

Articles

Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators

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I. Introduction

The golden goose again is being plucked. Across the country, municipalities are supplementing their general fund revenues through “fees,” “taxes,” and “rents” charged to wireline telecommunications and cable television companies occupying municipal rights-of-way.¹ These

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1. For convenience, when discussing generally both wireline telecommunications

charges typically are imposed as a percentage of the companies' gross revenues. As the companies' revenues increase with consumer acceptance of high-speed Internet access, data, digital video and other "broadband" services, municipalities are eagerly pocketing their share.

Naturally, the goose is not happy. Wireline providers are being squeezed between the growing competition from companies that are not similarly taxed and the rising size of the exactions demanded by the municipal regulators. Wireless and satellite providers are offering increasingly stiff competition to the companies that use the municipal streets for their wired services.² Already suffering losses in market share, wireline companies can ill-afford municipal charges that are not shared by their competitors.³ And the stakes are growing with each new service offered.⁴ The more money that wireline companies are able to

and cable companies together, the term "wireline companies" will be used.

2. The rapid growth of cellular telephone service threatens wireline telephone service growth. The mobile telephone market experienced a twenty-eight percent increase in 2000 and has a nationwide penetration rate of thirty-nine percent. 6 FED. COMMUNICATIONS COMM'N, FCC 01-192, IN THE MATTER OF IMPLEMENTATION OF SECTION 6002(B) OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1993: ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO COMMERCIAL MOBILE SERVICES 21 (2001) [hereinafter MOBILE SERVICES REPORT]. There are 2.5 million mobile internet users. *Id.* at 4.

Cable television operators, meanwhile, are fighting an intense competitive battle in many markets. The number of customers of direct broadcast satellite [hereinafter DBS] service alone grew at more than nineteen percent from June 2000 to June 2001 and is growing at over 8500 subscribers a day. Competition to cable is also offered by other companies that do not use the public rights-of-way, including satellite master antenna companies (offering service to multiple dwelling units through rooftop antennas) and multichannel multipoint distribution service (also known as wireless cable). 8 FED. COMMUNICATIONS COMM'N, FCC 01-389, IN THE MATTER OF ANNUAL ASSESSMENT OF THE STATUS OF COMPETITION IN THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING paras. 57-58 (2002) [hereinafter VIDEO PROGRAMMING REPORT].

3. Wireless, satellite, and satellite master antenna television companies now account for twenty-two percent of the market for multichannel video programming distribution [hereinafter MVPD]. VIDEO PROGRAMMING REPORT, *supra* note 2, para. 5. Three of every four new MVPD customers are signing up for DBS. *See id.* paras. 18, 57. It is estimated that three to five percent of mobile telephone subscribers do not have a wireline phone. MOBILE SERVICES REPORT, *supra* note 2, at 32 & n.207. One survey showed that twelve percent of respondents purchased a wireless phone instead of adding a wireline phone. *Id.* at 33. A wireless provider whose business plan is to compete directly with wireline telephone service has reported that seven percent of its customers in Nashville and Chattanooga have given up their wireline phones. The same company reports that sixty percent of its customers use their wireless phones as their primary phone. *Id.* at 34.

4. Cable revenues from advanced services (advanced analog, digital video, high-speed data, cable telephony, interactive services, and games) rose last year to \$5.6

generate, the deeper the impact of fees calculated as a percentage of revenues. At the same time, the total dollar amounts involved are increasingly worth fighting over.

State and federal public policy makers have noticed, and they are concerned about the impact of municipal fees on the roll-out and health of new wireline services. Michael Powell, Chairman of the Federal Communications Commission, recently commended the National Association of Regulatory Utility Commissioners ("NARUC") for "pushing for a dialogue" with municipalities on the need for fair access to rights-of-way.⁵ The NARUC action to which Chairman Powell referred involved a resolution encouraging local governments to provide right-of-way access to wireline companies at "reasonable" rates.⁶ Meanwhile, the Administrator of the National Telecommunications and Information Administration has sought to identify "positive models" of state and local right-of-way management that can be used in other jurisdictions.⁷

The volume of litigation between wireline companies and municipalities, not surprisingly, is in crescendo. But, instead of leading to a settled doctrine of law, the increased litigation continues to dispense wildly inconsistent judicial decisions. The theories offered by the litigants differ from case to case, and the decisions show little consistency, even when based on similar facts. It is a situation that one might expect of courts and litigants navigating a whole new world of unfamiliar issues.

But many of the issues should not be unfamiliar. The present municipal efforts to take a meaningful share of the revenues generated through new electronic services is by no means unprecedented. Indeed, in

billion—an increase of 171.2%. VIDEO PROGRAMMING REPORT, *supra* note 2, app. tbl. B-4. The average household expenditure for telephone service increased from \$325 in 1980 to \$849 in 1999. INDUS. ANALYSIS & TECH. DIV., FED. COMMUNICATIONS COMM'N, TRENDS IN TELEPHONE SERVICE 3-1 (2001), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_link/IAD/.

5. FED. COMMUNICATIONS COMM'N, CC Docket No. 02-33, IN THE MATTER OF APPROPRIATE FRAMEWORK FOR BROADBAND ACCESS TO THE INTERNET OVER WIRELINE FACILITIES (2000) (separate statement of Chairman Powell).

6. Herb Kirchhoff, *NARUC Panel Adopts Satellite and Special Access Positions*, COMMUNICATIONS DAILY, Feb. 13, 2002, at 2.

7. Nancy J. Victory, Assistant Secretary of the Department of Commerce, Together on the Right Track: Managing Access to Public Roads and Rights of Way, Address Before the National Association of Regulatory Utility Commissioners Committee on Telecommunications (Feb. 12, 2002) (transcript available at <http://www.ntia.doc.gov/ntiahome/speeches/2002/naruc021202.htm>).

the nineteenth century, municipalities attempted to ride the back of the then-exciting new technologies of the telegraph and telephone.

Beginning in the 1880s, municipalities throughout the nation made a massive push to extract their toll from companies that used the public streets to run their wires. These municipalities began to impose annual fees on telegraph and telephone poles placed in the public rights-of-way. The fees were sometimes enormous, totaling as much as forty-four percent or more of the assessed value of the wireline companies' facilities.⁸

The municipal ambition to raise revenues from wireline companies was met with an equally intense effort by the companies to obtain judicial relief. An avalanche of litigation ensued; dozens of cases reached the Supreme Court and the highest state courts in the latter part of the nineteenth century and the early years of the twentieth.⁹

The courts, in the main, rejected municipal efforts to raise revenues from the telegraph and telephone companies and required that municipal fees be limited to regulatory costs. But in 1893, in *City of St. Louis v. Western Union Telegraph Co.*,¹⁰ the Supreme Court interjected a new concept into the debate. For the first time the Court suggested that municipal wireline fees were "in the nature of rental" for occupancy of a small portion of the streets. On rehearing of the case, the Court immediately pulled back from the theory, and the Court never clearly relied on it to validate a municipal fee.¹¹ But the rental theory, once loosed, was never quite recaptured, and it has now reappeared to create confusion in the new generation of cases concerning municipal wireline fees.

In an effort to restore some grounding to the issues related to municipal right-of-way fees, this article begins by tracing municipal authority to impose wireline charges back to the origin of telecommunications. After setting forth the historic bases for municipal ownership and control of streets, the article addresses the different theories used over the years in analyzing municipal charges imposed on wireline companies using public rights-of-way. This article considers whether municipal exactions can be justified as regulatory fees, rentals of the streets, franchise fees or taxes. Then the article addresses the overlay

8. See *infra* notes 51-53 and accompanying text.

9. See *infra* notes 51-94 and accompanying text.

10. 148 U.S. 92, *reh'g denied*, 149 U.S. 465 (1893).

11. See *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. at 465-67.

of federal statutes, the Telecommunications Act of 1996¹² and the Cable Communications Policy Act of 1984 (“Cable Act”).¹³ In conclusion, this article suggests that there is no reasonable basis today for imposing municipal revenue-generating charges on telecommunications companies, or, in the absence of specific state laws, on cable operators.

II. An Historical Perspective

A. *Municipal Ownership and Control of the Streets*

Municipal streets are no more like private property than municipal corporations are like private corporations. Municipalities “are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes.”¹⁴ Municipalities have no inherent powers;¹⁵ all municipal power stems from the state.¹⁶ If the municipality does not derive a particular power directly from the state constitution, then it must find the power in a statute.¹⁷

12. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The Telecommunications Act amended the Communications Act of 1934, Pub. L. No. 101-239, 103 Stat. 2131 (codified as amended at 47 U.S.C. §§ 151-573 (2001)). When referring to sections of the Telecommunications Act, this article will generally use the section numbers in the Communications Act, for ease of reference.

13. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

14. *Town of East Hartford v. Hartford Bridge Co.*, 51 U.S. 511, 534 (1850).

15. *Vill. of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d 105, 108 (Ill. 1950); 2 C. DALLAS SANDS ET AL., *LOCAL GOVERNMENT LAW* § 13.02 (1997).

16. Judge John Forrest Dillon, whose *Commentaries on the Law of Municipal Corporations* served as the Bible on municipal law and regulation for decades, stated:

As the highways of a State, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon their charters or the legislative enactments applicable to them.

JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 1846-1847 (5th ed. 1911); see also *Alpert v. Boise Water Corp.*, 795 P.2d 298, 304 (Idaho 1990) (noting municipality empowered only by state constitution or legislature); SANDS ET AL., *supra* note 15, § 13.01.

17. As was stated in *People v. Kerr*:

The city corporation, as feeholder of the streets, in trust, for public use as highways, is but an agent of the State. Any control which it exercises over them, or the power of regulating their use, is a mere police or governmental power delegated by the State, subject to its control and direction, and to be exercised in strict subordination to its will.

27 N.Y. 188, 213 (1863).

Municipal streets are acquired directly from the state or indirectly through use of the state's sovereign power of eminent domain. In many cases, streets are not owned in fee simple by the municipality, but are held only by easement.¹⁸ Even where the municipality has a fee simple interest, that interest is held in "trust for the public."¹⁹ It is a widely accepted principle of long standing that "[t]he interest [of a city in its streets] is exclusively *publici juris*, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage."²⁰

Courts commonly have distinguished between property acquired by municipalities in the normal course of business, and streets acquired from the state or under eminent domain powers.²¹ For example, in *City of Des Moines v. Iowa Telephone Co.*,²² the Iowa Supreme Court rejected the idea that the municipality had the same rights in its streets that it had in other municipal property.²³ Relying heavily on an earlier decision by Judge Dillon, the most influential commentator on municipal law of the era, the court observed that the state legislature had total control of the municipal streets.²⁴ The municipality's interest in the streets was unlike

18. See also *Sears v. City of Chicago*, 93 N.E. 158, 160-61 (Ill. 1910); *In re John & Cherry Streets*, 19 Wend. 659, 674-78 (N.Y. Sup. Ct. 1839).

19. Again, quoting *People v. Kerr*:

By an exercise of State power, [the streets] were taken or confiscated to public use It cannot be pretended that the absolute title and estate in the land embraced within the streets, have ever been granted to the corporation from any source. Whatever estate or interest it holds, either conferred by the Dongan charter or by the State, is in trust for the public use.

27 N.Y. at 211-12; see also *Vill. of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d at 109; *City of Vicksburg v. Marshall*, 59 Miss. 563, 571 (1882).

20. *Kerr*, 27 N.Y. at 200.

21. Byron and William Elliott, the authors of an early and seminal treatise on public streets, stated:

[I]f the state should take land for the purpose of a public way the purpose would be essentially public, but if it should buy in land sold upon foreclosure of a mortgage executed to it, or should take property in payment of a debt due to it, the purpose for which the property would be held would be, in a qualified sense, private.

1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF ROADS & STREETS § 150 (4th ed. 1926).

22. 162 N.W. 323 (Iowa 1917).

23. *Id.* at 325. The court thus described the city's position: "Reduced to its last analysis the proposition is this: The city owns the fee to its streets, alleys, and public places, and is entitled to compensation for the use thereof to the same extent as any private party would be under like circumstances . . ." *Id.*

24. *Id.* (citing *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868)).

its ownership interest in “a market house, a public hall, or the like.”²⁵ Although the municipality had ownership interests in the “market house” and “public hall,” similar to the ownership interest of a private party, the municipality’s ownership interest in the streets was “not of this nature.”²⁶ The municipality had no “proprietary rights” in its streets.²⁷ Numerous other cases have echoed this thought that the ownership interest municipalities hold in their streets is “governmental,” and not “proprietary.”²⁸

The plain implication of these differing ownership interests is that municipalities do not have the same inherent rights to charge for the use of the streets as they might have to charge for the use of other property. The Mississippi Supreme Court, also quoting from Judge Dillon, observed in 1895 that “it is a mistake to suppose that when the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee.”²⁹ Municipalities have no rights to profit from their streets, unless specifically authorized by the state.³⁰

Although the primary use of the streets is the movement of pedestrians and vehicles, courts have long recognized that the streets may also properly be used for the laying of water, gas and sewer pipes, and for the placement of telegraph and telephone infrastructure.³¹ Utility

25. *Id.* at 326 (quoting *Clinton*, 24 Iowa 455).

26. *Id.* at 327.

27. *Id.* at 331.

28. *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of New York v. Bee Line Inc.*, 284 N.Y.S. 452, 456 (N.Y. App. Div. 1935); *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 784 (Ohio 1901). “When a fee is granted, the corporation within which the highway is situated takes it in trust for public use and does not acquire an absolute proprietary title.” ELLIOTT & ELLIOTT, *supra* note 21, § 125.

29. *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895) (quoting *Clinton*, 24 Iowa 455).

30. *See, e.g., People v. Kerr*, 27 N.Y. 188, 212 (1863). There is serious question as well whether a municipality may sell its streets to the general public for a profit. *See, e.g., Lerch v. Short*, 185 N.W. 129 (Iowa 1921); *Ransom v. Boal*, 29 Iowa 68 (1870); *Town of Chouteau v. Blankenship*, 152 P.2d 379, 383 (Okla. 1944). And courts have held that streets are required to be reserved for public purposes and may not be transferred to another for a “non-public” purpose. *Sears v. City of Chicago*, 93 N.E. 158 (Ill. 1910); *Glasgow v. City of St. Louis*, 87 Mo. 678 (1885); *Embury v. Conner*, 3 N.Y. 511 (1850); *In re John & Cherry Streets*, 19 Wend. 659 (N.Y. Sup. Ct. 1839).

31. *Julia Bldg. Ass’n v. Bell Tel. Co.*, 88 Mo. 258, 272 (1885) (quoting *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121 (1884)).

poles and the wires that are attached to them are “private property,” but property “devoted to the public use.”³² Use of the streets for these purposes is not only consistent with the public purpose for which the streets were dedicated but benefits the municipality. For example, telegraph and telephone services have been recognized to *reduce* the amount of traffic on the streets.³³ In addition, courts have recognized that telephone and telegraph poles obstruct traffic no more than lamp posts or even “footmen, horsemen, carriages and wagons,” all of which obstruct the streets or sidewalks during the time that they are traveling on them.³⁴

B. *Municipal Regulatory Fees*

States have always permitted municipalities to regulate the use of the streets and to recover the costs of that regulation from the regulated entities.³⁵ Municipal regulatory fees, however, have generally been limited to regulatory costs.³⁶ As early as the 1880s, the United States circuit courts of appeals were striking down municipal wireline regulatory fees on the ground that they were higher than the cost of regulation and excessive as a matter of law.³⁷

Although the courts have differed at the margins of what they consider to be appropriate “regulatory costs,” at their core the cases are largely consistent. Legitimate regulation expenses may be charged, including the cost of permitting and policing compliance with regulations.³⁸ Fees may be used to reduce congestion and to limit

32. *City of St. Louis v. Bell Tel. Co.*, 10 S.W. 197 (Mo. 1888); *see City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. at 785.

33. *Julia Bldg. Ass’n*, 88 Mo. at 269 (“[T]o the extent of the number of communications daily transmitted by [the telephone company], the street would be relieved of that number of footmen, horsemen or carriages.”).

34. *Id.*

35. *Postal Tel. Cable Co. v. Mayor of Baltimore*, 29 A. 819 (Md. 1894), *aff’d*, 156 U.S. 210 (1895); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

36. *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904); *W. Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419 (1903); *W. Union Tel. Co. v. City of Philadelphia*, 12 A. 142 (Pa. 1888); 9 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 26.17 (3d ed. 1995).

37. *See City of Philadelphia v. W. Union Tel. Co.*, 40 F. 615 (C.C.E.D. Pa. 1889); *City of St. Louis v. W. Union Tel. Co.*, 39 F. 59 (C.C.E.D. Mo. 1889), *rev’d*, 148 U.S. 92 (1893); *cf. City of Saginaw v. Swift Elec. Light Co.*, 72 N.W. 6 (Mich. 1897).

38. *See, e.g., Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160, 166-67 (1903). A municipality may recover “the necessary expenses of issuing [the license], and the additional labor of officers and other expenses thereby incurred.” *Id.* (quoting *City of*

activities that the municipality may legitimately restrict.³⁹ Some courts have suggested that regulatory fees may also include repair costs and some portion of street maintenance expenses.⁴⁰ A municipality may not, however, use a regulatory fee for the purpose of raising revenues.⁴¹

In most cases the question whether fees are excessive in light of the regulatory purpose has been for a jury to decide.⁴² But where the courts have felt that the fee is “clearly” above regulatory costs, they have not hesitated to strike it down as excessive as a matter of law.⁴³ “[I]f it were possible to prove in advance the exact cost, that sum would be the limit of the law.”⁴⁴ But in the absence of such information, the municipality need not demonstrate that the fees are a precise match, either with past or

Philadelphia v. W. Union Tel. Co., 89 F. 454, 461 (3d Cir. 1898)).

39. See *Dignet, Inc. v. W. Union A.T.S., Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992); *Chicago Gen. Ry. Co. v. City of Chicago*, 52 N.E. 880, 881 (Ill. 1898) (stating that a fee was justifiable because rails of street railways in streets were a “serious annoyance”). Regulatory fees may also be used to discourage undesirable conduct. See, e.g., *Gundling v. City of Chicago*, 177 U.S. 183 (1900); *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n*, 967 F.2d 683 (1st Cir. 1992); *Fylken v. City of Minot*, 264 N.W. 728 (N.D. 1936). The Supreme Court has suggested in dicta, however, that assessments intended to discourage an activity “are in the nature of ‘taxes.’” *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341 (1974); see *infra* notes 113-37 and accompanying text (discussing taxes).

40. See *City of Memphis v. Postal Tel. Cable Co.*, 145 F. 602, 606 (6th Cir. 1906); *Am. Tel. & Tel. Co. v. Vill. of Arlington Heights*, 620 N.E.2d 1040, 1046 (Ill. 1993). But see *Bryant v. Vill. of Sherman*, 561 N.E.2d 1320, 1324 (Ill. App. Ct. 1990) (holding that no fee permitted for cost of maintenance of street); *Boston Gas Co. v. City of Newton*, 682 N.E.2d 1336, 1339 (Mass. 1997) (finding that ordinance requiring fees to recover reduction in useful life of streets from street excavations preempted by state law giving utility responsibility for restoring street).

41. See, e.g., *Alstadt v. Ark.-Mo. Power Co.*, 219 S.W.2d 938, 940 (Ark. 1949); *City of Chicago Heights v. W. Union Tel. Co.*, 94 N.E.2d 306, 309 (Ill. 1950); see also *Merrelli v. City of St. Clair Shores*, 96 N.W.2d 144, 148 (Mich. 1959).

42. See, e.g., *W. Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419, 420-21 (1903) (finding that whether annual fees of \$1 per pole and \$2.50 per mile of wire were reasonable left to jury); *In re Petition of Del. & Atl. Tel. Co.*, 73 A. 175 (Pa. 1909); *City of Allentown v. W. Union Tel. Co.*, 23 A. 1070 (Pa. 1892) (per curiam) (finding that annual fee of \$2.50 per pole not so clearly excessive as to justify taking from jury).

43. See, e.g., *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904) (striking down as excessive fee twenty times higher than costs); *City of Philadelphia v. W. Union Tel. Co.*, 40 F. 615 (C.C.E.D. Pa. 1889) (finding that fee five times the cost of regulation clearly excessive); *City of Saginaw v. Swift Elec. Light Co.*, 72 N.W. 6 (Mich. 1897) (finding that \$.50 annual pole fee to cover inspection costs of approximately \$.05 per pole was clearly excessive); *Wis. Tel. Co. v. City of Milwaukee*, 104 N.W. 1009, 1013 (Wis. 1905) (finding it “quite obvious” that \$1 annual pole fee would be “far beyond the reasonable expense of such inspection and supervision”).

44. *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. at 70.

projected expenses.⁴⁵ And most courts have placed the burden of persuasion on the wireline company to prove that the fee is not a reasonable approximation of the costs of regulation.⁴⁶ Nevertheless, the expenses must be “reasonably anticipated,”⁴⁷ and at least one court has required the municipality to demonstrate with factual studies or statistics how the fee is related to expenses.⁴⁸

These general requirements for wireline regulatory fees were well established by the early 1890s, and have been applied since that time.⁴⁹ But the question whether a fee is in fact a “regulatory fee” or something else has bedeviled courts dealing with municipal wireline fees. In the 1893 case of *City of St. Louis v. Western Union Telegraph Co.* (“*St. Louis I*”),⁵⁰ the Supreme Court changed the nomenclature for considering municipal wireline fees in a way that created confusion for the next century and beyond.

C. *The City of St. Louis Cases and the Concept of “Street Rentals”*

St. Louis I was the first case to reach the Supreme Court involving challenges to municipal charges for allowing telegraph and telephone companies to place poles and wires in the public rights-of-way. The City of St. Louis had imposed an annual charge of \$5 for each pole Western Union placed in the city streets.⁵¹ The total amount of the fee to Western Union annually was \$7,545, more than forty-four percent of the assessed valuation of Western Union’s property in the City.⁵² By the time the matter reached the Supreme Court, state and lower federal courts had already struck down, as excessive regulatory fees, similar municipal efforts to impose annual charges for the placement of utility poles.⁵³ In

45. See, e.g., *W. Union Tel. Co. v. Borough of New Hope*, 187 U.S. at 425-26; *Borough of Gettysburg v. Gettysburg Transit Co.*, 36 Pa. Super. 598 (1908).

46. See, e.g., *Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160, 165 (1903). But see *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 97, 99 (S.D.N.Y. 2000).

47. See, e.g., *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. at 70; *Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. at 164-65.

48. *N.Y. Tel. Co. v. City of Amsterdam*, 613 N.Y.S.2d 993, 995 (N.Y. App. Div. 1994); 9 McQUILLAN, *supra* note 36, § 26.36, at 112.

49. See sources cited *supra* notes 36-41; *infra* notes 75-99 and accompanying text.

50. 148 U.S. 92 (1893) [hereinafter *St. Louis I*], *reh’g denied*, 149 U.S. 465 (1893) [hereinafter *St. Louis II*].

51. See *St. Louis I*, 148 U.S. at 93.

52. Statement, Brief & Argument for Defendant in Error at 39, *St. Louis I*, 148 U.S. 92 (No. 94).

53. See, e.g., *City of Philadelphia v. W. Union Tel. Co.*, 40 F. 615 (C.C.E.D. Pa.

St. Louis I, the circuit court below had expressed its belief that it was “obvious . . . that the ordinance cannot be upheld under the power conferred on the municipality ‘to regulate’ telegraph companies.”⁵⁴

But, in a surprising opinion by Justice Brewer, the Supreme Court went off in an unexpected direction. Reversing the decision of the lower court and remanding for a new trial, the Court suggested that the charge was “in the nature of rental.”⁵⁵ The Court analogized to the City’s leasing rooms in an old city hall and declared: “The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent.”⁵⁶

Justice Brewer’s reliance on a rental theory in considering *St. Louis*’s pole fees was a bolt out of the blue. Neither the City nor Western Union had mentioned any rental theory in their briefs to the Court.⁵⁷ And no lower court cases had engaged in such an analysis. So far as reflected in the reported decisions, this was the first case at any level suggesting that municipalities could charge rent for a wireline company’s placement of facilities in the public rights-of-way.

The *St. Louis I* Court focused on the potentially catastrophic impact of telegraph and telephone infrastructure on the public streets. At that time in the growth of the telegraph and telephone industries, it was not clear to what extent the burgeoning infrastructure might overwhelm the thoroughfares in major cities. An 1888 Pennsylvania case had noted the potential for utility poles to clutter the streets with so many obstructions as virtually to eliminate the public’s ability to use the streets for normal pedestrian and vehicular traffic.⁵⁸ “By sufficient multiplication of

1889); *City of Allentown v. W. Union Tel. Co.*, 23 A. 1070 (Pa. 1892).

54. *City of St. Louis v. W. Union Tel. Co.*, 39 F. 59, 60 (C.C.E.D. Mo. 1889), *rev’d*, 148 U.S. 92 (1893) (emphasis added). The court below had held that the \$5 per pole charge was a “tax,” unauthorized under state law. For a discussion of whether a charge amounts to a “tax,” see *infra* notes 113-24 and accompanying text.

55. The Court stated that the charge was for “the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental.” *St. Louis I*, 148 U.S. at 99.

56. *Id.* at 98.

57. See Abstract of the Record, *St. Louis I*, 148 U.S. 92 (No. 94); Statement of Assignment of Errors, *St. Louis I*, 148 U.S. 92 (No. 94); Argument and Brief for Plaintiff in Error, *St. Louis I*, 148 U.S. 92 (No. 94); Statement, Brief & Argument for Defendant in Error, *St. Louis I*, 148 U.S. 92 (No. 94).

58. The Pennsylvania Supreme Court stated:

The streets are already lined with masts sustaining an intricate web of wires, actually or potentially charged with an electric current . . . [N]o argument is

telegraph and telephone companies,” mused the *St. Louis I* Court, “the whole space of the highway might be occupied”⁵⁹ The Court also focused on the inability of municipalities to limit the use of the streets for telegraph poles under a congressional enactment in 1866, which authorized telegraph companies to occupy all “post roads.”⁶⁰ All the streets in St. Louis were “post roads” under the law,⁶¹ and thus the City could not prevent telegraph companies from placing their poles within them.

The Court buttressed its “rental” analysis by observing that the federal government could not deprive the state of its property without “just compensation.”⁶² “[T]he state,” said the Court, “may 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.”⁶³

The Court did not address the nature of the City’s property rights, and did not acknowledge or dispute the historical consensus that municipalities did not hold a proprietary interest in their streets.⁶⁴ Nor did the Court address the level of compensation that would be appropriate, noting that the latter question would be a proper subject for a later trial on remand.⁶⁵ At the trial later held on this issue, the trial court struck down the \$5 charge, and the Supreme Court ultimately sustained that decision.⁶⁶

The significance of the Court’s first-of-its-kind “rental” analysis was almost immediately thrown into doubt. The Court issued a second

requisite to show the inconvenience that might result if the number could be indefinitely increased [M]uch as they have multiplied in the past, we may believe that in the near future they will be still more numerous.

W. Union Tel. Co. v. City of Philadelphia, 12 A. 144, 145 (Pa. 1888). Photographs from the era show hundreds of wires crisscrossing the streets. See EDWIN S. GROSVENOR & MORGAN WESSON, ALEXANDER GRAHAM BELL 120, 172 (1997).

59. *St. Louis I*, 148 U.S. at 99.

60. Act of July 24, 1886, ch. 230, 14 Stat. 221 (providing for aid in the construction of telegraph lines and for securing government use of the same for postal, military, and other purposes).

61. *St. Louis I*, 148 U.S. at 100.

62. *Id.* at 101. The Court failed to note that just compensation principles would afford the City only nominal compensation for Western Union’s use, in any case. See *infra* text accompanying notes 184-93.

63. *St. Louis I*, 148 U.S. at 101-02.

64. See *supra* notes 21-28 and accompanying text.

65. *St. Louis I*, 148 U.S. at 104.

66. City of St. Louis v. W. Union Tel. Co., 166 U.S. 388 (1897) [hereinafter *St. Louis III*].

opinion, on rehearing, two months after the first opinion.⁶⁷ Western Union argued on rehearing that the City did not have the authority delegated by the state of Missouri that the Court necessarily assumed in its first opinion. Although disavowing any change in the “views expressed as to the power of the city of St. Louis in this matter,”⁶⁸ the Court apparently agreed that St. Louis had no legislative or constitutional authority to charge a “rental” for its rights-of-way.

The *St. Louis II* Court was forced to ground the City’s authority to impose the charges in the permission given in its charter to “regulate . . . telegraph companies.”⁶⁹ “[T]he power to require payment of some reasonable sum for the exclusive use of a portion of the streets,” said the Court, “was within the grant of power to regulate the use.”⁷⁰ Moreover, “[t]he determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles.”⁷¹ The Court used the words “regulate” or “regulation” fourteen times in the seven-page opinion. It did not once mention “rent” or “rental” or any similar concept. Failing to find any authority for municipal “rental” of the streets, therefore, the Court effectively reduced the discussion of the concept in its earlier opinion to dicta.

Abandoning the concept of “rent” in *St. Louis II*, the Court focused, instead, on the right of the City, under its delegated regulatory powers, to impose a regulatory charge for Western Union’s “use” of the streets. Without clearly articulating the concept as such, the Court’s analysis in *St. Louis II* has the flavor of the modern economic theory of “congestion” costs. If congestion occurs, it imposes a cost on all users. It is appropriate to permit a regulatory charge (or toll) that recognizes that cost and acts to reduce overuse.⁷² In the Court’s view, Western

67. *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465 (1893) [hereinafter *St. Louis II*].

68. *Id.* at 467.

69. *Id.* at 468. Although the charter as originally granted gave the power “to license, tax, and regulate . . . telegraph companies,” the power to tax had been repealed. MO. REV. STAT. § 6901 (1879).

70. *St. Louis II*, 149 U.S. at 470. “And so it is only a matter of regulation of use when the city grants to the telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the street.” *Id.*

71. *Id.* at 471.

72. *See, e.g., Diginet, Inc. v. W. Union A.T.S., Inc.*, 958 F.2d 1388, 1398-99 (7th Cir. 1992) (noting that “[c]ongestion is the obvious problem calling for regulation, whether it is traffic congestion or a crowded utilities duct” and that “[r]egulation to solve

Union was potentially obstructing the free use of the streets by others. It was within the regulatory power of the municipality to impose a charge to recognize the possible cost of Western Union's use on other right-of-way users and to impose a charge on Western Union's use to that degree.

By avoiding further discussion of "rentals," and by returning to the traditional concept of "regulation," the Court brought the analysis back to settled principles of municipal law. As noted earlier, the established common law made clear that municipalities had no "proprietary" interest in their streets,⁷³ and had no inherent power to rent them.⁷⁴ If anything remained of the concept in *St. Louis I* that municipal fees for a wireline company's placing poles and wires in the public rights-of-way were "in the nature of rental," it was only as a diluted proxy for fees based on regulatory costs.

In the twenty-five years that followed *St. Louis I*, the Supreme Court heard ten more cases involving municipal charges on poles in the public streets.⁷⁵ In several of these cases, the Court referred to a "rental"

such problems can take the form of user fees reasonably calculated to cover the cost that a given use of the public way imposes on either the municipality or the other users of the public way"); see also 1 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 87-89 (1993) (discussing use of tolls to reduce congestion).

73. See *supra* notes 14-28 and accompanying text. To the extent that municipalities have only an easement in streets, which is commonly the case, there is nothing to "rent" under any theory. 2 SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 30.09 (2d ed. 1998) ("When a local government has an easement . . . there is nothing available for the local government to sell to anyone.").

74. See *supra* notes 14-28 and accompanying text; see also STEVENSON, *supra* note 73, § 24.12[6] ("Local governments must have clear authority [from the state] to lease or rent governmental properties.").

75. See *Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94 (1919) (finding no support in record for argument that \$.50 per-pole license tax was unreasonable); *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252 (1919) (finding \$2 per-pole fee not excessive regulatory cost); *Postal Tel.-Cable Co. v. City of Newport*, 247 U.S. 464 (1918) (involving res judicata issue); *W. Union Tel. Co. v. City of Richmond*, 224 U.S. 160 (1912) (finding \$2 per-pole charge not proved to be unreasonable based solely on claims brought under federal constitutional and statutory provisions); *Postal Tel.-Cable Co. v. Borough of New Hope*, 192 U.S. 55 (1904) (finding no error for jury to find that \$1 per-pole charge was unreasonable, but finding error for jury to determine what a reasonable fee would be); *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904) (finding \$1 per-pole charge was twenty times the cost of regulation and was unreasonable); *Atl. & Pac. Tel. Co. v. City of Philadelphia*, 190 U.S. 160 (1903) (finding sufficient evidence to uphold a \$1 per-pole charge as reasonable); *W. Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419 (1903) (upholding \$1 annual per-pole charge as prima facie reasonable in light of cost of regulation); *City of St. Louis v. W. Union Tel. Co.*, 166 U.S. 388 (1897) (upholding lower court's finding in favor of Western Union regarding the \$5 per-pole fee discussed in *St. Louis I* and *St. Louis II*); *Postal Tel.-Cable*

theory,⁷⁶ but never did the Court determine whether a charge was reasonable on that ground. Indeed, since *St. Louis I*, the Court has *never* analyzed the reasonableness of a municipal wireline charge on the basis of whether it constitutes a permissible or reasonable “rental” of a portion of the rights-of-way.

Instead, when considering the reasonableness of municipal wireline fees, the Court has steadfastly relied on the traditional analysis: Is the fee justified by regulatory costs? Municipal fees of \$1 per pole and \$2.50 per mile of wire were upheld as *prima facie* reasonable in view of the cost of regulation in *Western Union Telegraph Co. v. Borough of New Hope*⁷⁷ and *Atlantic & Pacific Telegraph Co. v. City of Philadelphia*.⁷⁸ In the latter case, the Court determined that the fee was *not* in the nature of rental.⁷⁹ On the other hand, the Court reversed the lower court’s approval of similar fees of \$1 per-pole and \$2.50 per mile of wire as reasonable regulatory costs in *Postal Telegraph-Cable Co. v. Borough of Taylor*.⁸⁰ In *Postal Telegraph-Cable Co. v. City of Richmond*,⁸¹ the Court agreed that a \$2 per-pole fee was not excessive considering the cost of “looking after the many poles . . . part of which, at least, carried many wires.”⁸²

Numerous state and lower federal courts, since *St. Louis I*, have rejected arguments that municipal telecommunications fees should be upheld as “rentals” of the public rights-of-way.⁸³ In 1895 the Mississippi Supreme Court held that the municipality’s fee interest in its streets was

Co. v. Mayor of Baltimore, 156 U.S. 210 (1895) (affirming lower court’s decision upholding \$2 per-pole annual charge on authority of *St. Louis I*).

76. *W. Union Tel. Co. v. City of Richmond*, 224 U.S. at 170; *Postal Tel.-Cable Co. v. City of Newport*, 247 U.S. at 473; *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. at 259.

77. 187 U.S. 419 (1903).

78. 190 U.S. 160 (1903).

79. *Id.* at 164.

80. 192 U.S. 64 (1904) (holding telegraph company entitled to judgment because fees exceeded by twenty times the cost of regulation).

81. 249 U.S. 252 (1919).

82. *Id.* at 260.

83. *City of Tulsa v. Southwestern Bell Tel. Co.*, 75 F.2d 343, 353 (10th Cir. 1935); *Vill. of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d 105 (Ill. 1950); *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323, 327 (Iowa 1917); *Hodges v. W. Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895) (quoting *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868)); *Sch. Dist. of McCook v. City of McCook*, 81 N.W.2d 224, 227 (Neb. 1957); *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 105 S.E.2d 260 (W. Va. 1958); *Wis. Tel. Co. v. City of Milwaukee*, 104 N.W. 1009, 1013 (Wis. 1905).

maintained in trust for the public and the municipality was not entitled to charge rent from a telegraph company for the use of those streets.⁸⁴ Similar decisions were reached in Ohio,⁸⁵ Iowa,⁸⁶ Wisconsin,⁸⁷ Nebraska,⁸⁸ Oklahoma,⁸⁹ Illinois,⁹⁰ and West Virginia.⁹¹ Courts that have upheld municipal wireline fees have generally found the fees to be justified by regulatory costs.⁹²

Only a very few cases actually have upheld municipal wireline fees as authorized “rentals” of the streets, and these cases are poorly reasoned.⁹³ Judge Dillon, writing in 1911, questioned whether the Court in *St. Louis I* could really have meant to base its analysis on the municipality’s right to charge compensation for the use of the streets, as

84. *Hodges v. W. Union Tel. Co.*, 18 So. at 85 (quoting *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455).

85. *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. at 785 (holding municipal corporation has “no private proprietary right or interest in [the streets] which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden”).

86. *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. at 27 (finding corporation acting in “public business” cannot be required to pay “rental” value for use of streets).

87. *Wis. Tel. Co. v. City of Milwaukee*, 104 N.W. at 1013 (finding \$1 per pole annual charge would be “far beyond the reasonable expense of such inspection and supervision”).

88. *Sch. Dist. of McCook v. City of McCook*, 81 N.W.2d at 227 (holding city has no right to rent or charge a toll for the use of the public streets).

89. *City of Tulsa v. Southwestern Bell Tel. Co.*, 75 F.2d 343, 356 (10th Cir. 1935) (holding city has no power to charge compensation for use of its streets).

90. *Vill. of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d 105, 109-10 (Ill. 1950) (holding rental implies an ability to exclude those for whom the streets are held in trust, which is not authorized).

91. *Chesapeake & Potomac Tel. Co. v. City of Morgantown*, 105 S.E.2d 260, 269-70 (W. Va. 1958) (holding that there exists no power in municipality to lease streets or collect rental).

92. *City of Memphis v. Postal Tel. Cable Co.*, 145 F. 602, 606 (6th Cir. 1906) (upholding \$3 per-pole charge as reasonable proportion of the cost of making and keeping in repair and policing streets); *Alstadt v. Ark.-Mo. Power Co.*, 219 S.W.2d 938, 940 (Ark. 1949) (holding pole fee of \$.10 per month was not void on its face as excessive regulatory fee).

93. See *City of Pensacola v. S. Bell Tel. Co.*, 37 So. 820, 823 (Fla. 1905) (recognizing that *St. Louis II* derived city’s power from power to “regulate” the use of streets, but justifying fee as rental); *City of Springfield v. Postal Tel.-Cable Co.*, 97 N.E. 672, 674 (Ill. 1912) (refusing to authorize rental fees, as explained in *Village of Lombard v. Illinois Bell Telephone Co.*, 90 N.E.2d 105, 110 (Ill. 1950)); *Fleming v. Houston Lighting & Power Co.*, 138 S.W.2d 520, 522 (Tex. 1940) (permitting rental fee on authority of *Southwestern Telegraph & Telephone Co. v. City of Dallas*, 174 S.W. 636 (Tex. Civ. App. 1915)).

opposed to the regulatory basis clearly underlying *St. Louis II*.⁹⁴ The idea that municipal fees could be justified as rentals of the streets, stillborn in *St. Louis I*, was never viable.

But the *St. Louis I* “rental” analysis left a continuing legacy of confusion.⁹⁵ Courts occasionally referred to municipal fees as street rental payments,⁹⁶ and dredged up the concept in a variety of contexts.⁹⁷ Although several recent cases have dismissed the theory of street rentals as “outdated,”⁹⁸ as will be seen in the later discussion of decisions interpreting section 253 of the Telecommunications Act of 1996, the concept that municipalities may charge “rent” for use of their streets has never been fully discarded.⁹⁹

94. DILLON, *supra* note 16, § 1275 n.3.

But the doubt may be suggested whether the pole tax in question in this case [*St. Louis I*] must not rest for its validity upon the police power or upon some ground other than that the city under its general powers over or concerning streets had the right . . . to exact this pole tax or charge as a return or compensation for the use of the streets of the city. . . . We think the court did not hold or intend to hold . . . that . . . the city had any ownership of the streets of private or proprietary rights therein which were beyond legislative regulation and control.

Id.

95. *See, e.g., City of Peoria v. Postal Tel.-Cable Co.*, 113 N.E. 968 (Ill. 1916) (illustrating the confusion between regulatory fees and rentals); *Southwestern Tel. & Tel. Co. v. City of Dallas*, 174 S.W. 636 (same).

96. *See, e.g., City of Dallas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997) (stating, in ruling on FCC interpretation of franchise fees, that they are “essentially a form of rent: the price paid to rent use of public right-of-ways”); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (using “rental” terminology in discussing franchise fee); *Erie Telecomms., Inc. v. City of Erie*, 659 F. Supp. 580, 594 (W.D. Pa. 1987) (using term “rent” but recognizing that city may not have a “possessory interest in the public streets”); *City of Little Rock v. AT&T Communications of the Southwest, Inc.*, 888 S.W.2d 290, 292 (Ark. 1994) (“In common parlance, such franchise fees are, in form, rental payments for a public utility’s use of the municipality’s right-of-way . . .”).

97. *See, e.g., Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092-93 (N.D. Cal. 2001) (treating payment as rent for purposes of Tax Injunction Act); *City of Philadelphia v. Holmes Elec. Protective Co.*, 6 A.2d 884, 887 (Pa. 1939) (treating payment as “rent” for purposes of applying municipal immunity doctrine).

98. *City of Chattanooga v. BellSouth Telecomms., Inc.*, 1 F. Supp. 2d 809 n.3 (E.D. Tenn. 1998); *Alachua County v. State*, 737 So. 2d 1065, 1068 n.1 (Fla. 1999).

99. *See infra* notes 138-219 and accompanying text. Indeed, some commentators, without analyzing the true basis for the theory, continue to call for increased “rental charges” on wireline companies. *See, e.g., Clarence A. West, The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments To Be Compensated for the Use of Public Rights-of-Way*, 1 MICH. TELECOMM. & TECH. L. REV. 29 (1995); Roger D. Colton & Michael F. Sheehan, *Raising Local Government Revenue Through Utility Franchise Charges: If the Fee Fits, Foot It*,

D. Municipal Franchise Fees

Since the rejection by most courts of municipal pole fees as a method of raising municipal revenues, many municipalities have turned to franchise fees as their preferred method of exacting revenues from wireline companies. Today, municipalities typically take five percent of gross revenues from cable operators as franchise fees,¹⁰⁰ and are increasingly attempting to force similar fees on telecommunications companies.¹⁰¹ Franchise fees, unlike regulatory fees, represent a charge for the franchisee's receipt of some special "privilege" from the municipality.¹⁰² In theory, at least, a municipal franchise fee represents a bargained-for exchange by the franchisee for the right to use municipal rights-of-way that could otherwise be denied to it.¹⁰³

Franchises are deemed to be contracts between the municipality and the franchisee.¹⁰⁴ Because franchise fees are part of agreements between the municipality and the franchisee, courts have been reluctant to allow wireline companies to attack the fees during the term of the franchise. "[E]xactions agreed to . . . are not exactions."¹⁰⁵ To complain about the amount of a franchise fee, therefore, wireline companies have generally been required to contest the amount before agreeing to it.¹⁰⁶ Yet, for a wireline company to obtain access to the municipal rights-of-way in the first place, it has typically had no choice but to agree to the fee.

21 URB. LAW. 55, 73 (1989).

100. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, limits franchise fees for operation of the cable system in the community to no more than "5-percent of [the] cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b); *see infra* notes 227-34 and accompanying text.

101. *See infra* notes 138-217 and accompanying text.

102. The term "franchise" is defined generally as "a special privilege granted by the government to particular individuals or companies to be exploited for private profits." *BellSouth Telecomms., Inc. v. City of Orangeburg*, 522 S.E.2d 804 n.5 (S.C. 1999); *see also* *Greene Line Terminal Co. v. Martin*, 10 S.E.2d 901, 903 (W. Va. 1940).

103. *See, e.g., Alachua County*, 737 So. 2d at 1068.

104. *See, e.g., City of Calhoun v. N. Ga. Elec. Membership Corp.*, 443 S.E.2d 469, 471 (Ga. 1994); *City of North Las Vegas v. Cent. Tel. Co.*, 460 P.2d 835, 836 (Nev. 1969); 12 MCQUILLIN, *supra* note 36, § 34.06.

105. *Ill. Broad. Co. v. City of Decatur*, 238 N.E.2d 261, 265 (Ill. App. Ct. 1968).

106. *See, e.g., City of Hartford v. Conn. Co.*, 140 A. 734, 744 (Conn. 1928); *MCI Metro Access Transmission Serv., Inc. v. City of St. Louis*, 941 S.W.2d 634, 639 (Mo. Ct. App. 1997). Where a statute reflects a congressional desire to impose limits on existing franchises, however, courts will not consider those limits to have been waived. *See id.*

As with other municipal powers, the authority of a municipality to exact franchise fees must be derived directly from the legislature or the state constitution.¹⁰⁷ Where authorized by state statute or covered within their home rule powers, municipalities have been able to demand large fees under franchises, sometimes even auctioning off franchises to the highest bidders.¹⁰⁸ These municipalities have been able to use “their locational monopolies to . . . extort monopolistic fees from companies that must frequently run wires and cables across local governmental boundaries.”¹⁰⁹

But new government policies favoring local competition in telecommunications and cable television have completely undercut the traditional municipal franchise paradigm.¹¹⁰ Today, the idea that municipal wireline franchises embody a government “privilege” has been preempted by federal laws that severely limit municipalities’ ability to deny access to their rights-of-way. The Telecommunications Act of 1996 prohibits municipalities from preventing telecommunications companies from providing “any interstate or intrastate telecommunications service.”¹¹¹ The 1984 Cable Communications

107. See, e.g., *McPhee & McGinnity Co. v. Union Pac. R.R. Co.*, 158 F. 5, 10 (8th Cir. 1907); *Pac. Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 41 (Cal. 1955); *Alpert v. Boise Water Corp.*, 795 P.2d 298 (Idaho 1990); *Vill. of Lombard v. Ill. Bell Tel. Co.*, 90 N.E.2d 105, 108 (Ill. 1950) (holding that municipal corporation has no “inherent power to . . . exact a payment for a privilege”); *Cnty. Antenna Television of Wichita, Inc. v. City of Wichita*, 471 P.2d 360, 366 (Kan. 1970) (holding that municipality had no authority to demand franchise fee); *KAOK-CATV, Inc. v. La. Cable T.V., Inc.*, 195 So. 2d 297 (La. Ct. App. 1967) (holding that municipality had no authority to require cable operator to obtain franchise); *Nugent v. City of East Providence*, 238 A.2d 758 (R.I. 1968) (same); *City of Abbeville v. Aiken Elec. Coop., Inc.*, 338 S.E.2d 831, 835 (S.C. 1985) (holding that power to franchise is an attribute of state power delegated to municipalities by statute); 12 MCQUILLIN, *supra* note 36, § 34.14 (“It is undisputed that a municipal corporation has no inherent power to grant a franchise or license to use the streets and that its authority is limited to that conferred upon it expressly or by implication by the state constitution or the legislature.”).

108. See, e.g., *Tulare County v. City of Dinuba*, 206 P. 983 (Cal. 1922); 12 MCQUILLIN, *supra* note 36, § 34.31.

109. *Diginet, Inc. v. W. Union A.T.S., Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992). Although Judge Posner, who wrote the decision, was specifically referring to a municipality’s imposition of fees on a telecommunications provider’s use of the public rights-of-way for wires that were not directly used to provide any services in the community, his wording applies equally to the traditional power of municipalities in demanding high fees in franchise negotiations. *Cf. id.*

110. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

111. 47 U.S.C. § 253 (2002).

Policy Act, as amended, limits municipal ability to refuse franchises to cable operators.¹¹² No longer may it fairly be said that, in allowing telecommunications providers and cable operators to place their facilities in city streets, municipalities are providing any special “privileges.” The municipalities are now simply complying with federal law.

The preemption of municipal ability to exclude wireline companies from the public rights-of-way fundamentally affects municipal leverage to extract franchise fees from wireline companies. Only if the municipality has the authority under state law to impose a wireline tax can it realistically expect to be able to force wireline companies to accept franchise fees greater than regulatory costs.

E. Municipal “Taxes”

Seldom, however, can municipal wireline fees be justified under state law as “taxes.” In fact, designation as a tax has doomed many a municipal fee. Municipalities have no inherent power to tax, and the power to exact taxes from wireline companies must be found in constitutional or legislative provisions.¹¹³ Numerous cases have rejected as unauthorized taxes wireline fees that exceed the cost of regulation.¹¹⁴ As early as 1889, a United States circuit court held that a municipal charge more than five times the cost of regulation, though labeled a “fee” by the municipality, was an unauthorized tax.¹¹⁵

In describing the difference between regulatory fees and taxes, courts have noted that a “classic tax” is found where a revenue-generating measure is imposed by the legislature on many of its citizens. Tax revenues typically go into the general fund to be used for any purpose. A “classic fee” is imposed on a limited class of people and is intended to have a clear regulatory purpose, such as discouraging certain conduct or defraying the cost of regulation.¹¹⁶ Courts have also noted that fees generally are imposed on parties that receive some benefit from

112. *Id.* §§ 541, 546; *see infra* notes 227-30 and accompanying text.

113. *See, e.g.,* Chesapeake & Potomac Tel. Co. v. City of Morgantown, 105 S.E.2d 260, 269 (W. Va. 1958); Radiofone, Inc. v. City of New Orleans, 630 So. 2d 694, 697 (La. 1994); 16 McQUILLIN, *supra* note 36, § 44.05.

114. *See, e.g.,* Vill. of Lombard v. Ill. Bell Tel. Co., 90 N.E.2d 105 (Ill. 1950); N.Y. Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993 (App. Div. 1994); *Chesapeake & Potomac Tel. Co.*, 105 S.E.2d 260.

115. *City of Philadelphia v. W. Union Tel. Co.*, 40 F. 615 (C.C.E.D. Pa. 1889).

116. *San Juan Cellular Tel. Co. v. Pub. Serv. Comm’n*, 967 F.2d 683, 685 (1st Cir. 1992).

the regulatory regime or have some choice in whether to engage in the activity that is the subject of the fee.¹¹⁷

Courts that have ventured into this thicket when evaluating municipal right-of-way fees have often struggled. On the one hand, right-of-way fees that exceed regulatory costs meet some of the central criteria for a tax. They are typically imposed by legislative ordinance; they are intended to be revenue-generating; and the amounts collected typically are placed in the general fund. But, on the other hand, the fees are imposed by the municipality on only a very small group, and the group obtains the arguable benefit of being able to use the public rights-of-way. In trying to place the municipal exactions at the correct point on the continuum between fees and taxes, many courts have been influenced primarily by whether the imposts are intended to generate revenue and whether the amounts collected are destined for the municipal general fund.¹¹⁸ Some courts have found right-of-way fees to be taxes solely because they have a clear purpose to generate revenue in excess of regulatory costs.¹¹⁹

Courts have sometimes loosely characterized fees as “taxes” in a sort of shorthand, without engaging in any analysis.¹²⁰ For example, in an interesting allusion to the statement in *St. Louis I* that the pole fees at issue were “in the nature of rental,”¹²¹ the New York Supreme Court found in 1979 that a gross revenue fee imposed on cable television companies was “in the nature of” a tax.¹²² The New York court contrasted the measure—“essentially a measure of the value of the franchise . . . intended to produce revenue”—to a “modest, flat fee

117. See, e.g., *Boston Gas Co. v. City of Newton*, 682 N.E.2d 1336, 1343 n.19 (Mass. 1997); *N.Y. Tel. Co. v. City of Amsterdam*, 613 N.Y.S.2d at 995; *BellSouth Telecomms., Inc. v. City of Orangeburg*, 522 S.E.2d 804, 806 (S.C. 1999).

118. See, e.g., *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 376 (3d Cir. 1978); *N.Y. Tel. Co. v. City of Amsterdam*, 613 N.Y.S.2d at 995-96; see also *Merrelli v. City of St. Clair Shores*, 96 N.W.2d 144, 150 (Mich. 1959).

119. See, e.g., *Radiofone, Inc. v. City of New Orleans*, 630 So. 2d 694 (La. 1994); *Kent County Water Auth. v. State Dep't of Health*, 723 A.2d 1132 (R.I. 1999); *Chesapeake & Potomac Tel. Co.*, 105 S.E.2d 260.

120. See, e.g., *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986).

121. The Supreme Court said that the pole fee, in that case, was “in the nature of rental.” *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 99 (1893) [hereinafter *St. Louis I*], *reh'g denied*, 149 U.S. 465 (1893) [hereinafter *St. Louis II*]; see *supra* notes 51-64 and accompanying text.

122. *Teleprompter Manhattan CATV Corp. v. City of New York*, 420 N.Y.S.2d 544, 546 (N.Y. Sup. Ct. 1979).

intended to defray the cost of licensing.”¹²³

For reasons that are obscure, courts have gone out of their way to characterize municipal fees that are revenue-generating and clearly greater than regulatory costs as unauthorized taxes, rather than simply as excessive regulatory fees. Under either designation, the fees are impermissible,¹²⁴ and whether a fee is labeled a “tax” as well as an excessive regulatory fee should be irrelevant to a court’s analysis. Especially where there is no argument presented that the municipality has authority to impose taxes on the use of its streets, calling the excessive fee an unauthorized tax adds nothing meaningful to the analysis.

In cases in which it has been important to determine whether a municipal wireline fee exceeding the cost of regulation is actually a tax, the weight of authority has favored an affirmative determination. Assuming that the fee (1) clearly exceeds regulatory costs, (2) is deposited in the general fund, and (3) has not been accepted by the wireline company as a franchise fee, it will generally be considered to be a tax. Only if state law explicitly permits the municipality to impose such a tax, therefore, will it be permissible.

A determination that a municipal wireline fee is a tax, rather than simply an excessive regulatory fee, can be more than semantics in at least one important context. The Federal Tax Injunction Act of 1937¹²⁵ deprives federal courts of jurisdiction to order injunctive or declaratory relief from state taxes. Federal courts considering whether wireline fees are unauthorized taxes have found themselves trapped by the traditional analysis. One district court initially held that a municipal right-of-way fee was an excessive tax under state law. Facing an argument by the municipality on rehearing that the decision was beyond the court’s jurisdiction under the Tax Injunction Act, the court vacated the decision and remanded the case to state court.¹²⁶

123. *Id.*

124. Wireline fees have often been found impermissible as excessive regulatory fees, without any consideration whether they are also impermissible taxes. *See, e.g.*, *Postal Tel.-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904); *City of Saginaw v. Swift Elec. Light Co.*, 72 N.W. 6 (Mich. 1897); *Fylken v. City of Minot*, 264 N.W. 728 (N.D. 1936).

125. The Tax Injunction Act provides that “the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” 28 U.S.C. § 1341 (2002).

126. *See City of Chattanooga v. BellSouth Telecomms., Inc.*, 1 F. Supp. 2d 809 (E.D. Tenn. 1998); *cf. Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371 (3d

To avoid the proscriptions of the Tax Injunction Act, courts have adopted a variety of approaches. A few of these approaches would seem problematic, at best. Simply ignoring the Act, as some courts apparently have done,¹²⁷ plainly is a dubious strategy, and one that certainly is not available where the issue is raised by one of the parties. Some courts have suggested, based on the language from *St. Louis I* discussed extensively above,¹²⁸ that municipal fees are not taxes, but rather are rental payments.¹²⁹ Other courts have simply bucked the weight of authority that revenue-generating fees are considered taxes.¹³⁰

In addition, caselaw supports a holding that, where a suit is brought by the municipality in federal court to collect a tax, the Act does not apply.¹³¹ But this approach will not permit a wireline company to remove the case to federal court where a municipality sues in state court to collect the fee.¹³² None of these theories warrants further discussion here.

Two other arguments against application of the Tax Injunction Act to requests for injunctions and declaratory judgments against municipal right-of-way fees, however, do deserve analysis. First, if the

Cir. 1978) (holding that, under Tax Injunction Act, federal court had no jurisdiction to consider municipal fee of five percent of gross revenues on alarm company's use of streets); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986) (suggesting that FCC's policy of restraint in ruling on cable television franchise fee disputes would leave issues entirely in state court under Tax Injunction Act).

127. See, e.g., *Diginet, Inc. v. W. Union A.T.S., Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992); *N.J. Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631 (D.N.J. 2001); *Bell Atl.-Md., Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated & remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999). Each of these cases deals with requests for injunctions and/or declaratory judgments without discussion of the Tax Injunction Act. It is not inconceivable that the courts dealt with the Tax Injunction Act in other non-reported decisions.

128. See *supra* notes 51-68 and accompanying text.

129. In fact, some of the current confusion about whether a municipal fee is actually "rent" for use of the streets has been perpetuated in discussions by federal courts attempting to avoid surrendering jurisdiction under the Tax Injunction Act. See *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1092-93 (N.D. Cal. 2001); *T.C.G. Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

130. See, e.g., *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d at 1092-93.

131. *Jefferson County v. Acker*, 527 U.S. 423 (1999).

132. If the municipality brings the action in state court, the "well-pleaded complaint" rule may prevent the wireline company from having the case removed to federal court. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* § 3566 (2d ed. 1984).

municipality is using its power of exclusion from the right-of-way to force a wireline company to accept terms—including excessive fees—that are not otherwise clearly authorized, the action should not be dismissed under the Tax Injunction Act. The District Court for the Western District of Texas, for example, recognized that actions brought against municipalities for violations of the Telecommunications Act's proscription against municipal prohibitions on telecommunications services¹³³ do not trigger the Tax Injunction Act, even when issues of fees/taxes are involved.¹³⁴ A similar analysis would argue that the Tax Injunction Act does not apply when a municipality is attempting to force a cable operator to accept a franchise requirement to pay excessive fees as a condition to access the rights-of-way. The Cable Act prevents municipalities from denying cable franchises on unreasonable bases.¹³⁵ Where the issue involves an unlawful denial of access to the rights-of-way, the Tax Injunction Act should not preclude the exercise of federal jurisdiction.

It would also seem apparent that, before a district court must give up jurisdiction under the Tax Injunction Act to review a municipal fee, there must be some colorable argument that the municipality has ultimate authority to impose a tax. The Supreme Court held in reviewing a “comparable” statutory provision—the Anti-Injunction Act¹³⁶—that, “if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists.”¹³⁷ If the municipality cannot make the claim that the challenged charge is an authorized tax under state law, the court should not be required to forego the jurisdiction to find that the charge is an excessive and improper regulatory fee.

133. 47 U.S.C. § 253 (2002).

134. See *AT&T Communications of the Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 854-55 (W.D. Tex. 1998), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000). The court must find that the municipal restrictions at issue have “erected a barrier to the provision of telecommunications services under section 253(a) before ever deciding whether the fees are nevertheless permissible under the “safe harbor” provisions in section 253(c). *Id.*

135. 47 U.S.C. §§ 541(a), 546; see *infra* notes 227-30 and accompanying text.

136. 26 U.S.C. § 7421 (2002). Similar to the purpose of the Tax Injunction Act, the Anti-Injunction Act is intended to “withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes.” *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962); see also *Schneider Transp., Inc. v. Cattanch*, 657 F.2d 128, 134 (7th Cir. 1981).

137. *Enochs*, 370 U.S. at 7.

III. The Preemptive Effect of Current Federal Statutes

A. *Section 253 of the Telecommunications Act*

In the words of Judge Richard Posner, “[t]he deregulation movement in telecommunications makes today more like the day before yesterday (1903) than like yesterday, the heyday of regulation.”¹³⁸ The 1996 Telecommunications Act rejects the last century’s recognition of the virtues of regulated natural monopolies and makes the furtherance of telecommunications competition a national policy.¹³⁹ Section 253(a) of the Act limits the ability of state and municipal governments to interfere with that national policy by adopting a statute, regulation, or other “legal requirement” that “prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁴⁰ In section 253(c), however, Congress provided that “[n]othing 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 a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”¹⁴¹

The majority view is that section 253(c) creates a form of “safe harbor” only.¹⁴² These cases treat section 253(c) not as a prohibition, independent of the prohibition contained in section 253(a), but as specifying types of conduct that are permissible, regardless of section 253(a). The FCC, the federal agency given responsibility under the Act for implementation of many of its provisions, has placed its weight behind this approach.¹⁴³

Many of the cases under section 253 have involved municipal

138. *Diginet, Inc. v. W. Union A.T.S., Inc.*, 958 F.2d 1388, 1398 (7th Cir. 1992).

139. *See* S. REP. NO. 104-23, at 2, 16-17 (1995).

140. 47 U.S.C. § 253(a).

141. *Id.* § 253(c).

142. *See, e.g., BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170 (9th Cir. 2001), *cert. denied sub. nom. City of Tacoma v. Qwest Corp.*, 122 S. Ct. 809 (2002); *Cablevision of Boston, Inc. v. Pub. Improvement Comm’n*, 184 F.3d 88, 99 (1st Cir. 1999).

143. FED. COMMUNICATIONS COMM’N, SUGGESTED GUIDELINES FOR PETITIONS FOR RULING UNDER SECTION 253 OF THE COMMUNICATIONS ACT, FCC 98-295 (1998), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices/1998/fcc98295.txt.

ordinances that require telecommunications companies to agree to accept particular franchise terms, including agreeing to pay specified franchise fees.¹⁴⁴ These ordinances typically contain harsh penalties, sometimes criminal, for operating in the municipality without a franchise. And, if the telecommunications provider obtains a franchise but fails to follow its terms, again the penalties are often severe, and the franchise can then be revoked.

A municipal requirement that a telecommunications company enter into a franchise before constructing its essential infrastructure is itself a prohibition that clearly triggers section 253(a). A literal reading of subsection (a) permits no other conclusion. As noted in *AT&T Communications of the Southwest, Inc. v. City of Dallas*,¹⁴⁵ a requirement that a franchise be granted before a telecommunications company can provide service is “sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a).”¹⁴⁶

144. See, e.g., *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. (2000)); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *Bell Atl.-Md, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000).

145. 52 F. Supp. 2d 763, 770 (N.D. Tex. 1999), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001).

146. See *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d at 814. In *Bell Atlantic-Maryland*, the court stated that:

[A]ny “process for entry” that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way “may . . . have the effect of prohibiting” the provision of telecommunications services in violation of the [Federal Telecommunications Act].

Id.; see also *N.J. Payphone Ass’n v. Town of West New York*, 130 F. Supp. 2d 631, 637 (D.N.J. 2001).

The Sixth Circuit derided as “sophistry” the argument that the City’s requirement to enter into a franchise and pay a franchise fee was a violation of section 253(a). But that court did not appear to recognize the safe harbor analysis that could permit a franchise fee that meets the requirements of subsection (c). See *T.C.G. Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). In its revised opinion in *City of Auburn*, apparently to avoid a clear split with the Sixth Circuit on the point, the Ninth Circuit revised the text and added a footnote to state that it was relying on “the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone.” *City of Auburn v. Qwest Corp.*, 260 F.3d at 1176 & n.11, *amending* 247 F.3d 966 (2001). Nevertheless, the Ninth Circuit did not say that a franchise requirement alone could not violate section 253(a), and it noted that “a regulatory structure that allows a city to bar a telecommunications provider from operating in the city . . . [violates] 47 U.S.C. § 253(a).” *Id.*

In addition, that a franchise may be revoked for failure of the telecommunications company to abide by a franchise's terms, or that other harsh penalties may accompany franchise violations, triggers subsection (a). In *City of Auburn v. Qwest Corp.*, the Ninth Circuit recognized that, in the final analysis, "[t]he ultimate cudgel" was the municipality's ability to revoke the franchise and to remove the wireline company's facilities from the rights-of-way if the company failed to observe the franchise requirements.¹⁴⁷ The court ruled also that the threat of criminal sanctions for violation of a franchise requirement itself "can indubitably only be described as a prohibition."¹⁴⁸

This does not necessarily mean, of course, that franchise requirements or penalties for violating ordinances or franchises are impermissible under the Telecommunications Act.¹⁴⁹ That question cannot be answered without considering whether the franchise requirements are "saved" by the provisions of subsection (c). But the prohibitions in section 253 are to be broadly construed.¹⁵⁰ As noted by the court in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, although the Telecommunications Act does not prohibit franchises, telecommunications providers may not be required to agree to terms that would be inconsistent with subsection (c).¹⁵¹

There is no reason to exempt existing franchises from preemption under section 253, assuming the provisions fail justification under the criteria of subsection (c). So long as a franchise is required and the existing franchise is subject to revocation or harsh penalties are threatened for violations, the franchise stands as a "local legal

147. *City of Auburn v. Qwest Corp.*, 260 F.3d at 1176.

148. *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d at 88 (quoting *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 939 (W.D. Tex. 1997), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000)). In *Board of County Commissioners v. Qwest Corp.*, the court found that the civil and criminal penalties in a right-of-way ordinance, along with "extensive reporting requirements that if not specifically met would result in termination of the franchise" had the effect of prohibiting telecommunications services in violation of section 253(a). 169 F. Supp. 2d 1243, 1246 (D.N.M. 2001).

149. *See, e.g.*, *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 763, 769 (N.D. Tex. 1999), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001); *Bell Atl.-Md. v. Prince George's County*, 49 F. Supp. 2d at 816.

150. *See, e.g.*, *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d at 769; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 975 F. Supp. at 939.

151. 49 F. Supp. 2d at 816 n.25.

requirement” that “may prohibit or have the effect of prohibiting the ability of any entity to provide . . . telecommunications service” under subsection (a).¹⁵²

The only case to consider the issue directly—*City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*¹⁵³—held that the Act does not apply to pre-existing franchises. But that court focused on what it believed was the Act’s intent, rather than its language. The court found no “barrier to entry” to exist in the case of a franchise that pre-dated the 1996 Telecommunications Act.¹⁵⁴ Section 253, however, does not speak directly of barriers to entry; it is couched in terms of “prohibitions.” And, far from exempting existing franchises, section 253(a) states clearly that “[n]o local legal requirement” that has “the effect of prohibiting the ability of any entity to provide . . . telecommunications service” is permissible.¹⁵⁵ The language contains no justification for refusing to extend the Act’s protection to pre-existing franchises.¹⁵⁶

The courts have not taken a consistent line in determining whether municipal fees are permissible under section 253(c). The statutory standard—that the fees must not exceed “fair and reasonable compensation” and must be “competitively neutral and non-discriminatory”—has been subject to varying interpretations.

As an initial matter, it should be clear that section 253(c) does not *authorize* municipal fees where such fees are not otherwise authorized under state law. The language of the section states merely that “[n]othing in this section *affects* the authority” of the local government to impose reasonable, competitively neutral and nondiscriminatory fees.¹⁵⁷

152. See *City of Auburn v. Qwest Corp.*, 260 F.3d at 1175 (quoting 47 U.S.C. § 253(a) (2002)).

153. No. 3-98-CV-2128-R, 2000 WL 198104 (N.D. Tex. Feb. 17, 2000).

154. *Id.* at *5.

155. 47 U.S.C. § 253(a).

156. The *City of Dallas* court recognized (correctly) that franchises entered into after the Telecommunications Act was enacted on February 8, 1996, were subject to preemption under section 253. 2000 WL 198104, at *5; see also *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 756, 760 (N.D. Tex. 1998) (finding that franchises entered into after passage of the Act were preempted), *vacated as moot*, 243 F.3d 928 (5th Cir. 2001). The United States District Court for the District of Oregon reviewed the reasonableness of an existing franchise under section 253(c) in *Qwest Corp. v. City of Portland*, No. 01-1005-JE, 2002 WL 834051 (D. Or. Mar. 22, 2002). It is not clear from the opinion whether the franchise was entered into before or after the 1996 Telecommunications Act.

157. The loose language of the Fifth Circuit Court of Appeals in *AT&T Communications of the Southwest, Inc. v. City of Austin* to the effect that section 253(c) makes use of streets “compensable” is clearly wrong. See 235 F.3d 241, 243 (5th Cir.

The language does not purport to create such authority.¹⁵⁸

The starting point in any analysis of whether a fee is “fair and reasonable” under section 253(c) must be whether the fee is authorized under state law.¹⁵⁹ If the fee is not authorized, clearly it cannot be “reasonable.”¹⁶⁰ But, even if a municipal fee is authorized under state law, it is not necessarily “fair and reasonable compensation” or “competitively neutral and non-discriminatory” under section 253(c). A number of courts have held that the fees must be limited to “the cost to the [municipality] of maintaining and improving the public rights-of-way that [the telecommunications provider] actually uses.”¹⁶¹ These cases have rejected municipal fees that are based—as are most—on a percentage of the gross revenues of telecommunications providers.¹⁶² Some of these cases have also analyzed the degree of usage of the rights-of-way, refusing to permit fees to be imposed on entities that access the rights-of-way only by using the facilities of others.¹⁶³ In striking down fees, some courts have also held that fees recovering more than a municipality’s costs cannot be “compensatory” within the meaning of

2000). So also is language in *Bell Atlantic-Maryland* that local governments are “expressly authorized under Section 253(c) to demand some type of compensation from telecommunications providers for use of public rights-of-way.” 49 F. Supp. 2d 805, 817 (D. Md. 1999).

158. Any federal statutory language purporting to give a municipality authority to charge a fee or tax not authorized under state law must be clear beyond debate. *See infra* notes 233-34 and accompanying text.

159. In *Bell Atlantic-Maryland, Inc. v. Prince George’s County*, the Fourth Circuit vacated and remanded the district court’s decision for failure to consider the state law issues. 212 F.3d 863, 866 (4th Cir. 2000).

160. *See City of Hawarden v. U.S.W. Communications, Inc.*, 590 N.W.2d 504, 510 (Iowa 1999) (noting its “obvious conclusion” that a fee that is not authorized “is neither reasonable nor nondiscriminatory in its application”). In most cases, of course, courts will not reach the question whether a fee is preempted under section 253 if the fee is not authorized under state law. *See, e.g., BellSouth Telecomms., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999).

161. *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d at 818; *see also Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Cal. 2001); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941, at *7 (E.D. Pa. Dec. 20, 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d at 593.

162. *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d at 817-18; *PECO Energy*, 1999 WL 1240941, at *8 (“[R]evenue-based fees cannot, by definition, be based on pure compensation for use of the rights-of-way.”).

163. *See, e.g., AT&T Communications of the Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 856 (W.D. Tex. 1998), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d at 593.

section 253(c).¹⁶⁴

B. The City of Dearborn Case and Its Progeny

Four cases have suggested the contrary—that municipal fees may be deemed “fair and reasonable,” even if based on a percentage of revenue and clearly exceeding the municipality’s costs.¹⁶⁵ The first of these cases, *T.C.G. Detroit v. City of Dearborn*,¹⁶⁶ is grounded in large part on a faulty historical reliance on the rental discussion in *St. Louis I*. Two of the other cases adopt the *Dearborn* court’s reliance on *St. Louis I* without further analysis.¹⁶⁷ The fourth and most recent case, *Qwest Corp. v. City of Portland*, addressed the reasonableness of the fee only as a third alternative basis for upholding the ordinance.¹⁶⁸ This decision also relies on *Dearborn*, but here, in addition, the facts showed that the wireline company had willingly agreed to the fee in its franchise and had sponsored state legislation that would have explicitly authorized the fee.¹⁶⁹

The district court decision in *Dearborn* was the first opinion to address the whether municipal wireline fees were fair and reasonable under section 253. T.C.G. Detroit, a telecommunications provider hoping to compete with Ameritech, the incumbent local exchange carrier, proposed to place its fiber optic cables beneath the City’s streets in existing conduit owned by the electric power company Detroit

164. *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d at 1100; N.J. Payphone Ass’n v. Town of West New York, 130 F. Supp. 2d 631, 638 (D.N.J. 2001).

165. *T.C.G. Detroit v. City of Dearborn*, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), *aff’d*, 206 F.3d 618 (6th Cir. 2000); *Omnipoint Communications, Inc. v. Port Auth.*, No. 99-CIV-0060, 1999 WL 494120, at *6 (S.D.N.Y. July 13, 1999) (dicta); *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 96 (S.D.N.Y. 2000); *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002). Two other cases have upheld fees. In one case, *BellSouth Telecommunications, Inc. v. City of Orangeburg*, the court did not analyze the fee other than to state that a fee equal to a percentage of revenue generated “is not inherently unfair or unreasonable as a measure of the franchise’s value as a business asset to the franchisee.” 522 S.E.2d 804, 808 (S.C. 1999). In the other case, *AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene*, the court held that the plaintiffs had not demonstrated that an ordinance violated section 253(a), and did not reach the fee issue. 35 P.3d 1029 (Or. Ct. App. 2001).

166. 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff’d*, 206 F.3d 618 (6th Cir. 2000).

167. *Omnipoint Communications, Inc. v. Port Auth.*, 1999 WL 494120, at *6; *T.C.G.N.Y., Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 96 (S.D.N.Y. 2000).

168. *Qwest Corp. v. City of Portland*, 200 F. Supp. 2d at 1259.

169. *Id.*

Edison.¹⁷⁰ The cable would be owned by Detroit Edison, but leased back to T.C.G. Detroit.¹⁷¹ The City demanded that T.C.G. Detroit pay an annual fee of four percent of its gross revenues, as well as a one-time charge of \$50,000.¹⁷² The City argued that the various fees represented a reasonable “rental” under *St. Louis I* for T.C.G. Detroit’s use of the streets.¹⁷³ T.C.G. Detroit argued that Congress intended that the term “fair and reasonable compensation” in section 253 should be given the same meaning as the term “just and reasonable” rates under the Federal Pole Attachments Act.¹⁷⁴ Neither argument presented the court with a viable analytic framework under section 253.

Unable to find any authority to support T.C.G. Detroit’s position, the court accepted the City’s argument. The court stated that section 253 “specifically” allows charging “rent,” which the court equated to “compensation.”¹⁷⁵ Where the court found any reference in the statute to “rent”—much less a “specific” reference—is unexplained. The court then relied on the 1893 *St. Louis I* case¹⁷⁶ as recognizing “the general right of a city to seek compensation from a user of the city’s land/right-of-way.”¹⁷⁷ Without repeating our earlier exhaustive analysis of *St. Louis I*,¹⁷⁸ it is enough here to say that the *Dearborn* court’s reliance on *St. Louis I* for the proposition that municipalities may rent their rights-of-way is misplaced.

Ironically, the *Dearborn* court refused to consider T.C.G. Detroit’s argument that the City was not permitted to charge “rent” under Michigan law.¹⁷⁹ By this refusal, the court failed to consider an argument that might have established, beyond question, that the fee was

170. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 786-87.

171. *Id.* at 786-87.

172. *Id.*

173. *Id.* at 790-91.

174. 47 U.S.C. § 224 (2002). The Pole Attachments Act limits a utility’s recovery for providing pole attachment space to cable operators and certain telecommunications providers to a maximum of the fully allocated cost of making the pole space available. *Id.*

175. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 789. “First, there is nothing inappropriate with the city charging compensation, or ‘rent’, [sic] for the City owned property that the Plaintiff seeks to appropriate for its private use. The statute specifically allows it.” *Id.* No language authorizing a rental charge, however, is found in the Act.

176. City of St. Louis v. W. Union Tel. Co., 148 U.S. 92 (1893) [hereinafter *St. Louis I*], *reh’g denied*, 149 U.S. 465 (1893) [hereinafter *St. Louis II*].

177. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 789.

178. See *supra* text accompanying notes 51-68.

179. See T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 790 n.1

not “reasonable.”¹⁸⁰ The court failed to recognize that the Supreme Court’s decision in *St. Louis II*¹⁸¹ belatedly accepted the critical importance of state law in considering whether the fees were permissible.

The *Dearborn* court’s reliance on *St. Louis I* was doubly ironic because the Supreme Court had relied heavily on its perception that Western Union’s poles constituted a “permanent and exclusive appropriation of a part of the highway.”¹⁸² T.C.G. Detroit, on the other hand, did not intend to place a single pole or conduit in the City’s streets and intended to rely entirely on the existing conduit of Detroit Edison.¹⁸³ It is thus not evident what the *Dearborn* court was referring to when it stated: “[T]here is nothing inappropriate with the city charging compensation, or ‘rent’, [sic] for the City owned property that the Plaintiff seeks to appropriate for its private use.”¹⁸⁴ T.C.G. Detroit was apparently “appropriating” no property, and indeed was not affecting the city streets in any measurable way. Although the court noted that T.C.G. Detroit intended to run approximately twenty-seven miles of cable within the City’s rights-of-way, the company was intending to do so entirely within existing Detroit Edison conduit.¹⁸⁵

Even had T.C.G. Detroit intended to place its own poles or conduit in the Dearborn streets, it is questionable whether the concerns expressed by the Supreme Court in *St. Louis I* would justify more than nominal fees. Despite the *St. Louis I* Court’s concern about congestion of municipal streets with numerous utility poles, utilities have for decades shared pole usage among the various users, limiting the number of poles. The 1866 Post Road Act, which gave telegraph companies the right to occupy “post roads,” was never extended to other types of utilities, including telephone companies,¹⁸⁶ and the Act was eventually repealed.¹⁸⁷ Municipalities today commonly require that utilities occupying the streets move their facilities, as necessary, to make room for road enhancements, widenings, and so on, including the obligation to move facilities underground where the municipality determines that all

180. See *City of Hawarden v. U.S.W. Communications, Inc.*, 590 N.W.2d 504, 510 (Iowa 1999).

181. *St. Louis II*, 149 U.S. 465 (1893).

182. *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893) [hereinafter *St. Louis I*], *reh’g denied*, 149 U.S. 465 (1893).

183. *T.C.G. Detroit v. City of Dearborn*, 16 F. Supp. 2d at 787.

184. *Id.* at 789.

185. *Id.* at 787.

186. See *City of Richmond v. S. Bell Tel. & Tel. Co.*, 174 U.S. 761 (1899).

187. Act of July 16, 1947, ch. 256, § 1, 61 Stat. 327 (1947).

aerial wires should be buried.¹⁸⁸ At most, therefore, the presence of utility poles on municipal streets is a temporary occupancy, subject to reasonable regulation by the municipality. Wireline carriers do not receive anything in the nature of the bundle of rights that a “renter” receives.¹⁸⁹ Furthermore, the use of streets for wireline companies’ facilities is wholly consistent with the continued use of the streets for their primary purpose of carrying pedestrian and vehicular traffic.

The other factors considered by the *Dearborn* court fare little better. First, the court looked to “what other telecommunications providers would be willing to pay” and the prior “dealings between the parties.”¹⁹⁰ These two criteria suffer from a similar deficiency. They fail to recognize that section 253, as intended by Congress, fundamentally changed the nature of the relationship between telecommunications companies and municipalities. Until section 253’s limitation of municipal fees to “fair and reasonable compensation,” telecommunications providers frequently had no ability to prevent municipalities from requiring franchise fees that were *not* “fair and reasonable.” As the Illinois Supreme Court noted in *American Telephone & Telegraph Co. v. Village of Arlington Heights*,¹⁹¹ earlier actions of parties are irrelevant in situations of this type:

[I]t is immaterial that the [municipal] defendants have been able to coerce other companies into similar agreements or that AT&T has been coerced into such agreements in the past. The mere fact that AT&T chose not to litigate every wrong thrust upon it does not prevent it from asserting its rights at the present time.¹⁹²

That other parties had been “coerced” into agreeing to pay the fee in Dearborn, and that T.C.G. Detroit had discussed paying such a fee with the City before the Telecommunications Act completely changed the relationship of the parties, is hardly a valid basis on which to find the fee “fair and reasonable.”

188. See, e.g., LEBANON, OHIO, ORDINANCE NO. 7256, § 10(D) (1996); A Cable Franchise Agreement Between Montgomery County, Md. & SBC Media Ventures, L.P. § 5(a)(10) (June 10, 1998) (on file with author); see also 12 MCQUILLIN, *supra* note 36, § 34.74.10.

189. See, e.g., Vill. of Lombard v. Ill. Bell Tel. Co., 90 N.E.2d 105, 109 (Ill. 1950) (“Rental implies possession or controlling the use of, exclusively, to the detriment of those for whom it is held in trust.”).

190. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 790.

191. 620 N.E.2d 1040 (Ill. 1993).

192. *Id.* at 1046.

Finally, the *Dearborn* court looked to whether the fees were “so excessive that they [were] likely to render doing business unprofitable.”¹⁹³ Although whether a fee would drive a company into the red would surely be relevant, this standard would raise the bar much too high. Not only would such a standard be extremely unwieldy and difficult of proof, it would permit fees to be set according to the differing circumstances of each company. Fees set according to such a criterion would necessarily raise serious issues under the other criteria clearly set forth in section 253(c), which require that fees be competitively neutral and non-discriminatory.

In affirming the decision of the district court in *Dearborn*, the Sixth Circuit Court of Appeals conducted little of its own analysis, thus failing to require this critical aspect of the district court’s decision to survive the rigor that might have been imposed through the writing of an appellate opinion. Any kind of careful analysis by the Sixth Circuit panel might have saved it from the unfortunate assertion that the district court’s analysis relating to the fairness and reasonableness of the fee was “thorough and its reasoning sound.”¹⁹⁴ The district court’s analysis, though unquestionably an honest effort at dealing with a statute that had not been previously analyzed,¹⁹⁵ was anything but “sound.”

The District Court for the Southern District of New York referenced the *Dearborn* analysis in two decisions issued the next year—*Omnipoint Communications, Inc. v. Port Authority*¹⁹⁶ and *T.C.G. New York, Inc. v. City of White Plains*.¹⁹⁷ The first of these cases, *Omnipoint*, though favoring the reasoning of the *Dearborn* court, did not rely on it. The court in *Omnipoint* noted that, even were it to adopt the reasoning of the several other courts that had limited fees under section 253(c) to “costs,” *Omnipoint* had not presented evidence that the fees would exceed the Port Authority’s reasonable costs.¹⁹⁸ In the *White Plains* case, the court

193. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d at 791.

194. T.C.G. Detroit v. City of Dearborn, 206 F.3d 618, 625 (6th Cir. 2000).

195. The district court’s decision was handed down in August 1998. T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d 785. Prior to that time, only two cases had been decided related to municipal fees challenged under section 253. Neither the decisions in the *City of Austin* cases, 40 F. Supp. 2d 852; 975 F. Supp. 928, nor the decision in the *City of Dallas* case, 8 F. Supp. 2d 582, issued before the *Dearborn* decision was released by the district court, analyzed the fee issue in any detail. No other cases addressing section 253 are cited by the *Dearborn* district court.

196. No. 99-CIV-0060, 1999 WL 494120 (S.D.N.Y. July 13, 1999).

197. 125 F. Supp. 2d 81 (S.D.N.Y. 2000).

198. *Omnipoint Communications, Inc. v. Port Auth.*, 1999 WL 494120, at *8.

simply followed the “authority” of the earlier *Omnipoint* decision, issued by another judge from the same court.¹⁹⁹

The final case in this quartet, *Qwest Corp. v. City of Portland*,²⁰⁰ relied largely on two other bases for upholding the municipal fee and discussed the *Dearborn* case in a third alternative holding. The court quoted from the decision by the Sixth Circuit in *Dearborn* in a brief statement that “compensation” and “costs” were not the same.²⁰¹ But the court in *Qwest Corp.* was apparently swayed heavily by the wireline operator’s agreement to pay the challenged fee, as well as its sponsoring state legislation earlier that would have explicitly authorized the fee.²⁰²

C. *A Better Analysis: Relying on the Language and Legislative History of Section 253*

In contrast to the *Dearborn* case and the cases favoring its analysis, the cases limiting the safe harbor of section 253(c) to compensation directly related to municipal right-of-way costs rely on analyses with roots in the language of the subsection, historic precedent and the section’s legislative history.

The language of subsection (c) itself squarely limits the range of permissible fees. The word “compensation” suggests a reference to the damage to be caused the holder of the underlying property right.²⁰³ In the seminal case of *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,²⁰⁴ the Supreme Court upheld a jury award of \$1 as “just compensation” for a city’s use of a railroad right-of-way because “the opening of the street across the railroad tracks did not unduly interfere with the [railroad’s] use of the [right-of-way] for legitimate railroad

199. T.C.G.N.Y., Inc. v. White Plains, 125 F. Supp. 2d at 96.

200. 200 F. Supp. 2d 1250 (D. Or. 2002).

201. *Id.* at 1258 (quoting T.C.G. Detroit v. City of Dearborn, 206 F.3d 618, 625 (6th Cir. 2000)).

202. *Id.*

203. See, e.g., BLACK’S LAW DICTIONARY 354 (4th ed. 1957) (defining “compensation” as “[i]ndemnification; payment of damages; making amends; making whole . . . ; that which is necessary to restore an injured party to his former position”); JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 15.15 (3d ed. 1999) (stating that, when a “telegraph company (or any utility company for that matter) acquires the right to maintain its lines along a railroad location . . . [t]he railroad company is not entitled to recover the market value of that portion” and that compensation “is limited to the decrease in the value of the use of the right-of-way for railroad purposes by reason of its being concurrently used for telegraph purposes”).

204. 166 U.S. 226 (1897).

purposes.”²⁰⁵ Because the railroad company was not prevented from using its right-of-way, the Court held that nominal compensation was appropriate.²⁰⁶ These principles, established more than a century ago when questions of utility use of rights-of-way were being commonly raised, continue to be followed: The only compensation due to the holder of a right-of-way for a consistent use is “for any diminution in value of its right-of-way property as a result of the new [use].”²⁰⁷ As noted recently by the District Courts for the District of New Jersey and the Northern District of California, a wireline fee that does more than make a municipality whole “is not compensatory in the literal sense.”²⁰⁸

The language in subsection (c) also establishes that the compensation must be “for” the “use” of the rights-of-way. As several cases have held, this language establishes the need for some direct tie between the compensation exacted and the particular use of the rights-of-way by the telecommunications provider.²⁰⁹ The language suggests both that “revenue-based” fees with no direct relationship to “use of the public rights-of-way,”²¹⁰ are inappropriate and that the degree of such use is plainly relevant to the analysis.²¹¹

205. *Id.* at 242.

206. *Id.* at 256; *see also* *Or. Short Line Ry. Co. v. Postal Tel. Cable Co.*, 111 F. 842 (9th Cir. 1901); *City of Oakland v. Schenck*, 241 P. 545 (Cal. 1925).

207. *Green Bay & W.R.R. Co. v. Pub. Serv. Comm’n*, 68 N.W.2d 828, 834 (Wis. 1955); *see also* *Vill. of Arlington Heights v. Ill. Commerce Comm’n*, 380 N.E.2d 812, 816 (Ill. App. Ct. 1978) (stating that compensation owed limited to decrease in value of the land as it is used, and may be nominal).

208. *N.J. Payphone Ass’n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Cal. 2001); *see also* *Bd. of County Comm’rs v. Qwest Corp.*, 169 F. Supp. 2d 1243, 1251 (D.N.M. 2001) (“[T]he amount of a User Fee must directly relate to the County’s expenses incurred in managing the actual physical use of the public right of way.”).

209. *See, e.g.*, *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998); *AT&T Communications of the Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 856 (W.D. Tex. 1998), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); *Bell Atl.-Md., Inc. v. Prince George’s County*, 49 F. Supp. 2d 805, 817 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941, at *7 (E.D. Pa. Dec. 20, 1999); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d at 1100.

210. *Bell Atl.-Md. v. Prince George’s County*, 49 F. Supp. 2d at 817; *PECO Energy*, 1999 WL 1240941, at *8 (stating that, “by definition,” fees may not be “revenue-based”).

211. *Bell Atl.-Md. v. Prince George’s County*, 49 F. Supp. 2d at 818; *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d at 593; *see also* *N.J. Bell Tel. Co. v. State Bd. of Taxes & Assessment*, 280 U.S. 338, 349 (1930) (stating that “it is well known” that the amount of telephone facilities placed by telephone

Other courts also have balked at the idea that a fee based on gross receipts has any relationship to a company's use of the streets. In *City of Chicago Heights v. Public Service Co.*,²¹² the Illinois Supreme Court noted that "a fee or imposition based upon gross receipts has no relation to the amount of space in a street used by wires or poles of a given company." Basing a fee on gross receipts is "purely arbitrary and discriminatory in its nature."²¹³

The FCC, in an amicus curiae brief to the Court of Appeals for the Second Circuit, called fees based on a percentage of gross revenues "problematic" under section 253(c).²¹⁴ "A percentage of gross revenues-based fee, even if uniformly applied," said the FCC, "might well have no relationship to either the extent of the carrier's use of the rights-of-way or the costs imposed on the municipality."²¹⁵ Although the brief noted that "the FCC has not addressed the specific issue," it recognized "a serious question whether a gross revenues based fee is 'fair and reasonable compensation . . . for use of public rights of way' within the meaning of section 253(c)."²¹⁶

The legislative history of section 253(c) supports those cases that have given the safe harbor limited application. Congress adopted an amendment offered by Representatives Bart Stupak and Joe Barton rejecting the bill's original provision that would have required municipalities to charge the same fees to different telecommunications providers.²¹⁷ Representative Stupak, in offering the amendment, stated his belief that cities "must be able to distinguish between different telecommunications providers" based on their use of the rights-of-way.²¹⁸

companies in different streets varies widely, and that there is "no precedent for the use of gross earnings as a measure of the value of a single element of such a [telephone] plant").

212. 97 N.E.2d 268 (Ill. 1951).

213. *Id.* at 272.

214. Brief of Amici Curiae Federal Communications Commission and United States, T.C.G.N.Y., Inc. v. City of White Plains, Nos. 01-7213(L) & 01-7255(XAP), 2002 WL 31045144 (2d Cir. Sept. 12, 2002).

215. *Id.*

216. *Id.* Representatives of municipal interests were unhappy with the quoted language and requested that the Commission's General Counsel revise the brief. Although noting that the language "was not intended to represent a definitive FCC position that Section 253 precludes any compensation above cost recovery," the General Counsel declined to revise the brief, observing that it "says what it says." Letter from Jane E. Mago, General Counsel, FCC, to Kenneth S. Fellman, Esq. (Oct. 18, 2001) (on file with author).

217. H.R. 1555, 104th Cong. § 243(e) (1995); *see also* 141 CONG. REC. H8425, H8427 (daily ed. Aug. 4, 1995).

218. 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak).

He noted that companies placed differing burdens on the rights-of-way depending on whether the companies dug up the streets and on the miles of rights-of-way used by the companies. His amendment intended that municipalities be permitted to recognize these differing levels of burden in their fees.²¹⁹

D. The Municipal Response: Fees To Reflect Congestion or Street Maintenance Costs

It seems evident that the courts will soon have to deal with attempts by municipalities to structure their fees on telecommunications providers in new and different ways to avoid the growing weight of authority that fees based on a percentage of gross receipts do not meet the criteria of section 253(c). The caselaw contains suggestions that municipal fees may be appropriate to reduce congestion and to maintain the streets. Each of these theories relates to an arguable regulatory cost.²²⁰

Although there seems little question that reducing congestion is a legitimate regulatory goal and that municipal fees may generally be used to achieve it, it is difficult to posit a situation where a legitimate case could be made here. Whatever one may think of the aesthetics of utility poles and their suspended wires and cables, there is no evident crowding of poles on city streets that would justify a municipal “congestion” fee for the purpose of discouraging additional wires. Nor is there evidence of sufficient crowding of underground ducts to suggest that a fee is needed to ration use. In any case, section 253 clearly preempts any fee that attempts to ration right-of-way use. A municipality may not, consistent with section 253, impose a fee that has the intention or effect of prohibiting telecommunications providers from adding more facilities to the right-of-way, at least so long as there are other means to “manage the public rights-of-way” under section 253(c).²²¹

219. *Id.* “[I]f a company plans to run 100 miles of trenching in our streets and wires to all parts of cities, it imposes a different burden on the right-of-way than a company that just wants to string a wire across two streets to a couple of buildings.” *Id.* The Barton-Stupak amendment was intended to ensure that cities were not required to charge the same fee “regardless of how much or how little they use the right-of-way or rip up our streets.” *Id.*

220. The cases also suggest that regulatory fees may be used to discourage undesirable conduct. *See supra* note 39 and accompanying text. Plainly, fees may not be used to discourage the provision of telecommunications services.

221. Any attempt to ration right-of-way use through municipal fees intended to reduce the number of wires on poles and in conduits would also be inconsistent with section 224(f) of the Telecommunications Act. 47 U.S.C. § 224(f) (2002). That

The extent to which a municipality may impose a fee intended to help maintain the streets raises different issues. A municipality may require a telecommunications provider to restore the street to a condition comparable to the condition prior to being excavated. And presumably the municipality may choose to make the restoration itself, at the reasonable expense of the excavator.²²² According to the legislative history of section 253, the section would not prohibit a municipality from “requir[ing] a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation.”²²³ But a municipality may not, under the guise of charging to maintain the street, impose a fee that is used to construct or improve the streets.²²⁴ An exaction used to construct public facilities, such as streets, is plainly a tax that may not be imposed in the absence of explicit taxing authority.²²⁵ And even where such taxing authority resides in the municipality, it may not be used where the effect is to prohibit the provision of telecommunications services. A local tax to construct streets could not be construed either as “management of the public rights-of-way” or as “fair and reasonable compensation . . . for use of public rights-of-way.”²²⁶

E. Limitations Imposed by the Cable Act

In 1984 Congress enacted the Cable Communications Policy Act, the first congressional effort to provide a comprehensive scheme of

provision requires utility pole owners to provide non-discriminatory access to their poles and conduits. *See id.*

222. *But see* Boston Gas Co. v. City of Newton, 682 N.E.2d 1336, 1339 (Mass. 1997) (finding that excavation fees are not permitted where statute gave utility obligation to restore street to original condition); N.Y. Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d 993, 995-96 (N.Y. App. Div. 1994) (finding that excavation fee of \$13 per square foot was not permitted where clearly disproportionate to costs of permits, inspections and enforcement and moneys deposited in general fund).

223. 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein).

224. *See supra* note 41 and accompanying text.

225. *See, e.g.,* N.Y. Tel. Co. v. City of Amsterdam, 613 N.Y.S.2d at 996.

226. 47 U.S.C. § 253(c). Although municipalities have opposed actions brought under section 253 on the grounds that the section does not create a private right of action, the Eleventh and Sixth Circuits have disagreed, and the Ninth Circuit has permitted actions raising section 253 claims to be brought under the Supremacy Clause. *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1174 (9th Cir. 2001); *T.C.G. Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *see also* *Qwest Communications Corp. v. City of Berkeley*, No. C 01-0663 SI, 2001 WL 1867722 (N.D. Cal. Apr. 29, 2002).

regulation for cable television.²²⁷ Among other things, the Act imposed a maximum level—five percent of gross revenues—on franchise fees that could be collected by state and municipal governments from cable operators.²²⁸ Franchise fees include “any tax, fee, or assessment of any kind imposed by a franchising authority or governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.”²²⁹ Excluded from the definition, however, are nondiscriminatory taxes, fees or assessments “of general applicability (including any such tax, fee or assessment imposed on both utilities and cable operators or their services . . .).”²³⁰ Under this exclusion, nondiscriminatory taxes applied to all utilities for street access would not be subject to the federal franchise fee maximum.

The Act was amended in 1996 to clarify that gross revenues include only revenues derived by cable operators from the provision of “cable services.”²³¹ The Senate report on the 1996 amendment describes its intention: “to make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems.”²³²

Section 622(a) of the Cable Act states that, “[s]ubject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.” Although subsection (b) limits the *maximum* amount to five percent of gross revenues, neither subsection (a), nor any other provision of the Act, explicitly authorizes fees up to that amount. Section 622(a) does not say that franchise fees are subject *only* to the limitations of subsection (b), and no such expansive reading of subsection (a) is warranted.

227. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

228. 47 U.S.C. § 542(b). The Act actually increased the maximum level above that permitted by the FCC since 1972. Beginning in 1972 the FCC had permitted franchising authorities to charge cable operators three percent of gross revenues, unless there was a showing that the franchising authority’s regulatory expenses exceeded that amount. In the latter case, the fee could be increased to five percent of gross revenues. See Cable Television Report & Order, 36 F.C.C.2d 141, 219-20 (1972).

229. 47 U.S.C. § 542(g)(1).

230. *Id.* § 542(g)(2)(A). The Act also excludes from the definition payments required by franchise for capital costs for public, educational or governmental access facilities and payments “incidental to the awarding or enforcing of the franchise.” *Id.* § 542(g)(2).

231. Telecommunications Act of 1996, Pub. L. No. 104-104, § 303(b), 110 Stat. 56, 125 (amending 47 U.S.C. § 542(b)).

232. S. REP. NO. 104-23, at 36 (1995).

To read subsection (a) as a grant of authority to municipalities to charge fees that are not otherwise authorized by the state would directly impact state law governing municipal powers. Any congressional interference in the relationship between a state and its political subdivisions is permissible “only when Congress has manifested its intention with unmistakable clarity.”²³³ Interpreting the language of section 622(a) to authorize municipalities to impose franchise fees in amounts not clearly provided for under state law would fail that test. Subsection (a) simply means that federal law neither permits nor limits cable franchise fees, except for the five-percent maximum amount specified in subsection (b).²³⁴

Any cable television franchise fee, therefore, even after the Cable Act, must be authorized in the first instance by state law. Although some municipalities may be authorized explicitly to charge fees up to the federal maximum by state statute or charter provisions,²³⁵ most municipal franchise fees simply stem from the municipal ability to enter into franchise contracts.²³⁶ In return for the right to provide cable service in the community, the cable operator agrees to pay franchise fees.

233. *City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). The D.C. Circuit also declared that “interfering with the relationship between a State and its political subdivisions strikes near the heart of State sovereignty.” *Id.* at 52; *see also* *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96-C5962, 1997 WL 280692, at *16 (N.D. Ill. May 21, 1997) (quoting *Warner Cable Communications v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 214 (E.D. Pa. 1992)) (“[T]he power to create municipalities and define the limits of their powers is quintessentially a state function.”).

In the *Schuylkill Haven* case, the court considered section 613(d) of the Cable Act, 47 U.S.C. § 533(e), which provides that a “franchising authority may hold an ownership interest in a cable system.” 784 F. Supp. at 212. Holding that “Congress had no intention of granting powers to municipalities that the municipalities did not have under state law,” the court found the statutory language “permissive rather than empowering.” *Id.* at 213.

234. *See, e.g., City of Walnut Creek v. UACC Midwest, Inc.*, No. C 96-04335 SI, 1997 WL 85009, at *5 (N.D. Cal. Feb. 13, 1997). Although the House report on the Cable Act contains ambiguous language that could be interpreted to authorize franchise fees, there is nothing in the language of the Act or the legislative history that would indicate a clear congressional intention to dictate to the states that they must permit their municipalities to impose such fees where they would not otherwise be permitted under state law. *See* H.R. REP. NO. 98-934, at 26, 63 (1984).

235. *See, e.g., Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 410 S.E.2d 652 (Va. 1991) (finding that Norfolk City Charter conferred taxation authority); *see also* NEV. REV. STAT. 354.59883 (2002) (authorizing municipal fees up to five percent of gross revenues).

236. *See, e.g., Schloss v. City of Indianapolis*, 553 N.E.2d 1204 (Ind. 1990) (finding franchise fee permitted under city’s right to bargain for franchise contract).

Under the Cable Act, franchise fees may be passed directly through to cable customers and itemized on their bills.²³⁷ With that ability, few cable operators have chosen to bring judicial challenges against municipal franchise fees that do not exceed the federal maximum for cable services.²³⁸ At the same time, many cable operators have been willing to accept municipal demands in franchise renewal negotiations to agree to pay the federal maximum fee. But, with the dollar amounts and competitive bite of franchise fees increasing annually, it is inevitable that cable operators will be less willing to agree to the federal maximum fees in franchise renewal negotiations going forward.

The variety of services delivered by cable operators is expanding and the competitive landscape is rapidly changing. In addition to traditional cable services, cable operators are the leaders in providing high-speed data and Internet access services.²³⁹ Several large cable operators already provide circuit-switched telephone service, and other cable operators are experimenting with the provision of Internet protocol ("IP") telephony over their systems. Competition is growing for all services.²⁴⁰ Direct broadcast satellite ("DBS") providers gained more than three million video subscribers from June 2000 to June 2001, an increase of more than ten percent. In addition to increased experiments with high-speed digital subscriber line ("DSL") technology to provide video entertainment services, telephone companies have an estimated 4.3 million high-speed Internet access subscribers.²⁴¹ Wireless and DBS providers are also beginning to offer competitive high-speed Internet access.²⁴² Neither DBS nor wireless operators pay municipal franchise

237. Franchise Fee "Pass Through," 13 F.C.C.R. 4566 (1998); 47 C.F.R. § 76.922 (2002). Cable operators are also permitted to "itemize" the amount of the franchise fee on subscriber bills. 47 U.S.C. § 542(c).

238. The few challenges that have been brought have been based on the First Amendment and have largely been unsuccessful. See, e.g., *Erie Telecomms., Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988).

239. The FCC's *Video Programming Report* states that, by June 2001, cable operators had 5.6 million cable modem (cable data and internet access) subscribers, a six-month increase of 1.7 million. VIDEO PROGRAMMING REPORT, *supra* note 2, para. 44.

240. Cox Communications and AT&T Broadband provide circuit-switched telephone service. AOL Time Warner, Comcast, Charter, and AT&T all are experimenting with cable-delivered IP telephony. *Id.* para. 50.

241. *Id.* para. 43 & n. 126. Analysts expect that, by 2004, 28.9 percent of all households will access the Internet through cable modems and 21.1 percent through DSL. *Id.*

242. Wireless and satellite providers currently have eight percent of the high-speed Internet access market. *Id.* By 2004, 5.7 percent of households are expected to access

fees on any of their services, nor, typically, their equivalent in state taxes.

Meanwhile, telecommunications companies are challenging the authority of municipalities to impose fees above the cost of regulation. It seems inevitable that cable operators will soon be rising in force to challenge the imposition of municipal fees not only on revenues received from high-speed data, Internet access, and telephone services, but also from traditional cable services.

Typical cable franchises run a maximum of ten to fifteen years.²⁴³ The Cable Act has established an expectation of franchise renewal,²⁴⁴ and, if cable operators are not able to negotiate a renewal on reasonable terms, they are entitled to a formal administrative hearing and judicial review. Section 626 of the Act provides that cable operators are entitled to a renewal of franchises so long as they meet four specified criteria.²⁴⁵ In the absence of substantial questions about past performance and continued legal, financial, and technical qualifications, cable operators are entitled to have their franchises renewed if their renewal proposals are reasonable in view of the future cable-related needs and interests of the community and the related costs.²⁴⁶ A general municipal desire to augment its general fund certainly cannot be said to be a future cable-related community need or interest.

Under the Act, franchise fees are understood to include operating expenses in support of public, educational and governmental access

the Internet through broadband wireless and satellite technologies. *Id.* para. 44 & n.126.

243. H.R. REP. NO. 98-934, at 25 (1984).

244. *E. Telecom Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3d Cir. 1989).

245. The statute details these criteria as whether:

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. § 546(c)(1) (2002).

246. Most disputes related to cable franchise renewals are focused on this criterion—whether the cable operator's proposal “is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.” *Id.* § 546(c)(1)(D).

(“PEG access”) use of the cable system.²⁴⁷ Only such payments agreed to in franchises predating the 1984 Act are exempted from the Act’s “franchise fee” definition.²⁴⁸ Under this statutory scheme, payments made by cable operators under newer franchises in support of PEG access operating costs would be permitted up to the point that the total fees, including those in support of PEG access, do not exceed five percent of gross revenues from cable services. The “need” for those payments, however, would have to be demonstrated by the municipality, and the revenues collected for that purpose would have to be spent on PEG access. Only meeting PEG access needs and the municipality’s legitimate costs of regulation—at most—could be said to be cable-related. And nothing in the Cable Act alone would justify a franchise fee in excess of PEG access requirements and regulatory costs.²⁴⁹

As existing franchises come up for renewal, cable operators will be forced increasingly to question whether, based on state law, municipalities may demand franchise fees up to the federal maximum. Unless state law explicitly provides municipalities the authority to tax cable operators, cable operators will likely resist agreeing to pay franchise fees that exceed regulatory costs and demonstrated PEG access operating needs.

Cable operators’ attacks on municipal fees imposed by municipalities on services other than “cable services” are not likely to wait for a renewal context. The FCC recently determined that “cable modem service is not a ‘cable service’ under the definition prescribed by the Act.”²⁵⁰ The FCC also “tentatively conclude[d]” that the Cable Act “does not provide an independent basis of authority for assessing franchise fees on cable modem service.”²⁵¹ Why the FCC’s conclusion

247. PEG access programming is programming controlled by “local governments, schools, and nonprofit and community groups” and carried over the cable system. H.R. REP. NO. 98-934, at 30 (1984); *see also* 47 U.S.C. § 531.

248. 47 U.S.C. § 542(g)(2)(B). Payments for PEG access capital costs are also excluded from the definition of franchise fees. *Id.* § 542(g)(2)(C).

249. A municipality is entitled to recover its reasonable regulatory costs under the historic precedents. *See supra* notes 42-48 and accompanying text.

250. *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4833 (2002). The FCC defined “cable modem service” as “a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access.” *Id.* at 4818-19. The Commission determined that cable modem service is an “interstate information service.” *Id.* at 4802.

251. *Id.* at 4851. The FCC couched the issue in the wrong terms. As noted above, the Cable Act does not provide any “independent basis for assessing franchise fees” on any

to that effect should be termed “tentative” is unclear. Once the FCC determined that cable modem service is not cable service, the conclusion that revenues from cable modem services do not constitute part of the franchise fee “gross revenue” base follows indubitably. Only if the courts overturn the FCC’s determination that cable modem service is not a “cable service” under the Cable Act should cable modem services be subject to franchise fees under section 622.²⁵²

Where a service is not a “cable service” but is provided over a “cable system,” the Act plainly prohibits the payment of any franchise fee on a cable operator’s revenues from it. “Cable service” is defined as “the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any which is required for the selection or use of such video programming or other programming service.”²⁵³ A “cable system” is defined, in relevant part, as “a facility . . . designed to provide cable service which includes video programming.”²⁵⁴ Cable operators’ IP telephone services, for example, would clearly be covered by the statutory exclusion because they are offered over the same facilities that provide cable service yet are not “cable services.”

Under the FCC’s ruling that cable modem services are “information services,” rather than cable services,²⁵⁵ or under the Ninth Circuit’s *City of Portland* ruling that Internet access is “telecommunications,”²⁵⁶ these services would not be subject to a municipal franchise fee. Whether circuit-switched telephony services are offered by cable operators over a “facility designed to provide cable service” will likely depend on the facts that can be proved in the individual case.²⁵⁷ But, even if these services are not offered over the “cable system,” Congress has prohibited any franchise fees on them. Section 621(b)(3)(B) of the Cable Act

service. *See supra* text accompanying notes 233-36.

252. Municipal interests appealed the FCC’s decision to the D.C. Circuit, from where it was transferred to the Ninth Circuit, where the case now resides. *National League of Cities v. FCC*, No. 02-71425 (9th Cir. May 24, 2002).

253. 47 U.S.C. § 522(6).

254. *Id.* § 522(7).

255. *See supra* note 250 and accompanying text.

256. *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

257. At most, revenues from circuit-switched telephony offered by cable operators would be subject to fees limited under section 253. *See supra* notes 203-19 and accompanying text. But to the extent that cable operators’ provision of circuit-switched services are offered “with respect to any cable system,” no fee would be permitted under section 622(b). *See supra* notes 203-19 and accompanying text.

prohibits franchising authorities from imposing “any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of telecommunications service by a cable operator or an affiliate thereof.”²⁵⁸

IV. Conclusion

The issues surrounding municipal wireline fees are likely to remain on boil until the judicial decisions reach equipoise, as they largely did a century ago regarding municipal efforts to exact “pole fees” from telegraph and telephone companies. However, because municipalities show no lessened desire for revenues, because telecommunications and cable companies are facing increasing competition from entities that do not pay wireline fees, and because the revenues at stake are growing rapidly, the battle is expected to get even hotter before it is resolved.

Although some municipalities continue to allege an ability to collect “rent” for the wireline companies’ occupancy of the streets, that analysis is misplaced. The case universally relied on for that theory—*St. Louis I*—does not stand as good authority. Wireline charges in excess of regulatory costs are either “taxes” or “franchise fees.” If the charges are taxes, they must be authorized explicitly by state law. And, even where authorized by the state, they are closely limited by section 253 of the Telecommunications Act and section 622 of the Cable Act. Section 253 limits municipal taxes related to right-of-way use by telecommunications companies to regulatory costs. Section 622 of the Cable Act limits municipal right-of-way fees that do not have general applicability to all utilities to five percent of a cable operator’s gross revenues derived by the cable system from cable services.

If the wireline charges are franchise fees, they must be agreed to by the wireline company. Municipal leverage to demand fees higher than regulatory costs in new or renewed franchises is cabined by the preemptive effect of the federal statutes. Telecommunications providers have little incentive to agree to pay fees higher than the cost of regulation when federal law carefully circumscribes the municipalities’ ability to deny them a franchise. Cable operators also have little incentive to agree

258. 47 U.S.C. § 541(b)(3)(B). The meaning of the reference to imposing requirements “under this title” has never been explicated by the courts. To the extent that a franchising authority attempted to impose fees under title II of the Communications Act, section 253 of the Telecommunications Act would come into play. See *supra* notes 138-219 and accompanying text.

in franchise renewal discussions to pay franchise fees that exceed the costs of regulation, plus justified costs of PEG access. The days when municipalities can expect to pluck the golden goose of new telecommunications and cable services are drawing to a close.