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***Broadband and Local Strategy Planning, Competition and  
Technological Developments Necessitating Changes in  
Rights-of-Way Controls***

Presented by:

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## **I. INTRODUCTION**

Cities throughout the country are confronted with changing federal and state laws, technologies, and services as well as additional and competitive providers to incumbent cable and telephone companies. Cable operators now not only offer entertainment video programming but also are offering high speed Internet access service and digital telephone services. Also, telephone companies and new entrepreneurial communications service providers have decided to compete with cable operators and offer video programming services together with telecom services and Internet connection services.

The combination of voice, video, and data, “broadband,” is increasingly becoming a part of our daily lives in work and at home with globalization and the importance of broadband for our country and the economic welfare of its citizens. A national broadband strategy must be initiated. Local government policies and governance of rights-of-way, including local goals to overcome barriers to development of communications systems, are essential.

Against this backdrop, and in light of the rapidly changing telecommunications environment, it is essential to step back and evaluate what is taking place now, what is likely to take place in the near term and longer term future, and plan the regulatory city structure to ensure that the public is benefiting by change and advanced broadband capabilities are available.

Accordingly, this memorandum attempts to provide a high-level process outline to assist cities in making informed judgments about issues resulting from change and need for controlling what we view rights-of-way ordinances required for an effective local regulatory plan. It is the intent of this paper to establish a basis for making decisions and directions necessary to proceed to develop the best standards and requirements for the city.

The concepts and recommendations outlined herein are not presented as complete or detailed descriptions of what may be included in a Communications Code or rights-of-way construction ordinance. It is our intent to provide a general overview description of ordinance(s) structure and the basis for it.

## **II. SUMMARY OF BROADBAND**

Our firm recently completed a comprehensive paper on behalf of e-NC Authority of North Carolina describing broadband, what it is, its importance, a broadband strategy, and recommendations.<sup>1</sup>

Using the above as a reference, local officials will have an understanding of the urgent need for them to adopt changes at the local level to help with making increased broadband capabilities available to its citizens and business and industry.

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<sup>1</sup> <http://tinyurl.com/48j3ry>, Baller Herbst white paper for the e-NC Authority of North Carolina: “Bigger Vision, Bolder Action, Brighter Future: Capturing the Benefits of Broadband for North Carolina and America.”

The paper includes the following by way of introduction to highlight the need for a broadband strategy not only at the national level, but more importantly the local level. We include this by way of highlighting, at least in part, support for city review and modernization of its local policies and governance of rights-of-way use that is discussed in this presentation.

Over the past few years, technologists, economists, consumer advocates, business leaders, service providers, government officials, and many others around the world have recognized that broadband services and capabilities are becoming as essential as water, roads, and electricity and are changing forever the way people live, work, and interact with each other. As The Economist recently noted:

In eras past, economic success depended on creating networks that could shift people, merchandise and electric power as efficiently and as widely as possible. Today's equivalent is broadband: the high-speed internet service that has become as vital a tool for producers and distributors of goods as it is for people plugging into all the social and cultural opportunities offered by the web. Easy access to cheap, fast Internet services has become a facilitator of economic growth and a measure of economic performance.<sup>2</sup>

Broadband is not simply a consumer service or good, like cable television or an XBox. Rather, it is also a distribution system, a personal tool for interacting with the world, and a catalyst and enabler of an endless array of other products, processes, and services. Broadband will increasingly become integrated into virtually everything that we do at work, at home, and at play. From economic development to entertainment, from education to health care, from environmental sustainability to public safety and homeland security, from our smallest hamlets to our largest cities, from our young people to our senior citizens, almost everything and everyone will come to depend directly or indirectly on affordable and ubiquitous access to broadband.

Furthermore, broadband does not merely benefit buyers and sellers of broadband connectivity. It also benefits designers and builders of broadband networks; manufacturers of broadband-enabled equipment and devices; developers of software and other applications; creators of content of all kinds; and countless others who have a huge stake in America's rapid transition to an online digital society. That is why the American Association of Retired Persons, Alcatel-Lucent, EDUCAUSE, the Fiber to the Home Council, Hitachi, Intel, Google, the Telecommunications Industry Association, Tropos, and so many other organizations and individuals opposed the bill introduced in the North Carolina legislature in 2007 that would have impaired municipal broadband initiatives.<sup>3</sup>

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<sup>2</sup> "Open Up Those Highways," The Economist (January 17, 2008), <http://tinyurl.com/yswrhe>.

<sup>3</sup> Copies of the statements of these entities are collected in the Community Broadband page of the Baller Herbst website, [www.baller.com](http://www.baller.com).

In short, "broadband is unique in that the social returns of broadband investment exceed the private returns to companies and consumers."<sup>4</sup> Because broadband "facilitates enormous economic opportunities that rise with the number of users," increasing the number of users is an important public objective.<sup>5</sup> As a result, "the normal rule that 'the development of a technology should be left solely to the marketplace' does not apply in the case of broadband, which promises an array of social and economic benefits, ranging from distance learning to telemedicine to public safety to democracy."<sup>6</sup>

In many respects, the potential of broadband is similar to that of electricity at the turn of the 20th Century:

When electric power first emerged from the back rooms of inventors such as Charles Brush and Thomas Edison, it hit nineteenth century America with a dazzling impact. What fire had been for early man was a rough draft for the force electricity took on in lighting cities, running hundreds of thousands of industrial motors, engendering extensive networks of trolley car lines, and sparking the birth of mass communications.<sup>7</sup>

Yet, despite the vast benefits that electricity promised, it took more than 50 years for electrification to reach many parts of the United States. It would have taken even longer if thousands of municipalities and cooperatives had not stepped forward to establish their own electric utilities, believing that their economic survival and quality of life were at stake.<sup>8</sup>

Now, the history of electrification is repeating itself in the broadband area.<sup>9</sup> Like the power companies of a century ago, the major communications providers are focusing first on their most lucrative markets and are leaving less profitable communities behind. In the areas that are least attractive to these companies — rural and low-income urban areas — they are either not providing broadband at all or are limiting their offerings to low-capacity technologies such as Digital Subscriber Line (DSL) and Cable Modem Service (CMS).

Unlike a century ago, the United States does not have the luxury of time and isolation from the rest of the world to allow infrastructure of such strategic national significance to evolve at its own pace. The world is now a much more fiercely competitive and globally interconnected place than it used to be.

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<sup>4</sup> Robert D. Atkinson, "Framing a National Broadband Policy," *CommLaw Conspectus* at 4 (Fall 2007), <http://tinyurl.com/2htbwo> ("Atkinson 'Framing Report'").

<sup>5</sup> Philip Weiser (Rapporteur), "A Framework for a National Broadband Strategy," Aspen Institute at 4 (2008) ("Weiser"), citing Robert D. Atkinson, "The Case for a National Broadband Policy," "Information Technology and Innovation Foundation (2007), <http://tinyurl.com/24usph>, see also Robert D. Atkinson and Andrew McKay, "Understanding the Economic Benefits of the Information Technology Revolution," Information Technology and Innovation Foundation (2007).

<sup>6</sup> Weiser, at 5, quoting Jonathan Adelstein, Commissioner of the Federal Communications Commission, at the Aspen Institute conference on Framing a National Broadband Strategy.

<sup>7</sup> R. Rudolph and S. Ridley, *Power Struggle: The Hundred year War Over Electricity* at 10 (1986).

<sup>8</sup> For an extensive comparison of the history of electrification in the United States and the current period in the communications industry, see James Baller, "The Essential Role of Consumer-Owned Electric Utilities in Developing the National Information Highway: A Historical Perspective." (October 1, 2004), <http://tinyurl.com/2f5tq4>.

<sup>9</sup> See, e.g., Robert McChesney and John Podesta, "Let There Be WiFi," *Washington Monthly* (January/February 2006), <http://tinyurl.com/exlaq>.

### **III. SUMMARY OF WHY HAVE A COMMUNICATIONS CODE AND RIGHTS-OF-WAY ORDINANCE**

Cities need to consider their options and local policies to initiate a local broadband strategy. That is, what are the goals of a city to achieve delivery of modern state-of-the-art broadband capability in the best interest of residents, business, institutions, including educational and government. In furtherance of this strategy, we firmly believe that the results of city's decision-making process should be to create a Communications Code and management and administration of rights-of-way.

Fiber optic cable, wireless services, and new and potentially unheard of communication capabilities will undoubtedly use public rights-of-way. Technologies and services are subject to differing legal requirements under both federal and state law and, in addition, differing technologies utilize rights-of-way and public properties in differing ways. The city needs to be mindful of what the potential differences are to ensure that there is not discrimination or differing treatment of providers and to assure a "level playing field." Additionally, it is important to recognize that the processes and requirements of the city need to be centralized as well as the regulatory requirements need to make sure that there is not a barrier or overly burdensome process and requirements for development of new capabilities that will serve the community or those that exist seeking to enhance, improve, or update their facilities.

Rights-of-way is a valuable asset of a city and must be closely guarded and protected so that there is not interference or disruption among users, the public, or others and that the public healthy, safety, and welfare of the city can be preserved through the protection of the right-of-way for the best purposes that will serve and meet the goals and policies of the city.

It is extremely important to initially plan what the city's options are, who will be responsible for the oversight and administration, and what the requirements will be.

It is with this in mind that this paper has been prepared to provide assistance and recommendations to achieve what we believe is a common sense approach for local units of government to follow. What follows will outline considerations important to a city process that will lead to the development of a broadband strategy, ways to achieve and enhance the standards and requirements that will be in furtherance of the broadband policy while at the same time protecting the public interests and uses of public rights-of-way.

#### **Background and Considerations for Planning**

- NATOA principles recently released and included in Appendix B.
- Identify city goals and strategy to secure broadband capacity to serve community interest and needs.
- Competition, new services (wired and wireless), and new service providers will seek permission to use city rights-of-way.

- A Communications Code will facilitate better city administration, it is desirable to have all types of communication services in one location of city code.
- Availability of services, broadband strategy, to meet city needs and consideration of options and alternatives, including municipal broadband.
- Different types of technologies require differing regulatory authority, and importance for city to identify its authority applicable to differing technologies and services.
- Multiple provider use of rights-of-way needs to be controlled to protect against interference of existing facilities, safety, and appearance.
- Compensation.
- City benefits from services.
- Oversight or customer service protection.
- Having communications and rights-of-way ordinances with clear and unequivocal requirements and processes will ensure that the city is open and accessible to competitive service providers and not a burden to entry.

**Communication Industries are Subject to Different Legal Structures at the Federal and State Level Applicable to the City's Authority**

- Telecom
  - Generally regulated by the state.
  - City authority limited to granting permission to use rights-of-way and to manage and control the use of the right-of-way and require compensation for rights-of-way use.
- Video services (generally cable services)
  - Based on the federal Cable Act, city authority for video services is very broad, unless such authority is changed by recent state legislation (see Appendix), including establishing requirements for services that will meet city needs, location and build-out of system, rates and charges, programs and services, city benefit requirements, and fair compensation for rights-of-way use.
- In general, withstanding changing franchising authority with state laws, all private users of right-of-way are subject to reasonable management and control of rights-of-way use in terms of construction of facilities and public health, safety, and welfare matters, including the provision of insurance to protect against damage or injury to others.
- There are distinctions in legal and regulatory requirements to different industries and yet there are also common elements to all users of rights-of-way with respect to control and management of the right-of-way. We propose consideration of a Communications Code



structure to recognize the differences while at the same time applying similar requirements applicable to construction and use of the rights-of-way.

### **Bundled Services**

- If services are bundled, i.e., voice, video, and data through common facilities, a franchise or authorization applicable to each type of service may be required.
  - A cable franchise does not apply to telecom. A separate franchise is required if telecom service is offered by the cable provider.
- The above is also the requirement in the case of a telecom provider seeking to provide video or cable type services.
- The federal Cable Act makes clear, for example, a telecom provider intending to provide video services is subject to the Cable Act requirements. Further, the FCC's recent Order applicable to incumbents and franchise renewals made this same requirement clear.

### **Level Playing Field, Most Favored Nation Treatment**

- For years, we have experienced in negotiation with cable service providers the desire to have written into a franchise a provision that will assure them protection from competition and assure them that if a new entrant is granted a cable service franchise, it will be obligated to the same requirements as the incumbent. Recent Orders of the FCC have addressed this (see footnote 1). It is clear in the FCC Orders that there needs to be fairness among varying providers, but also the FCC describes the need for a new entrant to become more established or successful before being obligated to build-out or to extend its system.
  - The Communications Code is intended to create a level playing field to ensure similar providers have similar obligations and new entrants do not have a burden to entry.
  - Having the Communications Code in place makes it easier for operators to know in advance of coming to the city what the city's rules and requirements are. It further eliminates delays in government processes and ensures uniform and equal treatment. For example, the build-out requirements have been developed to comply with the FCC's most recent Order to enable build-out within a reasonable time consistent with provisions of the federal Cable Act in Section 47 U.S.C. § 541.

### **Compensation for Rights-of-Way Use**

- The city's right-of-way is a valuable city asset and its use for private enterprise is subject to the payment of a fair and reasonable rental charge referred to as a use fee. Unless a legal exception applies to a particular provider, the use fee in the ordinance is uniformly applied to all types of communication services.

## **Recent FCC Cable Franchising Orders<sup>10</sup>**

- The first Order in March and the second Order in November provide guidelines on a wide range of matters affecting local franchising processes and requirements that need to be included in a Communications Code. These include:
  - Recognition of differences between different types of services.
  - Recognition of differences in the application of local controls to new entrants and incumbent providers.
  - Build-out requirements may be enforceable if reasonable (what is and what is not reasonable is outlined).
  - Application procedures and time limits for review and approval or negotiation of a new franchise by local authority necessitates ordinance and franchise requirements to be in place.
  - City benefit and funding obligations.
    - What is included in a 5% franchise fee cap?
    - What is incidental and not part of 5%?
    - What is in-kind? -- Free services – are those part of the 5% cap?
    - What are capital grants? Are they part of the 5% cap or not?
    - PEG funding and how determined.
- These and many other subjects are part of the Orders and must be made part of the Communications Code, unless due to a state law governing cable there may be in whole or part an exemption to local franchise requirements from the FCC Orders. Because state laws vary, a careful review needs to be made to determine whether or not the FCC Orders are applicable.

## **Recent State Legislation Affecting Cable Franchising**

Significant developments have occurred over the past several years, leading off with the State of Texas, to change local authority over cable services. There are now 17 or 18 states that have adopted laws that have either changed local cable service franchising from the local level to the state level or altered the rights of cities significantly. The process of change has been driven by the telecommunications industry. The telecommunications industry has attacked cities authority in a three-prong approach, including seeking state legislation, seeking change in the FCC, and seeking federal Congressional change to the federal Cable Act. Their greatest success has been

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<sup>10</sup> FCC Franchising Order, MB Docket No. 05-311 released March 5, 2007 and, in addition, the Second Order on November 6, 2007. Further, in a case entitled *Alliance for Community Media v. FCC*, No. 07-3391 (6<sup>th</sup> Cir., June 27, 2008). The FCC Franchising Orders are upheld. These Franchising Orders represent the FCC's review of significant issues and challenges created by telecommunications industry objections and complaints to local control. For a more detailed review or summary of both Orders and the 6<sup>th</sup> Circuit decision, our website [www.baller.com](http://www.baller.com) can be accessed or further information made available upon request.

on the state level. Above, we briefly described recent FCC Orders that have impacted local franchising rights, but not to the same degree as the state legislation. Attempts in Congress to alter or change the federal Cable Act have not been successful thus far.

In any process involving development of local controls over rights-of-way, regulation of competitive cable and telecom service providers, and the rights and authority of cities to achieve benefits from the use of the right-of-way must be addressed not only taking into account the federal Cable Act, but now also state legislation and the FCC Franchising Orders.

Rather than describing in detail state legislation, we have included in Appendix A a summary chart prepared by NATOA. This will highlight significant provisions in state legislation in states that have thus far adopted such legislation. It is important to understand that while the state legislation has altered local authority and in many instances removed the right to franchise cable providers, a great deal is preserved for cities. Perhaps the greatest protection for city is its right to control and manage and adopt reasonable ordinances governing the public safety and welfare of their city in the use of public rights-of-way. However, careful consideration must also be included in any city process to update its ordinances or to adopt a Communications Code, to ensure that the greatest benefits available through state legislation are implemented through the appropriate processes or regulatory steps that are unique to state legislation. For example, cities may preserve the right to receive 5% franchise fee of gross revenues. How will this be preserved? What vehicle must a city use? Similarly, with regard to public, educational and governmental access channels, funding, facilities and equipment may also be preserved and continued in the future, but through a process identified in a state legislation. Additionally, many of the state statutes have imposed rights on cable operators that in effect preempts existing negotiated franchise agreements and enables existing or incumbent cable providers to seek a state-wide certificate to replace a current franchise. How this happens, what rights are preserved for the city and how such rights are initiated based on a state law should be included in the Communications Code.

As outlined in this paper, it is our intent to outline a Communications Code concept for you to consider that will establish guidelines relevant to a city regulatory authority of its rights-of-way and based on state legislation, to implement changes and requirements resulting from the new state legislation and FCC Franchising Orders, and to encourage cities to examine local controls of right-of-way to make sure that the requirements include the broadest possible scope of authority within its regulatory rights.

### **III. RECOMMENDATIONS**

We recommend that the city take a fresh look at what ordinances, franchises, and license agreements are required in order to establish uniform standards with respect to the use of rights-of-way by wired and wireless service providers.

While some distinctions are necessary with respect to cable services and telecommunication services due to state laws and provisions of the federal Cable Act and FCC rules,<sup>11</sup> we recommend a Communications Code to implement a cohesive, consistent and predictable approach to City controls that can apply to all communications providers using the public right of way, regardless of regulatory classification.

It is our recommendation that the city consider adopting a new Communications Code with regard to cable and telecommunications that will include separate articles or chapters with regard to Wireline and Wireless use of the public rights-of-way and a separate chapter on rights-of-way, for example, as follows:

- Chapter 1    General Provisions and Definition of Terms
- Chapter 2    Video Transmission Services (Cable Service)
- Chapter 3    Wireline Communications Services (Telecommunications)
- Chapter 4    Wireless Communications Services (Telecommunications)
- Chapter 5    Construction and Administration Ordinance

**A.    Rights-of-Way Regulation**

Rights-of-way regulation must include an ordinance addressing cable services and the requirement of a franchise, and requirements, providing a description of the city processes and franchise requirements, an ordinance relating to telecommunication facilities (both wired and wireless), and franchise requirements, subject to limitations based on both federal and state laws, and establish standards regarding permitting and construction within a right-of-way.

Chapter 1. General. The initial Chapter of a Communications Code will describe the background, purpose, and city goals. Additionally, in order to have the processes streamlined as possible, we suggest including all the definitions of relevant terms in the first Chapter. Other requirements of a general nature can also be included in this Chapter, including referred to applicable franchise requirements, indemnification and insurance requirements, enforcement procedures, and necessary references to other Chapters of the Code.

Perhaps the most important part of Chapter 1 is to establish not only the background for the Communications Code, but, in addition, to create the city's processes and governance. This includes application steps, who to see, who will enforce requirements, and all of the administrative and organizational matters that are important to city's regulatory controls.

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<sup>11</sup> Generally cable services are currently subject to broad authority by cities. This is contrasted from telecommunication services in which the service providers are certified or licensed by the state PUC and local licensing or franchising is limited to controls with respect to the use of the right-of-way and compensation requirements.

Chapter 2. Cable Services.<sup>12</sup> Within the city's control are generally the following, subject to new state legislation limitations and also the recent FCC Franchising Orders described above:

- Application and approval proceedings (consistent with the FCC Franchising Orders)
- Franchise fees
- City benefits, including in-kind contributions, public, educational, and governmental access channels, equipment, facilities and funding (FCC Orders should be reviewed to make sure contributions are not part of franchise fees)
- PEG channels, funding, facilities and equipment
- Interconnection of PEG channels
- Institutional networks
- Build-out –reasonably allowing new entrants market success
- Competitive equity
- Transfers of ownership
- Privacy
- Discrimination
- Broad program categories
- Legal, technical, and financial qualifications of an applicant
- Consumer service standards
- Franchise term
- Periodic review

Chapters 3

and 4. Telecommunications (Wired and Wireless). States traditionally approved telecommunications service providers. The rights-of-way governance is limited to rights-of-way management subject to Section 253 of the Telecommunications Act of 1996. A city can adopt a Regulatory Ordinance for both wired and wireless services requiring permission through a franchise grant to use rights-of-way subject to the city's grant of a franchise. Such an ordinance may include:

- Requirements for a franchise.
- Compensation that is reasonable, competitively neutral, and non-discriminatory.
- Rent for attachments.
- Ensure compliance with federal and state laws.
- Require an application or registration for a license or franchise.
- Include and size provisions relating to the guidelines for the location, placement of wired and wireless facilities within the rights-of-way.

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<sup>12</sup> Cable service franchising may not be permissible under a state. However, careful review of a state law is necessary to determine what a city can regulate and how. For example, PEG access may be required, but the state law may have a procedure to follow that must be incorporated into this Chapter.

- Encourage location of facilities on existing structures, including utility poles that are in existence.
- Ensure that the facilities are safe and to the extent large boxes, attachments, or above-ground facilities are developed, that they will blend into the environment and not be interfered with or disrupt other facilities located within the right-of-way.
- Include provisions relating to support structures and use of existing facilities or structures and the requirement for attachment agreements with other providers.
- Include maintenance requirements.

Chapter 5. Construction and Administration Ordinance. It is important to have a thorough understanding of the underlying public health, safety, and welfare authority of a city. Review of the more in-depth legal discussion that follows in Section IV of this paper will provide a basis for such an understanding. Rights-of-way management described in this Chapter is not service regulation.

Rights-of-Way Construction and Administration Ordinance should address at least the following matters:

- City administration.
- Impose public health, safety, and welfare standards.
- Control disruption and obstruction.
- Streamline the administrative process.
- Protect property of residents and businesses.
- Ensure that users are treated equally.
- Require maps of use and location.
- Provide for city inspection.
- Establish a permitting process and permit fee.
- Construction standards relating to rights-of-way that will include broad standards regarding construction, interference, safety, notifications to users, maintenance, repair replacement, and numerous other similar types of standards and requirements.
- Requirement of a franchise license or license agreement before permit issued.
- Filing of insurance, inspection procedures, administration enforcement, emergency repair and replacement.

#### **IV. AUTHORITY OVER USE OF RIGHT-OF-WAY**

The Telecommunications Act of 1996 made sweeping changes designed to usher in a new era of competition in the telecommunication industry. Congress did not, however, sweep away the authority of state and cities to manage right-of-way, and to be compensated for the use of those rights-of-way. Notwithstanding this, in many jurisdictions telecommunications operators have sought to have courts preempt a local ordinance on the basis that it conflicts with Section 253 of the federal Telecommunications Act, which is aimed at removing state and local barriers to

entry. The Supreme Court has cautioned that the striking down of state laws through preemption is generally disfavored.

Consideration of issues of arising under the Supremacy Clause “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by ...Federal Act unless that [is] the clear and manifest purpose of Congress.”<sup>13</sup>

Further, the Supreme Court has made clear that this preemption analysis is the same whether it is a state law or local ordinance that is being subjected to scrutiny.<sup>14</sup> Thus, when preemption is invoked to prevent a municipality from wielding its traditional police powers, Congressional intent to displace that authority must be “clear and manifest.” In this instance, not only is their a lack of such intent in the Telecommunications Act, Section 253(c) of the Act actually contains a clear and manifest expression of Congressional intent to preserve state or local management of right-of-way. Section 253(c) states:

Nothing in this section affects the authority of a state or city to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.<sup>15</sup>

The legislative history of Section 253(c) confirms that Congress intended to protect the traditional regulation of right-of-way by state and city. The House Report states that Section 253(c) “makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way.”

In determining what “manage the public rights-of-way” means as applied to a local ordinance, a court need look no further than to the opinion of the Federal Communications Commission. The FCC is the experienced administrative agency long entrusted by Congress with the responsibility of implementing and enforcing the Communications Act. Accordingly, its construction of the Act is entitled to judicial deference “unless there are compelling indications that it is wrong.”<sup>16</sup>

The FCC has identified the following management practices as permissible areas of local control:

- (1) Scheduling common trenching and street cuts;
- (2) Repairing and resurfacing construction-damaged streets;
- (3) Ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable, and similar companies; and

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<sup>13</sup> *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)(alterations in original).

<sup>14</sup> *Hillsborough County, Fla. V. Auto. Med. Labs.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985).

<sup>15</sup> 47 U.S.C. § 253(c).

<sup>16</sup> *CBS, Inc. v. FCC*, 453 U.S. 367, 398, 101 S.Ct. 2813, 2827 (1981).

- (4) Keeping track of the various systems using the rights-of-way to prevent interference among facilities.<sup>17</sup>

The FCC has also stated that:

Section 253(c) preserves the authority of state and cities to manage the public rights-of-way, but requires such regulations to be both competitively neutral and non-discriminatory. In addition, Section 253(c) permits state and cities to impose compensation requirements for the use of the public rights-of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, and is publicly disclosed. The legislative history sheds light on permissible management functions under Section 253(c). During the Senate floor debate on Section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under Section 253(c), including state and local legal requirements that: (1) “regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;” (2) “require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;” (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations;” (4) “enforce local zoning regulations;” and (5) “require a company to indemnify the city against any claims of injury arising from the company’s excavation.”<sup>18</sup>

In addition to the legislative history and the FCC’s interpretation of Section 253(c), every single court that has examined this issue to date underscores the fact that municipalities continue to have the authority to manage the rights-of-way. The case of *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F.Supp.2d 1304 (S.D. Fla. 1999) is particularly instructive on this point.

BellSouth challenged a local ordinance that imposed a number of requirements upon telecommunications providers, including a number of right-of-way management provisions. There BellSouth recited a seemingly endless list of infirmities under both state and federal law. BellSouth argued that the ordinance was preempted by federal and state law, as well as unconstitutional under the Florida and United States Constitutions as an impairment of contract, violation of equal protection, and violation of due process.<sup>19</sup> While the court in *Coral Springs* overturned many of the ordinance’s requirements that related to the regulation of telecommunications services, the court specifically upheld the right-of-way of management provisions as being a proper exercise of the city’s police authority.

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<sup>17</sup> *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, CS Docket No. 96-46, FCC 96-249, 61 Fed. Reg. 28698 at ¶ 210, 11 F.C.C.R. 18223 at ¶ 210, 1996 WL 290812 (FCC adopted May 31, 1996).

<sup>18</sup> *In re Classic Telephone, Inc.*, FCC File No. CCBPol 96-10, FCC 96-397, 11 F.C.C.R. 13082 at ¶ 39, 1996 WL 554531 (FCC, adopted September 30, 1996). A nearly identical ruling is found in *In re TCI Cablevision of Oakland County, Inc.*, FCC File No. CSR-4790, FCC 97-331, 12 F.C.C.R. 21396 at ¶ 103, 1997 WL 580831 (FCC, adopted September 18, 1997). Significantly, this is the same ruling in which the FCC first discussed its concern that city control over telecommunications services could create a third tier of regulation. Thus, the FCC clearly considers the management of right-of-way and the regulation of telecommunications services as two entirely distinct matters.

<sup>19</sup> *City of Coral Springs*, 42 F.Supp.2d at 1306.



Subsequent to the *Coral Springs* BellSouth opposed a similar ordinance in Palm Beach, Florida on nearly identical grounds.<sup>20</sup> In upholding the provisions in the ordinance related to the management of rights-of-way, the Court in the *Palm Beach* decision noted that both Congress and the Florida legislature excluded from preemption municipal control over rights-of-way, and that “BellSouth’s arguments gloss over this specific exclusion from preemption for municipalities in both federal law and state law.”

Control and management over the excavation and construction of wires, ducts and conduits within city rights-of-way is a traditional function of a municipality's police authority. The courts recognize that the problem of municipal regulation of street obstructions is a practical one to be solved by the municipalities and not the courts.<sup>21</sup>

Irrespective of an incumbent carrier’s alleged rights to a perpetual franchise by state or city grant, it is well established that a municipality's police powers cannot be contracted away.

The police power is absolutely inalienable in the state, and it cannot be delegated, abridged, abdicated, or bargained away; a state cannot in any manner, by express grant or otherwise, divest itself of, or diminish, this power which is attribute of its sovereignty, and it cannot by any agreement, arrangement or any device or means whatsoever restrict or limit itself in the slightest degree in its exercise of the power.<sup>22</sup>

Further, inherent in all contracts is a fundamental assumption that all contracts rights are subject to the proper exercise of police power. As a result, neither the federal due process clause nor the contract clause have the effect of overriding the proper exercise of police powers by a state or city.<sup>23</sup>

Finally, while it is true that a municipality's police power authority is limited by constitutional guarantees, the due process clause of the United States has been held to only prohibit arbitrary, unreasonable, and improper use of police powers. Additionally, it has been held that a vested interest, such as a "Contract Clause claim, cannot be asserted against the exercise of police power on the basis of conditions once prevailing, because to do so would preclude development and fix a city forever in its state or condition at the time the interest vested.<sup>24</sup> Thus, it is prudent and proper for a city to revise and update its right-of-way management policies and requirements so as to conform to the vastly different environment of multiple entities seeking access to its rights-of-way than what existed at the time of the initial.

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<sup>20</sup> *BellSouth Telecommunications, Inc. v. The Town of Palm Beach*, 1999 U.S. Dist. Lexis 16904 (S.D. Fla.).

<sup>21</sup> McQuillin, *Municipal Corporations*, Section 24.589 at 318 (3<sup>rd</sup> Edition).

<sup>22</sup> McQuillin, *Municipal Corporations*, Section 24.07 at 23 (3<sup>rd</sup> Edition).

<sup>23</sup> McQuillin, *Municipal Corporations*, Section 24.20 at 62 (3<sup>rd</sup> Edition), citing *Chicago & A.R. Co. v. Tranbarger*, 238 US 67, 59 L Ed 1204, 35 S Ct. 678.

<sup>24</sup> McQuillin, *Municipal Corporations*, Section 24.09 at 29 (3<sup>rd</sup> Edition).

## A. Compensation

Section 253(c) of the Act preserves the right of a city to “require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis for the use of public rights-of-way.”

There is currently a split of opinion as to the meaning of the legislative language. Telecommunications carriers suggest that such compensation is limited to the cost of managing the rights-of-way and even suggest that such costs are limited to the administrative cost of managing the rights-of-way. The principle case that carriers rely on for this narrow interpretation is *Bell Atlanta v. Prince George’s County*, 49 F.Supp. 2d 805 (D. Md. May 24, 1999).

In contrast, the U.S. Court of Appeals for the Sixth Circuit *TCG v. Dearborn* (March 7, 2000) recently upheld a gross receipt based right-of-way usage fee on a telecommunications provider as consistent with Section 253(c) of the Act. In upholding the reasonableness of the fee, the court noted that while congress has elected to use the term “cost” with respect to the reasonableness of utility pole attachments, it specifically chose to use the term “compensation” with respect to municipal charges for the use of rights-of-way. The court upheld the lower court’s decision that “compensation” implied more than mere recovery of costs. The court held that the reasonableness of compensation depends on the totality of the individual circumstances.

The court also indicated the fact that a municipality did not charge a similar fee on the incumbent provider as a result of its pre-existing perpetual franchise did not necessarily constitute discriminatory activity on the part of the city unless the action rose to the level of constituting a “barrier to entry.”

## B. Void for Vagueness

Claims are made that an ordinance violates due process rights because it vague with respect to compliance standards and obligations, and that it delegates unrestricted authority to the city engineer. A statute is facially vague in violation of due process only when the law is impermissibly vague.<sup>25</sup> In interpreting this requirement, the Sixth Circuit has held, “[A] court can find a statute unconstitutionally vague on its face only if the court concludes that it is capable of no valid application.”<sup>26</sup>

With respect to the question of unrestricted delegation of authority, in the *Vandergriff* case the Sixth Circuit had an opportunity to address this issue. In that case the City of Chattanooga delegated the city's storm water manager with primary authority to enforce an ordinance related to storm water systems. The court held that because the Chattanooga ordinance sufficiently defined the terms and conditions for storm water facilities, the discretion given to the storm water manager was not unfettered. This same logic applies to a modern ordinance that establishes procedures for rights-of-way use. Terms and conditions to ensure that the city’s Engineer’s enforcement is not overly broad, but also provide flexibility by necessity, as it is

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<sup>25</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 US 489, 497, 102 S.Ct. 1186, 1192-1193, 71 L. Ed. 2d 362.

<sup>26</sup> *Vandergriff v. City of Chattanooga*, 44 F.Supp.2d 927 (E.D. Tenn.)

impossible to anticipate all of the exact construction and engineering issues that will arise as systems and underground usage requirements change in the future, are reasonable and enforceable.

### **C. Equal Protection Claim**

Claims arguing that an incumbent telecommunications operator will be disproportionately impacted by the ordinance and that the city has improperly excluded its own departments from having to comply with the ordinance may be made in challenge to a ordinance. Such a claim is suspect because unlike new competitive entrants its incumbent status should place it in a position of not needing to undertake wholesale excavation and construction related to the development of a brand new telecommunications system. A city should require the same standards for city work in the right-of-way. Accordingly, the telecommunications operator is not being treated any differently than any other user of the right-of-way. In fact, one of the primary motivations of a city in developing and enacting an ordinance is to ensure that the city's requirements are applied on non-discriminatory and competitively neutral basis.

The Supreme Court has discussed the standard by which courts must review legislation to determine if a equal protection challenge is valid:

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rationale basis for the classification. [Citations omitted.] Where there are "plausible reasons" for [the government's] action, our inquiry is at an end.<sup>27</sup>

The record developed by a city as well as the deliberations and actions of the City Council should evidence a clear basis for the ordinance and thus satisfy this requirement.

### **D. Conclusion**

The steps we suggest include at least the following:

- The city should announce the planning of community need and goals for a broadband strategy for the city and development of a Communications Code and rights-of-way construction ordinance as high priorities for development and enforcement.
- A committee should be created composed of dedicated persons who will undertake the challenges to learn about what is going on, what the rights of the city are, what other cities are doing, and evaluate the local needs.
- A process timeline and schedule of tasks should be outlined. Use of outside consulting assistance may be beneficial to provide the committee with a head start. We often help a city get started by having an educational conference and

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<sup>27</sup> *Federal Communications Commission v. Beach Communications, Inc.* 508 US 307, 313-314, 113 S.Ct. 2096, 2101, 124 L.Ed. 2d 211.

organizational meeting that provides an opportunity for the participants to meet with us and discuss legal, technical, and other considerations. This is a good way to get the process moving ahead.

- It should be expected that a process of evaluating law, technology, services, and identifying city needs and requirements will take approximately six months to one year. During the interim, demands for use of right-of-way can be accommodated by interim agreements or other arrangements that will satisfy the needs of the provider but at the same time preserve the right of the city to complete its process and develop a more permanent form of agreement with the provider.
- Evaluating existing applicable state laws and local ordinances and charter provisions will be important. There may be limitations on the extent and scope of authority of the city and this must be understood before any framework can be devised for a particular city. Additionally, the city may have in place ordinances or requirements that should be evaluated. Often what is in place was developed a number of years ago and may be outdated.
- Industry participation. At the stage where the committee has created a draft or model Communications Code and construction ordinance, it will be important to invite industry comments. It is better to have input and comments early on from industry representatives to the drafts that the committee is working on rather than wait until the city has passed it.
- As part of the process, the city will also need to determine what its approach to governance will be. That is, who is going to oversee and manage the right-of-way? Where do people go to apply for licenses, permits, or franchises and what will be the procedures that are followed? How are fees and charges regularly administered? Who will be responsible for keeping up-to-date on changes in technology, services, or legal requirements that may affect the city's regulatory structure?

In conclusion, the tasks are challenging, will take time, and can be fairly large. In many instances, more than one city may join together to form a joint committee. No matter what approach of a city, it must be recognized that this is a subject that will not go away and must be addressed soon and periodically. Getting started is the most important first step.

**APPENDIX A**

**STATE-BY-STATE CHART  
STATE-WIDE VIDEO FRANCHISING LAWS**

**APPENDIX B**

**NATO Broadband Principles**

## NATOA ANNOUNCES ADOPTION OF BROADBAND PRINCIPLES, PARTNERSHIP INITIATIVES AND ACTIONS

July 18, 2008 12:00 AM

**Alexandria, VA. (July 18, 2008)** — The National Association of Telecommunications Officers & Advisors (NATOA) has adopted and released formal [Broadband Principles](#) encouraging the immediate development of a National Broadband Strategy. The ten Broadband Principles, created by a task force of NATOA members, outline the critical need for widespread deployment of next-generation broadband networks and necessary steps to achieve this goal:

- NATOA calls for the immediate nationwide deployment of advanced broadband networks.
- True broadband requires high capacity bandwidth in both directions.
- Fiber to the premises is the preferred broadband option.
- High capacity broadband connectivity must be affordable and widely accessible.
- High capacity broadband requires open access networks.
- Network neutrality is vital to the future of the Internet.
- All networks and users have the right and obligation to non-discriminatory interconnection.
- Local governments must be involved to ensure that local needs and interests are met.
- Local governments must be allowed to build and operate broadband networks.
- A variety of options must be considered to cover deployment costs.

“NATOA has dedicated extensive time and resources to national broadband interests,” noted Libby Beaty, NATOA Executive Director. “Our Broadband Principles partnerships and actions are the culmination of these efforts. We are thrilled to be involved in the evolution and progression of so many opportunities sustaining public interest.”

In furtherance of these principles and the organization’s goals, NATOA has announced a number of congruent partnerships and broadband actions:

- [Internet for Everyone](#) – NATOA has joined this national initiative of public interest, civic and industry groups supporting not only fast and affordable Internet for all citizens but the assurance that the Internet continues to drive U.S. economic growth and prosperity. Internet for Everyone launched last month with the simultaneous release of One Nation Online, a snapshot of the current state of broadband adoption in the U.S. and the vast digital divide. Internet for Everyone will hold public forums throughout the country to build support for a national broadband policy that restores America’s place as a world technology leader.
- [National Public Lightpath](#) (NPL) – NATOA is a member of this coalition formed to advocate for public participation in and ensure community access to the Next Generation Internet, and advise policy makers and government on a national infrastructure strategy for America’s next Internet. NPL is a partnership of the Institute for Next Generation Internet (INGI) at San Francisco State University, the Bay Area Video Coalition

(BAVC), and the Association of Public Television Stations (APTS) working to establish the public media community as a leader in Next Generation Internet.

- [BroadbandCensus.com](#) – NATOA has partnered with the newly-formed BroadbandCensus.com, a free consumer-focused web service that provides the public and policy-makers with information and news about local broadband availability, competition, speeds and service. Together, we have created a system that will discretely capture individual consumer and local government information and make it available to the public. This information is vital to a transparent, competitive and universally accessible internet.
- [Comments on the Development of Nationwide Broadband Data](#) NATOA has filed comments with the Federal Communications Commission (FCC) in the ongoing proceedings in the matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data (WC Docket No. 07-38). A copy of the comments can be found on the NATOA website at [www.natoa.org](http://www.natoa.org). NATOA will continue to work on this and related proceedings in furtherance of our principles, goals and initiatives.

Local governments have always played an essential role in ensuring that the benefits of communications infrastructure would be available in communities across the United States. Localities will, by necessity and by choice, be part of the solution to our national broadband deficit. NATOA will continue to work with its members, partners and affiliates toward a national broadband strategy and the assurance of a sustainable communications environment for the future.

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