Harvard Journal of Law & Technology
Volume 12, Number 3 Summer 1999

DISMANTLING THE FINAL REGULATORY ENTRY BARRIERS: A CALL FOR THE FCC TO ASSERT ITS PREEMPTIVE AUTHORITY

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I. INTRODUCTION

In Portland, Oregon, the Mt. Hood Cable Regulatory Commission, bolstered by a ruling in its favor by a federal district court judge, has claimed authority to require AT&T Broadband Internet Services to open its cable television transmission facilities to competitive Internet Service Providers ("ISPs") as a condition of the local franchising authority ("LFA") approving applications to transfer cable television franchises

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from Tele-Communications, Inc. ("TCI") to AT&T.[1] In Troy, Michigan, city authorities refused to grant construction permits for TCI to upgrade its cable plant unless TCI agreed not to provide telecommunications services without a separate franchise.[2] In Hill City and Bogue, Kansas, municipal authorities denied the telecommunications franchise applications of a state-certified competitive local exchange carrier ("CLEC") on the grounds that the CLEC would offer "inadequate" and "harmful" service.

Are these legitimate exercises of regulatory authority by cities or obstructionist attempts to erect regulatory barriers to the competitive offerings of new entrants? Three years after the enactment of the Telecommunications Act of 1996,[3] substantial confusion still exists among federal, state, and local regulators and the courts that have confronted such issues. This has left potential new entrants unable to predict the regulatory obstacles to the provision of competitive voice, video, and data services in a given community. While critics often cite the court challenges[4] to the federal regulations promulgated pursuant to the 1996 Act as the main impediments to competition — particularly in the telephony context — the patchwork of localities' regulatory restrictions arguably pose even greater long-term threats to the harvest of benefits consumers might otherwise reap from competition.

Although endowed with substantial authority by Congress to preempt such obstructionism, the Federal Communications Commission ("FCC" or "Commission") has thus far proven reluctant to articulate and enforce the permissible zones of regulation over the communications industry for localities, states, and the federal government. If competitive entry is to be expedited, the FCC must issue a clear statement of principles, consonant with the text and intent of the 1996 Act, that delineates where localities' regulations must accede to the absence of regulatory barriers necessary for vigorous competition. Moreover, pursuant to its preemption authority, the FCC must be steadfast in its enforcement of these boundaries. Specifically, the FCC should clarify that while the 1996 Act preserves localities' traditional jurisdiction over public rights-of-way and public safety issues, local obligations that extend beyond these spheres to impose

1. *See* COMM. DAILY, Feb. 3, 1999, at 11; *see also* Joe Estrella, *Oregon Regulators Will Keep Up Push*, MULTICHANNEL NEWS, Feb. 8, at 6.

2. *See infra* Part IV.B.

3. Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

4. *See, e.g.*, BellSouth Corp. v. FCC, 162 F.3d 678 (D.C. Cir. 1998) (challenging Section 271 of the 1996 Act as an unconstitutional bill of attainder); SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998) (same).

behavioral regulations affecting the kinds and extent of services offered violate the letter and intent of the 1996 Act and should be preempted.

II. SOURCES OF FCC PREEMPTION

There is no shortage of evidence that the 1996 Act's fundamental premise was that competition among communications providers in a deregulated environment would benefit consumers.[5] Indeed, vigorous competition was envisioned as the mechanism for unshackling communications entities from burdensome regulations while safeguarding consumers' interests. But the realization of this vision depended upon the 1996 Act's ability to dismantle entry barriers, lower entry costs, and offer regulatory certainty for communications providers at the federal, state,[6] and local levels. Cast in the role of referee is the FCC, vested with expansive authority to preempt state and local regulations that conflict with the 1996 Act's provisions.

The FCC draws its preemption power from both general repositories of authority applicable to all provisions of the Communications Act[7] and from specific delegations to preempt local restrictions in certain areas. First, Section 2 provides that, subject to certain exceptions applicable to wholly intrastate and foreign entities, the Communications Act applies to "all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio . . . and to all persons engaged within the United States in such communication" as well as "with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which

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5. *See* S. REP. NO.104-23, at 67 (1995) (additional views of Senator Hollings); 142 CONG. REC. H1168 (1996) (testimony of Rep. Markey); S. REP. NO. 104-23, at 1 (1995) (indicating the Senate Commerce Committee's intent to provide "for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . .").

6. While highly relevant to a discussion of permissible zones of regulatory authority, the jurisdiction of state public utility commissions ("PUCs") is addressed only peripherally in this Article because of length constraints and because many state PUCs have acted to encourage entry by prospective communications competitors. As states have generally limited their involvement to certifying entities as financially and technically adequate to offer service, this Article focuses on local governments as the principal hurdles to widespread competitive entry.

7. Communications Act of 1934, ch. 652, 48 Stat. 1064 (as amended).

relate to such service . . . ."[8] From the plain text of Section 2, it is evident that the provisions of the Communications Act, including the procompetitive amendments added by the 1996 Act, apply to virtually all communications entities doing business in the U.S. by wire or radio. It follows that, under Section 2 and the Supremacy Clause,[9] state and local regulations that conflict with the Communications Act are preempted.

Further support for broad general federal preemptive authority can be found in Section 636(c), enacted as part of the 1984 Cable Act[10] and left unaltered by the 1996 Act. Section 636(c), subtitled "Coordination of Federal, State, and Local Authority," provides that "[e]xcept as [applied to some existing franchises], any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent *with this Act* shall be deemed to be preempted and superseded."[11] While placed in Title VI of the Communications Act regulating "cable communications," Section 636(c)'s reference to "this Act" suggests that its tentacles reach not only those state and local laws inconsistent with the federal regulations on cable operations under Title VI, but all provisions of the Communications Act. Given the references in Section 636(a) to "this title," the use of "Act" in Section 636(c) implies applicability of the preemption clause to all provisions of the Act. Semantic considerations and statutory parsing aside, expansive general preemptive authority and the many references to competition in the 1996 Act's legislative history suggest both that localities' regulatory restrictions, beyond permissible rights-of-way and safety management, are antithetical to Congress' model and that the Commission possesses the inherent authority to raze these barriers to entry.

The 1996 Act also contains specific grants of preemption authority to the FCC in addition to the residual power vested in the Commission by Sections 2 and 636 of the Communications Act. Among other areas, as discussed more fully below, the 1996 Act limits regulatory authority of localities over providers of telecommunications services,[12] precludes municipalities from requiring telecommunications franchises of franchised cable operators,[13] and eliminates any federal requirement for

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8. 47 U.S.C. § 152(a) (1994).

9. U.S. CONST. art. VI, cl. 2.

10. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered section of 47 U.S.C.).

11. 98 Stat. at 2800 (emphasis added).

12. *See* 47 U.S.C. § 253(a) (Supp. III 1997).

13. *See* 47 U.S.C. § 541(b)(3) (Supp. III 1997).

open video system ("OVS") operators to obtain cable franchises from LFAs as a condition of providing video services.[14] Of course, the Commission's power to preempt is not without its limits. Indeed, several provisions of the 1996 Act indicate that Congress simultaneously envisioned that local governments would retain authority over traditional zones of regulation. Specifically, as indicated by the text of Section 636, no federal cable regulation was "to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare . . . ."[15] Similarly, while Section 253 of the 1996 Act preempts discriminatory and competitively unbalanced regulation of telecommunications providers, it also explicitly preserves local jurisdiction over public rights-of-way.[16] Nevertheless, the array of statutory language devoted to preemption strongly suggests that Congress foresaw that localities would reach beyond permissible rights-of-way management, and accordingly gave the FCC the power to restrict cities' regulatory purview. With the FCC ensuring that states and localities confined their regulations to defined public rights-of-way management and safety, Congress envisioned that new participants could compete in areas long dominated by entrenched providers and existing entities would enter new lines of business, with consumers the recipients of the fruits of vigorous competition.

As in many other components of the 1996 Act, the reality of this model over the past three years has diverged from Congressional intent, evidenced by the lack of vibrant competition in areas such as local residential telephony; the substantial confusion about the scope of allowable regulation among federal, state and local authorities; and the often divergent judicial interpretations of the 1996 Act. But how, precisely, have localities' regulations affected the 1996 Act's competitive vision? Further, why has the Commission thus far been reticent in wielding its preemptive power? What role have courts played in interpreting and clarifying the allowable spheres of regulation among federal, state, and regulatory entities? Efforts by numerous providers — whether using broadband cable television systems or wireless technologies — to enter the entrenched lines of business often

14. *See* 47 U.S.C. § 573(c)(1)(C) (Supp. III 1997); *but see* City of Dallas v. FCC, 118 F.3d 393, 397–99 (5th Cir. 1997) (holding that this provision does not restrict LFAs from imposing franchise requirements on OVS operators to the extent authorized under local law).

15. 47 U.S.C. § 556(a) (1994).

16. *See* 47 U.S.C. § 253(c) (Supp III 1997).

dominated by incumbent telecommunications providers offer insight into the impact of cities' regulations on the emergence of competition.

III. CABLE'S POTENTIAL AS MULTIPLE SERVICE PROVIDER AND THE THREATS POSED BY LOCALITIES

While many prospective entrants have demonstrated an interest in and a commitment to offering competitive communications services, local regulatory barriers as applied to *cable operators* may be the most troubling because of existing burdens and because of cable's unique technical potential to realize many of Congress's competitive goals. Cable operators are already subject to a myriad of local franchising requirements, including franchise fees of up to 5% on gross revenues, various information requirements, and universal service commitments. Now, many localities are simply appropriating cable franchise agreements as models for telecommunications franchise requirements. This tactic not only applies an inappropriate model to local telecommunications competitors, it also specifically violates Section 621's prohibition on simultaneous and duplicative cable and telecommunications franchise obligations.[17] As existing facilities-based providers of cable services, cable operators are well positioned to compete with incumbents for various communications services, including telephony offered using Internet Protocols ("IP"). The pending merger of AT&T and TCI, Microsoft's $1 billion investment in Comcast,[18] and the 20-year agreement recently announced between AT&T and Time Warner to offer residential telephony and other services over cable television infrastructure[19] all confirm the potentially pivotal position cable operators occupy in infusing previously monopolized industries with competition. Having already wired consumers' homes with high bandwidth cable, cable operators are uniquely poised to deliver competitive video, voice, and data to subscribers.

Of these services, the lucrative local telephony market in no small part drove the AT&T/TCI merger. Despite FCC approval of the merger,[20] however, the obstinate opposition of one local franchising

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17. *See* 47 U.S.C. § 541(b)(3).

18. *See* Leslie Cauley & Steven Lipin, *AT&T is Expected to Purchase Teleport Stock in a Stock Deal Valued up to $11 Billion*, WALL ST. J., Jan. 8, 1998, at A3.

19. *See* Fred Dawson, *AT&T, Time Warner Finally Dance*, MULTICHANNEL NEWS, Feb. 8, 1999, at 1.

20. *See* Applications for Consent to the Transfer of Control of Licenses and

authority — the aforementioned Mt. Hood Cable Regulatory Commission ("MHCRC") — has cast a pall over the multibillion dollar transaction. The MHCRC has effectively refused to approve the franchise transfers from TCI to AT&T unless the combined entity opens its cable television transmission facilities to competitors of TCI's @Home cable modem Internet access service. Apart from the merits of imposing common carrier-like Title II restrictions on Title VI-regulated cable operators as urged by America Online ("AOL") and others in an effort to access cable's broadband facilities, or the coherence of the federal district court decision upholding the MHCRC's authority to do so,[21] the LFA's attempt to extract concessions from AT&T/TCI certainly begs the question of whether local franchise transfers represent the appropriate fora for evaluating a national transaction — let alone the even larger and more profound question of mandatory ISP access to cable architecture. Indeed, mirroring its conclusion from the Section 706 proceeding that such regulatory restrictions would deter investment in advanced services,[22] the FCC begged off the ISP community's demand for open access to TCI's cable facilities precisely because the enormous implications of such a request for the affected industries made one transaction — even one as large as AT&T/TCI — the wrong context to decide national Internet policy.[23] In its refusal to constrain its franchise transfer review to appropriate matters of local concern, however, the MHCRC apparently espouses the converse conclusion that each franchising authority should be able to attach whatever demands it deems best for the future of Internet, voice, or other communications services.[24] Irrespective of

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Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, FCC 99-24, 14 F.C.C.R. 3160 (1999) (Memorandum Opinion and Order), *available at* <http://www.fcc.gov/ccb/Mergers/ATT_TCI> [hereinafter AT&T/TCI MO&O].

21. *See infra* Part IV.C.

22. *See* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 99-5, 14 F.C.C.R. 2398, ¶ 100–101 (1999) (Report).

23. *See* AT&T/TCI MO&O, *supra* note 20, ¶ 60.

24. The MHCRC's unconvincing defense of its actions on the basis of FCC inaction misconstrues the Commission's mandate under Section 706, which is solely to use deregulatory measures to spur deployment of advanced telecommunications services, and not to impose burdensome regulations such as a national open access requirement. For an analysis of the cable industry's view of the FCC's Section 706 authority, see Comments of the National Cable Television Association Before the FCC, CC Docket No. 98-146 (filed Sept. 14, 1998).

one's views of mandatory access to cable broadband capacity, it is absurd to apply city-by-city restrictions to the Internet — the very essence of which defies local, state,[25] national, and international boundaries. After losing in the federal district court in Oregon,[26] AT&T/TCI must await the outcome of the appeal as well as fight off similar open access requests from emboldened LFAs before consumer benefits from the merger may be fully realized.

IV. CASE STUDIES

Only after protracted, expensive litigation of the kind between AT&T/TCI and the MHCRC have cable companies and other new entrants succeeded in inducing the Commission or courts to preempt local restrictions that have extended far beyond rights-of-way management and safety regulation. While not exhaustive, the following case analyses demonstrate that even in instances of localities' regulations blatantly violating the letter and intent of the 1996 Act, the FCC has responded timidly and slowly, thereby squelching competition and deterring new entities from entering the market for local telephony and other communications services.

A. Classic Telephone

Two of the first battlegrounds for would-be competitors in local telephony were Hill City and Bogue, Kansas. *Classic Telephone*[27]

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25. The FCC's recent Order categorizing dial-up Internet access as interstate traffic suggests that even state-by-state Internet policy is inappropriate. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Declaratory Ruling); Inter-Carrier Compensation for ISP-Bound Traffic (Notice of Proposed Rulemaking), FCC 99-38, 14 F.C.C.R. 3689, ¶ 1 (1999). Notwithstanding this fact, ISPs have recently added state legislatures to their regulatory targets to gain mandatory access to cable broadband capacity. *See* Joe Estrella & Linda Haugsted, *ISPs Take Case to the States*, MULTICHANNEL NEWS, Apr. 12, 1999, at 1, 63 (describing the ISPs' OpenNet Coalition as "the force behind bills in the Texas, New Mexico and Missouri legislatures calling for cable operators to open their broadband networks to unaffiliated ISPs").

26. *See* AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146 (D. Or. 1999).

27. Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, FCC 96-397, 11 F.C.C.R. 13,082 (1996) (Memorandum Opinion and Order) [hereinafter Classic Preemption Order]; Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation, FCC 97-335, 12 F.C.C.R. 15,619 (1997) (Memorandum Opinion and Order) [hereinafter Classic Enforcement Order]; Classic Telephone, Inc., DA 99-170, 14 F.C.C.R. 960 (1999) (Order) (granting Classic's

concerned the proposed purchase of four telephone service exchanges by Classic Telephone, Inc. ("Classic") from United Telephone Company of Kansas ("United"), which had been the incumbent Local Exchange Carrier ("LEC") certified by the state and serving Hill City and Bogue for many years. Before passage of the 1996 Act, both cities had awarded telecommunications franchises to Rural Telephone Service Co. ("Rural") and denied Classic's applications for such franchises on the grounds that competition in the provision of local telephone service was neither desirable nor feasible.[28] Still prior to the 1996 Act's passage, and over the cities' objection and petition for reconsideration, the Kansas public utility commission ("PUC") approved the sale of United's assets to Classic and designated Classic as a "provider of last resort" for Hill City and Bogue.[29] The cities appealed these decisions to the local federal district court.[30]

The subsequent enactment of the 1996 Act, including Section 253's prohibition on local regulatory barriers to entry by competitive telecommunications providers, would seemed to have doomed the cities' efforts to proscribe local telephone competition in Bogue and Hill City. But the cities rebuffed Classic's petition to reconsider their refusals to issue franchises to Classic, ostensibly based on the pending district court consideration of the Kansas PUC's decision certifying Classic and the pending license transfer applications at the FCC, as well as stated concerns about Classic's financial stability and the quality and feasibility of competitive local telephone service.[31] Classic then filed a petition at the FCC for preemption, a declaratory ruling, and injunctive relief under the new Section 253.

In the *Classic Preemption Order*, released more than two years after Classic contracted to purchase United's facilities,[32] the

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motion to dismiss its petition for reconsideration of the Enforcement Order as moot).

28. *See* Classic Preemption Order, *supra* note 27, ¶ 6. The Kansas Supreme Court had held that municipalities have the authority to require telecommunications providers to obtain franchises. *See* United Tel. Co. of Kansas v. City of Hill City, 258 Kan. 208, 208, 899 P.2d 489, 492 (Kan. 1995). Note that Kansas state law permitted local governments to determine "which company or companies shall serve their communities so long as that decision does not interfere with intrastate and interstate communications." 258 Kan. at 222, 899 P.2d at 500.

29. *See* Classic Preemption Order, *supra* note 27, ¶¶ 7–8.

30. *See id.* ¶ 10.

31. *See id.* ¶¶ 10–11.

32. Classic entered into an agreement to purchase the Hill City and Bogue exchanges from United in May, 1995 and filed its preemption petition in March, 1996. *See id.* ¶¶ 5, 12. The Commission released its order denying Classic's Enforcement Petition on September 24, 1997. *See* Classic Enforcement Order, *supra* note 27.

Commission initially signaled a broad scope for Section 253, clarifying that its Section 253(a) preemption authority reached even municipalities' actions that affect purely intrastate franchising matters.[33] The Commission then explained that "economic and operational impediments" to competition, in addition to "statutory and regulatory" barriers, also fall within the confines of Section 253.[34] Applying those standards to the cities' conduct, the Commission was all but forced to find that the cities' rejection of Classic's franchise applications, based on their stated desire to avoid competition in the provision of local telephone service and their emphasis on the relative capabilities of Classic and Rural, constituted a violation of Section 253(a).[35] Only when confronted with an obvious violation of Section 253 did the cities proffer cited public safety and rights-of-way management issues — which the Commission took pains to emphasize were still within the jurisdiction of localities[36] — as post-hoc rationales for their denials of Classic's applications.

However, in spite of the cities' actions being clearly within the Commission's jurisdiction and so patently contrary to statutory text and legislative intent, the Commission refused to enjoin the cities from taking any action that directly or indirectly interfered with Classic's provision of telecommunications services, as requested by Classic.[37] Instead, the FCC simply ordered the cities to "expeditiously reconsider Classics' [sic] franchise applications . . . ."[38] The Commission exhibited a similar reluctance to take wide ranging action in Classic's subsequent enforcement request that the Commission require the cities to grant Classic telecommunications franchises and all other authority necessary for Classic to provide telecommunications services.[39] Instead, the Commission issued toothless warnings over "unreasonable delay" and declared itself "especially troubled" that the cities' failure to reconsider Classic's franchise applications and provide written

33. *See* Classic Preemption Order, *supra* note 27, ¶ 24.

34. *See id.* ¶ 25.

35. *See id.* ¶¶ 26–27.

36. Citing legislative history, the FCC gave examples of permissible management functions, including (1) time and location of construction; (2) placement of facilities underground; (3) fees to cover street repair; (4) standard local zoning regulations; and (5) indemnification for injuries. *See id.* ¶ 39 (citing 141 CONG. REC. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco)).

37. *See id.* ¶ 50.

38. *Id.*

39. *See* Classic Enforcement Order, *supra* note 27, ¶ 27.

rationales for its decisions might have delayed financing, causing Classic to abandon its plans to purchase the Hill City exchange and precluding a determination of whether a violation of Section 253 had occurred.[40] Classic's victory was a Pyrrhic one; apparently exhausted from the protracted ordeal, Classic eventually abandoned its plans to offer competitive telecommunications services in Hill City and Bogue and withdrew its appeal of the Enforcement Order.[41]

B. City of Troy

Where the FCC failed to take an aggressive preemption position on Section 253 in analyzing Classic's ultimately futile attempt to offer local telephone competition in Kansas, the *City of Troy* proceeding[42] — aptly named both for the city involved as well as its epic length — presented another opportunity for the Commission to assert its preemption authority — this time under Section 621 — and clarify the permissible boundaries of local regulation under the 1996 Act. But again, while practically forced to find a statutory violation, the Commission appeared content to rattle its saber, issuing stern warnings, rather than proactively ordering broad enforcement. Thus, the Commission imparted a mixed message to cities and would-be competitive telecommunications entrants that although the FCC will entertain petitions to preempt blatant violations of the 1996 Act, the Commission will not act promptly and will be reluctant to exercise its preemption authority to ensure compliance.

In *City of Troy*, TCI, the franchised cable operator in Troy, Michigan, petitioned the Commission to examine Troy's treatment of the cable operator's two construction permit applications to upgrade its existing cable plant.[43] When TCI sought a permit to install fiber optic facilities in parts of the city where it did not yet provide cable service,

40. *See id.* ¶¶ 27, 29.

41. When Classic ultimately decided not to offer local telephone service in Bogue and Hill City, the Commission granted Classic's petition to dismiss its appeal of the Enforcement Order as moot. *See* Classic Telephone, Inc., DA 99-170, 14 F.C.C.R. 960 (1999) (Order).

42. TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253, FCC 97-331, 12 F.C.C.R. 21,396 (1997) (Memorandum Opinion and Order) [hereinafter Troy MO&O], FCC 98-216, 13 F.C.C.R. 16,400 (1998) (Order on Reconsideration) [hereinafter Troy Reconsideration Order].

43. *See* Troy MO&O, *supra* note 42, ¶ 1. The cable franchise and city regulations required TCI to obtain approval via permits to disrupt public rights-of-way for maintenance, repairs, or plant upgrades. *See id.* ¶ 2.

ostensibly to connect three cable headends, Troy required as a condition of such permits that TCI agree that such facilities would not be used to provide telecommunications services.[44] Troy then enacted a telecommunications ordinance that imposed a variety of regulations and fees on telecommunications providers.[45] When TCI submitted its second construction permit application to install aerial cable along public rights-of-way to upgrade an institutional network and improve cable service to a local school, Troy sought further assurances that TCI did not intend to provide telecommunications service as conditions of the construction permits.[46] TCI sought relief under, inter alia, Sections 621 and 253.[47]

Examining the scope of Section 621 of the 1996 Act, the Commission first side-stepped TCI's allegation of a violation of Section 621(b)(3)(A)[48] on the grounds that TCI's stated intent not to provide telecommunications services removed it from the scope of that provision.[49] In failing to reach this issue, the Commission managed to avoid the major issue in disputes between localities and cable entities as to the scope of the term "telecommunications service." The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used[,]"[50] while "cable service" is "(A) 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."[51] States and localities have adopted broad

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44. *See id.* ¶ 3.

45. *See id.* ¶¶ 4, 15–18.

46. *See id.* ¶ 4.

47. *See id.* ¶¶ 5–6.

48. *See* 47 U.S.C. § 541(b)(3)(A) (Supp. III 1997) (stating that LFAs may not require cable operators to obtain a franchise to provide telecommunications services).

49. *See* Troy MO&O, *supra* note 42, ¶ 67.

50. 47 U.S.C. § 153(46) (Supp. III 1997). "Telecommunications carrier" under the Communications Act is "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services . . . . A telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44) (Supp. III 1997).

51. 47 U.S.C. § 522(6) (1994 & Supp. III 1997). For an analysis of the classification and accompanying regulatory treatment of various communications services over cable, see BARBARA ESBIN, FEDERAL COMMUNICATIONS COMMISSION, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST (1998), *available*

interpretations of the former and exceedingly narrow constructions of the latter such that, in their view, anything other than traditional one-way video offered by a cable operator is deemed by LFAs to be a "telecommunications service." By contrast, cable interests have argued that even private line provision of telecommunications capacity over a cable system to customers on an individualized basis does not invoke the common carrier obligations of Title II of the Communications Act applicable to providers of "telecommunications service." The FCC's hesitancy to clarify this difference of interpretation is regrettable, as it has deprived cable operators, states, and localities of valuable insight into the scope of permissible local regulation.

Nevertheless, as it did in *Classic Telephone*, the FCC did include cautionary rhetoric criticizing Troy for administrative delay in processing TCI's applications to upgrade its cable plant.[52] Moving to Section 621(b)(3)(B),[53] the Commission concluded that Troy had violated this provision by conditioning its grant of cable permits on TCI's agreement not to provide telecommunications services.[54] The Commission rejected Troy's claim that it was acting under residual state law authority[55] — and thus outside the scope of Section 621(b)(3)(B) — and preempted Troy's attempt to require TCI to agree to obtain a telecommunications franchise before it approved TCI's permit request to upgrade its cable plant.[56]

Preemption of Troy's demands for a separate telecommunications franchise from an already franchised cable operator was not only the required result under the statute but also the proper outcome from a policy perspective. Indeed, city attempts to impose duplicative telecommunications franchise obligations call into question whether *any* additional rights-of-way restrictions on franchised cable operators offering telecommunications through their existing cable equipment are appropriate. After all, the cable franchise theoretically compensates municipalities cities for cable operators' use of the public rights-of-way. Where cable operators simply alter these facilities to offer a telecommunications or other communications service with no additional

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at <http://www.fcc.gov/ opp/workingp.html>.

52. *See* Troy MO&O, *supra* note 42, ¶ 78.

53. 47 U.S.C. § 541(b)(3)(B) (1994 & Supp. III 1997) ("A franchising authority may not impose any requirement . . . that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or affiliate thereof.").

54. *See* Troy MO&O, *supra* note 42, ¶¶ 6, 62–66, 84.

55. *See id.* ¶ 47.

56. *See id.* ¶ 75.

intrusion into the public rights-of-way, it defies logic for localities to levy new fees and regulatory requirements on cable operators under the auspices of rights-of-way management. Indeed, although not fully articulated by the Commission in its *City of Troy* opinion, this rationale must have been precisely Congress's intent in enacting Section 621(b)(3). While cities certainly have the right to demand compensation for use of public rights-of-way, cable operators should not have to pay twice for use of the same facilities.

In addition to its Section 621 claim, TCI also sought relief under Section 253 by mounting both facial and as applied challenges to Troy's telecommunications ordinance.[57] Explaining that the standard for a Section 253(a) violation would be whether the state or local provision "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment"[58] and placing the burden squarely on the party seeking preemption to produce "credible and probative evidence" of a violation,[59] the Commission found an insubstantial record to support TCI's allegation of a Section 253 violation.[60]

As in *Classic Telephone*, the Commission offered mostly rhetorical support for preemption, describing Section 253 as "a critical component of Congress' pro-competitive deregulatory national policy framework that it put into place by enacting the 1996 Act."[61] The Commission also claimed to be "troubled" by the Troy ordinance in the context of Congress's goals, expressed repeated reservations about local governments creating "an unnecessary 'third tier' of regulation,"[62] and warned cities that attempts to impede local telecommunications competition will be met with "close scrutiny."[63] Citing ripeness concerns, the Commission declined to issue what it considered to be a "purely advisory opinion," given TCI's stated lack of intention to offer telecommunications services.[64]

While TCI ultimately succeeded in the *City of Troy* proceeding, its "victory," like Classic's, proved time consuming and costly. TCI filed its first permit application in October, 1995[65] and the FCC, after much

57. *See id.* ¶ 87.
58. *Id.* ¶ 98 (citation omitted).
59. *Id.* ¶ 101.
60. *See id.* ¶ 99.
61. *Id.* ¶ 102.
62. *Id.*
63. *Id.* ¶ 105.
64. *Id.* ¶ 99.
65. *See id.* ¶ 3.

internal debate over the scope of its preemption authority, released its opinion on Troy's Petition for Reconsideration in September, 1998.[66] As a clearly invalid attempt to require a telecommunications franchise of an already franchised cable operator, *City of Troy* should have been an "open and shut" case. Further, the FCC's cautionary rhetoric on Section 253 probably has had little effect on cities' attempts to over-regulate, thereby hindering local telephony competition by cable operators and other prospective telecommunications providers. As a result, perhaps, some frustrated market entrants have turned to the federal courts for regulatory relief.

C. Federal Court Case Law

Where local regulations in Hill City and Bogue, Kansas and Troy, Michigan, illustrate the most brazen attempts to defy the 1996 Act's attempt to remove local regulatory barriers, they are by no means the only examples of local authorities raising regulatory entry costs. And while the FCC has been reticent to entertain and swiftly act upon preemption petitions, federal courts, asserting concurrent jurisdiction over Section 253, generally have demonstrated a more aggressive approach to preempting local regulations that inhibit the provision of competitive telephony. The federal court case law, however, also demonstrates the vagaries of judge-by-judge adjudication of issues within the expertise of and best decided by the FCC.

Although not decided under Section 253 and potentially an anomaly, Judge Owen Panner's decision in *AT&T v. City of Portland*[67] demonstrates the potentially explosive repercussions of city-by-city regulation and judge-by-judge adjudication of national communications policy. In *City of Portland*, Judge Panner held that the City was within its authority to require AT&T/TCI to allow ISPs that compete with AT&T/TCI's @Home service access to the combined entity's cable architecture as a condition of transferring TCI's cable franchises to AT&T.[68] In a rather cursory decision that AT&T promptly denounced as "inexplicable,"[69] Judge Panner dismissed AT&T's arguments that Portland's restrictions were preempted by the Cable Act and violated the

66. *See* Troy Reconsideration Order, *supra* note 42.

67. 43 F. Supp. 2d 1146 (D. Or. 1999).

68. *See id.* at 1149.

69. *See* Deborah Solomon, *AT&T Ordered to Open Cable Line Access*, S.F. CHRON., June 5, 1999, at A1.

speech, commerce, and contract clauses of the First Amendment.[70] Cable interests most vigorously objected to Panner's defense of the City's open access requirements, which were founded on the "essential facility" doctrine from antitrust law,[71] on the theory that they did not regulate the cable facilities as a common carrier (as explicitly prohibited by federal law) because the requirement applied only to competitive ISPs.[72]

While AT&T and other incredulous cable interests await the outcome of the appeal, advocates for cities are using the decision as leverage to extract concessions from cable operators.[73] With the FCC, for the moment, playing a merely peripheral role, it appears that for the foreseeable future the policy decisions on the regulatory architecture for broadband access over cable will be developed on an ad hoc basis by the courts. This result is entirely antithetical to any coherent policy on Internet access, and, one hopes, will prompt the recalcitrant FCC into declaring that all local regulation of Internet access is preempted.[74]

In addition to this case affecting Internet access policy, judges have also played an important role in adjudicating disputes on the roll-out of competitive telecommunications. For example, a federal district court judge in the Southern District of Florida struck down in part the provisions of a telecommunications ordinance enacted by Coral Springs, Florida in an action brought by BellSouth Telecommunications, Inc. ("BellSouth").[75] Specifically, the court held that the Coral Springs ordinance was valid only to the extent that it regulates facilities within

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70. *See City of Portland*, 43 F. Supp. 2d at 1151–55.

71. *See id.* at 1150.

72. *See id.* at 1153.

73. *See, e.g., Open Access Advocates Say Broward County Is Just 2nd Of Many*, COMM. DAILY, July 15, 1999, at 8–9 (describing mandatory access ordinance passed by Broward County, Florida and citing predictions by city advocates of similar outcomes in many municipalities, including Dade County, Florida, and San Francisco).

74. Indeed, the remarks of Chairman Kennard and Commissioner Powell indicate substantial opposition to the *City of Portland* decision and a willingness to entertain declaratory ruling petitions to preempt LFAs' open access conditions. *See The Road Not Taken: Building a Broadband Future for America*, Remarks of FCC Chairman William E. Kennard before the National Cable Television Association, Chicago, IL, June 15, 1999, *available at* <http://www.fcc.gov/Speeches/Kennard/spwek921.html>; Remarks of FCC Commissioner Michael K. Powell before the Federal Communications Bar Association, Chicago, IL, June 15, 1999, *available at* <http://www.fcc.gov/Speeches/Powell/ spmkp902.html>; *see also FCC Attorneys at Cable '99 Criticize Portland Open Access Decision*, COMM. DAILY, June 17, 1999.

75. *See* BellSouth Telecomms., Inc. v. City of Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla. 1999).

the city's rights-of-way and imposes reasonable fees for their use.[76] Outside of the scope of that permissible rights-of-way management, according to the court, were the Coral Springs ordinance's requirements for competitively sensitive information about the systems, plans, and purposes of BellSouth's telecommunications facilities.[77] The preemption of this latter requirement for information is particularly encouraging for providers in locales where cities are building their own networks, placing them in the inherently conflicted dual position of competitors in addition to regulators.[78] Similarly encouraging was the court's preemption of the Coral Springs ordinance's demands for burdensome technical, legal, and financial information that BellSouth had already furnished to the Florida Public Service Commission in order to obtain certification, as required of communications providers in most states.[79] Finally, the court also excised the ordinance's requirement of universal service requirements as areas reserved to state and federal law.[80]

The Coral Springs decision relied in part on decisions evaluating Section 253 in the federal district courts in Texas. In decisions for preliminary and permanent relief in *AT&T Communications of the Southwest, Inc. v. City of Austin*, the federal district court for the Western District of Texas granted a preliminary injunction[81] and then permanent relief[82] against the imposition of an Austin ordinance that required municipal consent, franchise fees, and various reporting requirements and other information of local telecommunications service providers. Having obtained a certificate of operating authority from the

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76. *See id.* at 1308.

77. *See id.* at 1309 (citation omitted).

78. *See, e.g.*, Bill Virgin, *City Utilities: Electricity, Water, — Cable? As Latest Round of Cable Deregulation Kicks In, More Cities Enter Cable*, CHRISTIAN SCI. MONITOR, Apr. 1, 1999, at 2 (stating that the "National Cable Television Association counts 67 municipally owned cable systems around the country" and describing Tacoma, Washington's Click! Network); Linda Haugsted, *Iowa Reinstates Municipal Telco Services*, MULTICHANNEL NEWS, Mar. 15, 1999, at 36 (describing efforts of Hawarden, Iowa to build and operate its own telecommunications facilities). For a summary of litigation over whether cities are considered an "entity" for purposes of Section 253, see TELECOMMUNICATIONS REP., Feb. 22, 1999, at 34–35.

79. *See City of Coral Springs*, 42 F. Supp. 2d at 1310. For a recent case that also invalidated a franchise ordinance that required similarly broad information that was well beyond the scope of the franchising authority's permissible rights-of-way management, see Bell Atl.-Md., Inc. v. Prince George's County, 49 F. Supp. 2d 805 (D. Md. 1999).

80. *See City of Coral Springs*, 42 F. Supp. 2d at 1310–11.

81. 975 F. Supp. 928 (W.D. Tex. 1997).

82. 42 F. Supp. 2d 708 (W.D. Tex. 1998).

Texas Public Utility Commission (PUC), AT&T planned to offer local telephony service solely through facilities owned by Southwestern Bell and therefore claimed that it did not occupy or use public rights-of-way.[83] The court held that under Section 253 of the Communications Act and under state law, municipalities retained only the right to "manag[e] and deman[d] compensation for the use of the City's public rights-of-way[,]" and not to enact comprehensive and burdensome franchise and reporting requirements.[84] In the ensuing proceeding for permanent relief, the court affirmed that, as a non-facilities-based provider, AT&T did not "use" the city's rights-of-way and therefore could not be subject to the city's ordinance.[85] Citing Commission precedent, the court rejected any difference in the (non) use of public rights-of-way between a wireless provider and a non-facilities-based provider, emphasizing that "[t]he essential point is that AT&T will not erect telephone poles or dig holes in the city's streets . . . because those rights and duties belong to [Southwestern Bell], not to AT&T."[86]

The federal court for the Northern District of Texas adopted a similarly critical view of Dallas's attempt to condition the grant of a telecommunications franchise on regulations beyond rights-of-way management in *AT&T Communications of the Southwest v. City of Dallas*.[87] In its ruling granting AT&T preliminary injunctive relief, the court held that Dallas could require AT&T, whose Dallas facilities did use the public rights-of-way, to obtain a franchise to use city rights-of-way for local telephone service, but that the grant of that franchise could not be conditioned on anything other than AT&T's agreement to comply with the city's "reasonable regulations of its rights-of-way and the fees for use of those rights-of-way."[88] The court explained that "[f]ederal law [Section 253] therefore limits the scope of Dallas's authority to regulate telecommunications to two narrow areas: the 'management' of city rights-of-way and the requirement of fees for use of rights-of-way."[89]

At the same time, the *City of Dallas* opinions appeared to enlarge the state's regulatory power, holding that the Texas PUC could impose,

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83. *See* 975 F. Supp. at 934.

84. 975 F. Supp. at 942–43.

85. *See* 42 F. Supp. 2d at 711–12.

86. *Id.* at 711.

87. 8 F. Supp.2d 582 (N.D. Tex. 1998).

88. *Id.* at 586.

89. *Id.* at 591. The court reiterated these grounds for its grant of permanent injunctive relief to AT&T and Teligent in *AT&T Communications of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999).

on a competitively neutral basis, more expansive requirements on telecommunications carriers — such as universal service responsibilities — but that a municipality's regulatory authority, according to the court, was circumscribed to the telecommunications providers' use of its public rights-of-way.[90] Further, citing legislative history to the 1996 Act, the court required that the fees imposed on AT&T by Dallas be in proportion to the use of their rights-of-way, rejecting the notion that competitive neutrality required the imposition of one flat fee on all local telecommunications providers.[91]

In spite of the circumscribed view of localities' jurisdiction seen in the Coral Springs, Austin, and Dallas cases, federal court support for preemption of city regulations has not been unanimous. In *TCG Detroit v. City of Dearborn*,[92] the federal district court for the Eastern District of Michigan granted summary judgment to Dearborn on the claim by TCG — a competitive local telecommunications service provider authorized by the Michigan Public Service Commission — that the city's telecommunications ordinance violated Section 253.[93] In 1994, Dearborn enacted an ordinance requiring telecommunications providers that sought to use the city's rights-of-way to enter into franchise agreements.[94] In 1995, TCG and the city negotiated such an agreement that required, inter alia, franchise fees of 4% of TCG's gross revenues, a $50,000 one-time payment, and up to $2,500 in costs incurred by Dearborn.[95] As in the *Classic Telephone* context, TCG rejected the agreement following enactment of the 1996 Telecommunications Act on the basis of purported conflict with Section 253.[96]

While analyzing a number of statutory claims, the court rejected the argument that the competitive neutrality component of Section 253 required identical treatment of telecommunications providers by municipalities.[97] Since the city, by its suit against the incumbent local exchange provider ("ILEC"), Ameritech, intended to impose franchise

90. 8 F. Supp. 2d at 587, 590–91.

91. *See id.* at 587; *see also* AT&T Communications of the Southwest, Inc. v. City of Dallas, 52 F. Supp. 2d 756, 762 (N.D. Tex. 1998) (granting the preliminary injunction of Teligent, a wireless provider, against city rights-of-way regulations on the grounds that Teligent did not "use" Dallas's rights-of-way).

92. 977 F. Supp. 836 (E.D. Mich. 1997) (denying city's motion to dismiss); 16 F. Supp. 2d 785 (E.D. Mich. 1998) (granting city's motion for summary judgment).

93. *See* 16 F. Supp.2d at 785, 788.

94. *See id.* at 787.

95. *See id.*

96. *See id.*

97. *See id.* at 791–93.

requirements on the incumbent as well as competitive telecommunications providers, it was not, according to the court, acting in a discriminatory fashion.[98] However, even as the court appeared to endorse the concept that Ameritech ought to be subject to franchise obligations proportionate to its use of public rights-of-way, the court then held that the nineteenth century state law granting Ameritech free use of the rights-of-way was not invalidated either by subsequent amendments to the Michigan Constitution or the passage of Section 253.[99] Thus, under the 1883 state law, the city could exercise authority over Ameritech only for public health and safety purposes.[100] The anomalous result was that, in the face of clear congressional intent to the contrary, the city could subject TCG and other competitive telecommunications providers to extensive franchise fees and other requirements, but could not impose *any* such requirements on the incumbent local telecommunications provider.

Outside of the local telephony context, the Fifth Circuit reached a perhaps even more anomalous result in *City of Dallas v. FCC*[101] in invalidating the FCC's regulations preempting local open video system ("OVS") franchise requirements. As noted above,[102] Section 653(c)(1) of the Communications Act generally relieves LECs offering video service through open video systems from cable franchising requirements of Section 621.[103] The Fifth Circuit rejected the FCC's argument that Section 621 is the sole source of local franchising jurisdiction and concluded that Section 621 merely relieved OVS providers from federal — and not preexisting local — requirements to obtain a franchise.[104] According to the court, the 1984 Cable Act, which initiated the Section 621 franchising requirements, merely intended to codify preexisting law on franchising.[105]

The Fifth Circuit's reasoning evidences a fundamental misinterpretation of Congressional intent, which demonstrates the perils of setting communications preemption policy court-by-court and

98. *See id.* at 791–92.

99. *See id.* at 793–97.

100. *See id.* at 794.

101. 165 F.3d 341 (5th Cir. 1999).

102. *See supra* note 14 and accompanying text.

103. *See* 47 U.S.C. § 573(c)(1) (Supp. III 1997). In exchange for these "reduced regulatory burdens," OVS providers must carry eligible unaffiliated video programming providers without discrimination on up to two-thirds of capacity. *See id.* § 573(b)(1)(B). Section 621 is codified at 47 U.S.C. § 541 (1994 & Supp. III 1997).

104. *See* 165 F.3d at 347–48.

105. *See id.* at 348.

circuit-by-circuit. First, the court's decision ignores the plain text of Section 621(a), which expressly empowers franchising authorities to award franchises;[106] if it were true, as asserted by the court, that Congress simply intended to codify preexisting law on franchising, then Section 621(a) would be superfluous. Second, the court's argument ignores the fact that before the 1984 Cable Act, the FCC concluded that it had the authority to preempt all franchising in favor of federal licensing but declined to do so on policy grounds.[107] Therefore, even if the FCC only has the authority it had before the 1984 Act, it still may and should preempt local franchise requirements that impede Congress's attempt to entice OVS providers into the multi-channel video programming distribution ("MVPD") market by lowering regulatory barriers.

Moreover, Section 636(c)'s enactment in the 1984 Act supports preemption of local franchising jurisdiction.[108] Under the video dialtone ("VDT") rules — the precursors to the OVS provisions and which were upheld by the D.C. Circuit[109] — the FCC preempted the local franchising requirement.[110] Since Congress repealed the VDT rules in the 1996 Act in order to *reduce* Title II burdens,[111] it defies logic to suggest that this repeal was intended to reimpose franchise obligations. Instead, the court's analysis might allow LFAs to impose *greater* obligations on OVS providers than cable operators. This truly anomalous result is clearly inconsistent with Section 653(c)(2)(A), expressing Congress's intent that OVS regulatory obligations be "no greater" than those applicable to cable.[112]

V. THE TRADITION OF FCC PREEMPTION AUTHORITY AND SEPARATE SPHERES OF REGULATION

These examples of federal court consideration of preemption petitions under Section 253 generally, but by no means exclusively, indicate a willingness by the courts to cast a skeptical eye on municipal

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106. *See* 47 U.S.C. § 541.

107. *See* Cable Television Report and Order, FCC 72-108, 36 F.C.C.2d 143, ¶ 177 (1972).

108. *See* 47 U.S.C. § 556(c) (1994).

109. *See* National Cable Television Association v. FCC, 33 F.3d 66 (D.C. Cir. 1994).

110. *See* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–63.58, FCC 91-334, 7 F.C.C.R. 300 (1991) (Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry).

111. *See* H.R. CONF. REP. NO. 104-458, at 178–79 (1996).

112. 47 U.S.C. § 573(c)(2)(A) (Supp. III 1997).

attempts to regulate communications providers beyond control over rights-of-way. But a piecemeal judicial approach to addressing pervasive local barriers to competition hardly seems to be the most efficient method for defining the federal, state, and local boundaries of authority — particularly for large operators such as AT&T and Time Warner, each of whom serve subscribers in numerous cities. Such varying regulatory boundaries are particularly destructive of cable operators' regional "clustering" strategies. Aggregating cable plant and subscribers into regional clusters is essential to cable's ability to provide facilities-based local competition to the regional Bell Operating Companies ("RBOCs") and GTE, who, despite the 1996 Act's passage, have retained their stranglehold on local telephone service and who themselves are organized into massive regional clusters.[113] A maze of different local regulations could defeat cable clustering, jeopardizing cable's opportunity to compete for local telephone customers.[114]

The federal court decisions and the FCC's substantial authority to preempt local regulations raise the question why the expert federal agency, endowed with substantial authority, has not asserted a stronger leadership role in defining allowable zones of regulatory authority for states and cities. The costs are very real for prospective communications market participants who must now speculate over the time and expense of entering new markets, for consumers deprived of the fruits of competition, and for courts burdened with increasing lawsuits better suited to Commission adjudication. The FCC could do much to minimize these costs by articulating a statement of principles clarifying where local regulations must give way to the 1996 Act's competitive goals.

Such a rule would be consistent with both the FCC's own pronouncements on its expansive preemption authority and Supreme Court precedent partitioning federal, state, and local regulatory authority over communications. As early as the middle 1970s, the FCC recognized that while localities had a role to play in the franchising process, "the complexities and national character of cable television called for nationwide rules and guidelines"[115] and expressed "concern[]

113. *See* 1997 STATISTICS OF COMMUNICATIONS COMMON CARRIERS, *available at* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/SOCC/scc97idx.html>.

114. For a description of cable clustering, see Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, FCC 97-423, 13 F.C.C.R. 1034, ¶¶ 140–148 (1998).

115. Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, FCC 74-384, 46 F.C.C.2d 175, ¶ 41 (1974).

about the developing duplicative and burdensome overregulation of cable television."[116] Even more explicitly, the Commission expressed its intent in 1975 to "preempt areas of cable regulation in order to assure the orderly development of this new technology into the national communications structure."[117] In the Commission's own assessment:

> The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission.[118]

The FCC's assertion of its preemption authority would also comport with established Supreme Court precedent illustrating expansive FCC authority and circumscribed state and local jurisdiction. In *United States v. Southwestern Cable Co.*,[119] the Court granted the FCC's request for jurisdiction over cable communications as "reasonably ancillary" to its authority over broadcasting, suggesting an expansive Commission power over communications even in the absence of explicit statutory delegation.[120] Subsequently, the Court's opinion in *FCC v. Midwest Video Corp.*[121] clarified that the FCC's authority extends to all regulatory actions "necessary to ensure the achievement of the Commission's statutory responsibilities."[122] In 1984, the Court offered a more specific indication of the regulatory contours of the FCC, states, and localities in *Capital Cities Cable, Inc. v. Crisp*.[123] In *Crisp*, the Court explained that under the 1984 Cable Act, while states and localities retained their traditional jurisdiction over franchising and rights-of-way issues, Congress's "deliberately structured dualism" gave full regulatory authority to the FCC over content and nearly all other

116. *Id.* ¶ 42.

117. Amendment of Part 76 of the Commission's Rules and Regulations Relative to an Inquiry on the Need for Additional Rules in the Area of Duplicative and Excessive Over-Regulation of Cable Television, FCC 75-897, 54 F.C.C.2d 855, ¶ 24 (1975).

118. *Id.* ¶ 21.

119. 392 U.S. 157 (1968).

120. *Id.* at 178.

121. 440 U.S. 689 (1979).

122. *Id.* at 706.

123. 467 U.S. 691 (1984).

matters affecting the Commission's mandate to foster a "rapid, efficient Nationwide and world-wide wire and radio communications service . . . ."[124] The Court's landmark decision two years later in *Louisiana Public Service Commission v. FCC*[125] continued this trend toward bright line distinctions in communications regulation between states and cities on the one hand and the FCC on the other. Even before the 1996 Act, lower courts have continued this gradual trend toward judicial fashioning of more concrete regulatory boundaries for cities in the communications arena.[126]

VI. CONCLUSION: PRINCIPLES FOR OPEN COMPETITIVE ENTRY

To assert that Congress, in adopting the 1996 Act, intended a dramatic restructuring of the communications marketplace is as insightful as pointing out that there is tension in the Middle East. Nevertheless, it is useful to remember that promotion of competition was the 1996 Act's entire "raison d'etre." Where entrenched incumbents once dominated the distribution of communications services, Congress envisioned that competition among new entrants and existing players using alternative technologies would bring consumers better service, more options, and more competitive prices.

But three years after the 1996 Act, significant local telephone competition has not been realized. While the intransigence of the ILECs to implement the competitive check-list embodied in Section 271 of the Act has undoubtedly forestalled competition, some blame must also lie with the burdensome regulations of localities that extend far beyond permissible rights-of-way management to saddle would-be competitors with fees, behavioral regulations, extensive reporting obligations, and additional franchise requirements. Cities can and should demand compensation of providers who use the public rights-of-way; to do otherwise would abdicate their responsibilities and effectuate a subsidization of these providers by taxpayers. But while federal regulatory barriers appear to have been eased by the 1996 Act's architecture, a patchwork of local regulations has emerged as perhaps

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124. *Id.* at 708 (citing 47 U.S.C. § 151).

125. 476 U.S. 355 (1986).

126. *See, e.g.*, American Tel. and Tel. Co. v. Village of Arlington Heights, 156 Ill.2d 399, 620 N.E.2d 1040, 189 Ill. Dec. 723 (Ill. 1993) (holding that a city has a regulatory, but not a proprietary, interest in the use of its streets); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388 (7th Cir. 1992) (limiting ability of city of Chicago to charge Western Union unrelated to rights-of-way usage).

the major obstacle to the realization of the Congressional vision. As a result, potential entrants must navigate and try to assess the costs of the extensive and often Byzantine maze of regulations imposed by localities, without any mechanism to assess the potential costs of compliance. While the FCC thus far has appeared to be an unwilling participant in adjudicating petitions for relief from such local regulations, federal courts have become the primary adjudicators, handing down individual decisions on local regulatory authority that, by definition, vary from one federal court to the other, and leave prospective competitors unable to gauge their regulatory exposure.[127]

How should this situation be addressed? It is time for the FCC to demonstrate leadership by exercising its congressionally-delegated preemptive authority. In the abstract, borrowing the buzz words of Section 253, cities must at the very least regulate in a "competitively neutral" and "non-discriminatory" manner, with no variation in the regulations applied to services offered via different technologies other than based on rights-of-way usage.[128] More specifically, rather than further revisions to the Communications Act, a clear statement of principles clarifying the regulatory parameters of federal, state, and local regulation combined with an aggressive approach toward preemption and enforcement would do much to remove the uncertainty that dissuades new entrants from competing with incumbent telecommunications providers. These principles should include the following:

- Under the doctrine of primary jurisdiction, federal courts should defer to swift FCC assessment and adjudication of preemption petitions.

- Localities may impose regulations and fees on entities that utilize public rights-of-way, but these regulations and fees

127. That the judiciary is leading the way on defining key parameters of the 1996 Act seems particularly ironic, given that one of Congress's objectives, as evidenced by the addition of Section 601 to the 1996 Act, was to end the "government by consent decree" that had resulted in Judge Greene's lengthy oversight of AT&T's breakup and other ongoing judicial supervision. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 56, 143.

128. Some encouraging movement toward competitively neutral regulation can be seen in Minnesota, with the introduction of a draft bill that apparently would replace all existing Minnesota state and local phone and cable regulations with a single set of regulatory parameters applicable to all communications providers, whatever the technology used. *See* COMM. DAILY, Apr. 19, 1999, at 6–7.

should be directly and reasonably related to the proportion of use of the rights-of-way and may not apply differently based on the kinds of services offered over facilities subject to right-of-way regulations. In no event should such fees exceed 5% of the providers' gross revenues.[129] All permit applications to use public rights-of-way that are denied must be accompanied by a statement of reasons and include procedures for expeditious appeal.

- Certification by a state PUC should constitute prima facie evidence that an entity seeking to provide telecommunications services is qualified to offer such service. Localities challenging the entity's fitness to offer such services or alleging public safety concerns should bear the burden of proof to show that such concerns are legitimate and not pretextual.

- A state should be required to specifically delegate powers to a locality wishing to inspect the financial fitness of a communications entity to offer service.

- Localities should not be allowed to require separate franchises of already franchised entities to provide new forms of communications services.

- Petitions for preemption before the FCC should be placed on a "rocket docket" that ensures prompt fact finding and adjudication. The FCC should assert its broad enforcement authority to order comprehensive and prompt compliance by cities.

- Localities should not require entities to divulge subscriber lists, planned construction, or other competitively sensitive information beyond minimal information directly related to the localities' management of their public rights-of-way.

- Localities should not attach conditions to their approval of franchise transfers or construction permits that require conditions of the regulated entity that are unrelated to the use of public rights-of-way.

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129. *See* 47 U.S.C. § 542(b) (1994 & Supp. III 1997).

- Localities should not be allowed to impose customer service requirements, price regulations, open access obligations, or other behavioral regulations on the services offered to consumers by any telecommunications provider.

By initiating a Notice of Inquiry ("Notice") on right-of-way management and franchise fees, the Commission at least has demonstrated that it is finally willing to examine the prevalence and legality of regulations promulgated by LFAs under the aegis of rights-of-way management.[130] Specifically, the Notice solicits comments from "service providers and State and local governments regarding their rights-of-way management experiences, including examples of problems they have encountered, successful solutions to problems, and information regarding the prevalence of each of these types of experience."[131] However, whether this proceeding results in the swift removal of barriers to competition for would-be competitive communications providers remains to be seen. As the Commission conducts its inquiry, consumers remain deprived of the fruits of competition that competitive entry would engender. Nonetheless, the Commission's recognition of the problem represents a positive development in addressing this systemic problem.

In sum, while localities have an ongoing role in collecting compensation for use of public rights-of-way and protecting their citizens' safety, municipal regulations that reach beyond these zones of authority represent serious threats to the competition envisioned by the 1996 Act. Communications entities — whether ILECs, CLECs, cable, or wireless providers offering video, voice, and/or data — should be able to predict with some degree of certainty the regulatory costs of entering new lines of business. Particularly as these entities transition to digital offerings, local regulations that make distinctions among providers based on the nature of the service offered, rather than the extent of their use of the public rights-of-way, will appear more untethered from permissible management functions. Statutory text, legislative history, and well-established precedent all demonstrate that expansive jurisdiction rests with the FCC to preempt local rules that impede competition through regulations unrelated to rights-of-way management, but case studies illustrate that the FCC thus far has

130. *See* Promotion of Competitive Networks in Local Telecommunications Markets, FCC 99-141, 14 F.C.C.R. 12,673, ¶¶ 70–80 (1999).

131. *Id.* ¶ 79.

abdicated its ordained role as regulatory policeman. It is now up to the FCC to exercise that authority to remove the last remaining hurdles to meaningful and widespread telecommunications competition.