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TELECOMMUNICATIONS LAW UPDATE

Carriers, Local Governments Battle Over Rights-of-Way Ordinances and Section 253

Following the adoption of the Telecommunications Act of 1996, a number of urban areas have seen a dramatic increase in the amount of fiber laid by telecommunications providers in the public rights-of-way. In some cases new entrants — competitive local exchange carriers, competitive access providers, data carriers and the like — have been laying this fiber. In other cases, incumbent providers have been upgrading and expanding existing services. Many local governments have viewed this flurry of activity as an untapped source of local revenues. Although, prior to the 1996 Act, incumbent telecommunications providers often paid so-called "franchise fees" for use of the rights-of-way, those fees were often quite low or were arguably justified because a carrier had an exclusive franchise in a city. The expansion of telecommunications services and increased competition following the 1996 Act have led many localities to seek to extract higher fees and thus increase local government revenues. As demand for use of the public rights-of-way has increased, local governments also have sought a more active role in regulating telecommunications providers, imposing detailed application procedures and reporting obligations on carriers and requiring carriers to provide excess conduit or free telecommunications services in return for use of the rights-of-way.

Telecommunications providers have challenged some of these enactments, with considerable success, arguing that they violate section 253 of the 1996 Act. Section 253 was intended to prevent states and local governments from creating barriers to entry that would deter providers from offering telecommunications services. It bars states and local governments from enforcing laws or ordinances that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." The FCC has made clear that section 253 bars not only state and local laws that directly prohibit the provision of services, but also any requirement that "substantially raises the costs and other burdens of providing [telecommunications] services." The FCC has expressed concern that local ordinances are creating a "third tier" of local regulation on top of federal and state requirements, deterring the deployment of new services and the entry of new competitors. However, section 253 preserves the authority of states and local governments to apply laws and ordinances that "manage the public rights-of-way," and to "require fair and reasonable compensation" from carriers for the use of the public rights-of-way, provided that such charges are imposed in a nondiscriminatory manner.

Carriers have relied on section 253 to attack local rights-of-way ordinances that appear to go beyond traditional rights-of-way management efforts. Federal district courts in Texas, New Mexico, Pennsylvania, and Florida, have invalidated local ordinances that imposed non-cost-based fees on telecommunications providers and established burdensome application requirements on carriers that sought to use the rights-of-way. The district court in Maryland also invalidated a local ordinance on these grounds, but the Fourth Circuit later vacated the decision, finding that state law objections to the ordinance should have been considered before determining whether the ordinance was preempted by section 253. *Board of Commissioners of Grant County, New Mexico v. US WEST*

Communications, Inc., No. Civ. 98-1354 JC/LCS, (D.N.M. June 26, 2000), one of the most recent cases, is typical: the court invalidated a county ordinance that imposed a 5 percent fee on a carrier's gross revenues from telecommunications services in that county, finding that the fee was not "fair and reasonable compensation" for a carrier's use of the rights-of-way because it was not related to the local government's "expenses in managing the rights of way." The court also found that the broad discretion given to local officials to grant or deny franchise applications improperly expanded the ordinance beyond mere rights-of-way management. In pending litigation, Qwest Corporation is challenging a similar right-of-way ordinance enacted by Santa Fe, New Mexico that, among other things, requires carriers to enter into individual leases and pay "rent" for each and every right-of-way that a carrier uses.

While most courts addressing claims under section 253 have broadly construed the preemptive force of section 253, a few courts have not: a federal district court in Michigan, for example, found that section 253 did not prohibit a local franchise fee equal to 5 percent of gross revenues. The court found that the fee constituted "fair and reasonable compensation" for the carrier's use of the rights-of-way, and the decision was upheld by the Sixth Circuit. Similarly, in *TCG New York, Inc. v. City of White Plains*, No. 99CIV.4419(BDP), 2000 WL 1873845 (S.D.N.Y. Dec. 20, 2000), a federal district court in New York upheld a fee set at 5 percent of gross revenues. However, the court did invalidate several other provisions of the local ordinance in question, finding that they extended beyond management of the rights-of-way by requiring carriers to provide information unrelated to rights-of-way management and by granting officials overly broad discretion to deny franchise applications.

Although many suits under section 253 have been brought by incumbent carriers, who often are more immediately affected by the new ordinances and the higher franchise fees, the FCC has initiated a Notice of Inquiry proceeding to address concerns that state and local governments may be enacting laws and ordinances that are interfering with the ability of new competitors to enter markets and provide service. However, the FCC ultimately may be reluctant to wade into this sensitive area of federal, state and local relations. The FCC's Local and State Government Advisory Committee (LASGAC), which will draft "best practices" guidelines for rights-of-way management policies, has recommended that the FCC take no action to preempt such laws and ordinances; it remains to be seen whether carriers can convince the FCC otherwise.

Meanwhile, the battleground over local rights-of-way ordinances is expanding to the state legislatures. A number of states, including Minnesota, Indiana, Colorado, Iowa, Nebraska, and Michigan, have adopted laws similar to section 253 that limit the power of local governments to impose charges on telecommunications providers for the use of public rights-of-way. These laws bar local governments from charging fees greater than necessary to recover their actual costs for managing their rights-of-way. Litigation in the future therefore may draw as much on state and federal law.

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This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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