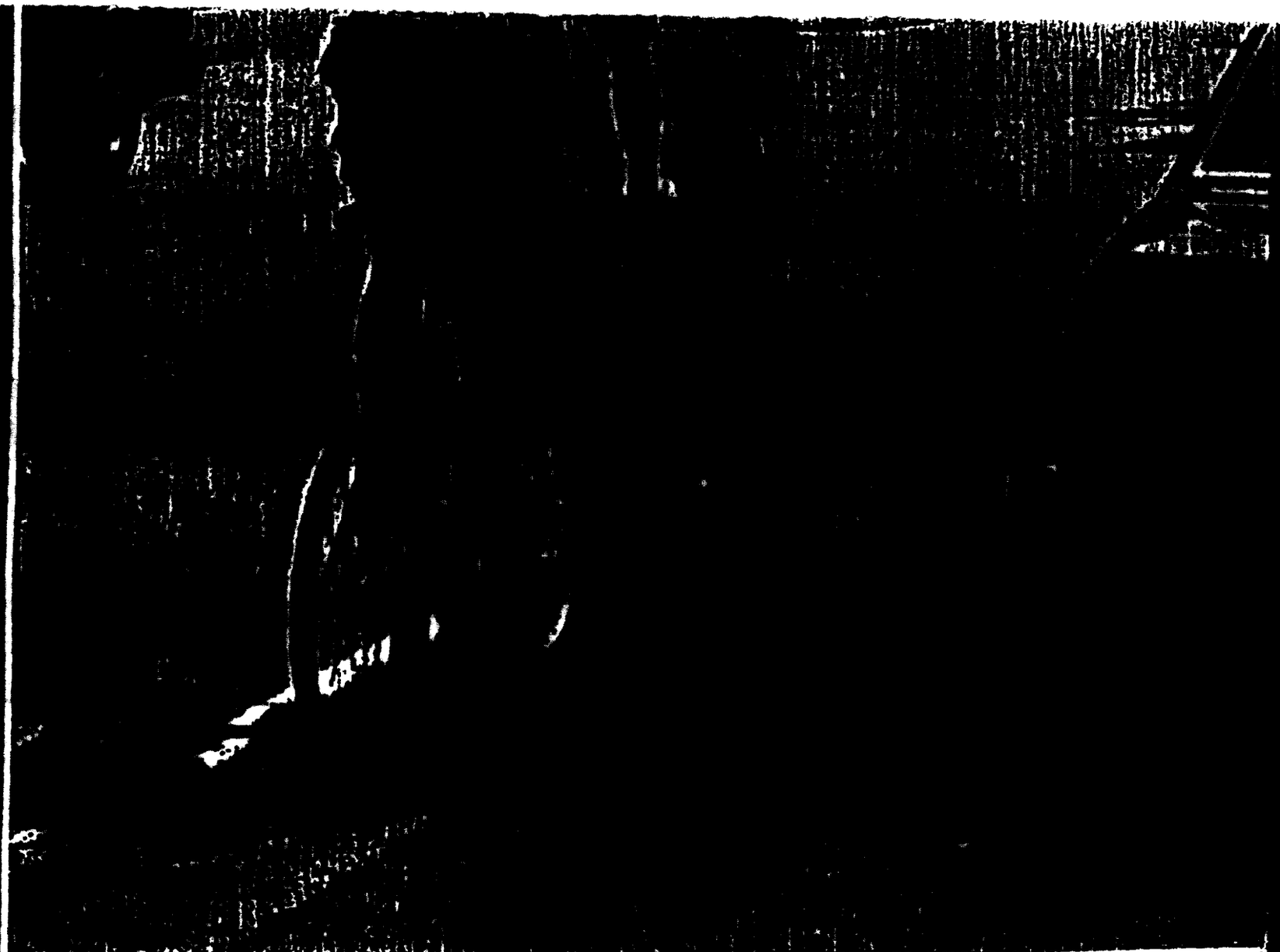


WASHINGTON, D.C.

Three months ago a private line fiber optic company attempted to patch a three-block long cut they had made in the middle of 17th Street, N.W. between G and Eye Streets. The company left a steel rebar sticking up into the street and has no plans to properly fix the street with permanent materials. Although the District bears the burden of permanently repairing the street, the District does not currently have the financial resources to make the necessary repairs. The steel rebar remains.

SAN FRANCISCO
Steam Pipe Explosion

Recently, a telecommunications company ruptured a steam pipe underneath a downtown office building. Steam released from the pipe shot up through an open elevator shaft that led to the building's top floor. Once the steam hit the top floor, it blew out several windows in the building, melted thousands of dollars in business equipment, and caused extensive damage to the building. Had the explosion occurred during the day, hundreds of people would have been scalded. There have been over a dozen similar explosions within the last twelve months.

KINGSVILLE, TEXAS
Competitor's Fiber Damaged

A contractor laying cable for a major long distance company damaged two fiber cables providing services for customers of three other common carriers. The contractor claimed the damaged cables were outside of the designated location in the right of way, but offered no explanation as to why the new cable was also being installed there.

ATLANTA, GEORGIA
Safety Violations Resulted in Two Deaths

After an investigation of a utility trench cave-in that killed two workers, a safety commission ruled that the construction contractor did not have an adequate safety program, adequate training on excavation safety, adequate instruction on confined space hazards, a competent person to oversee the trench as required, or an excavation protective system in the trench.

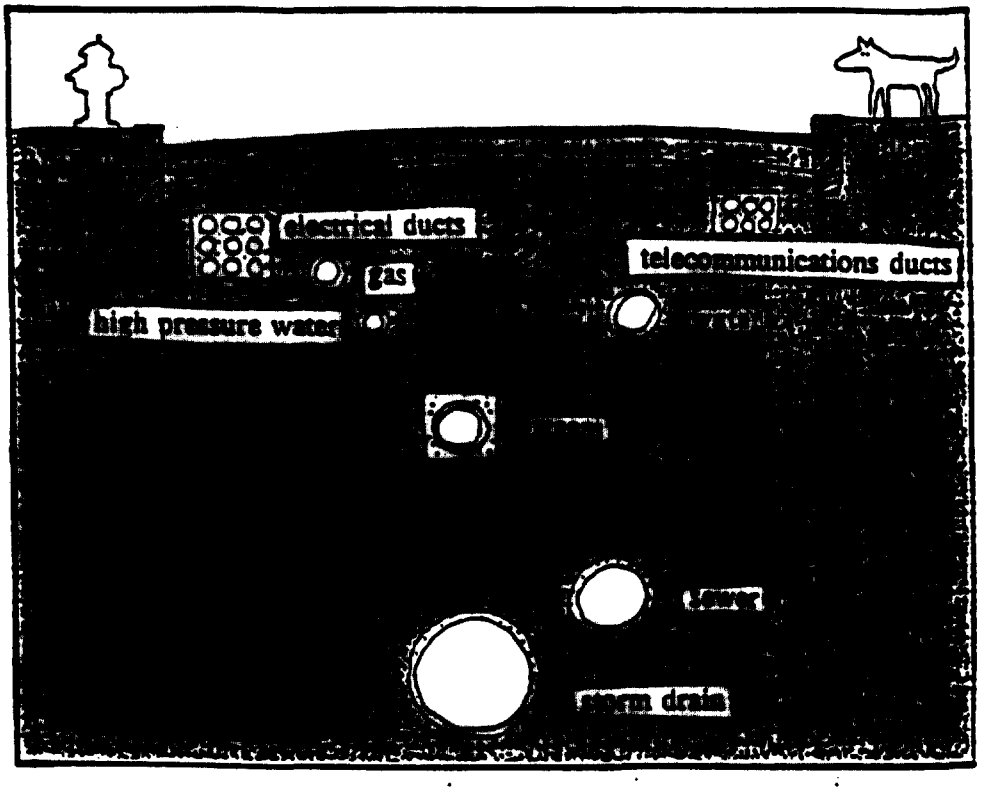
BATAVIA, NEW YORK
Telephone Service Cut for Entire City

Telephone service to the entire city was cut when a construction crew severed the main telephone cable serving the town, Phone crews had to work through the night to repair the line, and service was not restored until the next day.

RIGHT OF WAY
MANAGEMENT ESSENTIALS

There are many factors that local government must address in its role as trustee and landlord of the public rights of way, including: obtaining proof of compliance with all electrical, construction, and engineering standards; coordinating road cuts, facility locates, and map updates of multiple users; assigning short-term road repair responsibilities; and setting long-term road maintenance goals. Local governments uses standard right of way management procedures to protect the facilities of all right of way occupants while continuing to meet its historical mandate to develop safe and efficient streets and sidewalks.

IDEAL UTILITY LAYOUT

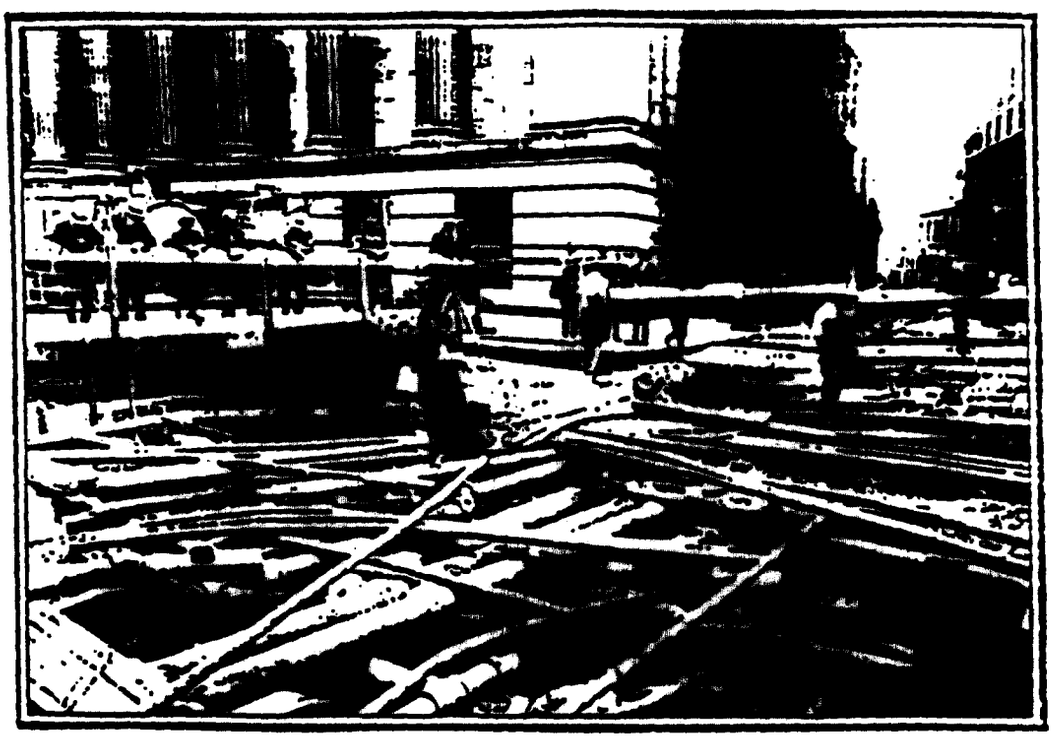


When a new street is being laid out, each utility is given a specific location according to a master plan. The sewer and storm drain are located farthest down and approximately under the center of the street. Above them is the steam system, which needs at least six feet of soil above it because of the high temperatures it produces. Closer both to the surface and to the sides of the street are the water and gas pipes, while just two feet below the surface are the electric and telephone cables.

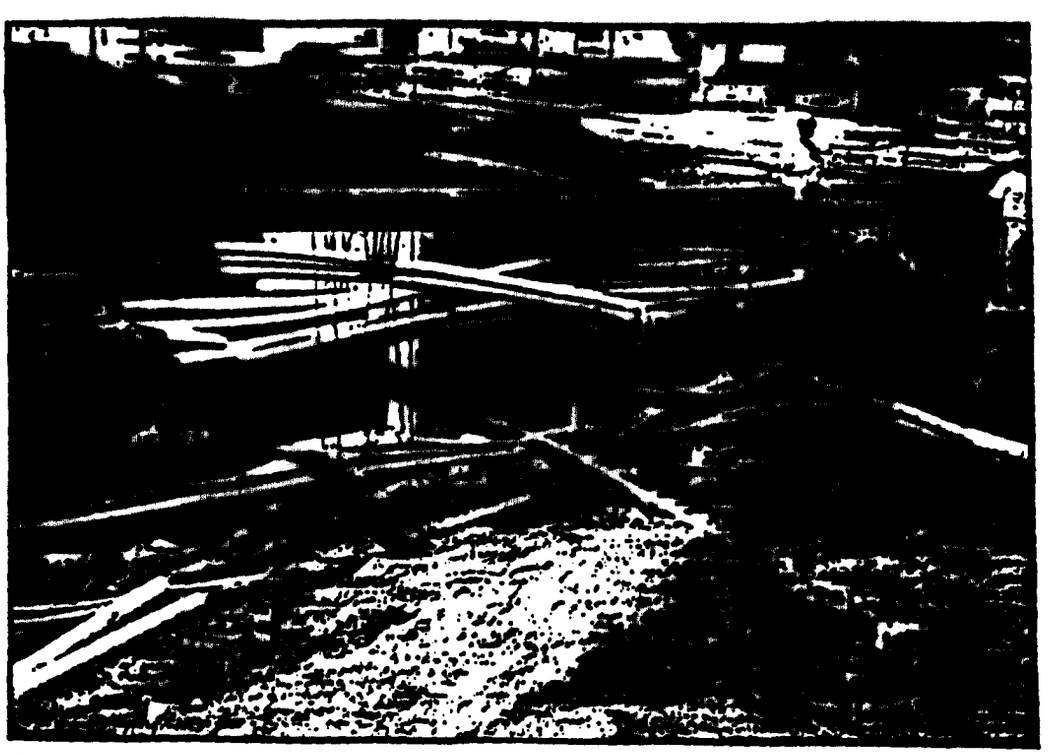
It is very rare that a new street can conform completely to this ideal plan. Most underground systems have grown gradually and randomly over many years and since the problem is usually to increase or replace what already exists, it is often necessary to squeeze things in wherever they will fit.

UNMANAGED VS. MANAGED
Then vs. Now

Source: *St. Paul, Telecommunications Task Force Report, March 1995*



New York City underground utilities, 1917 – Prior to effective management processes.



St. Paul, MN street – <u>One</u> telecommunications provider's managed facilities.

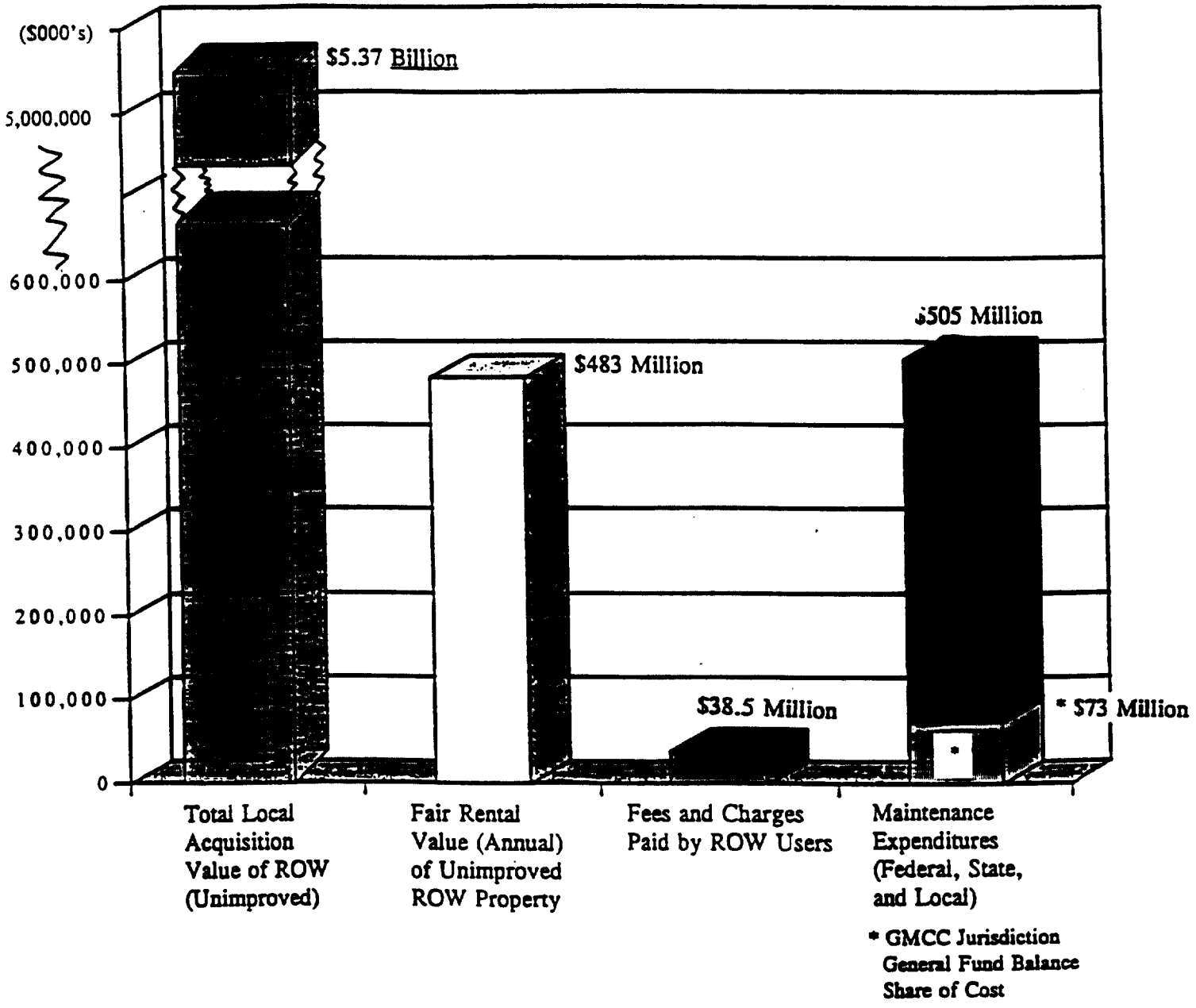
DIRECT AND INDIRECT COSTS OF ENTRY INTO THE RIGHTS OF WAY

As more users seek to enter the rights of way, public safety concerns intensify and management costs escalate. With each additional entrant into the rights of way, local governments face increased road replacement costs. Local governments and citizens also face indirect costs such as increased travel time, loss of access and trade to local businesses, and increased noise pollution and visual intrusion. The rent occupants pay to local governments for the permanent use of the rights of way helps to defray only a portion of these costs. Without the ability to receive fair and reasonable compensation for the use of the public rights of way from all private users, local governments will be forced to raise taxes in order to cover the increased rights of way costs associated with telecommunications competition.

RIGHT OF WAY VALUE, COST, AND FEE COMPARISON

Source: Greater Metro Cable Consortium

Estimated Figures for the Denver Metro Area



Acquisition Value: Extrapolated from actual property acquisition costs in representative cases.
Fair Rental Value: 9% of Acquisition Value. Based on estimates from regional property valuation experts.
Fees and Charges: Annual revenues received from private, permanent users of the rights of way.
Maintenance: Local costs estimated from actual rights of way maintenance budgets of local jurisdictions.

As this graph indicates, the taxpayer-funded rights of way acquisition and maintenance costs dwarf the relatively small contribution of private occupants of the public rights of way. Competition in the telecommunications market will necessarily force these costs to increase.

Without the ability to charge all users fair and reasonable rent for the use of public property, local governments will be forced to raise taxes to cover these increased costs.

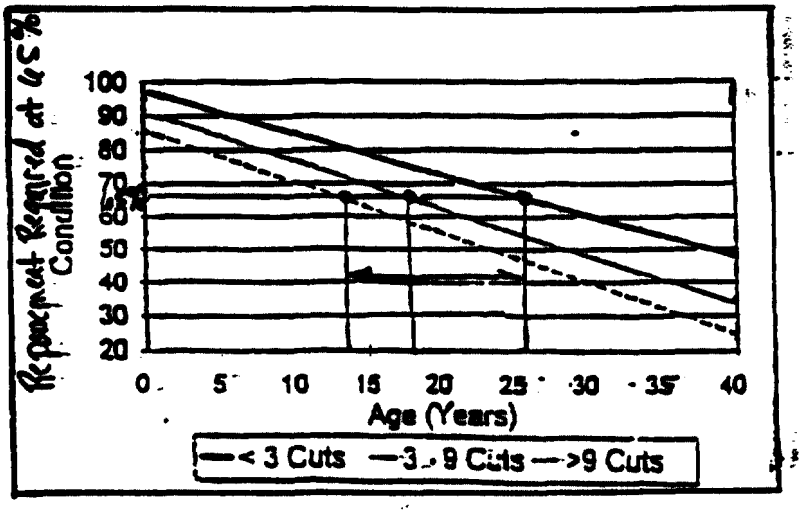
DIRECT COSTS OF MULTIPLE STREET CUTS

Direct Costs of Utility-Related Road Work

- Excavation and Backfill.
- Pipe and Pipelaying.
- Pavement Reinstatement.
- Temporary Utility Service Diversions.
- Traffic Diversions and Traffic Control.

Courtesy: Dr. Raymond L. Sterling, University of Minnesota, Indirect Costs of Utility Placement and Repair Beneath Streets, August 1994.

Utility Cuts Dramatically Reduce the Useful Life of a Street



Streets with 3-9 utility cuts are expected to require re-surfacing every 18 years. This represents a 30% reduction in service life relative to streets with less than 3 cuts.

Streets with more than 9 cuts are expected to require re-surfacing every 13 years. This represents a 50% reduction in service life relative to streets with less than 3 cuts.

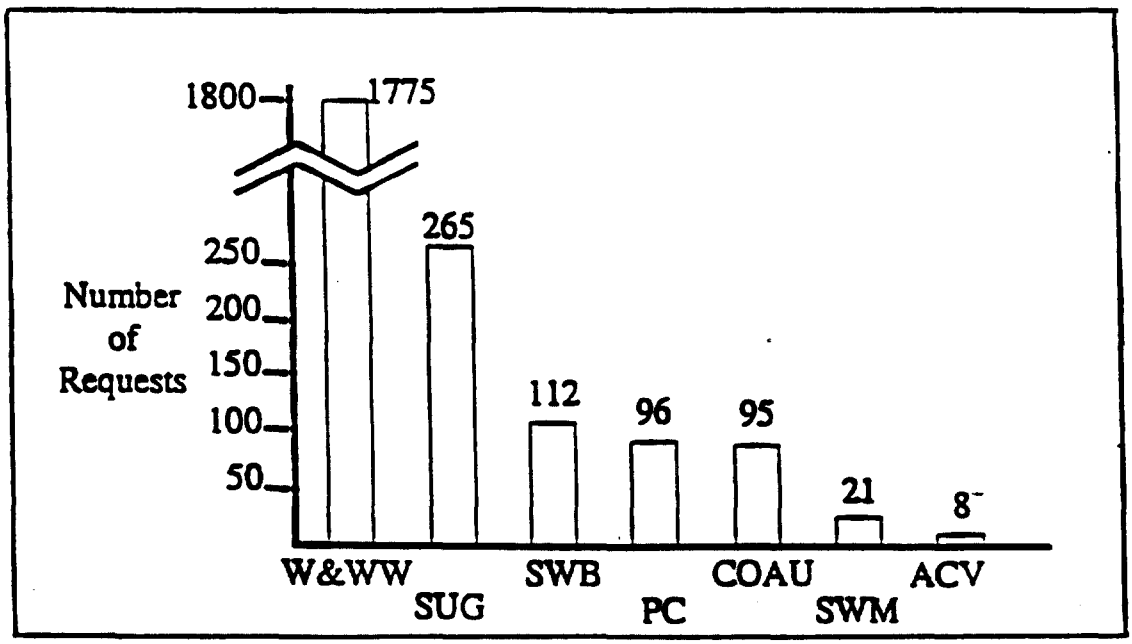
Courtesy: City of San Francisco.

CAUSES OF STREET LIFE REDUCTION

WASHINGTON, D.C., 17th & Eye Streets, N.W.
Even if this street cut had been permanently repaired, several factors will work together to reduce the life of the street. Among them are the early sinking of the cut due to its weaker, less compact structure, the immediate loss of pressure (and therefore strength) in the street due to the existence of the weaker fracture, and the expansion of cracks along the edge of the cut into which water can drain, eventually freeze and expand.

VOLUME OF STREET CUT REQUESTS

FY 1994 Street Cut Requests in Austin, Texas



Courtesy: City of Austin, TX. W&WW: Water and Wastewater; SUG: Southern Union Gas; SWB: Southwestern Bell; PC: Private Contractor; COAU: City-Owned Power Company; SWM: Stormwater Management; ACV: Austin Cablevision

INDIRECT COSTS AND IMPACTS OF STREET CUTS

Increased User Costs

- Increased travel time, reduced street network availability and capacity.
- Increased pavement roughness.
- Increased vehicle maintenance and fuel costs.

Economics

- Loss of access and trade to local businesses.

Safety Considerations

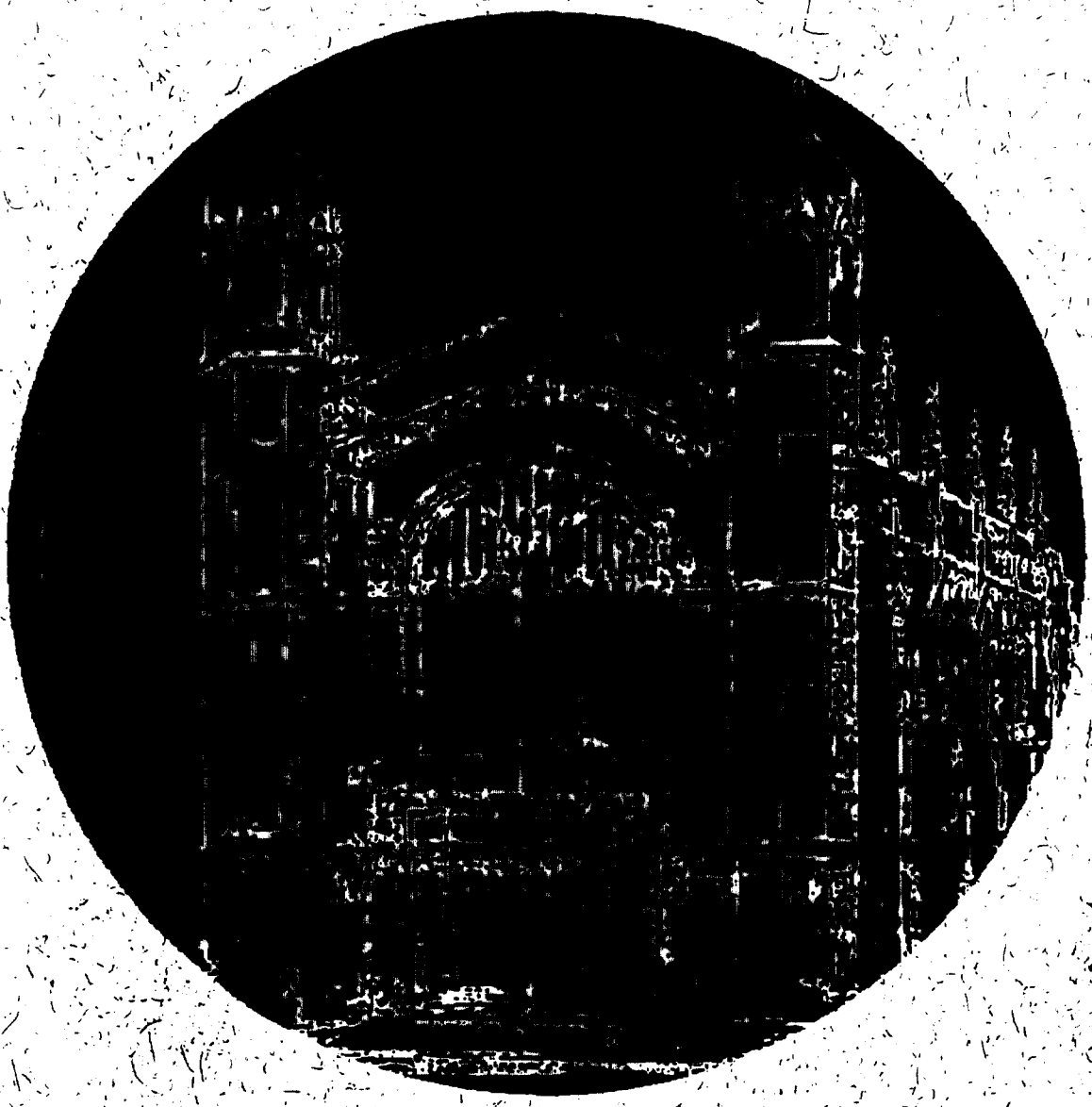
- Increased vulnerability to accidents for workers, pedestrians, and motorists.

Environmental Impacts

- Increased noise and air pollution from idling vehicles.
- Increased construction material disposal.
- Increased visual intrusion.

Courtesy: City of Austin and Dr. Raymond L. Sterling, University of Minnesota, Indirect Costs of Utility Placement and Repair Beneath Streets, August 1994.

Michigan
Telecommunications and Technology Law Review



THE INFORMATION HIGHWAY MUST PAY ITS WAY THROUGH CITIES: A DISCUSSION OF THE AUTHORITY OF STATE AND LOCAL GOVERNMENTS TO BE COMPENSATED FOR THE USE OF PUBLIC RIGHTS-OF-WAY

Clarence A. West

95 MICH. TEL. TECH. L. REV. 2

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Comments about this article should be sent to mttlr@umich.edu.

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

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

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

local public property, the Kentucky Court of Appeals, citing several previous United States Supreme Court cases, stated:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress . . . conferred on the defendant [telecommunications company] no right to use the streets and alleys of the city . . . which belonged to the municipality.[2]

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

I. THE WELL-SETTLED LAW

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

[¶3] As mentioned above, it has long been a well-settled legal concept that local governments may receive reasonable rental compensation from private commercial entities for their

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

use of local public property for private economic gain.[3] Local governments' regulatory authority over their rights-of-way usually emanates from state constitutional or statutory authority granted to cities.[4] In most states, the state itself initially has title and authority to regulate the public streets and rights-of-way, as the property is dedicated for public use.[5] A majority of states delegate the authority to municipalities by statute, while a minority of states grant franchises to the telecommunications provider directly.[6] While the majority of states do allow cities to be compensated, several do not.[7] The statutory law in each state regarding the city's authority to grant franchises should be reviewed in detail as to the extent of that authority and any limitations on it.

[¶4] A city-wide street franchise is a special kind of contract granted by a municipality. It is a contract that gives the city's permission to a private company--a franchisee--to use the public streets and rights-of-way for private economic gain.

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

[4]10A EUGENE MCQUILLIN ET AL., THE LAW OF MUNICIPAL CORPORATIONS § 30.39.10 (3d ed. 1990).

[5]10A *id.* § 30.39.

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

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

The franchisee pays the city for the use of the public streets in the form of franchise fees. These franchise fees that are paid to a city as compensation for using the public streets are sometimes called "street rentals"--they are not taxes.[8] A franchise fee is the consideration paid for the rights granted by the franchise, and serves as compensation for use of the public property.[9] The payment of franchise fees is a contractual obligation of the franchisee.[10]

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

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

[¶6] The law in this area arose primarily in the late 1800s and early 1900s through the United States Supreme Court's

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

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

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

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

interpretations of federal legislation passed in 1866 to assist the infant telegraph industry.[12] The same legal principles, as established in those cases, are still cited as they apply to cable television companies' contemporary use of local public rights-of-way.[13]

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

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

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

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

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

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

appropriate the public property of a State."[17] The Court went on to say:

> No one would suppose that a franchise from the Federal government to a corporation . . . to construct interstate . . . lines of . . . communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . . . [T]he franchise . . . would be . . . subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. . . . [I]t is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the State.[18]

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

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

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[17] *Id.* at 100.

[18] *Id.* at 100-01.

[19] *Id.* at 105.

[20] 149 U.S. 465 (1893).

[21] *Id.* at 470.

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

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

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[22]224 U.S. 160 (1912).

[23]*Id.* at 169. The last significant case of this series was in 1919, in which the Court tersely disposed of the issue of compensation. In *Postal Tel.-Cable Co. v. City of Richmond*, the Court concluded: "Even interstate business must pay its way--in this case for its right-of-way and the expense to others incident to the use of it." 249 U.S. 252, 259 (1919).

[24]458 U.S. 419, 428 (1982).

[25]*Id.* at 438-40.

[26]*Id.* at 438 n.16.

on whether the volume of space it occupies is bigger than a bread box."[27]

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

II. CURRENT ISSUES FACING THE WELL-SETTLED LAW

A. *Contemporary Constitutional Issues Concerning Franchise Fees*

[¶12] The Cable Communications Policy Act of 1984[30] (the "1984 Cable Act") has provided the overriding guidance as to cable television franchises and franchise fees.[31] One item the

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[27] *Id.* This same thought was expressed another way in Southwestern Bell Tel. Co. v. Webb, 393 S.W.2d 117 (Mo. Ct. App. 1965). The telephone company argued that the placement of telephone cable on the private landowner's property did not give rise to compensation as "'not one single iota of defendant's land was actually taken.'" *Id.* at 121 (quoting appellant's final complaint). To that argument, the court tersely replied: "If no land has been taken, where is the cable?" *Id.*

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

[29] 10A EUGENE MCQUILLIN ET AL., THE LAW OF MUNICIPAL CORPORATIONS § 30.39.10 (3d ed. 1990).

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

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

1984 Cable Act made clear was a federal mandate for a local franchise.[32]

[¶13] The 1984 Cable Act and the Cable Television Consumer Protection and Competition Act of 1992[33] (the "1992 Cable Act") (collectively, the "Cable Act"),[34] as did the FCC regulations[35] before them, expressly provide that compensation be paid to the franchising authority for the use of the local public property.[36] The Cable Act permits up to 5% of the cable operators' revenues as a franchise fee.[37] Absent this 5% compensation, the constitutionality of any mandated use of the public rights-of-way could be called into question, in light of *St. Louis v. Western Union Tel. Co.*[38] and its progeny, including *Loretto v. Teleprompter Manhattan CATV Corp.*[39]

[¶14] A number of cases comment on the possible violations of the Takings Clause that might arise under section 541(a)(2) of

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

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

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

[35]47 C.F.R. § 76.31 (1983).

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

[37]47 U.S.C. § 542(b) (1988).

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

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

the Cable Act[40] if it were construed as mandating access to non-publicly dedicated easements and rights-of-way.[41] All of these cases discuss the takings issue in the context of a physical taking. Therefore, any physical taking in the use of public properties by additional equipment or lines would violate the Takings Clause as interpreted by *Loretto* and the aforementioned line of cases.

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

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

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

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

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

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

[¶18] Telephone franchisees or telephone service providers have argued in the past that cities and states violate the Commerce Clause of the U.S. Constitution when they impose state

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

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

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

[45] 710 F. Supp. 1559, 1568-78 (N.D. Cal. 1988).

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

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

B. *Advances in Technology*

[¶19] Perhaps the more difficult issue is whether the current franchise grants the right to provide additional services, which are now technically available, or whether the franchise restricts the provided services to those expressly or technologically available at the time the franchise was granted. That, of course, will depend on the exact language of the franchise and the state law on construction of those contracts. It should be noted that in most states, as franchises are privileges granted by the governing authority, they are construed to the benefit of the City and against the franchisees.[50] One other variable is

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

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

[49]*Id.* at 262-63.

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

whether the new technology or service involves an additional physical taking of property or if additional lines are needed to provide the services; i.e., whether there are additional burdens on the estate which alter the magnitude of the servitude on the property.

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

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

[52] *Id.* at 774-75.

[53] *Id.*