



Where the wire meets the dirt: Access to municipal-rights-of-way for telecommunications carriers

by Chip Gerry and Brad Macdonald

Written from a telecom competitor's perspective on securing "last mile" access to customers in local markets, the authors discuss the background, issues, and negotiation tips for entrants seeking access to rights-of-way owned or controlled by cities, counties, townships, and other municipalities.

Historically, municipal rights-of-way — the roads, streets, underground passageways, conduits, street lamps, poles, and other municipal property to which telecommunications carriers require access — have been largely reserved for use by the "traditional" utilities. These utilities (today's incumbent local exchange carriers (ILECs) among them) typically enjoyed privileged access to the public thoroughfares under the authority of decades-old utility codes, ordinances, municipal charters, and utility easements.¹ The sharing of these privileges with competitors was simply not contemplated.

When local competition emerged in the early 1990's,² this picture began to change.

Competitors — competitive access providers (CAPs), competitive local exchange carriers (CLECs), alternative local telephone service providers (ALTs), and others — in their efforts to open the local exchange, all began to seek access to municipal rights-of-way as one of the "last mile" alternatives for local customers. In fact, in the absence of private (e.g., dark fiber) agreements with utilities, easements, or other special arrangements, municipal right-of-way access is — and remains to this day — the condition *sine qua non* for establishing a competitive local presence. Some municipalities voluntarily engaged in right-of-way negotiations with the new entrants; many did not.

The last mile right-of-way access problem for competitors soon surfaced as one of the major debates leading up to the 1996 telecommunications legislation.

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Preemption of Local Entry Barriers under the 1996 Act

In response to the lamentations of the CLEC industry, Congress, as part of the Telecommunication Act of 1996 ("the 1996 Act"), enacted Section 253(a)-(d):

- (a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
- (b) State Regulatory Authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with

of-way and to exact compensation for the use of public property. The legislative history of the 1996 Act further indicates Congress' intent to leave unaffected such rights of local governments.⁴ As expected, the proper scope and interpretation of these rights have been the subject of a great deal of disagreement.

The first real test of this new regulatory scheme came before the Federal Communications Commission (FCC) in *In re Matter of Classic Telephone, Inc.*⁵ In *Classic Telephone*, the petitioners, pursuant to Section 253(d) of the Act, sought FCC preemption of two municipal decisions refusing to approve petitioner's franchise applications to provide local exchange and related telecommunications services.⁶

In granting *Classic Telephone's* petition⁷, the FCC indicated that the scope of the municipal management function included the following: (1) to regulate the time or place of excavation to preserve traffic flow and prevent road hazards; (2) to require a service provider to place facilities underground rather than overhead, consistent with the requirements imposed upon other utility companies; (3) to require a service provider to pay its share of fees to recover street

repair and paving costs; (4) to enforce local zoning regulations; and (5) to require a service provider to indemnify the municipality against claims of injury arising from the service provider's excavation.⁸ In *Classic Telephone*, the facts did not implicate — and thus the opinion did not address — the issue of "fair and reasonable compensation." Further clarification remained necessary.

Some guidance soon came from the FCC, which again addressed its Section 253(d) preemption authority in its *In re Matter of TCI Cablevision of Oakland County* decision.⁹ Although the FCC declined to address the merits of the petition, it opined that it was not necessary for a prospective entrant to have attempted to compete within a municipality, and then to have withdrawn from the municipality due to the prevailing regulatory scheme, prior to the FCC exercising its authority under Section 253(d).¹⁰ However, in *dicta*, the FCC observed that local governments may be "creating an unnecessary 'third tier' of regulation that extends far beyond the statutorily protected interests in managing the public rights-of-way."¹¹ Thus, while the FCC admonished localities to limit the scope of their management duties, the ruling offered no further clarification as to the permissible extent of municipalities' right-of-way management authority. In addition, again the FCC did not address the contours of the "fair and reasonable compensation" standard.¹²

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section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

- (c) State and Local Government Authority. Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
- (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.⁹

Thus, Section 253 effectively restricts municipalities from denying telecommunications providers access to their rights-of-way. However, Section 253(c) reserves to municipalities the authority to manage their rights-



Further clarification as to the scope and meaning of these congressional standards came in *AT&T Communications of the Southwest, Inc. v. City of Dallas*.¹⁵ The court ruled that the municipal management function conferred by Section 253(c) does not empower local regulatory authorities to grant or deny a franchise based solely upon their own discretion.¹⁴ "Rather, granting a franchise may only be conditioned on a company's agreement to comply with the city's reasonable regulation of its rights-of-way and the fees for use of those rights-of-way."¹⁵

Regarding franchise fees, the court construed the "fair and reasonable compensation" provision of Section 253(c) as prohibiting municipalities from imposing fees on telecommunications providers except as compensation for use of the rights-of-way.¹⁶ Thus, the court invalidated Dallas' requirement that AT&T pay four percent (4%) of its gross revenue from *all* of its activities in Dallas. The court concluded that the proposed fee was an economic barrier to entry and that any fee that is not based on *actual* use of the municipalities' rights-of-way is prohibited.¹⁷

However, in *TCG v. Dearborn*,¹⁸ another court imparted a much broader construction to the powers reserved to state and local governments by Section 253(c). The court found "nothing inappropriate with the city charging compensation, or 'rent', for the City owned property that the plaintiff seeks to appropriate for its private use. The statute specifically allows it."¹⁹ Thus, whereas the court in *AT&T v. Dallas* expressly prohibited compensatory schemes based on "gross revenues," the *TCG v. Dearborn* court found the same wholly permissible. The *TCG v. Dearborn* decision was silent as to the scope of the municipal management function, but nevertheless clouded the issue of "fair and reasonable compensation" in light of *AT&T v. Dallas*.

In *Omnipoint Communications, Inc. v. Port Auth. of New York and New Jersey*,²⁰ the court employed a rationale similar to that in the *TCG v. Dearborn* decision. It observed that the term "compensation" has long been understood to permit municipalities to charge rental fees "for public property appropriated to private commercial use."²¹ It found no reason to construe Congress' intent so as to limit such compensation to actual costs incurred by the municipalities in providing right-of-way access.²² In determining what constitutes "fair and reasonable," the court, again looking to *TCG v. Dearborn* for guidance, adopted a totality of circumstances approach. The court

identified several non-exclusive factors that govern such a determination, including *inter alia*: (1) the extent of the use of the public rights-of-way, (2) whether other carriers have agreed to comparable compensation for comparable uses of the rights-of-way, (3) the course of dealings among the parties, and (4) whether the compensation sought is so excessive that it is likely to render doing business unprofitable.²³

The *Omnipoint* decision adds little to the analysis of the proper scope of the management function, but it is significant in that it underscores the lack of clarity that continues to pervade the scope of municipal authority under Section 253.

In summary, here's where things now stand in the turf war between municipalities and competitive entrants. Notwithstanding the numerous preemption cases that have been decided, there has been no clear resolution of most of the major points of contention between municipi-

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ties and telecommunications service providers. For example, the basis of fair and reasonable compensation for the use of rights-of-way is still in dispute, as is the degree of control a municipality may exert over telecommunications providers in the management of its rights-of-way. However, it appears that municipalities now generally concede that the nature and quality of the telecommunications services provided to their constituents are subject to regulation by state public service commissions and the FCC and not by the municipality itself.

Negotiating Municipal Right-of-Way Agreements

In negotiating right-of-way agreements, a number of threshold issues arise: first, does the municipality have the legal authority to *grant* the access rights sought by the entrant; second, conversely, does the entrant have the legal right to effectively *demand* such access? The first depends

upon the authority conveyed to the municipality by the enabling statute, constitutional provision, or charter that created the entity. The second typically depends upon the regulatory status of the entrant. Thus, for example, a competitive local exchange carrier having secured entry authority from the state public utility commission may, in some state jurisdictions, have the right to demand municipal-rights-of-way access, leaving open only the question of compensation.²⁴ In contrast, information service providers and other entities not providing telecommunications services may not have such rights.

Once the rights and authorities of the parties have been established, the next step is typically the exchange and markup of the municipalities' "standard form" franchise agreement. Issues typically addressed in the negotiation that follows include (but are by no means limited to) the following:

- Are the "franchise fees" based on the gross revenue received from the provision of telecommunication services within the municipality, or on the municipalities' costs incurred in administering the franchise program and in maintaining the rights-of-way used?
- Is the municipality seeking to regulate the provision of telecommunication services?
- Will the municipality agree to terms, rates, and conditions that are at least as favorable as those given to the ILEC?
- What remedies, including liquidated damages, is the municipality to have available?
- What indemnifications will the municipality require, including for the grant of the franchise itself?
- What additional permits and licenses must be obtained to install facilities in the rights-of-way?
- What services and facilities, if any, must be provided to the municipality?
- Are there restrictions and conditions on the transfer or assignment of the franchise or the telecommunication facilities and/or on the control of the franchisee?
- What audit rights is the municipality to have?
- What are the conditions under which the municipality can require the relocation of the telecommunication facilities in the right-of-way?
- What renewal rights, if any, can be obtained from the municipality?

Getting Started: Suggested Approaches for Competitors

In the period shortly after the 1996 Act was passed, many municipalities were not adequately prepared to address the demands of the numerous telecom-

munications providers demanding access to their rights-of-way under the 1996 Act. This is generally no longer the case. Municipalities now frequently have full-time telecommunications coordinators and have retained specialists in telecommunications and municipal law to represent their interests in franchise negotiations. Additionally, organizations such as the National Association of Telecommunications Officers and Advisors have established programs to inform municipalities of current developments in the law and to formulate uniform policies and model telecommunications ordinances for use by municipalities in right-of-way negotiations.

Prior to commencing comprehensive negotiations with a municipality, it will be helpful to obtain, if possible,²⁵ copies of other franchise agreements that the municipality has negotiated. These agreements can then be compared with the franchise form provided to the telecommunications provider seeking use of the right-of-way. The new applicant may then glean some indication of what may and may not be negotiable.

In many situations, the more franchise agreements entered into by a municipality, the more difficult it seems to negotiate significant changes in their form of agreement. Municipalities generally are sensitive to their statutory obligation to manage public rights-of-way on a "competitively neutral and non-discriminatory basis," and appear to believe that this obligation requires the uniform application of existing franchise provisions to those seeking subsequent access.

After reviewing the proposed form of franchise agreement – and, hopefully, other agreements already negotiated by the municipality – the requesting telecommunications provider should realistically evaluate whether it is willing to seek preemption if the changes it proposes are not accepted. This decision often forms the framework for the negotiating strategy that will be used. If it is decided that a preemption action is not a viable option, then the negotiation will frequently focus on negotiating acceptable revisions to the municipalities' terms and conditions (hopefully, at least as favorable as those affordable to competitors). However, if preemption is an option, then the negotiation will be typically more adversarial, with both parties seeking more to justify and defend their respective positions than to arrive at a compromise. ▲



¹ Some of these rights extended back to the turn of the century under "grandfathering" clauses in the city charters and easements. Recently, the issue of whether such conveyances included the rights to install modern telecommunications facilities has been the subject of litigation.

² See e.g., *In re Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, *Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket No. 92-222 (Report and Order and Notice of Proposed Rulemaking), 7 FCC Rcd. 7369 (Oct. 19, 1992).

³ 47 U.S.C. § 253(a)-(d).

⁴ See Conference Report, Joint Explanatory Statement, H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. (January 31, 1996).

⁵ *Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCB Pol. 96-10 (Memorandum Opinion and Order) 11 FCC Rcd. 13,082 (October 1, 1996) (hereinafter "*Classic Telephone*"). See also *In re New England Public Communications Council Petition for Preemption*, CCB Pol. 96-11 (Memorandum Opinion and Order) FCC 96-470 (Dec. 10, 1996) (FCC exercised Section 253(d) preemption power to invalidate a regulation permitting only certified Local Exchange Carriers (LECs) to provide payphone services, finding that the restriction barred a class of entities — non-LECs — from offering payphone services).

⁶ *Classic Telephone* at ¶ 1.

⁷ The FCC's ruling found that: "The Cities' decisions reflect the application of their franchise requirements in a manner that prohibits Classic from providing telecommunications services. The decisions, on their face, appear to violate section 253(a). Moreover, the Cities have failed to provide any evidence to show that their franchise denials are permitted pursuant to section 253(b). In addition, the Cities have not demonstrated that their actions were public rights-of-way management or related compensation actions so as to trigger section 253(c). We find, therefore, that section 253 preempts the Cities' decisions denying Classic's franchise applications for the provision of telecommunications services." *Id.* at ¶ 46.

⁸ *Id.* at ¶ 39.

⁹ *Petition for Declaratory Ruling, Preemption and Other Relief*, CSR-4790 (Memorandum Opinion and Order) FCC 97-331, 12 FCC Rcd 21396 (September 19, 1997) (hereinafter "*Troy*").

¹⁰ *Id.* at ¶ 100.

¹¹ *Id.* at ¶¶ 102 - 105 ("For example, the Troy Telecommunications Ordinance contains provisions that, among other things, require franchisees to interconnect with other telecommunications systems in the City for the purpose of facilitating universal service, provide for regulation of the fees charged for interconnection, and mandate 'most favored nation' treatment for the City under which a franchisee providing a 'new service, facility, equipment, fee or grant to any other community . . . within the State of Michigan' shall provide the same to the City of Troy. Such Ordinance provisions will be difficult to justify under Section 253(c) on the grounds

that they are within the scope of permissible local rights-of-way management authority . . .").

¹² The FCC found that TCI lacked standing to petition for Section 253 preemption because a change in its business strategy resulted in TCI's abandoning its plans to offer telecommunications services in the city. Moreover, the FCC declined to issue a declaratory or advisory ruling addressing whether Troy's ordinance should be preempted under Section 253(d). *Id.* at ¶ 7.

¹³ 8 F. Supp. 2d 582 (N.D. Tex. June 8, 1998) (granting petitioners' request for temporary injunctive relief), *aff'd* 1999 U.S. Dist. Lexis 727, Civ. Act. No. 3:98-CV-0003-R (granting petition for permanent injunctive relief and denying city's counterclaim).

¹⁴ *Id.* The court observed that "'appropriate rights-of-way management continues to set the parameters of local authority. These matters include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.'" *Id.* at 591-592 (quoting *Troy* at ¶ 103).

¹⁵ *Id.* at 592-593. The court further offered that Dallas also "does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services. State law and [the 1996 Act] both assign that determination to the State [Public Utility Commission], and it may not be second-guessed by the City." *Id.*

¹⁶ *Id.* at 593.

¹⁷ *Id.* See also *Bell Atlantic-Maryland, Inc. v. Prince George's County*, Civ. No. CCB-98-4187, 1999 WL 343646 (D. Md. May 24, 1999) (local governments may not set their fees above a limit that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving public rights-of-way).

¹⁸ 16 F. Supp. 2d 785 (E.D. Mich. 1998).

¹⁹ *Id.* at 789. The court found that "[t]he evidence shows that at least three other providers agreed to franchises that involved substantially the same terms and conditions as the City seeks to impose on TCG, including a percentage fee on gross revenue, costs, and conduit space. This indicates that such conditions are neither unfair nor unreasonable." *Id.* at 790.

²⁰ 1999 U.S. Dist. Lexis 10534 (hereinafter "*Omnipoint*").

²¹ *Id.* at 5. See also *BellSouth Telecommunications, Inc. v. City of Orangeburg*, No. 93-CP-38-430 (S.C. Ct. Common Pleas, March 12, 1998).

²² *Omnipoint* at 5-6.

²³ *Id.* at 6.

²⁴ See e.g., Ga. Code Ann. § 46-5-1.

²⁵ Many states have "sunshine laws" or "open records acts" that permit public inspection of such documents. See e.g., Ga. Code Ann. § 50-18-70, *et seq.*, Cal. Gov't Code § 9070, *et seq.*, Fla. Stat. Ann. § 286.011.