

The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access Is Killing Competitive Local Exchange Carriers

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I. INTRODUCTION.....	462
II. COMPETITIVE TELECOMMUNICATIONS CARRIER MODELS	463
A. <i>Resale Carriers</i>	463
B. <i>Facilities-Based Carriers</i>	464
III. BARRIERS TO REASONABLE RIGHTS-OF-WAY ACCESS.....	466
A. <i>Section 253 of the Telecommunications Act of 1996</i>	466
1. Plain Language	466
2. Legislative History.....	467
B. <i>Municipal Regulation of Public Rights-of-Way</i>	469
1. Fees and In-Kind Compensation	470
2. Favorable Treatment of the Incumbent Provider.....	471
3. "Third-Tier" Regulation of Service Offerings	473
4. Municipal Delay as a Barrier to Entry	475
C. <i>FCC Interpretation of Section 253</i>	477
D. <i>Judicial Interpretation of Section 253</i>	481
1. The Ninth Circuit Interpretation of Section 253.....	481
2. The Sixth Circuit Interpretation of Section 253	482

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IV. STATE RESPONSES TO MUNICIPAL RIGHTS-OF-WAY ACCESS	
ISSUES.....	484
A. <i>Direct Fees</i>	484
B. <i>In-Kind Compensation</i>	485
C. <i>Third-Tier Regulations</i>	486
D. <i>Prevention of Municipal Delay</i>	486
V. PROPOSALS.....	487
A. <i>Congress Should Amend Section 253 to Create a National Rights-of-Way Access Standard</i>	487
B. <i>The FCC Should Create a Rights-of-Way Access "Rocket Docket"</i>	490
VI. CONCLUSION.....	491

I. INTRODUCTION

The Telecommunications Act of 1996 (1996 Act)¹ contained the promise of a deregulated national telecommunications market with unfettered competition in both the local and long-distance telecommunications markets. Unfortunately, five years after the 1996 Act was signed into law, competition in local telephony is still not a reality in many areas of the United States. While some of the blame for the failure of local competition may be placed on failed business models and the withdrawal of venture capital from the market,² a series of regulatory failures have also served to create an inhospitable environment for competitive local exchange carriers ("CLECs"). One of the areas where this failure has been most evident is in Congress and the Federal Communications Commission's ("FCC") failure to adequately address municipal rights-of-way access for CLECs.³

This Article analyzes this regulatory failure, and presents a number of legislative and regulatory suggestions that could lead to a more coherent national scheme of regulation governing public rights-of-way access for telecommunications carriers. The first Section of this Article provides an

1. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of 47 U.S.C.).

2. See David A. Wolcott, *An ALTS Analysis: Local Competition Policy & The New Economy*, Feb. 2, 2001, at 12 at <http://www.alts.org/Filings/020201Analysis.pdf> (noting that "the capital markets have been virtually shut down to the CLEC sector") [hereinafter *ALTS Analysis*].

3. See Barnaby J. Feder, *New Economy: Fiber, Fiber Everywhere*, N.Y. TIMES, Nov. 19, 2001, at C4 (noting that while excess capacity exists on many long-haul fiber optic routes "the crucial missing links are within the metropolitan networks that connect businesses and homes to the high-speed long-distance fiber").

overview of the two general business models that developed for CLECs in the wake of the 1996 Act, and addresses the general failure of the resale carrier model. The second Section of this Article provides an overview of Section 253 of the 1996 Act, and the various municipal and judicial interpretations of Section 253 that have created a patchwork of local regulation governing rights-of-way access throughout the country. The third Section of this Article provides a series of legislative and administrative proposals that would serve to create a more unified, pro-competitive scheme of rights-of-way regulation throughout the United States.

II. COMPETITIVE TELECOMMUNICATIONS CARRIER MODELS

Under the framework of the 1996 Act, there are two basic ways a new entrant into a local telecommunications market can provide service. The first method is to provide service by "reselling" the services of another carrier.⁴ The second method of providing service is through the construction of telecommunications facilities for the provision of services.⁵

A. Resale Carriers

Under the 1996 Act, all local telecommunications carriers are required to resell their services to other local telecommunications carriers.⁶ Under this model, a new carrier can approach a facilities-based carrier and request that carrier to resell its service at a "discounted" retail rate.⁷ This

4. See STEWART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 717-18 (2001) (noting that the 1996 Act provides two statutory alternatives for new entrants into the local telecommunications market).

5. See *id.* Some commentators suggest that there are three models for entering the local exchange telecommunications market. See JERRY KANG, COMMUNICATIONS LAW AND POLICY 492-93 (2001) (suggesting that local exchange competition could be facilitated through resale, new construction of facilities, or through a CLEC combining its own facilities with unbundled network elements ("UNEs") leased from an incumbent carrier). For the purpose of this Article, the last two categories proposed by Kang will be treated as "facilities-based" because they both generally require carrier access to public rights-of-way.

6. See 47 U.S.C. § 251(b)(1) (Supp. V 2000) (stating that all local exchange carriers may not prohibit or "impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services").

7. See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report and Order*, 11 F.C.C.R. 15499, para. 8, 4 Comm. Reg. (P & F) 1 (1996) (stating that the "discount" provided to CLECs is calculated by subtracting "marketing, billing, collection, and other costs that will be avoided or that are avoidable by incumbent LECs when they provide services wholesale") [hereinafter *Local Competition Order*]; see also KANG, *supra* note 5, at 492 (noting that under this model "a CLEC would buy local telecommunications service from the ILEC at wholesale prices and then sell them to its customers at retail prices").

discount, or wholesale rate, is generally set by state regulators.⁸ The new carrier then attempts to make a profit on the provision of this resold service by reselling it at a rate that is generally equal to or lower than the rates charged by the incumbent carrier in the market.

After passage of the 1996 Act, a number of CLECs attempted to provide service using a business model based solely on the provision of resold service.⁹ Many of the new entrants, however, soon realized that it was impossible to turn a profit due to administrative costs and other expenses that were higher than the discount spread between the cost of the wholesale rate and the rate that the new entrants marketed the service to end users.¹⁰

B. *Facilities-Based Carriers*

Another model for new entrants is the facilities-based carrier model. Under this model, a new entrant constructs either some or all of the facilities that are required to operate a telecommunications network.¹¹ New entrants that only construct switching facilities on private property and utilize the incumbent carrier's facilities in the public rights-of-way are often referred to as "limited" facilities-based carriers, and are often regulated in a somewhat different manner than "full" facilities-based carriers that actually construct facilities in the public rights-of-way.¹²

In the last two to three years, most new CLECs have embraced the facilities-based model due to the fact that many entrants relying exclusively on the resale model found it difficult, and in some cases impossible, to earn a profit by repackaging and reselling the services of incumbent carriers.¹³

8. See *Local Competition Order*, *supra* note 7 (explaining that the "Commission identifies certain avoided costs, and the application of this definition is left to the states").

9. Riley K. Temple, *A Look at Three Issues: Network Unbundling, Resale and Reciprocal Compensation*, 18TH ANN. INST. ON TELECOMM. POL'Y. AND REG. 149 (Richard E. Wilet et al. eds. 2000) (noting that there were sixty-five companies offering resold local service in New York alone in July 1999).

10. See *id.* (stating that "potential new market entrants have criticized the prevailing rate discounts as too small to allow successful competition with entrenched incumbents").

11. See BENJAMIN, *supra* note 4, at 718 (noting that the "unbundling provisions" of the 1996 Act "allow a CLEC to purchase access to shared building blocks, whereas the resale provisions instead allow a CLEC to purchase complete telecommunications services").

12. In general, the courts have held that carriers who install facilities, such as switching equipment, only on private property and utilize the incumbent's UNEs to complete their provision of service, do not need to obtain a municipal franchise to "use" the public rights-of-way. See, e.g., *AT&T Comms. of the Southwest, Inc. v. City of Dallas*, 52 F. Supp. 2d 756, 760 (N.D. Tex. 1998) (holding that "use of public rights-of-way" is limited to actual physical occupation of the public rights-of-way by a carrier under Section 253(c)).

13. See D.R. Stewart, *Competition Stiffens Among Local Carriers*, TULSA WORLD, June 28, 2001, at 3 (noting that CLECs utilizing the pure resale model were much more likely to fail than carriers that constructed a substantial portion of their networks).

While the facilities-based model does offer the opportunity for new carriers to earn a larger profit on their investment, it also presents two regulatory issues that are unique to facilities-based carriers: interconnection and public rights-of-way access. Interconnection is the process by which new entrants "connect" to the networks of incumbent carriers, allowing the new entrants to provide seamless service between the incumbent carrier's customers and the new entrant's customers.¹⁴ Rights-of-way access, on the other hand, generally involves the process of negotiating agreements with local governments to install and utilize fiber-optic cable or other transmission equipment on or below public streets.¹⁵

Many basic interconnection issues have been resolved through FCC and state public utility commission rulings concerning the obligations of incumbents to allow CLECs access to necessary facilities.¹⁶ Unfortunately, the legal picture in the rights-of-way area is murkier. While Section 253 of the 1996 Act purports to erase all federal and state impediments to competition in local telephony, many CLECs have gone through the process of obtaining the required state and federal approvals necessary to provide local and interexchange telephone service, only to face the challenge of obtaining "last mile" rights-of-way access from numerous municipalities that each require adherence to jurisdiction-specific regulations and often payment of substantial fees.¹⁷ The next Section of this

14. See *Local Competition Order*, *supra* note 7, para. 26, 4 Comm. Reg. (P & F) 1 (1996) (concluding that "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic").

15. See, e.g., Las Vegas, Nev., Franchise Agreement Between City of Las Vegas and Telecommunications of Nevada, LLC d/b/a NEXTLINK Nevada, at 4 (May 24, 1999) (defining "rights-of-way" as "all present and future streets, avenues, highways, alleys, bridges and public ways, (excluding railroad rights-of-way) of the City within the City limits").

16. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding the vast majority of the FCC's interconnection rules promulgated in the *Local Competition Order*). But see Richard E. Wiley, *Communications Law in the Year 2000; The Three "Cs"—Competition, Convergence, and Consolidation—Continue*, 18TH ANN. INST. ON TELECOMM. POL'Y. AND REG. 74-76 (2000) (noting that while the Supreme Court upheld many of the FCC's UNE regulations, certain other interconnection issues are still unresolved).

17. See *The Telecom Act Five Years Later: Is it Promoting Competition?: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Larissa Herda, President and CEO, Time Warner Telecom Inc.) [hereinafter Time Warner Telecom Testimony]. "One of the more unfortunate results of the 1996 Act is that cities and building owners are attempting to control the pace of competition by extracting unreasonable rates, terms and conditions for access to a critical pathway to the customer." *Id.*; *Cable & Video: Competitive Choices: Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Robert Curry, Vice Chairman, RCN Corporation).

Article analyzes Section 253, and provides examples of many of the municipal challenges that CLECs and other telecommunications providers face.

III. BARRIERS TO REASONABLE RIGHTS-OF-WAY ACCESS

A. *Section 253 of the Telecommunications Act of 1996*

1. Plain Language

In many respects, Section 253 is the cornerstone of the 1996 Act for local telecommunications competition, as it sets the basic federal standard prohibiting local and state barriers to entry into the local telecommunications market.¹⁸ Although Section 253 is comprised of six subsections, (a) and (c) are particularly relevant to municipal jurisdiction over public rights-of-way utilized by telecommunications providers.¹⁹

Section 253(a) broadly preempts state or local statutes, regulations, or other legal requirements that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²⁰ Accordingly, the FCC has viewed Section 253(a) as a general proscription on state and local laws and regulations that would interfere with the provision of local telecommunications service.²¹

RCN has suggested to the Commission that it establish federally-mandated standards governing access to such public rights-of-way and require local authorities to adhere to reasonable standards of timeliness and equitable treatment in granting such access. The Commission has not yet acted on this proposal. At the moment there are few clear rules which are uniformly interpreted and applied in all areas.

Id.

18. 47 U.S.C. § 253 (Supp. V 2000). *See also* THE TELECOMMUNICATIONS ACT OF 1996: LAW AND LEGISLATIVE HISTORY 10 (Robert E. Emeritz, et al. eds., 1996) ("New Section 253 of the 1934 Act is relatively short but is in many ways the linchpin of the new regulatory scheme.").

19. *See* 47 U.S.C. § 253(a), (c) (Supp. V 1999). Section 253(b) provides a safe harbor for state laws and regulations that "preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." *Id.* § 253(b). Section 253(d) provides for FCC preemption of state or local actions that violate subsection (a) or (b) of Section 253. *Id.* § 253(d). Section 253(e) provides for separate regulatory treatment of commercial mobile service providers. *Id.* § 253(e). Section 253(f) provides certain exceptions from the requirements of Section 253 for rural markets meeting specific conditions. *Id.* § 253(f).

20. *Id.* § 253(a).

21. *See* Classic Telephone, Inc., *Memorandum Opinion and Order*, 11 F.C.C.R. 13,082, para. 25, 4 Comm. Reg. (P & F) 1062 (1998) [hereinafter *Classic Telephone*] ("We conclude that section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."); *see also* Suggested Guidelines for Petitions for Ruling Under Section

Section 253(c), however, contains an exception that allows state and local governments to retain control over certain aspects of rights-of-way management.²² Section 253(c) states that:

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.²³

Accordingly, much of the debate over the effect of Section 253 on municipal rights-of-way management activities has focused on the extent to which Section 253(c) actually creates an area for municipalities to regulate use of the public rights-of-way, or whether it merely creates a limited "safe harbor" for municipalities to regulate carefully defined rights-of-way management functions.²⁴

2. Legislative History

The legislative history underpinning Section 253 suggests that Congress intended for local governments to have a limited role in controlling rights-of-way usage by telecommunications providers. The 1996 Act was cobbled together by a Conference Committee that took various provisions from separate telecommunications reform bills passed by both the House of Representatives and the Senate.²⁵ In the case of Section 253, the language ultimately adopted was taken almost exclusively from the Senate version of the bill.²⁶ Therefore, the Senate history of Section 253 is critical to determining the legislative intent of that provision.

The Conference Report states that Section 20(a) of the Senate Bill, which later became Section 253, "is intended to remove all barriers to entry

253 of the Communications Act, *Public Notice*, 13 F.C.C.R. 22970, 22971 (1998) (noting that parties filing petitions for preemption under Section 253 "should first describe whether the challenged requirement falls within the proscription of section 253(a)").

22. *See* 47 U.S.C. § 253(c) (Supp. V 1999).

23. *Id.*

24. *See Classic Telephone*, *supra* note 21, para. 40 (limiting application of Section 253(c) to municipal "exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way"). *But see* TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 793 (E.D. Mich. 1998) (arguing that under Section 253(c), if a municipal regulation is "neither discriminatory nor unreasonable, it follows that the regulation does not prohibit its entry into the market").

25. *See* THE TELECOMMUNICATIONS ACT OF 1996: LAW AND LEGISLATIVE HISTORY, *supra* note 18, at 5 (noting that two different bills were passed by the House of Representatives and the Senate before being reconciled by a Conference Committee).

26. *See* S. REP. NO. 104-230, at 127 (1996) (noting that the "conference agreement adopts the Senate provisions" for Section 253).

in the provision of telecommunications services."²⁷ The Conference Report then lists the provisions of subsections (a) and (c) of new Section 253 by repeating the language contained in the plain language of the statute. Therefore, this language in the Conference Report would appear to support the premise that the overarching intent of Section 253 is to eliminate anything that could constitute a barrier to entry in the newly deregulated telecommunications market. Furthermore, the legislative history appears to support the contention that subsection (c) of Section 253 merely serves as a "safe harbor" to protect the ability of municipalities to manage the public rights-of-way only if such regulation does not prohibit or have the effect of prohibiting entry into a local market.

Statements by a number of senators who were deeply involved in the negotiations over Section 253 support this premise as well. During the Senate floor debate on Section 253(c), Senator Dianne Feinstein gave examples of the types of rights-of-way management activities that Congress intended to permit under Section 253(c) in support of an unsuccessful amendment that would have eliminated the FCC's authority to preempt certain state or municipal rights-of-way regulations.²⁸ All of the examples provided by Senator Feinstein dealt with construction and rights-of-way coordination activities rather than regulations governing the qualification of telecommunications providers, the provision of service, or payment of fees based on gross revenues collected within a municipality.²⁹ Similarly, Senator Slade Gorton, speaking on behalf of a successful alternative amendment defining the FCC's authority to preempt barriers to competition, stated:

[T]he rules that a city or a county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by

27. *See id.* at 126.

28. *See* 141 CONG. REC. 15,590-92 (1995) (statement of Sen. Feinstein quoting Letter from Office of City Attorney, City and County of San Francisco).

29. Senator Feinstein offered the following four examples of her concerns over Sections 253(a) and (d) of the Act:

As city attorneys state, is a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the costs of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a cable trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?

141 CONG. REC. 15,984 (1995) (statement of Sen. Feinstein).

subsection (c) of this section.³⁰

Accordingly, based on the legislative history and floor debates, it appears that much of the floor debate over Section 253(c) revolved around the municipal right to engage in time, place, and manner rights-of-way regulations, rather than a broader debate over whether a municipality had the ability to engage in conduct that could constitute a barrier to entry, in violation of Section 253(a).

B. *Municipal Regulation of Public Rights-of-Way*

Based on the plain language and legislative history of Section 253(c) of the Act, it appears that the provision was intended as a "safe harbor" to allow municipalities to regulate basic rights-of-way management functions. Many municipalities, however, have interpreted Section 253(c) quite differently.³¹ They view Section 253(c) as granting municipalities new affirmative rights not only to manage basic rights-of-way functions, but also to require payment of substantial fees and in-kind compensation.³² In addition, some municipalities also apparently view Section 253(c) as granting new authority to manage the actual types of services that are offered by competitive telecommunications providers.³³ As detailed below, many of these municipal requirements, combined with lengthy and expensive permit and "franchise" proceedings, often make it nearly impossible for many new telecommunications providers to enter certain municipal markets.

30. 141 CONG. REC. 15,984 (1995) (statement of Sen. Gorton). Senator Gorton also noted that the Feinstein Amendment would have directed all rights-of-way disputes to "some 150 or 160 different district courts with different attitudes." *Id.* Senator Gorton noted that such an approach would lead to "no national uniformity with respect to the very goals of this bill, what constitutes a serious barrier to entry." *Id.*

31. Petition for Declaratory Ruling, *City Signal Communications, Inc. v. City of Cleveland Heights*, CS Docket No. 00-253, Comments of Metromedia Fiber Network Services, Inc. at 8 (filed Jan. 31, 2001) [hereinafter *MFN Comments*].

Access to public rights-of-way is almost routinely conditioned on MFNS' provision of monetary or in-kind compensation that clearly violates the [1996] Act and/or state law. In most cases, the Municipality is clearly prohibited under state law from requiring compensation for use of the rights-of-way, *but the Municipality makes the argument that the law is no longer valid in light of the [1996] Act*, changing technology, or an absurd interpretation of the law.

Id. (emphasis added).

32. *See id.*

33. *See, e.g.*, Berkeley, Cal. Municipal Code § 16.11.070(A)(ii) (2001) (imposing various service quality requirements on telecommunications providers that do not offer "service on a common carrier basis"); Petition for Declaratory Ruling, *City Signal Comms., Inc. v. City of Cleveland Heights*, CS Docket No. 00-253, Reply Comments of Metromedia Fiber Network Servs., Inc. at 9 (filed Feb. 14, 2001) ("Municipalities routinely demand that carriers agree to provide customer lists for their review.").

1. Fees and In-Kind Compensation

As noted above, Section 253(c) provides that state and local governments retain the authority to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis."³⁴ Most telecommunications providers have read this provision to mean that providers are liable to municipalities for the actual costs incurred by those municipalities for their use of the public rights-of-way, a stance that is generally supported by the plain language and legislative history of Section 253(c).³⁵ Not surprisingly, many municipalities have taken the opposite position, arguing that Section 253(c) expressly allows municipalities to charge a tax or fee, beyond the cost of actual rights-of-way management activities, for use of the public rights-of-way.³⁶

Memphis, Tennessee's telecommunications rights-of-way ordinance³⁷ requires new providers to give the city "as initial compensation" four optical fibers in any new fiber-optic cable installation,³⁸ provide the city with access and spare capacity in all of the new entrant's ducts or pole attachments in "its overhead or underground system or systems,"³⁹ and "coordinate design and installation of other network specific requirements the city may have."⁴⁰ Furthermore, as general compensation, the city requires all new telecommunications providers to pay the city five percent

34. 47 U.S.C. § 253(c).

35. See, e.g., Brief of Bell Atlantic-Maryland, Inc. at 39, *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000) (No. 99-1784) ("The Act expressly and narrowly reserves to local governments their existing authority to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way . . ."); Press Release, MediaOne, Rights-of-Way Management Policies (1999) (on file with author) ("MediaOne accepts that local governments should be compensated for costs incurred as a result of various entities' access to the right-of-way. Appropriate fees and charges should be set to cover such costs.").

36. See Nicolas Miller, *Telecommunications Planning for Municipalities*, Strategic Resources Inst. Workshop on Telecomm. Planning for Municipalities, § 4, at 2-3 (1999)

Local public streets and rights-of-way are property that a local government holds on behalf of the public and that is paid for by the taxpayers. All private businesses that place wires, conduits or pipes over, on or under this public property are therefore tenants of the public. And like any property owner, the public—*through its local government*—is entitled to compensation from those who use its property for profit and to manage the use of that property to make sure it is used efficiently and safely.

Id.

37. See MEMPHIS, TENN., CODE OF ORDINANCES, No. 4398 (Dec. 23, 1996).

38. *Id.* § 10-155(a).

39. *Id.* § 10-155(b).

40. *Id.* § 10-155(b)(2).

of all gross revenues on a quarterly basis.⁴¹

Other municipalities impose compensation requirements that are even more egregious. Recently, Metromedia Fiber Network Systems, Inc. ("MFN") requested permission from the city of Medina, Washington to lay fiber-optic cable beneath a city park.⁴² In response, MFN was given a list of conditions for such access that included payment of \$250,000 per year for use of the park, the free use of eight fiber-optic strands by the city, free long-distance service for the city and "free high speed internet access to all Medina citizens."⁴³ In comments filed with the FCC, MFN reported that these demands were subsequently reduced by the city, but that the city had yet to produce a permanent franchise agreement, and that MFN "is concerned that its decision to bypass the City park property will result in retribution in the form of franchise delays."⁴⁴

While many municipalities do not impose compensation requirements as excessive as those noted above, many other municipalities impose compensation requirements that exceed the actual municipal cost of managing the public rights-of-way.⁴⁵

2. Favorable Treatment of the Incumbent Provider

The favorable municipal treatment of incumbent providers is another factor that often puts new entrants at a disadvantage. Such discriminatory treatment often occurs in one of two ways. The first occurs when a

41. *Id.* § 10-156(1).

The city finds that the public streets, alleys and public rights-of-way to be used by grantee for the purpose of reselling telecommunications services derived from telecommunication systems operated within the boundaries of the city are valuable, public properties, acquired and maintained by the city at great expense to its taxpayers, and that the grant to grantee of the use of said public streets, alleys and rights-of-way is a valuable property right, without which the grantee would be required to invest substantial capital in public right-of-way costs and acquisitions; the grantee agrees to pay the city as general compensation during each year of the franchise agreement, an amount equal to five (5) percent of gross revenues for each quarter of a compensation year.

Id.

42. *MFN Comments, supra* note 31, at 23 (noting that the city's demands "would be laughable, were they not so indicative of the manner in which Municipalities view carriers").

43. *Id.* at Exhibit F (stating that the demands were "[i]n return for use of city rights-of-way and, especially, easement through park, which city is not mandated to provide under State law").

44. *Id.* at 24.

45. See Elizabeth V. Mooney, *Fla.'s Simplified Tax Law Forerunner to Federal Effort*, RCR WIRELESS NEWS, July 30, 2001, at 10 (stating that "one of the most significant roadblocks to the expansion of bandwidth capacity in this country is the de facto ransom that carriers are compelled to pay in exchange for local government approval of requests for items like rights-of-way and tower siting").

municipality charges a new entrant a "gross revenue" fee that is not required of the incumbent.⁴⁶ Unfortunately, a number of municipalities only impose compensation requirements on new market entrants, and not on the incumbent telecommunications provider.⁴⁷

White Plains, New York, for instance, imposes a five percent franchise fee on new entrants that is not imposed on the incumbent provider, Verizon Communications.⁴⁸ In that case, the city claims that Verizon is exempted from the fee because it has traditionally provided, and continues to provide, free city use of its conduit and other facilities installed in the city's rights-of-way.⁴⁹ In Lexington, Kentucky, BellSouth Communications was granted a federal district court injunction prohibiting the city from enforcing its rights-of-way ordinance, which requires the payment of five percent of a provider's gross revenues, against BellSouth.⁵⁰ The rationale for the injunction appears to be based on the claim that BellSouth has a "statewide franchise" to offer telecommunications service throughout the Commonwealth of Kentucky, along with claims that the franchise provisions violated Section 253(a) of the Act.⁵¹ The city, however, continues to enforce the ordinance and its fee provisions against

46. See Brief of Amici Curiae FCC et al. at 14, *TCG NY, Inc. v. City of White Plains* (No. 01-7213(L), 01-7255(XAP)) [hereinafter *White Plains Brief*] (criticizing a municipal rights-of-way ordinance that requires new entrants to pay a gross-revenue fee while exempting the incumbent carrier as "precisely the kind of barrier to competitive entry that Congress intended section 253 to remove").

47. See *MFN Comments*, *supra* note 31, at 8-19 (noting numerous instances where municipalities had placed the incumbent provider in a more favorable condition for real and in-kind compensation requirements).

48. See *TCG NY, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 99 (S.D.N.Y. 2000).

49. See *id.* at 98-99 (holding that Verizon and its predecessor companies have "been paying a fee to the City, in the form of having provided the City with free use of its conduit—a valuable asset—in exchange for using the rights-of-way").

50. See *Lexington-Fayette Urban County Gov't v. BellSouth Telecomm., Inc.*, No. 00-41 (E.D. Ky. Feb. 25, 2000) (order granting preliminary injunction). It is important to note that in Lexington-Fayette County, BellSouth operates as a CLEC, rather than the incumbent provider GTE (now Verizon). See Answer and Counterclaim of BellSouth Telecomm., Inc. at 9, *Lexington-Fayette County Gov't v. BellSouth Telecomm., Inc.*, No. 00-41 (E.D. Ky. Jan. 31, 2000). BellSouth, however, has a "perpetual statewide franchise" to use rights-of-way throughout the Commonwealth of Kentucky based on its incumbent status in the Louisville area, which gives it "incumbent" rights-of-way access statewide. See *id.* at Exhibit 6.

51. See *BellSouth*, No. 00-41, at 1-2 (finding that the Kentucky Public Service Commission had approved BellSouth's application to operate as a CLEC in the Lexington-Fayette County area); see also Answer and Counterclaim of BellSouth Telecomm., Inc., *Lexington-Fayette County Gov't v. BellSouth Telecomm., Inc.*, No. 00-41 (E.D. Ky. Jan. 31, 2000) (requesting declaratory and injunctive relief against the Lexington-Fayette County ordinance based on a statewide "perpetual" franchise to use rights-of-way statewide and Section 253 of the Act).

other CLECs operating in the county.⁵²

The second type of disparate treatment occurs when municipalities levy in-kind or other "up-front" compensation that is not imposed on incumbent providers. This type of requirement is often even more harmful than equitable "gross revenue" requirements, because costs are imposed on new entrants before they begin to provide service and generate revenue. MFN notes that Chandler, Arizona charges \$1.47 per linear foot for access to the public rights-of-way in that city.⁵³ In addition, the city also mandates that MFN install additional conduit and manholes for the city's use, with compensation to MFN limited to "incremental construction costs."⁵⁴ MFN also states that none of these costs are imposed on the incumbent provider, Qwest Corporation.⁵⁵

In many cases, such as those detailed above, the imposition of disparate fees results in dual barriers to new carriers, as they are not only subject to entry fees and in-kind compensation requirements, but also to continuing municipal gross-revenue based compensation requirements that make competing with the incumbent carrier not competitively neutral.⁵⁶

3. "Third-Tier" Regulation of Service Offerings

Municipal regulations that impose operational requirements on providers seeking access to the public rights-of-way serve as another barrier to competitive telecommunications providers. These regulations are often referred to as "third-tier" regulations, because they duplicate the operational and service standards that are already governed by the FCC or state regulatory commissions.⁵⁷ In addition, these regulations frequently

52. See John Stamper, *Laying of Optic Cable Resumes, BellSouth Gets Injunction in City's Lawsuit Over Fee*, LEXINGTON HERALD-LEADER, Mar. 7, 2000, at C1 ("Other telecommunications companies, including GTE, e.spire Communications and Insight Communications, all pay a franchise fee to the city for use of its rights-of-way.").

53. See *MFN Comments*, *supra* note 31, at 11 (noting that the city imposes this charge on MFN because it claims that it is not a "telecommunications provider" because it provides dark fiber capacity for lease to other carriers).

54. See *id.*

55. See *id.*

56. See *White Plains Brief*, *supra* note 46, at 16 (stating that the imposition of a "five percent gross-revenues franchise fee" on an incumbent provider but not on a new entrant "is an incremental cost of doing business that inevitably puts [the new entrant] at a pricing disadvantage [to the incumbent]").

57. See TCI Cablevision of Oakland County, Inc., *Memorandum Opinion and Order*, 12 F.C.C.R. 21396, para. 105, 9 Comm. Reg. (P & F) 730 (1997) [hereinafter *City of Troy*] ("Our concern is that some localities appear to be reaching beyond traditional rights-of-way matters and seeking to impose a redundant 'third-tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public.").

create substantial operational problems for new entrants because they attempt to require new entrants to provide certain services or follow operational requirements that can differ from municipality to municipality.⁵⁸

One example of excessive "third-tier" regulation occurs when municipalities request detailed information regarding the ownership structure of a potential rights-of-way user or information regarding the types of service that a rights-of-way user will provide.⁵⁹ Pittsburgh, Pennsylvania, for instance, requires applicants to respond to no fewer than five pages of "ownership and control" information,⁶⁰ including information regarding whether the applicant has ever had "alcoholic beverages and restaurant licenses" revoked,⁶¹ or whether an applicant "or any principal [has] ever provided any consideration to prosecute, support or in any way further litigation against a municipality, the United States Federal Communications Commission, or the United States Federal Trade Commission."⁶² All of this information, however, must also be furnished to the Pennsylvania Public Utility Commission in connection with any application for a Certificate of Public Convenience and Necessity, a prerequisite to providing interstate telecommunications service to the public anywhere in the Commonwealth of Pennsylvania.⁶³

Another example of unnecessary "third-tier" regulation arises when municipalities actually attempt to regulate service offerings provided within municipal boundaries. As noted by MFN in comments to the FCC, Raleigh, North Carolina's general telecommunications license contains a list of customer service standards that regulates a wide variety of customer service issues, including the hours that a telecommunications provider must be available to take customer complaints, and the time-frame in which new customer orders must be filed.⁶⁴ All of these customer service standards,

58. *See id.* para. 106 (noting that "a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers").

59. *See id.* (noting that "where the rates, terms, and conditions under which telecommunications service is offered to the public are dictated by an [sic] local ordinance, is of considerable concern to this Commission").

60. BUREAU OF CABLE COMM., DEP'T OF GEN. SERVS., LICENSE APP'N FOR TELECOMMS. PROVIDERS FOR CITY OF PITTSBURGH, § 1 (2002).

61. *Id.* § 1.5.

62. *Id.* § 1.4.

63. *See* PA. PUB. UTIL. COMM'N APP'N FOR APPROVAL OF AUTHORITY TO OFFER, RENDER, FURNISH, OR SUPPLY TELECOMMS. SERVS. TO THE PUB. IN THE COMMONWEALTH OF PA., Form PUC-377 (Rev. 10/01) (requiring detailed information about an applicant, including information detailing the applicant's corporate structure and proposed telecommunications offerings).

64. *See MFN Comments, supra* note 31, at Exhibit B (attaching a copy of the city's "Customer Service Standards").

however, are already regulated by the North Carolina Utilities Commission.⁶⁵ Accordingly, a provider could conform to the state customer service regulations, and still be fined by one or more municipalities for failure to adhere to their specific regulations. It is also possible that a carrier could be fined multiple times, by a state regulator and then by one or more municipalities, for the same violation.

Even in cases where there is not a direct conflict, municipal service requirements often subject competitive telecommunications providers to uncertainty as to how regulatory requirements will be enforced. Jackson, Mississippi incorporates its Uniform Telecommunications Code⁶⁶ as a part of its standard "Nonexclusive Telecommunications Franchise Agreement."⁶⁷ One section of the Uniform Telecommunications Code attempts to delineate "consumer issues," which include responsibilities such as "demonstrat[ing] customer responsiveness, truth-in-billing, and [] a commitment to the local community by maintaining a local customer service office within the city."⁶⁸ The ordinance, however, does not specifically define what would constitute a lack of "responsiveness" and does not address the question of whether compliance with Mississippi Public Service Commission regulations governing the provision of telecommunications services would satisfy the ordinance's command.⁶⁹

4. Municipal Delay as a Barrier to Entry

For many new entrants, one of the most harmful and generally undocumented forms of barrier to entry is municipal delay in approval of rights-of-way access agreements.⁷⁰ For many upstart telecommunications companies, the ability to quickly serve new customers can often be the

65. N.C. ADMIN. CODE tit. 4, r.11.R9-8 (Oct. 2001) (detailing the "service objectives" that "each regulated local exchange telephone company shall perform" in North Carolina, including "[n]ew service installation appointments not met for Company reasons").

66. JACKSON, MISS., ORDINANCE No. 1996-12(5) (Nov. 28, 1995).

67. JACKSON, MISS., NONEXCLUSIVE TELECOMM. FRANCHISE AGREEMENT BY AND BETWEEN THE CITY OF JACKSON, MISS. AND ENTERGY LOCAL FIBER CO., § 10 (1997).

68. JACKSON, MISS., ORDINANCE No. 1996-12(5) § 35-27 (Nov. 28, 1995).

69. *See id.* (noting that the "city supports the fairest principles that govern the issues of privacy and security for consumers of advanced telecommunications service" without further definition); *see also* MISS. PUB. SERV. COMM'N R. 38 (1993), *available at* <http://www.psc.state.ms.us/regs/38.html> (last visited Jan. 27, 2002) (noting that the Commission generally requires telecommunications providers to restore "out of order" telephone service within forty-eight hours).

70. Corrected Comments of Adelpia Business Solutions, Inc., Petition for Declaratory Ruling, *City Signal Comm., Inc. v. City of Cleveland Heights*, CS Dkt. No. 00-253, at 9 (filed Jan. 31, 2001), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf+pdf&id_document=6512460412 (last visited Jan. 27, 2002) [hereinafter *Adelpia Comments*] (noting that "the economics of facilities-based entry into the telecommunications marketplace make delay a powerful barrier to competition").

difference between profitability in a specific market or inability to compete.⁷¹

Unfortunately, as noted in comments by several competitive providers to the FCC, a number of municipalities continue to block rights-of-way access as a means of extracting additional compensation from telecommunications providers.⁷² MFN, for example, reported that several cities delayed rights-of-way access negotiations in an attempt to obtain unreasonable compensation, and refused to issue construction or rights-of-way use permits until their compensation demands were met.⁷³

Certain municipalities also delay access through the use of "informal" permit moratoriums.⁷⁴ In many of these "moratorium" cases, the municipality informs a new entrant that it will not allow rights-of-way access until it enacts a rights-of-way use ordinance governing all carriers.⁷⁵ All too often, however, the incumbent carrier is allowed to continue to install facilities in public rights-of-way, even as new entrants are denied access.⁷⁶ Often, the inability to obtain timely rights-of-way access can be

71. *See id.* at 9-10.

One key checkpoint for investors and lenders in the CLEC industry is a CLEC's speed-to-market. The longer it takes for a CLEC, such as ABS, to begin providing service in a market, the longer it will be before an investor will see a return, if any, on its investment and the greater the risk that a lender will not obtain prompt repayment of its debt financing. To lenders and investors, therefore, delay in a CLEC's time-to-market is profoundly significant.

Id.

72. *See, e.g., MFN Comments, supra* note 31, at 4 (noting that MFN "has been constantly delayed in constructing its network because Municipalities purposely delay or demand unreasonable compensation in exchange for access to the public rights-of-way"); Adelpia Comments, *supra* note 70, at 10 (stating that if "a municipality delays ABS for even a few months, ABS may suffer numerous short and long-term negative effects"); Reply Comments of the Association for Local Telecomms. Servs., Petition for Declaratory Ruling, City Signal Comms., Inc. v. City of Cleveland Heights, CS Dkt. No. 00-253, at 6 (filed Feb. 14, 2001) at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf+pdf&id_document=6512461715 (last visited Jan. 27, 2002) [hereinafter ALTS Reply Comments] (concluding that "too many municipalities either have sought to exercise their control for pecuniary gain, or have been affirmatively uninterested in accommodating new entrants").

73. *See MFN Comments, supra* note 31, at 20 (stating that Culver City, California "has had an 'informal' moratorium on issuing telecommunications carrier permits since at least July 1999").

74. *See Adelpia Comments, supra* note 70, at 19 (stating that some municipalities "argue that delay is due to their 'management' of the rights-of-way, and thus is 'saved' from being an unlawful barrier to entry under Section 253(c)").

75. *See ALTS Reply Comments, supra* note 72, at 6 (noting that the delays can take "from six months to a year or more").

76. *See Adelpia Comments, supra* note 70, at 20 (noting that "[w]hile a municipality is delaying ABS from constructing and operating, under the guise of 'management' issues, it is at the same time allowing the ILEC to operate, maintain, and in some instances upgrade its facilities without delay").

financially devastating to a competitive provider because it prevents them from signing up new customers and generating any constant stream of revenue.⁷⁷

C. FCC Interpretation of Section 253

Since passage of the 1996 Act, the FCC has conducted several proceedings discussing municipal rights-of-way access issues and other barriers to entry under Section 253. Unfortunately, almost all of the FCC's cases to date have been extremely timid in their recommendations, and generally focus on rough concepts of "fair" access to public rights-of-way, rather than any bright-line rules defining the basic rights-of-way access responsibilities of municipalities.⁷⁸

To date, the FCC's most comprehensive effort to define municipal rights-of-way access responsibilities under Section 253 came in response to a Petition for a Declaratory Ruling filed by TCI Cablevision of Oakland County, Inc. (the "City of Troy" case).⁷⁹ This case was initiated not by a new entrant to the local telecommunications market, but by the incumbent cable television provider, TCI Cablevision ("TCI").⁸⁰ In early 1994, TCI

77. See ALTS Reply Comments, *supra* note 72, at 6 (noting that "delay can mortally wound a CLEC in its attempt to compete with an entrenched, and typically far stronger, ILEC").

78. This point is perhaps best illustrated by the FCC's latest pronouncement on the issue. 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, *Third Report*, CC Docket No. 98-146, para. 166-68 (rel. Feb. 6, 2002) [hereinafter *Third Report*]. In the *Third Report*, the FCC acknowledged "commenters' concern about the difficulty some companies have faced in securing access to the rights-of-way necessary to deploy advanced telecommunications infrastructure in a timely manner." *Id.* para. 166. However, rather than proposing any concrete solutions, the FCC merely stated it "asked the Common Carrier Bureau to further examine this matter to consider the legal and policy issues it presents" and stated that rights-of-way access issues "may best be served through a forum for all interests to meet and work together in creating a guiding set of 'best practices' for the appropriate management of the public's right-of-way." *Id.*

79. See *City of Troy*, *supra* note 57, para. 1. Prior to *City of Troy*, the FCC addressed certain state and municipal laws and regulations containing provisions that new entrants claimed were barriers to entry and, as such, were prohibited under Section 253. See *Classic Telephone*, *supra* note 21 (preempting two Kansas cities' denial of local franchises to new local telecommunications provider); Pub. Util. Comm'n of Tex., *Memorandum Opinion and Order*, 13 F.C.C.R. 3460, 9 Comm. Reg. (P & F) 958 (1997) (preempting a Texas statute that imposed different "build-out" requirements on different classes of local telecommunications carriers). Both cases, however, dealt mainly with Section 253(a) barrier to entry issues, and did not reach significant municipal rights-of-way management issues implicating Section 253(c).

80. See *City of Troy*, *supra* note 57, paras. 11-30 (stating that the city of Troy had delayed TCI's applications for rights-of-way permits to install new fiber optic facilities since early 1994).

began a series of projects to upgrade its cable system in the city with fiber-optic technology, and applied for the necessary city permits to allow the upgrade project to proceed.⁸¹ As the city began to review the permits, certain city officials apparently became concerned that the new facilities might be used for the provision of telecommunications services, rather than just cable service, and began to heavily scrutinize TCI's rights-of-way permit applications to upgrade facilities.⁸² In December 1995, the city adopted a telecommunications ordinance that required anyone constructing facilities capable of providing telecommunications services to get a "license" from the city for those services.⁸³ Subsequent to the enactment of the city's ordinance, the city informed TCI that it would have to obtain a license under the new telecommunications rights-of-way ordinance before it would issue any further rights-of-way permits, unless TCI expressly specified that none of its facilities would be used for telecommunications services.⁸⁴ TCI refused and filed its petition with the FCC seeking preemption of the city's licensing requirements.⁸⁵

Although TCI's petition mainly implicated federal law governing regulation of cable television service,⁸⁶ a number of CLECs filed comments with the FCC in the proceeding requesting that the FCC also determine whether the ordinance violates Section 253 of the 1996 Act.⁸⁷ Not surprisingly, the FCC refused to expressly state that the ordinance was preempted by Section 253, and demurred from the opportunity to provide clear guidelines defining the limits of municipalities to regulate rights-of-way use by telecommunications providers.⁸⁸ Instead, the FCC provided a

81. *See id.* para. 11.

82. *See id.* (noting that the city wanted to ensure that TCI would not offer telecommunications service without first obtaining authority from the city to do so).

83. *See id.* para. 15 (stating that the Troy ordinance "requires a party to obtain a license before constructing, maintaining or operating a telecommunications system in the City, and to obtain a franchise before transacting business by way of a telecommunications system in the City").

84. *See id.* para. 20 (noting that the city "continues to insist upon inclusion of its 'not for telecommunications purposes' condition in the permit").

85. *See id.* para. 1 (stating that TCI filed its petition "seeking preemption, a declaratory ruling and other relief against the City of Troy, Michigan" on July 10, 1996).

86. *See id.* para. 6 (noting that Petition was primarily based upon Sections 621 and 624 of the Act which limit the power of local franchising authorities to "condition the provision of telecommunications services by a cable operator").

87. *See id.* paras. 33-35 (detailing comments filed by MCI Metro and MFS urging the FCC to analyze the city's telecommunications ordinance as a barrier to entry under Section 253). MCI Metro and MFS were subsequently acquired and absorbed into Worldcom, Inc.

88. *See id.* para. 101 ("Nor do the comments and informal filings seeking preemption of the Troy Telecommunications Ordinance by MCI, on behalf of MCI Metro, and Worldcom, on behalf of MFS-D, provide an adequate factual basis as currently in the record for us to preempt the Troy Telecommunications Ordinance under section 253(d).").

few pages of dicta that appeared to indicate the FCC's future role in preempting onerous municipal franchising requirements with "fully developed factual records."⁸⁹

In its Section 253 dicta, the FCC suggested that it would take a much more aggressive role in preempting onerous municipal regulations. First, the FCC provided a list of rights-of-way management activities that it saw as consistent with the strictures of Section 253(c).⁹⁰ Second, the FCC expressed concern over municipal regulations that go beyond basic rights-of-way management activities, in noting that some municipalities are imposing "a redundant 'third tier' of telecommunications regulation which aspires to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public."⁹¹ In addition, the FCC, apparently seeking to sound a clear warning to municipalities, stated that "attempts to impose a redundant 'third tier' of regulation at the local level will be met with close scrutiny by the Commission."⁹²

Third, the FCC stated that the "discriminatory application of telecommunications regulation" between incumbent providers and new entrants was "[a]n especially troubling issue."⁹³ This was followed by a sentence that may be the closest the FCC has ever come to issuing a bright-line pronouncement on Section 253(c): "Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory."⁹⁴

The FCC's pronouncement of these broad objectives may have led some to believe that the Commission would take a more active role in ensuring fair and equitable rights-of-way access for new entrants. Unfortunately, since the City of Troy decision was issued, the FCC has done very little to further clarify the issue. In fact, the only subsequent case to involve substantial discussion of state or municipal rights-of-way access obligations involved a 1999 opinion declining to endorse a contract between the state of Minnesota and a private company that would grant the company an exclusive right to install fiber-optic cable alongside interstate

89. *Id.*

90. *See id.* para. 103 (noting that permissible rights-of-way management activities included "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them").

91. *Id.* para. 105.

92. *Id.*

93. *Id.* para. 107.

94. *Id.* para. 108.

highways in the state.⁹⁵ In that case, the FCC stated that "Minnesota fails to convince us that the existence of alternate rights-of-way means that the Agreement does not have the potential to prevent certain carriers from providing facilities-based services."⁹⁶ While this case may represent some expansion of the FCC's view that potential, not just actual barriers to entry may violate Section 253(a), and not be "saved" by Section 253(c), the notable lack of any bright-line standards or "rules" for states and municipalities again makes this case less than helpful in trying to determine municipal obligations and duties under Section 253.⁹⁷

The latest example of the FCC's general failure to take timely action on Section 253 rights-of-way management issues involves a complaint filed by City Signal Communications, Inc. against the city of Cleveland Heights, Ohio.⁹⁸ The complaint alleged that the city of Cleveland Heights violated Section 253 by requiring a CLEC to place all of its telecommunications facilities underground, while allowing the incumbent provider to keep and continue installing aerial telecommunications facilities on telephone poles.⁹⁹ On December 22, 2000, the FCC requested comments from interested parties on the City Signal Petition.¹⁰⁰ Unfortunately, this case has now languished at the FCC for over a year, in spite of the fact that the petition involves municipal discrimination in favor of the incumbent provider, an issue on which the FCC stated a clear position in the City of Troy case.¹⁰¹ The FCC's failure to address timely serious rights-of-way

95. See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transp. Capacity in State Freeway Rights-of-Way, *Memorandum Opinion and Order*, 14 F.C.C.R. 21697, 18 Comm. Reg. (P & F) 1294 (1999).

96. *Id.* para. 23.

97. In fact, the FCC makes note of the fact that it is again expressly avoiding the analysis of any substantial Section 253(c) issues in the decision. See *id.* para. 63 ("Our discussion of these issues should not be interpreted as addressing potential issues involving the Commission's jurisdiction under section 253(c).").

98. See *City Signal Comm., Inc. v. City of Cleveland Heights*, Petition for Declaratory Ruling, CS 00-253 (filed Oct. 18, 2000).

99. See *id.* at 2 (noting that the "City of Cleveland Heights has refused to grant City Signal Communications authorization to use the public right of way to string aerial fiber optic cable for telecommunications purposes on existing utility poles").

100. See Comments Sought on City Signal Communications, Inc. Petition for Declaratory Ruling Concerning Use of Public Rights of Way for Access to Poles in Cleveland Heights, Ohio Pursuant to Section 253, Public Notice, CS 00-253, DA-00-2870 (rel. Dec. 22, 2000). Many of the examples of municipal discrimination against new entrants detailed in Section III were taken from comments filed in this proceeding and which the FCC should be acutely aware of. See, e.g., *MFN Comments*, *supra* note 31; *Adelphia Comments*, *supra* note 70; *ALTS Reply Comments*, *supra* note 72.

101. See *City of Troy*, *supra* note 57, para. 101 (noting that the FCC stated that provisions aimed solely at new entrants were quite likely to be in violation of Section 253(a)).

access issues, such as the City Signal case, represents not only a regulatory failure, but also a threat to many CLECs that increasingly find that they have nowhere to turn for expedient resolution of rights-of-way issues.

D. *Judicial Interpretation of Section 253*

As a result of the FCC's failure to address substantial rights-of-way issues, a number of new entrants have turned to the courts to seek clarification of municipal rights-of-way issues. Many of the cases filed at the federal district court level by CLECs and other new entrants have been successful in striking down a number of municipal efforts to impose fees that are not reasonable and cost-based, and operational requirements that are noncompetitively neutral or pose a barrier to entry.¹⁰² Recently, however, a split in the interpretation of Section 253 has developed between the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Sixth Circuit, which again threatens to undermine any uniform application of Section 253.

1. The Ninth Circuit Interpretation of Section 253

In *City of Auburn v. Qwest*,¹⁰³ the Ninth Circuit addressed the question of whether Section 253 of the Act preempted municipal ordinances in various Washington municipalities that imposed certain franchise requirements on telecommunications providers installing facilities within those jurisdictions.¹⁰⁴ As part of the franchise requirements in the cities, telecommunications providers were required to provide "lengthy and

102. *See, e.g.*, *AT&T Comm. of the Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1999) (enjoining enforcement of a Dallas ordinance that sought to impose fees and operational requirements on telecommunications providers that were unrelated to rights-of-way management); *BellSouth Telecomm., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1308-09 (S.D. Fla. 1999) (striking down portions of Coral Springs rights-of-way management ordinance that do not deal directly with managing the rights-of-way); *PECO Energy Co. v. Township of Haverford*, 1999 WL 1240941 at *8 (E.D. Pa. 1999) (voiding a local rights-of-way management ordinance and finding that the 1996 Act preserves very specific authority to local governments). *But see* *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 95-100 (S.D.N.Y. 2000) (upholding a city ordinance that required a CLEC to pay a five percent fee for use of the public rights-of-way while exempting the incumbent provider from payment of such fee).

103. 260 F.3d 1160 (9th Cir. 2001).

104. *Id.* at 1166. The case was originally filed in Washington state court against Qwest by the cities of Auburn, Bellingham, Bremerton, Des Moines, Federal Way, Fife, Lakewood, Medina, Olympia, Puyallup, Renton, SeaTac, Shoreline, Spokane, Tacoma, Tukwila, University Place, and Vancouver. Qwest removed the case to federal district court, and filed a counterclaim against the cities of Auburn, Des Moines, Olympia, Tacoma, and University Place—"the counterclaim cities"—alleging violations of Section 253 of the Act. The district court dismissed Qwest's counterclaim, and Qwest appealed to the Ninth Circuit. *See id.*

detailed application form[s]" for the municipality to review the provider's qualifications to provide service,¹⁰⁵ submit to ordinance provisions regulating the ownership and transfers of the provider,¹⁰⁶ and adhere to provisions regulating the price of services offered within the community.¹⁰⁷ In addition, the ordinances also imposed direct¹⁰⁸ and in-kind compensation requirements that were not directly tied to municipal rights-of-way management costs.¹⁰⁹

In a strong opinion, the Ninth Circuit held that the challenged provisions of the municipal ordinances violated Section 253(a) because they sought to "establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way."¹¹⁰ In addition, the court harshly criticized municipal efforts to base regulation of a provider's "fitness to provide services" on the possible effect it might have on rights-of-way usage, stating that such an approach would allow the "safe harbor" in Section 253(c) to "swallow whole" Section 253(a)'s broad prohibition of barriers to entry.¹¹¹

2. The Sixth Circuit Interpretation of Section 253

In stark contrast to the Ninth Circuit's opinion, the Sixth Circuit gave a very broad reading to the municipal powers allowed under Section 253, and upheld a municipal ordinance that required many of the same rights-of-way franchising requirements as the municipal ordinances implicated in the Qwest case. In *TCG Detroit v. City of Dearborn*,¹¹² the court upheld a lower court decision that a Dearborn, Michigan ordinance imposing a four percent gross receipts and further in-kind compensation requirement as a precondition for use of municipal rights-of-way was permissible pursuant to Section 253.¹¹³ Unfortunately, the court provided little discussion or

105. *Id.* at 1178. The court noted that the applications included:

[D]ata gathered by the cities in order to determine the financial soundness, technical qualifications, and legal ability to provide telecommunications services; a description of all services provided currently or in the future; and unnamed discretionary factors that may have nothing to do with the management or use of the rights-of-way.

Id.

106. *See id.*

107. *See id.* at 1178-79.

108. *See id.* at 1179, n.19 (noting that the cities of Auburn, Des Moines, and Olympia set non-cost-based fees).

109. *See id.* at 1170 (stating that the counterclaim cities required providers to provide excess conduit capacity as a term of any franchise).

110. *Id.* at 1178.

111. *Id.* at 1179-80.

112. 206 F.3d 618 (6th Cir. 2000).

113. *Id.* at 621 (noting that the Dearborn ordinance and TCG's proposed franchise with

analysis of why the fee was permissible under Section 253.¹¹⁴ In addressing whether the fee presented a barrier to entry under Section 253(a), as claimed by TCG, the court merely stated that "the [district] court found the fee in question to be both fair and reasonable," and that "the [district] court's examination of this question was thorough and its reasoning sound."¹¹⁵

This decision was even further complicated by the fact that the lower court specifically exempted the incumbent provider, Ameritech, from paying the fee due to its preexisting "state-wide franchise."¹¹⁶ This disparate treatment among providers, due to the state-wide franchise or any other reason, would appear to implicate the nondiscrimination provisions of Section 253(c), as the differing fee structures would inevitably make it harder for TCG to compete.¹¹⁷ In addressing this point, the Sixth Circuit held that since the city tried to assess the fee against Ameritech, this evidenced the city's intention not to discriminate, and therefore made the city's action allowable under Section 253(c).¹¹⁸

Other provisions of the ordinance, which imposed a number of third-tier regulations, such as requiring municipal approval of service offerings and requiring prior approval of transfers and assignments of a provider or

the city required the payment by TCG of four percent of its gross revenues, on top of a \$50,000 one-time fee and up to \$2,500 in reimbursement of the city's administrative costs). Although the Sixth Circuit decision does not mention it, the \$50,000 one-time payment was apparently in lieu of an in-kind compensation requirement in the ordinance that required providers to give the city a certain number of strands in their fiber-optic cables. *See TCG Detroit*, 16 F. Supp. 2d at 787 (noting that the payment was in lieu of providing the city with four fiber-optic strands).

114. *See* Paul Glist, et al., *Telecommunications Franchising*, 642 PLI/PAT 349, 373 (2001) (on appeal, the Sixth Circuit affirmed the district court's holding, but provided no meaningful discussion of the franchise fee analysis under Section 253, or of any other case addressing Section 253).

115. *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000).

116. *See TCG Detroit*, 16 F. Supp. 2d at 796-97 (holding that Ameritech was granted state-wide franchise to operate and that Dearborn could not require Ameritech to enter into a franchise agreement).

117. *See id.* at 791 (noting TCG's claim that the city is not demanding compensation on a competitively neutral and nondiscriminatory basis).

118. *See TCG Detroit*, 206 F.3d at 625. The Sixth Circuit noted that because Ameritech enjoys a state-wide rights-of-way franchise its competitive position is strengthened, and it might be able, in theory, to undercut its competition. *See id.* After acknowledging this disparity, however, the court refused to address it by asserting that this was not TCG's overall allegation (TCG has not alleged that this has occurred). *See id.* This analysis, at the very least, represents an improvement from the district court rationale, which held that the city did not have to impose exactly the same requirements and that it is enough that the city imposes (or plans to impose) comparable burdens. *See TCG Detroit*, 16 F. Supp. 2d at 792. The district court, however, never details how the imposition of a four percent gross revenues charge on one provider and no charge on the incumbent provider is a comparable burden.

its assets, were never even addressed by the district court or the Sixth Circuit.¹¹⁹ Though the Sixth Circuit's decision contains little analysis of Section 253 and its overall intent, the Sixth Circuit's holding is squarely at odds with the general holding of the Ninth Circuit in *City of Auburn v. Qwest*.

This circuit split, and the absence of any concrete and enforceable Section 253 decisions by the FCC, has led to further uncertainty in the competitive telecommunications market, and is at least partially responsible for the lack of capital investment in the CLEC market.¹²⁰ In light of the confusion caused by the circuit split and the regulatory vacuum created by the FCC, the time has come for Congress to reexamine and amend Section 253 to clarify municipal rights-of-way access responsibilities required to create a vibrant market for competitive, facilities-based carriers in the United States.

IV. STATE RESPONSES TO MUNICIPAL RIGHTS-OF-WAY ACCESS ISSUES

Due to the failure of the FCC and the courts to clarify the issue of municipal rights-of-way access, a number of states have taken action to rein in municipal demands and foster the further development of facilities-based competition in the local telecommunications market. As detailed below, many of these state initiatives focus on the same issues identified by the FCC in its rights-of-way management orders. Unlike the FCC orders, however, many of the state statutes lay out clearly defined guidelines and rules for municipalities in order to limit fees and other barriers to entry that often confront new entrants into the local telecommunications market.

A. *Direct Fees*

At least ten states have enacted statutes that generally limit rights-of-way management fees to the direct costs incurred by municipalities by a telecommunications provider's physical use of the public rights-of-way.¹²¹

119. See *TCG Detroit v. City of Dearborn*, No. 98-803937-CK (Wayne Cty., Mich. Cir. Ct. 1999).

120. See Time Warner Telecom Testimony, *supra* note 17, at *7 (noting the enormous capital investment required to construct facilities-based local networks and stating that Congress should consider amending the Act to give the FCC the ability to ensure fair and consistent public policy by establishing nondiscriminatory access on a competitively neutral basis).

121. See, e.g., ARIZ. REV. STAT. ANN. § 9-582B (West Supp. 2001) (application fees, permit fees and charges must be directly related to the costs incurred by the political subdivision in providing services relating to the granting or administration of application and permits); IND. CODE ANN. § 8-1-2-101(4)(b) (West 2001) (costs must be limited to the direct, actual, and reasonably incurred costs a municipality incurs in managing the public

For example, Washington's rights-of-way access statute states that a municipal rights-of-way may recover "actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed statement."¹²² Other states, such as Florida¹²³ and South Carolina,¹²⁴ have set fixed rights-of-way use fees that are at least roughly calibrated to compensate municipalities for direct management costs.

At a very minimum, these statutes define what costs may be factored into the rights-of-way management fee imposed by municipalities in those states. This, in turn, fosters competition by providing new entrants with at least some guarantee that they will be free of excessive municipal compensation demands in those jurisdictions.

B. *In-Kind Compensation*

At least five states have also taken action to prohibit municipal imposition of in-kind compensation requirements.¹²⁵ Other states, such as

right-of-way); IOWA CODE ANN. § 480A.3 (West 1999) (local governments may only recover management costs that are caused by the public utility's activity in the public right-of-way); MINN. STAT. ANN. § 237.162(9) (West Supp. 2002) (local government may incur management costs incurred as a result of actions or inactions of that user); N.J. STAT. ANN. § 54:30A-124(a) (West Supp. 2001) (telecommunications providers are not subject to any fees, taxes, levies or assessments in the nature of a local franchise, right-of-way, or gross receipts fee, tax, levy or assessment); N.D. CENT. CODE § 49-21-26 (1999) (a municipality may only recover a fee for its management costs); OHIO REV. CODE ANN. § 4939.03(B) (Anderson 2000) (construction permit fee limited to direct incremental costs incurred by the political subdivision in inspecting and reviewing any plans and specifications and in granting the associated permit); WASH. REV. CODE § 35.21.860(1)(b) (2000) (limiting fees to actual administrative expenses).

122. WASH. REV. CODE § 35.21.860(1)(b) (2000).

123. Until October 1, 2001, Florida allowed municipalities and counties to charge a fee of up to one percent of gross receipts for use of the public rights-of-way. *See* FLA. STAT. ANN. § 337.401(3) (West 1991) (noting that such fee may only be levied on recurring local service revenues for services provided within the corporate limits of the municipality by a telecommunications provider). Effective October 1, 2001, Florida combined the rights-of-way fee and other state excise taxes into a local communications services tax, which is collected by the state and partially remitted to municipalities and counties. *See* 2001 Fla. Sess. Law Serv. ch. 2001-140 (West). Under this scheme, municipalities and counties that refrain from imposing additional rights-of-way permit fees can impose an additional 0.12 to 0.24 gross revenue levy on local telecommunications providers. *See id.*

124. South Carolina law allows a municipality to impose a business license tax of 0.3 of one percent on retail telecommunications services, along with a rights-of-way franchise or consent fee not to exceed \$1,000. *See* S.C. CODE ANN. §§ 58-9-2220(1), 58-9-2230(A) (Law. Co-op. Supp. 2000). After the year 2003, a municipality, under certain circumstances, may increase the business license tax fee to 0.75 of one percent. *See id.* at 58-9-2220(2)(a).

125. *See, e.g.*, IOWA CODE ANN. § 480A.4 (West 1999) (stating that local governments shall not require in-kind services by a public utility right-of-way user, or require in-kind

Arizona, continue to allow some use of negotiated in-kind compensation requirements, but require that the value of the in-kind compensation be subtracted from the overall fees imposed by a municipality in order to maintain neutrality among providers.¹²⁶

C. *Third-Tier Regulations*

In order to prevent burdensome rights-of-way applications that request compliance with, or information on, regulatory requirements already imposed by the FCC or state regulatory commissions, some states have taken action to prevent the imposition of these "third-tier" requirements by municipalities. For example, South Carolina law prohibits municipalities from using their authority over rights-of-way to regulate any functions also regulated by the FCC or the South Carolina Public Service Commission.¹²⁷ Minnesota, on the other hand, specifically enumerates the information that municipalities may collect, and specifically excludes operational requirements from the list of permissible municipal information requests.¹²⁸

D. *Prevention of Municipal Delay*

As discussed earlier, municipal delay often constitutes the most serious rights-of-way entry barrier because it completely locks a new entrant out of a potential market. While the FCC has made a number of amorphous statements regarding municipal delay, some states have taken action to impose a concrete timetable on municipal rights-of-way access negotiations. Ohio, for instance, requires that municipalities approve rights-of-way use applications "within thirty days after the date a utility service provider or cable operator applies for consent for the use of a public

services as a condition of the use of the local government's public right-of-way); MINN. STAT. ANN. § 237.163(7)(d) (West Supp. 2002) (prohibiting the provision of in-kind services by a telecommunications rights-of-way user); N.D. CENT. CODE § 49-21-27 (1999) (political subdivision may not require in-kind services by a telecommunications company as a condition of using the public rights-of-way); OHIO REV. CODE ANN. § 4939.03(A) (Anderson 2000) (prohibiting municipalities from requiring any nonmonetary or free service for use of the public rights-of-way).

126. See ARIZ. REV. STAT. ANN. § 9-582D (West Supp. 2001) (stating that any municipal "license or franchise shall be structured so that the in-kind payments made . . . under the license or franchise . . . are less than or equal to and are offset against any transaction privilege license tax on the business of providing telecommunications services").

127. See S.C. CODE ANN. § 58-9-2240 (Law. Co-op. Supp. 2000) (noting that matters relating to the operations, systems, service quality, service territory, and prices of a telecommunications company are explicitly excluded from municipal regulation).

128. See MINN. STAT. ANN. § 237.163(2)(b) (West Supp. 2002) (allowing municipalities to require telecommunications providers to submit a registration statement with information directly related to municipal management of the public rights-of-way).

way."¹²⁹ Similarly, Michigan requires municipalities to take action on telecommunications providers' rights-of-way access requests within ninety days of the receipt of an application for such access.¹³⁰

V. PROPOSALS

A. *Congress Should Amend Section 253 to Create a National Rights-of-Way Access Standard*

In light of the FCC's failure to adequately address rights-of-way access issues and the conflicting opinions from the Sixth and Ninth Circuits, the best option for clearly defining municipal rights-of-way access obligations is congressional action to amend Section 253. As detailed above, a number of states have already enacted municipal rights-of-way management statutes that seek to fill the void left by FCC inaction on this issue. While this state action has made market entry easier for new entrants in those states, it has done nothing to further the 1996 Act's mandate of a "pro-competitive, de-regulatory national policy framework" designed to increase telecommunications options.¹³¹ Accordingly, it is time for Congress to enact a three-prong amendment to the existing Section 253 that will ease rights-of-way access burdens for competitive telecommunications providers.

First, Congress should amend Section 253 to state that municipal requirements for use of the public rights-of-way must be limited to matters that directly impact the public rights-of-way. The requirements may not include "third-tier" requests or requirements, including requests for financial, managerial, or operational information from the provider.¹³² This

129. OHIO REV. CODE ANN. § 4939.02(F) (Anderson 2000).

130. See MICH. COMP. LAWS ANN. § 484.2251(3) (West Supp. 2001) (stating that a local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit to access to a right-of-way, easement, or public place).

131. S. CONF. REP. NO. 104-230, at 1 (1996).

132. As stated previously, the FCC has already expressed serious concern over multiple, inconsistent obligations imposed on a community-by-community basis. *City of Troy, supra* note 57, para. 106. Congress should build upon the FCC's observation by amending Section 253 to prohibit municipal regulation that is not directly related to use of the rights-of-way. Such a prohibition, however, could contain a specific list of rights-of-way management activities that would fall within a municipal safe harbor. Minnesota, for example, provides that local governments may request: (1) a rights-of-way "applicant's name . . . address, and telephone and facsimile numbers"; (2) evidence that the provider has registered with the state underground utility locator service; (3) "the name, address, and telephone and facsimile numbers of the applicant's local representative"; (4) "proof of adequate insurance"; (5) "other information deemed reasonably necessary by the local government unit for the efficient administration of the public right-of-way"; (6) "to submit . . . plans for construction and major maintenance that provide reasonable notice to the local government unit of

limitation would give telecommunications providers certainty as to their local regulatory requirements, while still allowing municipalities to retain their traditional rights-of-way management functions.

Second, Congress should amend Section 253 to state that the only costs municipalities may recover for rights-of-way access are those directly attributable to that provider's use of the public rights-of-way.¹³³ Such costs should be limited to costs incurred through the review of rights-of-way applications and issuance of permits, review of facilities plans, inspection of installation and repair work conducted in the public rights-of-way, and any costs incurred by the failure of a provider to restore any affected portion of the public rights-of-way to its original state.¹³⁴ Revised Section 253 should also state that in-kind contributions shall be neither required nor allowed by providers.¹³⁵

Finally, Congress should amend Section 253 to include a provision that allows for acceleration of a rights-of-way access request. Acceleration should occur if a municipality either denies or fails to act in good faith on a telecommunications provider's rights-of-way access request within seventy-five days of receiving a complete rights-of-way access application.¹³⁶ This

projects"; and (7) an applicant to "obtain a right-of-way permit"; (8) the imposition of "permit conditions consistent with the local government unit's management of the right-of-way." MINN. STAT. ANN. § 237.163.2(b)(1)-(3) (West 2000).

133. The Indiana statute governing utility rights-of-way access provides a useful definition of such direct costs:

- (1) Registering occupants.
- (2) Verifying public right-of-way occupation.
- (3) Inspecting job sites and restoration projects.
- (4) Restoring work inadequately performed after providing notice and the opportunity to correct the work.
- (5) Administering a reasonable restoration ordinance that ensures that a public utility or department of public utilities adequately restores the right-of-way as near as is reasonably possible to the right-of-way's original condition.
- (6) Management costs associated with the implementation of an ordinance adopted under this section.

However, as used in this section, direct, actual, and reasonably incurred management costs do not include rents, franchise fees, or any other payment by a public utility or department of public utilities for occupation of the public right-of-way.

IND. CODE ANN. § 8-1-2-101(b) (West 2000).

134. *See id.*

135. *See, e.g., id.* (prohibiting any other payment for use of the rights-of-way); *see also TCG Detroit*, 16 F. Supp. 2d at 791 (noting that at least four states have explicitly outlawed local government demands for in-kind compensation).

136. The FCC has already established this type of expedited review for pole attachment disputes between telecommunications providers seeking to use another utility's telephone poles. *See Local Competition Order*, *supra* note 7, para. 1224 (stating that the Commission

acceleration could be in the form of an arbitration conducted by a state utility commission. Alternately, in cases where a state utility commission declines to intervene, the arbitration could be conducted by the FCC's Enforcement Bureau.¹³⁷

Enactment of this three-pronged amendment to Section 253 would signify that Congress is serious about creating a truly competitive telecommunications market by creating uniform ground rules that would allow any new entrant to compete on equal terms.¹³⁸ This, in turn, would

sought to establish swift and specific enforcement procedures that will allow for competition where access can be provided). Under this expedited review process, a telecommunications provider must request use of another utility's poles in writing. If the utility then fails to allow access, it is required to notify the telecommunications provider, in writing, of the denial within 45 days. The telecommunications provider is then allowed to file an expedited complaint with the FCC. *See id.*; *see also* 47 C.F.R. §1.1403(b) (2001) (noting that the utility's denial letter "shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards"). The provider may then file an expedited complaint with the Commission. *See* 47 C.F.R. §1.1404; *see also Local Competition Order, supra* note 7, para. 1225 (stating that final decisions relating to access will be resolved by the Commission expeditiously). The seventy-five day period proposed herein would grant municipalities an extra thirty days over the period allowed for pole attachment denials. Under this approach, municipalities would have a reasonable amount of time to review rights-of-way applications, but would not be able to unreasonably delay access to new telecommunications providers.

137. Such arbitration is already prescribed by the 1996 Act and widely used in cases where carriers fail to agree on terms for interconnection agreements. *See* 47 U.S.C. §252(b)(1) (stating that a carrier or any other party to the negotiation may petition a state commission to arbitrate any open issues resulting from an interconnection request "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation); *see also* 47 U.S.C. § 252(e)(5) (mandating that the FCC assume the responsibility of the state commission under this section with respect to the proceeding or matter and act for the state commission if such commission does not assume responsibility for interconnection arbitrations or approvals). Cases that state commissions refuse to arbitrate or review could be referred to the FCC, which could then ostensibly refer them to the Enforcement Bureau. In addition, the amendment to Section 253 should also state that cases referred to state commissions or the FCC should be resolved in a timely fashion, such as ninety days.

138. To adopt the three-pronged solution advocated in this Article, revised Section 253(c) should read as follows:

(c) STATE AND LOCAL GOVERNMENT AUTHORITY State and local governments may manage the use of public rights-of-way by telecommunications providers, provided that:

(1) Compensation for use of the public rights-of-way must be limited to the direct, actual cost a state or local government incurs in managing the public rights-of-way. These costs may include:

- (A) registering rights-of-way occupants pursuant to a registration or application process;
- (B) verifying public rights-of-way occupation;
- (C) inspecting job sites and restoration projects;
- (D) restoring work inadequately performed after providing notice and opportunity to correct the work; and

likely spur more stable investment and development in the facilities-based telecommunications market.¹³⁹ Most importantly, this change would likely spur development of competition in the small business and residential market, which have been largely shielded from competition thus far due to the enormous cost of rights-of-way access.¹⁴⁰

B. The FCC Should Create a Rights-of-Way Access "Rocket Docket"

As detailed above, the best response to municipal rights-of-way access barriers would come in the form of a wholesale revision of the rights-of-way access provisions of Section 253.¹⁴¹ In the absence of congressional action, however, the FCC can at least take steps to minimize municipal delay by administratively creating a fast-track "rocket docket" in the FCC's Enforcement Bureau. This regulation could be modeled on the statutory solution suggested above that could resolve rights-of-way access disputes between providers and municipalities.¹⁴² The "rocket docket" could

(E) administering a reasonable restoration ordinance that ensures that a telecommunications provider adequately restores the affected rights-of-way to its original condition.

(2) applications or registrations by telecommunications providers shall only request information related to the direct physical occupation of the rights-of-way, such as the current name, address, and telephone number of a company contact, maps or other information indicating the current location of facilities, current evidence of insurance and bonding, and current evidence that a provider has registered with an underground utility locator service.

(3) state or local governments shall approve or deny application for use of the public rights-of-way by telecommunications providers within seventy-five days of receipt of a written request, along with any additional information required pursuant to subsection (b). In the case of a denial, the telecommunications provider may appeal to the Commission, which shall issue an order preempting the municipality within sixty days of the receipt of a complete Petition for Preemption if it finds a violation of subsection (a) or (b). Upon written notification to the Commission, a state commission may assume the above responsibilities, provided that the state commission resolve such disputes within sixty days of the receipt of a complete Petition requesting preemption of a state or local law, regulation, or ordinance.

139. See *ALTS Analysis*, *supra* note 2, at 12 (stating that in order "to further bolster investor confidence, Congress must act to correct the market place failures that are standing in the way of full, effective competition and preventing the full intent of the Act from being realized").

140. See *id.*

141. See *supra* Section V.A. (detailing possible revisions to Section 253 of the 1996 Act).

142. A number of CLECs have suggested the creation of such a review process within the FCC's Enforcement Bureau. See, e.g., *ALTS Reply Comments*, *supra* note 72, at 27-29 (urging the FCC to adopt an expedited review process for violations of Section 253); *MFN Comments*, *supra* note 31, at 32 (stating that the FCC should clarify that the Enforcement Bureau has jurisdiction over Section 253 issues and make the escalated dispute resolution

take cases where a municipality and telecommunications provider have negotiated in good faith for at least seventy-five days, but failed to reach an agreement on terms.¹⁴³ Once submitted, complaints would be reviewed and resolved in a period not to exceed ninety days.¹⁴⁴

The creation of such a "rocket docket" at the FCC has been urged by a number of competitive carriers over the last year.¹⁴⁵ Its creation, at least in the interim, would give facilities-based telecommunications carriers an option other than expensive and time-consuming litigation for pursuing disputes.¹⁴⁶

VI. CONCLUSION

The 1996 Act held out the promise of a deregulated, competitive telecommunications market that offered business and residential customers a wide variety of telecommunications services at lower prices than those offered by monopoly telecommunications providers. Unfortunately, six years after the passage of the 1996 Act, that promise has not been fulfilled, mainly because competitors cannot gain the rights-of-way access necessary to construct next-generation telecommunications networks. In order to finally unleash the promise of the 1996 Act, Congress must act to amend Section 253 to set a national rights-of-way access standard that will allow new market entrants fair, reasonable, and nondiscriminatory access to the public rights-of-way throughout the United States.

process, "rocket docket", available for these matters as well as informal mediation by the Enforcement Bureau staff); *see also* Steve Rosenbush & Peter Elstrom, *8 Lessons from the Telecom Mess*, BUS. WEEK, Aug. 13, 2001, at 66 (urging the creation of a more effective arbitration process at the FCC for disputes).

143. This provision roughly mirrors the provision advocated for a statutorily created "rocket docket". S. CONF. REP. NO. 104-230, at 1 (1996).

144. *Id.* (noting the FCC's expedited review procedures for pole attachment disputes); *see also* 47 C.F.R. §1.730(a) (2000) (detailing an accelerated docket for complaints lodged by a carrier against another carrier).

145. *See, e.g.*, ALTS Reply Comments, *supra* note 72 (noting that several CLECs have urged the creation of a rocket docket to resolve rights-of-way disputes).

146. Although Section V.A. of this Article advocates that Congress expressly mandate that the FCC create an expedited resolutions procedure for rights-of-way disputes, the FCC already has the broad power to create such a mechanism on its own motion pursuant to Section 253(d) of the 1996 Act. *See* 47 U.S.C. §253(d) (stating that if the FCC determines that a state or local government has imposed any barrier to entry the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency). Congressional action imposing a firm deadline for FCC action in such cases, however, would likely make the process much more effective.

