996 U.S.C.C.A.N. 228-1 [hereinafter President Clinton's Statement].

4. *Id.*

5. *Id.*

6. This Note uses the terms "local forms of government" or "local governments" as including all state, county, and city governments. As the most profoundly affected of these groups will be cities or municipalities, these forms will be used most often.

7. Telecommunications Act of 1996, sec. 101(a), § 253, 47 U.S.C.A. § 253 (West Supp. 1997).

8. The Fifth Amendment reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

9. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

10. 47 U.S.C.A. § 253(a)-(d).

11. *Id.* § 253(c).

12. *See e.g.*, *GST Tucson Lightwave, Inc. v. City of Tucson*, 950 F. Supp. 968 (D. Ariz. 1996); TCI Cablevision of

Oakland County, Inc., *Memorandum Opinion and Order*, 1997 WL 580831 (1997) [hereinafter *TCI Memorandum Opinion and Order*]; Classic Tel., Inc., *Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, 4 Comm. Reg. (P & F) 1062 (1996) [hereinafter *Classic Memorandum Opinion and Order*].

For an interesting and in-depth view of the arguments of individual cities and telecommunications concerns, see TCI Cablevision of Oakland County, Inc., *Petition for Declaratory Ruling* of PROTEC (petition date Sept. 4, 1996); Implementation of Section 302 of the Telecomm. Act of 1996, *Petition for Reconsideration* of the National League of Cities (petition date July 5, 1996); Reply Comments of the National League of Cities, to the *Report and Order and Notice of Proposed Rulemaking* in CS Dkt. 96-46 (Apr. 11, 1996); Comments of the National League of Cities, to the *Report and Order and Notice of Proposed Rulemaking* in CS Dkt. 96-46 (Apr. 1, 1996).

While some of these motions deal with section 302 of the 1996 Act, concerning Open Video Systems (one of the options available to a local exchange carrier wishing to provide video programming to subscribers), the relevant property interest and takings issues argued are similar in form and substance to those raised concerning section 253.

13. Nicholas P. Miller, *Local Government: The Silent Investor in Wireline Telecommunications Networks*, in *Local Government Roles and Choices on the Information Superhighway: Tenants or Architects of the Telecommunications Future?* 20 (1994).

14. *Id.* at 21.

15. *See* *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (finding that the term "private property" in the Fifth Amendment's Takings Clause encompasses the property of state and local governments, and the same principles of just compensation apply to those claims as they do to those of individual citizens).

16. Miller, *supra* note 13, at 22.

17. *Id.*

18. *Id.*

19. This Note will not discuss extensively the franchise issues that emerged with the promulgation of the 1996 Act other than for a brief discussion of the *TCI Cablevision of Oakland County, Inc.* case and fees, *infra* Parts II.C.2. and II.D., and will not address the differences between franchised telecommunications providers and those which simply pay access fees to local governments.

20. Miller, *supra* note 13, at 21. The latter two services are wireless and use towers and relay stations. Some of the unique properties of wireless transmissions media raise issues that place them beyond the scope of this analysis. For simplicity, only wireline media and cable or wire existing above, below, or around a local government's rights-of-way will be explicitly discussed in this Note. However, the concepts formulated here are applicable, with modification, to wireless services and to some of their aspects, including physical installations on municipality property not located in rights-of-way, which will be briefly discussed *infra* Part IV.B.

21. *See, e.g., Pole Owners Call Cable Mature; Cable Calls Pole Owners Anticompetitive*, *Comm. Daily*, July 1, 1997, at 2.

22. *See* President Clinton's Statement, *supra* note 3.

23. The "management activities" allowed by and within the scope of section 253 appear quite limited. The Act explicitly states that cities no longer have the right to prohibit any entity from providing telecommunications service. This mandate would include prohibiting a firm from entering the area beneath its streets. According to the first opinions to be docketed in this matter, "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry" *Classic Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, para. 38, 4 Comm. Reg. (P & F) 1062 (1996).

Congress attempted to list some of the permissible right-of-way management functions that cities would still be allowed to perform after section 253 was enacted. The most permissive include: (1) regulating the time or location of excavation to preserve effective traffic flow or hazardous road conditions; (2) requiring a company to place its facilities underground, rather than on poles above the streets; (3) enforcing local zoning regulations; and (4) requiring a company to indemnify the city against any claims of injury arising from a company's excavation. *See* 141 Cong. Rec. S8172 (daily ed. June 12, 1995).

24. *See generally* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995).

25. *See* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1 (1996).

26. Although the FCC indicated in the *Classic Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, paras. 40-42, 4 Comm. Reg. (P & F) 1062, that it does not have authority to rule on disputes in which section 253(c) (the "safe harbor" provision) is triggered, it is unclear how other tribunals will rule. As will be seen *infra* Part II.C.3., the Ninth Circuit has found that section 253(c) is not an offense for telecommunications firms, but is rather a defense for cities. Regardless of which entity has jurisdiction, section 253(a) still prohibits state and local governments from preventing any entity from providing service. Absent a Supreme Court decision, this Note assumes that as the statute expressly states, the FCC has the power to enforce section 253 in its entirety. Even if section 253(c) were under the jurisdiction of the federal courts, this Note asserts that they would ultimately find a taking pursuant to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), which is discussed in detail *infra* Part IV.

27. Telecommunications Act of 1996, sec. 101(a), § 253(b), 47 U.S.C.A. § 253(b) (West Supp. 1997).

28. *Id.*

29. 47 U.S.C.A. § 253(c).

30. *Id.*

31. *See* 141 Cong. Rec. S8172 (daily ed. June 12, 1995).

32. 47 U.S.C.A. § 253(d).

33. *Farquhar Discusses Tower Siting, Universal Service and Other Bureau Priorities at FCBA Luncheon*, Dec. 5, 1996, available in 1996 WL 699830.

34. *Id.*

35. *Classic Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, 4 Comm. Reg. (P & F) 1062 (1996).

36. *Id.*

37. Frank Shafroth, *FCC Sets Precedent for Local Authority Under Telecom Law*, *Nation's Cities Wkly.*, Oct. 7, 1996, at 13.

38. *Id.*

39. *Id.*

40. *FCC Makes Use of 'Preemption' Authority, Overturns Kansas Franchise Rejections*, *Telco Competition Rep.*, Oct. 10, 1996.

41. *Id.*

42. *Id.*
43. *Classic Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, para. 29, 4 Comm. Reg. (P & F) 1062 (1996).
44. *Id.*
45. *Id.*
46. In fact, the cities, cognizant of Kansas and federal law prohibiting the grant of exclusive franchises, argued that they were not excluding all firms except Rural, but were simply denying the franchise of an applicant (Classic) that was not qualified to provide telecommunications services. The FCC denied that argument, stating only that it found that Classic was qualified. *Id.* para. 19.
47. *Id.* para. 26.
48. *Id.* para. 33 (emphasis added).
49. *Id.*
50. *Id.* para. 50.
51. *Id.* para. 23.
52. *Id.* para. 28.
53. *Id.* para. 25
54. *Id.*
55. *Id.* para. 37.
56. Telecommunications Act of 1996, sec. 101(a), § 257, 47 U.S.C.A. § 257 (West Supp. 1997).
57. *Classic Memorandum Opinion and Order*, 11 FCC Rcd. 13,082, para. 15, 4 Comm. Reg. (P & F) 1062.
58. *Id.* (quoting 47 U.S.C.A. § 253(a)).
59. *Id.* para. 42.
60. *Id.* para. 7.
61. *Id.* para. 28 (emphasis added).
62. *See generally* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995); 141 Cong. Rec. S8172 (daily ed. June 12, 1995).
63. As of March 7, 1997, Hill City and Bogue have ignored the FCC's request that they "expeditiously" reconsider Classic's franchise application. John Seiver, an attorney representing Classic, stated: "Ignoring the FCC's order is the same as rejecting the franchise. We want an injunction. We want sanctions. This is ridiculous. It's like dealing with a disobedient child. The FCC has got to put its foot down." Joe Estrella, *Cable-Telco Seeks Sanctions on Towns*, Multichannel News, Dec. 16, 1996, at 16. Classic is asking the FCC to impose financial sanctions of \$250,000. *Id.*; *see also Classic Still Wants Franchises but Won't Buy Kansas Exchanges*, State & Local Comm. Rep., Mar. 7, 1997.
64. *TCI Memorandum Opinion and Order*, 1997 WL 580831 (1997).
65. TCI Cablevision of Oakland County, Inc., *Petition for Declaratory Ruling of PROTEC* (petition date Sept. 4, 1996).

66. Ted Hearn, *FCC in Deadlock on Troy Dispute*, Multichannel News, Mar. 31, 1997, at 56.
67. Barrie Tabin, *Municipal Leaders Defend Local Authority Before FCC*, Nation's Cities Wkly., Dec. 23, 1996, at 1, 19 (emphasis added).
68. *Id.*
69. *Id.*
70. TCI Cablevision of Oakland County, Inc., *Petition for Declaratory Ruling of PROTEC*, (petition date Sept. 4, 1996).
71. *Id.*; Hearn, *supra* note 66, at 1; *see generally* 141 Cong. Rec. S8172 (daily ed. June 12, 1995).
72. Hearn, *supra* note 66, at 1.
73. *Id.*
74. *FCC Still Wrestling with Basic Concepts of Preemption of Local Rules*, Comm. Daily, July 2, 1997, at 2.
75. *Id.* at 1.
76. TCI Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, 1997 WL 580831 (1997).
77. *Id.* para. 5.
78. *Id.* para. 7.
79. *Id.* para. 8.
80. *Id.* para. 105.
81. *Id.*
82. *Id.* para. 76. One of TCI's permit applications was not addressed by the City for 10 months.
83. *GST Tucson Lightwave*, 950 F. Supp. 968 (D. Ariz. 1996).
84. *Id.* at 970.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Court Says GST Can't Sue Tucson over Entry Barriers*, Telecomm. Rep., Jan. 13, 1997, at 16.
89. *See* Barrie Tabin, *Local Authority Gets a Boost from Federal Court Decision*, Nation's Cities Wkly., Jan. 27, 1997, at 1.
90. *See* 141 Cong. Rec. H8461 (daily ed. Aug. 4, 1995) (comments of Rep. Fields) ("[T]hat fee [11% of gross revenues] becomes a cost of doing business for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive.") Congressman Fields did not expound upon why he believes that telecommunications concerns should not have to incur such costs, while almost all other providers of goods and services must pay entry costs (including those for research and development, plant, property and equipment, advertising, raw materials, and

other inventory) simply to enter an industry and be operational.

91. *Id.* (Comment of Rep. Fields); Rene Stutzman, *Counties Don't Dig Phone Line Upheaval*, Orlando Sentinel, Aug. 12, 1996, at 9.

92. *GST Tucson Lightwave v. City of Tucson*, 950 F. Supp. at 969 (1996). US West paid no license or franchise fee to the city and GST Tucson Lightwave, a newcomer, was subjected to the fee. *Id.* In that case, the district court did not arrive at the merits because it found that, under section 253(c), GST Tucson Lightwave had no private cause of action against the municipality for managing its rights-of-way as it saw fit. *Id.* at 971 n.4.

93. Anthony Crowell, *Local Government and the Telecommunications Act of 1996*, Pub. Management, June 1996, at 7. The article did not discuss how city managers arrived at the above-mentioned figure.

94. *Id.*

95. Stutzman, *supra* note 91, at 9.

96. 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995).

97. For a discussion of the harms caused by street cuts, see *infra* Part III.

98. Bryan Gruley, *Disputed Call: Detroit Suburb Sparks Fight by Levying Fees on Telecom Concerns*, Wall St. J.-Europe, Dec. 24, 1996, at 1.

99. Miller, *supra* note 13.

100. *WTB Responds to CTIA's Request for Rule Clarification on State, Local Authority*, Mobile Phone News, Jan. 20, 1997.

101. *Id.*

102. Patricia Horn, *Phone Hangups: Cities Find Themselves Blindsided by Effects of Deregulation*, Sun-Sentinel (Ft. Lauderdale), Oct. 13, 1996, at 1G.

103. Gruley, *supra* note 98.

104. *Id.*

105. Ghassan Tarakji, *City of San Francisco, The Effect of Utility Cuts on the Service Life of Pavements in San Francisco: Study Procedures and Findings* (San Francisco State University 1995).

106. *Id.* at 6.

107. National Ass'n Of Telecomm. Officers And Advisors, *Local Rights-of-Way Management: Coordination Essentials and Cost Analyses 1* (1995).

108. *Id.* at 5.

109. Tabin, *supra* note 67, at 19.

110. This number should include the certain direct and psychological costs associated with accommodating a firm's need to cut open the rights-of-way, only to have the firm fail and close out its books in a year. Citizens are then forced to change carriers, and cities must then either find buyers for the firm's cable or dig up the cable so its space can be used by other telecommunications companies or utilities.

111. Section 253(c) allows municipal management of rights-of-way only if done on a nondiscriminatory basis.

Telecommunications Act of 1996, sec. 101(a), § 253(a), 47 U.S.C.A. § 253(c) (West Supp. 1997).

112. Horn, *supra* note 102 (describing the Act's effects on Florida cities as a "stealth bomber: barely seen until it already passed").

113. *Id.* (quoting Chris Barton, a Fort Lauderdale City planner).

114. *Id.* Incidentally, the legality of this action is questionable under section 253 as it prevents firms from laying cable, and thus, from obtaining access to rights-of-way. Is a city acting with competitive neutrality if it bars new firms from laying cable while permitting firms already there to continue operating? Perhaps to remedy this "discriminatory" situation, the congressional solution would be to turn off all phone service.

115. *Groups Seek FCC Protection from State, Local Officials*, TR Wireless News, Jan. 9, 1997, available in 1997 WL 8252744.

116. *Id.*

117. *Id.* CTIA Executive Director Thomas Wheeler states, "[T]he smart lawyers for city governments came up with moratoria as a sort of `limbo'" for citing applications, calling them a "subterfuge" to "get around" the instructions of Congress. *Id.*

118. Horn, *supra* note 102.

119. *Cable Firms, Towns Square Off in Suit over Public Lands: Officials in Two Detroit Suburbs Say the Companies Are Misinterpreting the Rules*, Grand Rapids Press (Mich.), Oct. 14, 1996, at B3.

120. *Id.* These "fees" are in addition to the base tax local forms of government are allowed to assess on municipalities.

121. Miller, *supra* note 13, at 24.

122. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 Colum. L. Rev. 1697, 1700 (1993).

123. Loretto, 458 U.S. 419 (1982).

124. Rose-Ackerman, *supra* note 122, at 1700.

125. *See, e.g.*, Florida Power & Light Co. v. Jennings, 518 So. 2d 895, 898 (Fla. 1987) (where the Florida Supreme Court citing Willsey v. Kansas Power & Light Co., 6 Kan. App. 2d 594, 605-07 (1981) stated: "We join the majority of jurisdictions . . . and hold that the impact of public fear on the market value of the property is admissible without independent proof of the reasonableness of the fear.").

126. U.S. Const. amend. V.

127. U.S. Const. amend. XIV.

128. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

129. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

130. *See* Jeffrey Evans Stake, *Loss Aversion and Involuntary Transfer of Title*, in *Law And Economics: New And Critical Perspectives* 331, 342 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

131. *Id.*

132. *Id.*

133. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (where the Supreme Court held that a regulation barring coal mining under an inhabited area, even without physical invasion of the property, could fit within the Fifth Amendment taking prohibition); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
134. See generally *Stake*, *supra* note 130, at 346.
135. *San Diego Gas & Elec.*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).
136. Margaret Teresa Harris & John Patrick Parker, Note, *Compensable "Takings"—and Why Not? An Analysis of the Fifth Amendment Just Compensation Clause and Police Power Regulatory "Takings"*, 10 Am. J. Trial Advoc. 365, 383 (1986).
137. *San Diego Gas & Elec.*, 450 U.S. at 652.
138. *Id.* at 653.
139. For an interesting treatment of this topic, see Dennis H. Long, Note, *The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law*, 72 Ind. L.J. 1185 (1997).
140. Most recently, these cases have involved initiatives such as the "Rails to Trails" program. See, e.g., *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). For an analysis of the cases dealing with this complex program, see Long, *supra* note 139.
141. *Pumpelly*, 80 U.S. 166 (1871).
142. *Id.* at 171.
143. *St. Louis v. Western Union Tel.*, 148 U.S. 92 (1893).
144. *Id.* at 101-02.
145. *Western Union Tel. v. Pennsylvania R.R.*, 195 U.S. 540 (1904).
146. *Id.*
147. See *supra* Part II.
148. *Kaiser Aetna*, 444 U.S. 164 (1979).
149. *Id.*
150. *Id.* at 178.
151. *San Diego Gas & Elec. Co v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980) (quoting 6 J. Sackman, *Nichols' Law of Eminent Domain* § 25.41 (rev. 3d ed. 1980))).
152. *Loretto*, 458 U.S. 419 (1982).
153. *Id.*
154. *Id.* at 426.
155. Telecommunications Act of 1996, sec. 101(a), § 253(a), 47 U.S.C.A. § 253(a) (West Supp. 1997).

156. Keith W. Bricklemeyer & David Smolker, *Inverse Condemnation*, in *Current Condemnation Law: Takings, Compensation & Benefits* 54, 56 (Alan T. Ackerman et al. eds., 1994).
157. *United States v. 50 Acres of Land*, 494 U.S. 24, 31 (1984); *United States v. Carmack*, 329 U.S. 230, 242 (1946) ("[W]hen the Federal Government . . . takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."). Exactly how municipalities should go about valuing the area above, below, and around their rights-of-way will be discussed *infra* Part V.C.
158. *Loretto*, 458 U.S. at 426.
159. *Id.*
160. *Id.* at 430 (citing *Lovett v. West Va. Cent. Gas Co.*, 65 S.E. 196 (W. Va. 1909); *Southwestern Bell Tel. Co. v. Webb*, 393 S.W.2d 117 (Mo. Ct. App. 1965); *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922)).
161. *Loretto*, 458 U.S. at 436.
162. *Id.* at 422.
163. *Id.* at 436-37.
164. *Id.* at 435 (citing *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).
165. *Id.* at 436 (emphasis added).
166. *Id.* at 430 n.7 (quoting 1 J. Lewis, *Law of Eminent Domain in the United States* 197 (1988)).
167. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967); *see also* Jesse Dukeminier & James E. Krier, *Property* 1165 (3rd ed. 1988).
168. *See supra* Part II.D.
169. 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak).
170. *Id.*
171. *Id.*
172. Frank Shafroth, *NLC Defends Local Authority in Open Video Systems Challenge*, *Nation's Cities Wkly.*, Oct. 14, 1996, at 16.
173. *Local Govts. Prepare Fight for Authority at State Level*, *Warren's Cable Reg. Monitor*, Sept. 16, 1996, available in 1996 WL 10832573.
174. Gruley, *supra* note 98.
175. *564.54 Acres of Land*, 441 U.S. 506 (1979).
176. *50 Acres of Land*, 469 U.S. 24, 26 (1984).
177. *Miller*, 317 U.S. 369, 374 (1943).

178. *Olson v. United States*, 292 U.S. 246, 255 (1934).

179. Stutzman, *supra* note 91, at 9.

180. Raymond L. Sterling, Minnesota Department of Transportation, Study of the Indirect Costs of Utility Placement and Repair Beneath Streets (Aug. 1994) (on file with author).

181. *Id.*

182. See J. Margaret Tretbar, Comment, *Calculating Compensation for Temporary Regulatory Takings*, 42 U. Kan. L. Rev. 201 (1993).

183. *Id.* at 223.

184. *Id.*

185. This theory does not take into consideration the enormous cost to the community of not having the telecommunications provider's cable beneath the street at all. In that case the municipality's residents would have to rely on wireless services, the cost of which would probably be significantly more (and the feasibility of which would have been zero several years ago).

186. Again, this proposition is theoretical as without wireless services, telecommunications carriers would have to resort to using another right-of-way infrastructure, such as that belonging to the railroads. Where that was not feasible (such as in downtown areas) service providers would have to string cable from building to building, paying each individual owner the "fair market value" for using her property.

187. See Stephen A. Ross et al., *Corporate Finance* 571 (1996); Tretbar, *supra* note 182, at 226.

188. Tretbar, *supra* note 182, at 226.

189. Gruley, *supra* note 98.

190. *Id.* (quoting attorney Nicholas Miller).