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

*Clarence A. West**

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In the ever-changing telecommunications industry there appears to be an enormous amount of confusion not only as to the appropriate amount of compensation chargeable to the users of public rights-of-way, but also as to the very authority of state and local governments to require compensation. This was not always the case. It has long been a well-settled legal principle that local governments may receive reasonable "rental" compensation from private commercial entities for their use of local public property for private economic gain, even where federal statutory law restricts local governments from denying access to rights-of-way for telecommunications services.[1] For example, in a turn-of-the-century case construing the applicability of a federal law to a telegraph company's use of local public property, the Kentucky Court of Appeals, citing several previous United States Supreme Court cases, stated:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress . . . conferred on the defendant [telecommunications company] no

* Of Counsel, Dow, Cogburn & Friedman, P.C., Houston, Texas. The views expressed herein are those of the author and do not necessarily reflect the views of Dow, Cogburn & Friedman, P.C. or its members.

1. St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Postal Tel. Cable Co. v. City of Newport, 76 S.W. 159 (Ky. 1903); Western Union Tel. Co. v. City of Richmond, 224 U.S. 160 (1912); Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252 (1919); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

> right to use the streets and alleys of the city . . . which belonged to the municipality.[2]

Although this principle has seemed to be well-settled since 1903, it may be revisited again 92 years later in light of (1) contemporary constitutional challenges, (2) advances in technology, (3) a recent Federal Communications Commission ("FCC") action on video dialtone services, and (4) proposed Congressional telecommunications legislation involving telecommunications companies' use of local rights-of-way for the "information superhighway"—that cornucopia of telecommunications services. This article will first examine the municipal and federal authority behind this established legal principle and then analyze the current issues facing it.

I. The Well-Settled Law

A. *Municipal Authority to Grant Franchises and Receive Compensation*

As mentioned above, it has long been a well-settled legal concept that local governments may receive reasonable rental compensation from private commercial entities for their use of local public property for private economic gain.[3] Local governments' regulatory authority over their rights-of-way usually emanates from state constitutional or statutory authority granted to cities.[4] In most states, the state itself initially has title and authority to regulate the public streets and rights-of-way, as the property is dedicated for public use.[5] A majority of states delegate the authority to municipalities by statute, while a minority of states grant franchises to the telecommunications provider directly.[6] While the majority of states do allow cities to be compensated, several

2. Postal Tel. Cable Co. v. City of Newport, 76 S.W. 159, 160 (Ky. 1903) (citing St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) and Postal Tel. Co. v. Baltimore, 156 U.S. 210 (1895)).

3. St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Postal Tel. Cable Co. v. City of Newport, 76 S.W. 159 (Ky. 1903); Western Union Tel. Co. v. City of Richmond, 224 U.S. 160 (1912); Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252 (1919); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

4. 10A Eugene McQuillin et al., The Law of Municipal Corporations § 30.39.10 (3d ed. 1990).

5. 10A *id.* § 30.39.

6. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 1175(2), 1181 (West 1994). *But see, e.g.*, Pacific Tel. & Tel. Co. v. City of San Francisco, 336 P.2d 514 (Cal. 1959) (rights to a telephone franchise are granted directly to the franchisee pursuant to state law).

do not.[7] The statutory law in each state regarding the city's authority to grant franchises should be reviewed in detail as to the extent of that authority and any limitations on it.

A city-wide street franchise is a special kind of contract granted by a municipality. It is a contract that gives the city's permission to a private company—a franchisee—to use the public streets and rights-of-way for private economic gain. The franchisee pays the city for the use of the public streets in the form of franchise fees. These franchise fees that are paid to a city as compensation for using the public streets are sometimes called "street rentals"—they are not taxes.[8] A franchise fee is the consideration paid for the rights granted by the franchise, and serves as compensation for use of the public property.[9] The payment of franchise fees is a contractual obligation of the franchisee.[10]

B. *Federal Authority to Affect State and Local Rights to Compensation*

While Congress may certainly preempt state and local governments' regulatory role in the interstate telecommunications industry, Congress cannot, without compensation, appropriate or "give" the local public rights-of-way to telecommunications service providers without reasonable compensation for the use of the local public rights-of-way.[11]

The law in this area arose primarily in the late 1800s and early 1900s through the United States Supreme Court's interpretations of federal legislation passed in 1866 to assist the infant telegraph

7. City of Tulsa v. Southwestern Bell Tel. Co., 75 F.2d 343 (10th Cir.), *cert. denied*, 295 U.S. 744 (1935). The states that are mentioned in *City of Tulsa* that could collect franchise fees in 1935 are: Illinois, Tennessee, Colorado, Connecticut and South Dakota. The ones that the court notes could not charge a fee are: Kansas, Wisconsin, Iowa and Oklahoma. *But see* AT&T v. Village of Arlington Heights, 620 N.E.2d 1040 (Ill. 1993) (disallowing city franchise fees pursuant to state law on a non-local fiber optics cable line).

8. St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Fleming v. Houston Lighting & Power Co., 138 S.W.2d 520 (Tex. 1940), *cert. denied*, 313 U.S. 560 (1941); City of Springfield v. Postal Tel.-Cable Co., 97 N.E. 672 (Ill. 1912); Lewis v. Nashville Gas & Heating Co., 40 S.W.2d 409 (Tenn. 1931); Nashville Gas & Heating Co. v. City of Nashville, 152 S.W.2d 229 (Tenn. 1941). *Compare* Diginet, Inc. v. Western Union ATS, Inc., 845 F. Supp. 1237 (N.D. Ill. 1994) (construing franchise fees as "taxes") *with* Robinson Protective Alarm Co. v. City of Philadelphia, 581 F.2d 371 (3rd Cir. 1978) (allowing that under state law franchise fees were "rental," but under the federal "Tax Injunction Act" they were taxes).

9. *See, e.g.*, Alpert v. Boise Water Corp., 795 P.2d 298 (Idaho 1990). This case provides an excellent contemporary analysis on the nature of a franchise and authority to charge a franchise fee. *Id.* at 304–07.

10. *Id. See also* City of Jamestown v. Home Tel., 109 N.Y.S. 297 (N.Y. App. Div. 1908); City of Mitchell v. Dakota Central Tel. Co., 127 N.W. 582 (S.D. 1910).

11. St. Louis v. Western Union Tel. Co., 148 U.S. 92, 100–01 (1893).

industry.[12] The same legal principles, as established in those cases, are still cited as they apply to cable television companies' contemporary use of local public rights-of-way.[13]

In the Telegraph Act of 1866, Congress granted rights to telegraph companies[14] to use federal "post roads" (mail routes) for interstate telegraph operations and prohibited states and local governments from interfering with those operations.[15] In *St. Louis v. Western Union Tel. Co.*, Western Union challenged the right of a city to impose a pole charge on its use of the local rights-of-way, in light of the Telegraph Act of 1866.[16] The United States Supreme Court held, in this 1893 case, that cities could require telegraph companies to pay reasonable street rental franchise fee payments for the use of the public streets, as the federal statute did not grant an "unrestricted right to appropriate the public property of a State."[17] The Court went on to say:

> No one would suppose that a franchise from the Federal government to a corporation . . . to construct interstate . . . lines of . . . communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . . . [T]he franchise . . . would be . . . subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. . . . [I]t is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any its corporations or grantees, without suitable compensation

12. Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1878). The Supreme Court characterized the early telegraph service as follows: "The electric telegraph marks an epoch in the progress of time. [It has] become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions." *Id*.

13. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428–30 (1982).

14. While telephone companies argued they had the same rights as telegraph companies under the federal statute, that argument was rejected in Richmond v. Southern Bell Tel. & Tel. Co., 174 U.S. 761 (1899).

15. 14 Stat. 221 (1866). *Cf.* City of Toledo v. Western Union Tel. Co., 107 F. 10 (6th Cir. 1901). In a narrowing of what the telegraph companies could use the "post roads" for, the court opined that the federal statute only authorized a telegraph company to use the post roads for interstate business and that it did not grant the right to use the roads for a "district" telegraph operation, i.e., local business. *Id.* at 14–15. *See also* City of Memphis v. Postal Tel. Cable Co., 145 F. 602 (6th Cir. 1906); Mayor of Nashville v. Cumberland Tel. & Tel. Co., 145 F. 607 (6th Cir.), *cert. denied*, 203 U.S. 589 (1906).

16. 148 U.S. 92 (1893).

17. *Id*. at 100.

> to the State. This rule extends to streets and highways; they are public property of the State.[18]

The Court concluded that under the Telegraph Act of 1866 "the occupation by this interstate commerce company of the streets cannot be denied by the city; . . . all . . . [the city] can insist upon is . . . reasonable compensation for the space in the streets thus exclusively appropriated . . . ."[19]

On rehearing of this case, a challenge was made as to the city's right to charge the fee pursuant to the state statutory authority delegated to it to "regulate the streets."[20] The Supreme Court held: "[T]he power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use."[21]

In delivering the opinion of the Court in *Western Union Tel. Co. v. City of Richmond*,[22] Justice Holmes construed the Telegraph Act of 1866 to avoid the takings issue as applied to public property: "[T]he statute is only permissive, not a source of positive rights. . . . [The statute] gives the appellant [the telegraph company] no right to use the soil of the streets, even though post roads, as against private owners, or as against the city or state, where it owns the land."[23]

The vitality of the century-old *St. Louis* opinion was evidenced again in 1982 by the Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*[24] In *Loretto*, the Supreme Court ruled on the constitutionality of a New York state statute which required landlords to allow cable television companies to install cable wires in buildings without any compensation to the property owner.[25] The Court held that the State of New York could not require such use of private property without compensation even though the cable wires did not take up a great deal of space.[26] As the Court stated, "a taking does not depend on whether the volume of space it occupies is bigger than a bread box."[27]

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18. *Id*. at 100–01.
19. *Id*. at 105.
20. 149 U.S. 465 (1893).
21. *Id*. at 470.
22. 224 U.S. 160 (1912).
23. *Id*. at 169. The last significant case of this series was in 1919, in which the Court tersely disposed of the issue of compensation. In *Postal Tel.-Cable Co. v. City of Richmond*, the Court concluded: "Even interstate business must pay its way—in this case for its right-of-way and the expense to others incident to the use of it." 249 U.S. 252, 259 (1919).
24. 458 U.S. 419, 428 (1982).
25. *Id.* at 438–40.
26. *Id.* at 438 n.16.
27. *Id*. This same thought was expressed another way in Southwestern Bell Tel. Co. v. Webb, 393 S.W.2d 117 (Mo. Ct. App. 1965). The telephone company argued that the placement of telephone cable on the private landowner's property did not give rise to

Again, while the authority of the state or a city to receive compensation for the use of public streets has been upheld many times by the Supreme Court,[28] the extent of any particular city's authority to regulate those public streets and receive compensation ultimately turns on the authority granted it by state law, as cities are wholly creatures of state law.[29]

II. Current Issues Facing The Well-Settled Law

A. *Contemporary Constitutional Issues Concerning Franchise Fees*

The Cable Communications Policy Act of 1984[30] (the "1984 Cable Act") has provided the overriding guidance as to cable television franchises and franchise fees.[31] One item the 1984 Cable Act made clear was a federal mandate for a local franchise.[32]

The 1984 Cable Act and the Cable Television Consumer Protection and Competition Act of 1992[33] (the "1992 Cable Act") (collectively, the "Cable Act"),[34] as did the FCC regulations[35] before them, expressly provide that compensation be paid to the franchising authority for the use of the local public property.[36] The Cable Act permits up to 5% of the cable operators' revenues as a franchise fee.[37] Absent this 5% compensation, the constitutionality of any mandated use of the public rights-of-way could be called into question, in light of *St. Louis v. Western Union*

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compensation as "'not one single iota of defendant's land was actually taken.'" *Id.* at 121 (quoting appellant's final complaint). To that argument, the court tersely replied: "If no land has been taken, where is the cable?" *Id.*

28. *See, e.g.*, St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Western Union Tel. Co. v. City of Richmond, 224 U.S. 160 (1912); Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252 (1919).

29. 10A Eugene McQuillin et al., The Law of Municipal Corporations § 30.39.10 (3d ed. 1990).

30. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C. (1988)).

31. Pub. L. No. 98-549, §§ 621–27, 98 Stat. at 2786–94 (codified as amended at 47 U.S.C. §§ 541–47).

32. *See* American Civil Liberties Union v. FCC, 823 F.2d 1554, 1557–63 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (reviewing the history of cable television jurisdiction between local governments and the FCC).

33. Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521–611 (Supp. IV 1992)).

34. 47 U.S.C. §§ 521–611 (1988 & Supp. V 1993).

35. 47 C.F.R. § 76.31 (1983).

36. 47 U.S.C. § 542 (1988 & Supp. V 1993).

37. 47 U.S.C. § 542(b) (1988).

Tel. Co.[38] and its progeny, including *Loretto v. Teleprompter Manhattan CATV Corp*.[39]

A number of cases comment on the possible violations of the Takings Clause that might arise under section 541(a)(2) of the Cable Act[40] if it were construed as mandating access to non-publicly dedicated easements and rights-of-way.[41] All of these cases discuss the takings issue in the context of a physical taking. Therefore, any physical taking in the use of public properties by additional equipment or lines would violate the Takings Clause as interpreted by *Loretto* and the aforementioned line of cases.

Cable television franchisees, as mediums of information, raise First Amendment issues as to their regulation and taxation. A number of cases do indicate, however, that cable television franchisees can be regulated and there can be local franchise fees and taxes imposed upon them, so long as they are incidental and not overly burdensome on the medium.[42]

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38. 148 U.S. 92 (1893).

39. 458 U.S. 419 (1982). See also TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 815 (8th Cir. 1993), in which the Circuit Court *in dicta* discusses the possible Constitutional problems of the 1984 Cable Act taking "undedicated" property. It also cites a number of other circuit court opinions which discuss this same issue. *Id.* Of course, the Cable Act provides for a 5% fee as compensation. 47 U.S.C. § 542(b) (1988).

40. 47 U.S.C. § 541(a)(2) (1988 & Supp. V 1993).

41. Cable Invs., Inc. v. Woolley, 867 F.2d 151, 159–60 (3rd Cir. 1989); Cable Holdings of Georgia v. McNeil Real Estate, 953 F.2d 600, 609 (11th Cir.) *cert. denied*, 113 S. Ct. 182 (1992); Media Gen. Cable v. Sequoyah Condominium Council, 991 F.2d 1169, 1175 (4th Cir. 1993); TCI of North Dakota, Inc. v. Schriock Holding Co., 11 F.3d 812, 815 (8th Cir. 1993); Century Southwest Cable Television v. CIIF Assocs., 33 F.3d 1068, 1071 (9th Cir. 1994).

42. *See* City of Los Angeles v. Preferred Communication, Inc., 476 U.S. 488, 495 (1986) (holding that a cable television franchise does raise First Amendment issues, but leaving open the extent of governmental regulations and the standard of judicial review pending further development of the facts at the trial court); Leathers v. Medlock, 499 U.S. 439 (1991) (upholding an Arkansas general sales tax on cable television revenue against a First Amendment challenge, even though the print media had been exempted from the tax); Telestat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 406–07 (S.D. Fla. 1991) (upholding franchise fees against a constitutional attack, as long as they were related to the costs of administration and to the fair market value of the public rights-of-way); Chicago Cable Communications v. Chicago Cable Comm'n, 678 F. Supp. 734 (N.D. Ill. 1988), *aff'd*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990) (holding it was not a First Amendment violation to assess a contractually agreed upon fine on a cable operator for violation of the cable agreement); Erie Telecommunications, Inc. v. City of Erie, 853 F.2d 1084 (3rd Cir. 1988) (without reaching the constitutional issue, holding that franchise fees were an essential part of the franchise contract, which were supportable as a term of the contract, because the payments were rent for commercial use of the public rights of way); Group W. Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954, 974–75 (N.D. Cal. 1987) (holding that they would uphold franchise fees which were reasonably based on the fair market value of the property and administrative costs). *But see* Century Fed., Inc. v. City of Palo Alto, 710 F. Supp. 1559 (N.D. Cal. 1988) (holding that a franchise fee violated the First

In *Telestat Cablevision, Inc. v. City of Riviera Dist.*,[43] a United States District Court in Florida held that a franchise fee on a cable television franchise did not violate the First Amendment, as the franchise fee constituted "the costs associated with the City's administration of the franchise *and* the reasonable rental value of the cable operator's use of the City's rights-of-way."[44]

However, in *Century Fed., Inc. v. City of Palo Alto*, the United States District Court for the Northern District of California held that the cable television franchise fees were unconstitutional based on the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[45] The court concluded that (1) the fees were excessive and infringed on First Amendment rights and (2) the fact that different users of the rights-of-way were paying different amounts of money constituted a violation of the Equal Protection Clause.[46] Thus, although local franchise fees are allowed, some courts may review them to ensure that they are reasonable.

Telephone franchisees or telephone service providers have argued in the past that cities and states violate the Commerce Clause of the U.S. Constitution when they impose state or local charges on interstate access fee revenue.[47] The Supreme Court has rejected that argument and has upheld such charges against the Commerce Clause challenges when there is a sufficient nexus with the state and when the charges (1) are fairly apportioned, (2) do not discriminate against interstate commerce, and (3) are fairly related to services which the state provides to taxpayers.[48] An example of a sufficient nexus is where an interstate call ends or begins in the state and is billed, charged or paid in the state or locale.[49]

B. *Advances in Technology*

Perhaps the more difficult issue is whether the current franchise grants the right to provide additional services, which are now technically available, or whether the franchise restricts the provided services to those expressly or technologically available at the time the franchise

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and Fourteenth Amendments where the City of Palo Alto did not charge all users of the rights-of-way a franchise fee, and those that were charged, had different charges).

43. 773 F. Supp. 383 (S.D. Fla. 1991).

44. *Id*. at 406 (emphasis added).

45. 710 F. Supp. 1559, 1568–78 (N.D. Cal. 1988).

46. *Id*. at 1576. A 2% fee was charged the gas & electric company and a 5% fee was charged the cable operator. *Id*.

47. *See, e.g.*, St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Goldberg v. Sweet, 488 U.S. 252 (1989).

48. 488 U.S. at 267–68 (upholding a state tax on telephone interstate access fee charges).

49. *Id*. at 262–63.

was granted. That, of course, will depend on the exact language of the franchise and the state law on construction of those contracts. It should be noted that in most states, as franchises are privileges granted by the governing authority, they are construed to the benefit of the City and against the franchisees.[50] One other variable is whether the new technology or service involves an additional physical taking of property or if additional lines are needed to provide the services; i.e., whether there are additional burdens on the estate which alter the magnitude of the servitude on the property.

Putting aside the issue of whether the franchise itself grants the right to provide the "new" services, if the services are merely an additional electronic impulse they would not seem to be an additional servitude on the easement. On the other hand, if the current use of the easement is akin to telegraph service in the sense that there are few streets being used in the city, while the new telecommunications service requires the use of all the public streets and rights-of-way, then that new use would seem to pose an additional burden on the servitude of the public property. The Tennessee Supreme Court in 1907 provided an excellent discussion of this issue in *Home Tel. Co. v. Mayor of Nashville*.[51] The court discussed why a telephone company does not have the same rights and privileges under a Tennessee statute as those granted to a telegraph company.[52] It noted the additional burdens and difficulties imposed by a telephone business versus a telegraph business in using the city streets.[53] Specifically, it indicated that while there are only a few lines and only a few people involved in the operation of a telegraph system within a city, many lines (to every residence and business) and many people are involved in the operation of a telephone system.[54] The case cites extensively the 1899 Supreme Court case of *Richmond v. Southern Bell Tel. Co.*,[55] which reached the same conclusion as to the enormous increase in the burdens placed on public property by a telephone company as opposed to a telegraph company.[56]

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50. *See, e.g.*, Incorporated Town of Hemstead v. Gulf States Utils. Co., 206 S.W.2d 227, 230 (Tex. 1947). *See generally* 6 EUGENE MCQUILLIN & JOHN D. LATTA, THE LAW OF MUNICIPAL CORPORATIONS § 20.53 (3d ed. 1969); 12 EUGENE MCQUILLIN & CHARLES R. P. KEATING, THE LAW OF MUNICIPAL CORPORATIONS § 34.45 (3d ed. 1986).

51. 101 S.W. 770 (Tenn. 1907).

52. *Id*. at 774–75.

53. *Id*.

54. *Id*. at 774.

55. 174 U.S. 761 (1899).

56. Home Tel. Co. v. Mayor of Nashville, 101 S.W. 770 (Tenn. 1907). See also Postal Tel. Cable Co. v. City of Newport, 76 S.W. 159, 160 (Ky. 1903), in which the court specifically said that "the [placement of telegraph] poles and wires in the streets are a serious

Several cases have addressed the issue as to whether easements dedicated for public utility uses are compatible with subsequent technological improvements.[57] The general rule seems to be that technological improvements may utilize the easement so long as the new use is substantially compatible with the original dedication or grant and does not substantially increase the burden on the easement.[58] In *C/R TV, Inc. v. Shannondale, Inc.*,[59] the developer of a residential subdivision argued that cable television service was not a compatible use and/or it substantially increased the burden on the easement granted to a telephone utility. The court concluded that in this case technological innovations fit within the use of the easements as long as such innovations did not increase significantly the burden on the estate.[60] The court found that as the telephone wires, which were fiber optic, already carry video images, there was in fact no distinction between the two—cable television and telephone lines that transmit video signals—which would result in any increased burden.[61]

However, in 1971, the Fifth Circuit took another view, focusing on what services were authorized to be provided rather than focusing on the additional burdens placed on the easement estate due to "technological innovations."[62] While this case primarily upheld the initial FCC Cable-Telco cross-ownership ban, the court, *in dicta,* stated that providing cable television services was not incidental to providing telephone services.[63] The significance of this is that if cable service is not incidental to providing telephone service, then local telephone franchises may not have granted the authority to the telephone company to provide any other telecommunications services, including video dialtone service (as discussed below) under that local franchise. Therefore a new video franchise may be required to obtain that authority, notwithstanding that there is no increase in the "burden" on the easements by providing this "technological innovation."

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servitude [on the public property], and . . . [the telegraph company] could not impose this servitude upon the city, thus taking its [the city's] property without compensation."

57. *See* Michels v. Times Mirror Cable TV of Louisville, Inc., No. 85-CA-1081-MR (Ky. Ct. App. Jan. 31, 1986), *cert. denied*, 484 U.S. 890 (1987); C/R TV, Inc. v. Shannondale, Inc., 27 F.3d 104 (4th Cir. 1994).

58. *Michels*, No. 85-CA-1081-MR, slip op. at 2; *C/R TV*, 27 F.3d at 108.

59. 27 F.3d 104 (4th Cir. 1994).

60. *Id.* at 108–09.

61. *Id*. at 109 ("The transmissions of a telephone company are virtually indistinguishable from transmissions of a non-telephone company transmitting television signals for purposes of a pole and wire easement grant."). *See also* Greater Worchester Cablevision, Inc. v. Carabetta Enters., Inc., 682 F. Supp. 1244 (D. Mass. 1985); Michels v. Times Mirror Cable T.V. of Louisville, Inc., No. 85-CA-1081-MR (Ky. Ct. App. Jan. 31, 1986).

62. General Tel. Co. v. FCC, 449 F.2d 846, 855 (5th Cir. 1971).

63. *Id*. at 860.

C. *FCC Activity*

In late 1994, the 1991[64] and 1992[65] FCC video dialtone decisions were upheld by the D.C. Circuit in *National Cable Television Ass'n v. FCC*.[66] These decisions allow local exchange telephone companies to provide video dialtone services (essentially a video programmer's electronic pipeline) without a cable television franchise under the 1984 Cable Act and the 1992 Cable Act.[67] The D.C. Circuit concluded that video dialtone service is not a cable television service under the Cable Act, and therefore the Cable Act does not apply.[68]

Video dialtone is a legal construct by the FCC of a telecommunications technology in which the video programmer is an entity distinct from the owner/operator of the physical facility which transmits the programming.[69] The physical facility in this case is owned by the local telephone exchange company. Thus, in essence, video dialtone is a use of the telephone lines as a pipeline for cable television programmers. By that legal construct or separation of entities, those providing video dialtone services avoid the requirements of the Cable Act, including the need for a local cable television franchise.

The FCC initially defined "video dialtone" as follows: "Video dialtone . . . is an enriched version of *video common carriage* under which [Local Exchange Companies] will offer various *non-programming services* in addition to the underlying *video transport* . . . [including] the transmission of entertainment video programming and other forms of video communications . . . ."[70] The FCC further explained in 1992 that in video dialtone service there is

> separate control over the creation, selection, and ownership of video programming from control over the facilities linking the program supplier and each of its individual viewers or "subscribers." This *separation* was *designed to comport* with the prohibition of Section 613(b) of the Cable Act against

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64. Telephone Co.-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 300 (1991) (first report and order) [hereinafter *Preliminary Video Dialtone Order*].

65. Telephone Co.-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781 (1992) (second report and order, recommendation to Congress and second further notice of proposed rulemaking) [hereinafter *First Video Dialtone Order*].

66. 33 F.3d 66 (D.C. Cir. 1994).

67. *Id*. *See generally Preliminary Video Dialtone Order*, *supra* note 64; *First Video Dialtone Order*, *supra* note 65.

68. *National Cable Television Ass'n*, 33 F.3d at 70–73. In 1991, Preliminary Video Dialtone Order, *supra* note 64, at 330, and in 1992, First Video Dialtone Order, *supra* note 65, at 5822–23, the FCC had reached the same conclusion.

69. *Preliminary Video Dialtone Order*, *supra* note 64, at 306.

70. *Id*. (emphasis added).

telephone companies providing video programming directly to subscribers in telephone service areas.[71]

Due to the potential impact of this novel way of avoiding the application of the Cable Act, the D.C. Circuit opinion was widely covered in the national news media.[72] Almost without exception, these news stories characterized the court's holding in *National Cable Television Ass'n* in much broader terms than in fact was the case, suggesting that the holding nullified *any* local franchising requirements and the attendant franchise fees that local governments may impose on telephone companies which provide video services.[73] These characterizations by the news reports of *National Cable Television Ass'n* created a misconception that a locally required franchise, as opposed to one required by the Cable Act, is not required to provide video dialtone service or other new telecommunications services. In fact, neither the FCC nor the D.C. Circuit addressed in any way any franchise or right-of-way use agreements required pursuant to state or local law. The 1991[74] and 1992[75] FCC orders and *National Cable Television Ass'n* only addressed the very narrow issue of whether the Cable Act applied to video dialtone service.[76] They held it did not and no more.

1. Local Franchise Requirements for the Provision of Video Dialtone Service

The FCC video dialtone decisions have given rise to confusion as to local franchise requirements for providing new telecommunications services.[77] The applicability of local or state franchise requirements to video dialtone may be questioned by those in the telecommunications industry because of the lack of clarity in the FCC opinions. As stated

71. Telephone Co.-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5069, 5070 (1992) (memorandum opinion and order on reconsideration) (emphasis added).

72. *See, e.g.*, Jeannine Aversa, *Phone Firms Avoid Paying for Cable*, THE LEGAL INTELLIGENCER, Aug. 29, 1994, at 9; Jube Shriver, Jr., *Telephone Firms Don't Need Local Franchise For Video*, L.A. TIMES, Aug. 27, 1994, D at 01; Jon Van, *Phone Firms Free Of Franchise Costs*, CHI. TRIB., Aug. 27, 1994, Business, at 3; *No Franchise Needed In Video Cable Service*, THE NATIONAL LAW JOURNAL, Sept. 12, 1994, at B 4.

73. *See* Jeannine Aversa, *Phone Firms Avoid Paying for Cable*, THE LEGAL INTELLIGENCER, Aug. 29, 1994, at 9; Jube Shriver, Jr., *Telephone Firms Don't Need Local Franchise For Video*, L.A. TIMES, Aug. 27, 1994, D at 01; Jon Van, *Phone Firms Free Of Franchise Costs*, CHI. TRIB., Aug. 27, 1994, Business, at 3; *No Franchise Needed In Video Cable Service*, THE NATIONAL LAW JOURNAL, Sept. 12, 1994, at B 4.

74. *Preliminary Video Dialtone Order*, *supra* note 64, at 330.

75. *First Video Dialtone Order*, *supra* note 65, at 5822–23.

76. 33 F.3d at 70–73.

77. *In re* Telephone Co.-Cable Television, CC Docket No. 87-266, 1995 FCC LEXIS 396 (Jan. 20, 1995).

above, the FCC ruled that "the Cable Act does not mandate that a local exchange carrier or its customer-programmer obtain a municipal cable television franchise [under the Cable Act] in order to offer video dial-tone service."[78] In reaching that determination, the FCC had a significant underlying assumption in its analysis. That analysis, discussed in detail in the subsequent 1992 FCC opinion, assumed that because a local telephone franchise had previously been granted to the local telephone company, such franchise authorized the use of the local public rights-of-way.[79] The FCC commented that such a local franchise allows and enhances "the ability of . . . local entities to regulate such use [of the local rights-of-way by the telephone company]."[80] The FCC went on to state:

> In contrast to cable operators, local telephone companies *already* receive authorization to use the public rights-of-way pursuant to common carrier regulation. Consequently, there is no basis to infer that Congress intended that local telephone companies secure a cable television franchise to use the same rights-of-way they are *already* authorized to use.[81]

Unfortunately, the FCC did not clearly state under which regulations telephone companies had received the prior authorization to use local public rights-of-way. Still, it refers to a franchise as how that authorization is accomplished with cable television.[82]

The FCC also explained in its 1992 opinion that as telephone companies already have a local franchise, which addresses the concerns about public safety and convenience and use of public rights-of-way, another franchise is not needed to provide video dialtone service. The FCC stated:

> Since these concerns [about use of the public rights-of-way] are *already addressed* by the existing common carrier regulatory scheme for telephone company facilities [in part by having a local telephone franchise], we conclude that Congress did not intend to subject telephone companies to the *duplicative regulation* that would occur if we were to find that a cable *franchise* is *also required* for video dialtone facilities.[83]

78. *Preliminary Video Dialtone Order*, *supra* note 64, at 302; *see also id*. at 324–25 and 330.

79. *First Video Dialtone Order*, *supra* note 65, at 5822–23.

80. *Id*.

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* at 5072 (emphasis added).

Thus, the FCC's analysis assumed that local telephone companies providing video dialtone would already have a local franchise permitting use of public rights-of-way.

2. The D.C. Circuit's Narrow Holding in *National Cable Television Ass'n v. FCC*

In *National Cable Television Ass'n v. FCC*, the D.C. Circuit, in upholding the FCC decisions, agreed that video dialtone was not a "cable service" as defined by the Cable Act, principally because it was only a conduit for the services.[84] The court analogized that in providing a video dialtone service the telephone company is like the post office in delivering a letter.[85] The telephone company, in providing video dialtone service, is delivering a video message from one customer to another customer, but it is not determining in any way what the message is, or what is sent, or to whom or by whom it is sent.[86]

The court distinguishes "video dialtone" and "cable service" under the Cable Act as follows:

> [V]ideo dialtone service and cable service are very different creatures: video dialtone is a common carriage service, the essence of which is an obligation to provide service indifferently to all comers—here, to provide service to all would-be video programmers. On the other hand, cable operators exercise "a significant amount of editorial discretion regarding what their programming will include."[87]

Video dialtone service is not "video programming" under the Cable Act definition and thus is not regulated by the Cable Act. Therefore, a franchise *under the Cable Act* is not required to provide this service.

The court does not hold or suggest in any way that a local franchise to use public rights-of-way, as required under state or local law, is somehow preempted or negated, nor does it state that any local public rights-of-way can be used without a locally required franchise. The court, like the FCC, states that it would be *duplicative* to *require another franchise* for the non-cable television service of video dialtone, as the concerns about the public safety and use of rights of way have already been addressed in that pre-existing franchise.[88]

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84. National Cable Television Ass'n v. FCC, 33 F.3d 66, 72–75 (D.C. Cir. 1994).
85. *Id.* at 71–72.
86. *Id.* at 72.
87. *Id.* at 75 (quoting FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979)).
88. National Cable Television Ass'n, 33 F.3d at 73–74.

The court quoted the House Report on the 1984 Cable Act which stated that nothing in the Cable Act was "intended to prevent a common carrier from constructing, *subject to applicable law*, a local distribution system that is capable of delivering video programming and other communications . . . to multiple subscribers within a community."[89]

In other words, if applicable state or local law requires a local franchise to use public rights-of-way for that distribution system, those applicable local laws must be adhered to prior to providing the video dialtone service.

Thus, neither the FCC's video dialtone decisions nor the D.C. Circuit's opinion addressed, in any way, local franchising requirements as required by applicable state or local law for providing video dialtone service. In fact, as has been noted above, the FCC predicated its opinion that no additional local cable television franchise was required to provide video dialtone service on the existing regulatory schemes which had already authorized use of the local public rights-of-way and already protected the local interest. The principal components of those regulatory schemes are right-of-way use agreements, typically by a local franchise to use the streets.

D. *Proposed Federal Legislation*

In legislation proposed but not adopted on the "information superhighway" in the 103rd Session of Congress, particularly the Brooks/Dingell Bill,[90] the Markey/Fields Bill (which passed out of the House after it was incorporated into the Brooks/Dingell Bill H.R.)[91] and the Hollings Bill,[92] there were several sections with very broad language concerning preemption of state and local regulatory authority.

89. *Id.* at 71 (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984), U.S.C.C.A.N. 1984, p. 4655) (emphasis added).

90. H.R. 3626, 103d Cong., 2d Sess. § 302(a) (1994) (amending 47 U.S.C. § 201(c)(3)) ("Preemption . . . [N]o State or local government may . . . effectively prohibit any person or carrier from providing any interstate or intrastate telecommunication service or information service, or impose any restriction or condition on entry into the business of providing any such service.").

91. H.R. 3636, 103d Cong., 2d Sess. (1994) (This bill was reported out of the House Committee with several new amendments. One was to exclude the "new" telecommunications revenue from the franchise fee base of the cable television franchise. Another amendment required "local franchise fee parity." If those two amendments had both been applied, current franchise fee charges on telephone franchises could have been challenged.).

92. S. 1822, 103d Cong., 2d Sess. § 230(a) (1994) ("[N]o State or local statute or regulation, or other State or local legal requirement, shall prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunication services.").

Again, in the current 104th Congress, H.R. 411 was filed on January 4, 1995, by Rep. Markey, together with Rep. Dingell and Rep. Conyers.[93] This bill includes some of the same broad, problematic clauses that were in last session's bills regarding preemption of state and local authority to regulate telecommunications services in their state or local area.[94] For instance, section 302(a) of the legislation provides the following preemption language:

> (c)(3) PREEMPTION.
>
> (A) Limitation. . . . [N]o state or local government may . . .
>
> (i) effectively prohibit any person or carrier from providing any interstate or intrastate telecommunication service or information service, or *impose any restriction or condition on the entry into the business providing* any such service . . . .[95]

Telecommunications service companies may argue that these sections not only preempt or supersede state and local authority to regulate interstate telecommunications providers, but perhaps also even prohibit state or local governments from requiring compensation for the use of local public property.

A narrow exception to this preemption allows state and local regulation that is "necessary and appropriate to . . . protect public safety and welfare,"[96] and that provides for "normal construction permits."[97]

The bill allows, in section 302, for cable companies to provide other telecommunications services (including, presumably, telephone services)[98] and, in section 401, for local exchange telephone companies to provide cable services.[99] Section 302(a) also provides that all franchise fees and charges should be equivalent for all telecommunications operators.[100] In section 659(a)(3), the bill exempts video services provided by a telephone company from the franchise requirements of the Cable Act (including franchise fees),[101] yet section 659(b)(2) of the bill requires local franchise fees to be charged that are comparable to Cable

93. H.R. 411, 104th Cong., 1st Sess. (1995) (amending scattered sections of 47 U.S.C.).
94. *Id.* § 302(a), (b)(1), (b)(2) (1995).
95. *Id.* § 302(a) (amending 47 U.S.C. § 201 by adding subsection (c)(3)) (emphasis added).
96. *Id.* § 302(a) (amending 47 U.S.C. § 201 by adding subsection (c)(3)(B)(i)).
97. *Id.* § 302(a) (amending 47 U.S.C. § 201 by adding subsection (c)(3)(C)).
98. *Id.* § 302.
99. *Id.* § 401.
100. *Id.* § 302(a).
101. *Id.* § 659(a)(3).

Act fees on such revenue.[102] However, section 302(b)(1) of the bill amends section 541(c) of the Cable Act to restrict the application of franchise fees on cable operators to apply only to cable service revenue, thereby excluding any telephone or other telecommunications service revenue from a cable operator's franchise fee base.[103] The result of section 659 and section 302(b)(1) is a nonparity of fees. These provisions, taken together, could jeopardize existing franchise fee agreements of cable companies, telephone companies and other competitive access providers.[104]

III. CONCLUSION

While the Supreme Court has ruled in a number of cases that Congress cannot appropriate state and local public streets and rights-of-way for the use and benefit of third parties without compensation, the authority actually to receive compensation for the use of state and local public properties is contingent on state law. The misconception (which has grown to almost a mythical proportion) that somehow federal regulatory oversight in the telecommunications area has wholly negated the need or authority of state and local governments to require a local telecommunications street franchise under the existing applicable state or local law prior to use of public property should not continue. FCC action and federal legislation should be monitored and revised or challenged if necessary to avoid any ambiguity that may give rise to litigation in this area. However, based upon the present law, in the event of such litigation, state and local governments should prevail.

102. *Id.* § 659(b)(2).

103. *Id.* § 302(b)(1) (amending 47 U.S.C. § 541(c)).

104. At the time of final publication of this article there recently has been a Senate Bill, S. 652, 104th Cong., 1st Sess. (1995), introduced by Senator Pressler. That Senate Bill appears to address some of the issues raised in the article with regard to the parity issue of franchise fees. As presented, it allows "competitively neutral" franchise fees to be applied to both cable television operators providing telephone service and telephone companies providing cable service, i.e., both "new" sources of revenue being subject to franchise fees. *Id.* at § 201(a) (amending 47 U.S.C. § 254(c)).