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ATTACHMENT D

Bell Atlantic-Maryland v. Prince George's County, CA JFM-98-CV-4187, Memorandum in Support of Defendants' Motion to Dismiss, United States District Court for the District of Maryland, January 26, 1999

Prince George's County v. Bell Atlantic-Maryland, CA 99-1784, Brief for Prince George's County, United States Court of Appeals, Fourth Circuit, August 2, 1999

Comments of the National League of Cities, et al., Implementation of Section 302 of Telecommunications Act of 1996 (OVS) CS Docket No. 96-46, April 1, 1996

In the Matter of TCI Cablevision of Oakland County, Petition for Declaratory Ruling, Joint Motion to Dismiss or Deny, CSR-4790, September 4, 1996

Legislative History of Rights-of-Way Provisions in the Telecommunications Act of 1996, filed in *TCI v. Troy*, CSR-4790, December 13, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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BELL ATLANTIC—MARYLAND, INC. Plaintiff, vs. PRINCE GEORGE'S COUNTY, MARYLAND, et al., Defendants.	Civil Action No. JFM-98-CV-4187

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

Bell Atlantic's complaint seeking to bar the application of the County's ordinance to the company should be dismissed with prejudice. The challenged provisions of the ordinance fall within the police powers of the County and within the County's proprietary rights.

The telephone company's attempt to bar application of the ordinance to it by a claim to prior vested franchise rights should be rejected. No prior franchise blocks the County's reasonable exercise of its lawful police powers. No prior franchise blocks reasonable rental compensation for use of the public's property. A consistent line of cases in the Maryland Court of Appeals indicates that any Bell Atlantic prior rights are subject to the condition that the company pay rental compensation for occupying the County's rights-of-way.

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I. THE COUNTY'S ORDINANCE LAWFULLY IMPLEMENTS COUNTY AUTHORITY OVER ACTIVITY IN THE PUBLIC RIGHTS-OF-WAY.

The Court should reject the premise of Bell Atlantic's arguments. The County is properly regulating Bell Atlantic's activities. And the Court should explicitly reject the implicit, but real point Bell Atlantic hopes to win — free use of the public's property in perpetuity. To get this result, Bell Atlantic claims the County is preempted several different ways by federal and state law, and by pre-existing grants from the State to Bell Atlantic and from the County to Bell Atlantic. The court has the opportunity to resolve these claims finally and completely, and to endorse the County's reasonable efforts to protect the public's safety in the rights-of-way while collecting reasonable rent for Bell Atlantic's occupancy of that property for its own private proprietary purposes.

A. The County's Ordinance Is A Necessary And Appropriate Response To Changing Conditions In The Telecommunications Market.

The County's new right-of-way ordinance is a necessary and appropriate response to the radical new changes in the uses of the public rights-of-way for telecommunications. These changes result from technologically driven developments in the marketplace and from the Telecommunications Act 1996, signed by the President on February 8, 1996 ("Federal Act"). The Federal Act is intended to foster competition among competing providers as a substitute for

the long tradition of regulated monopoly in the telephone industry.[1] The County Ordinance is totally consistent and cognizant with the Federal Act and its purposes.

The Federal Act contemplates the augmentation of competition through the entry of multiple providers. The AT&T Divestiture Decree[2] introduced hundreds of competitors into the market for long distance telephone service.[3] In the 1996 Federal Act, Congress sought to facilitate the entry of multiple competitors into the market for local exchange telephone service.

One important provision in the Federal Act is at the heart of this current dispute. Section 253 (Removal of Barriers to Entry) of the Federal Act, 47 U.S.C. § 253, preempts in subsection (a) any

> State or local statute or regulation, or ... legal requirement, [that] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications *service*.

In short, Congress intended that any entity should freely enter the market for local telephone service, uninhibited by any entry restriction imposed by a state or locality. Maryland, similarly, has encouraged multiple providers of intrastate telecommunications services.

At the same time, Congress distinguished "entry" from free or unregulated access to public rights-of-way. Congress, of course, realized that the FCC alone could not practicably supervise all the local rights-of-way, so it very carefully preserved from preemption by

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[1] The 1996 act is entitled An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. 110 Stat. 56.

[2] U.S. v. Western Electric, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. U.S., 460 U.S. 1001 (1983).

[3] The FCC lists 3,604 interstate telecommunications carriers in its current annual carrier locator report. See FCC press release, dated January 14, 1999, appended hereto as Attachment 1.

subsection 253(a) the independently existing property rights and duties of the non-federal governments. This it did in the subsection 253(c) (State and local government authority) "safe harbor":

> 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 public rights-of-way* on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

In other words, Section 253 has two important and balanced provisions. Subsection (a) applies to the provision of telecommunication services, and subsection (c) speaks to management and use of the public rights-of-way.

The County's ordinance is an expressly permitted vehicle for the County's management of, and receipt of compensation for multiple telecommunications providers' uses of the County's rights-of-way.

Bell Atlantic would set up as an obstacle to the implementation of this inter-governmentally integrated scheme the company's claim to a perpetual right in those rights-of-way vested in the company. As this memorandum will show under Point II, the law of Maryland does not recognize the company's claimed "rights" as *unconditionally* vested. Bell Atlantic's "rights" have always been subject to (1) the reserved and police powers of the State, whether exercised at the State or local level, and (2) an obligation to compensate the localities for such uses of their rights-of-way. See Board of County Commissioners of Garrett County v. Bell Atlantic—Maryland, 346 Md. 160, 174, 695 A.2d 171, 178 (1997), discussed in Point IV (B) *post*.

The County has *not* sought to evict Bell Atlantic or to interfere in any way with its operation of its telephone system. The County is merely seeking to obtain reasonable compensation and right-of-way management conditions that will be applied to everyone, including Bell Atlantic. These conditions are similar to those under which Bell Atlantic has lived in recent years.

This case, then, is about Bell Atlantic's attempt to use Prince George's County property for free – thus gaining a competitive advantage over its competitors. Bell Atlantic seeks to hold onto the privileges of the old monopoly regime, yet gain the benefits of the new competitive regime. The County, on the other hand, is seeking to bring Bell Atlantic into the modern world of telecommunications on a reasonably consistent basis with its competitors. A company that wishes to play in a competitive market cannot at the same time hold onto the old indicia of a regulated monopoly – including free use of the public rights-of-way, which is really what Bell Atlantic is seeking here. A century of free rent is enough.

B. The County Has Legislative Authority To Enact A Telecommunications Ordinance To Manage Its Public Rights-Of-Way And To Require Compensation.

As a Maryland home-rule county, Prince George's County has been given express statutory authority to issue franchises, and to receive compensation, for the use of public rights-of-way. This authority rests on the Maryland State Constitution, the County's home-rule poewrs, and the pre-existing State statutes authorizing Bell Atlantic to incorporate as a telephone company.

First, the Maryland Constitution, Article XI-A provides for home-rule for counties in Maryland. This Constitutional Amendment was ratified in 1915. It gave counties the option of

adopting a charter form of local government. In 1918, the General Assembly enacted the Express Powers Act, which defined the scope of the legislative powers that charter counties were granted by the State. Laws of Maryland 1918, ch. 456.

In 1970 Prince George's County adopted a charter form of government. Thus, as a home-rule county, it may exercise all the powers given it by the state legislature as set forth in the Express Powers Act, Article 25A, Section 5, of the Annotated Code of Maryland 1957, as amended. Relevant to this dispute, Section 5 (B) of Article 25A grants to the County the *power to franchise* for the protection of the public rights-of-way *and to lease county property*, as follows:

> (B) County Property and Franchises
>
> To provide for the protection of the county property; ... to grant any franchise or right to use the same, or any right or franchise in relation to any highway, street, road, lanes, alley or bridge; ... to provide for the leasing as lessor ... or to any person, any property belonging to the county or any agency thereof, in furtherance of the public purposes of such county or agency, upon such terms and compensation as said county may deem proper. ...

Even before home-rule Prince George's County was responsible for taking care of the public roads.[4]

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[4] Initially, Prince George's County was under the county commissioner form of government. Historically, county commissioners are outgrowths of the old levy courts which were composed of the justices of the peace of the several counties. Their duties were to meet and determine the necessary expenses of their counties and to impose an assessment or rate on property to defray county expenses. The name "county commissioners" was first recognized in the Constitution of 1851. When the Constitution of 1867 was adopted, Article VII, Section 1, provided that the powers and duties of county commissioners should be such "as now or may be hereafter prescribed by law." Until the Constitution of 1867, county commissioners were simply administrative officers in charge of county finances, and taking care of the public roads. After the Constitution of 1867 these powers could be broadened by legislative authority. Cox v. Board of County Comm'rs of Anne Arundel County, 181 Md. 428, 433-434, 31 A.2d 179, 182 (1943);

The 1904 Laws of Maryland, Ch. 591, Article 17, Code of Public Local Laws, Section 279, provided that matters affecting the public roads of Prince George's County were under the control of the Board of County Road Commissioners. Section 285 further provided that the Board of County Road Commissioners was to be considered the agent of the Board of County Commissioners and *that title to all public roads vested in the County Commissioners of Prince George's County.* Thus, in March 1904, when Bell Atlantic allegedly obtained a County franchise for the use of the County public roads for its aerial lines,[5] the management of the public roads was given to the Prince George's County Commissioners to oversee and fund.

Bell Atlantic's prior Maryland State grants of authority do not change this fact, and Bell Atlantic's own behavior ratifies this understanding of the County's authority.

The Southern Maryland Telephone Company was incorporated by the General Assembly of Maryland by 1904 Laws of Maryland, Ch. 353. Section 4 specifically provided that the company must first obtain the consent of the Board of County Commissioners before using both the "public or county roads" to provide its telephone services. That consent for aerial lines was obtained in May, 1905, from the Prince George's County Commissioners in much the same terms (Ord. 322).[6] In 1953, the State amended the Laws of the County, to specifically grant the authority to the Board of County Commissioners "to grant franchises as provided under existing Public General or Public Local Laws."[7] This law confirmed the authority that the Prince

City of Bowie v. County Comm'rs for Prince George's County, 258 Md. 454, 461-462, 267 A.2d 172, 176 (1970).

[5] Ordinance 282 (Exhibit 5 to Plaintiff's Complaint).

[6] The statutory obligations of the Southern Maryland Telephone Company, have been assumed by Bell Atlantic, as successor to the Southern Maryland Telephone Company.

[7] The Laws of Maryland 1953 at Ch. 710 amended Article 17, Section 381 of the Code of Public Local Laws of Prince George's County as indicated.

George's County Commissioners had previously exercised over the care and management of its public roads.[8]

Bell Atlantic concedes that right-of-way permitting should be "consistent with the public's health, safety, and welfare." (Pl. Complaint, Whereas Clause (iii) to Count I). This has been a condition to Bell Atlantic's use of the County roads since at least 1904.[9] Ordinance CB-98-1998 amplifies the County's management of its rights-of-way and provides for the receipt of compensation for the use of public rights-of-way by telecommunications providers in the new competitive era. Bell Atlantic is subject to this police power authority of the County to manage the public rights-of-way.

C. The County Properly Implemented Its Rights-Of-Way Authority In Ordinance Cb-98.

Implementation of the County's ordinance comports with applicable federal and state laws.

1. The County Law Establishes a Comprehensive Plan for Reasonable Access to the Public Rights-of-Way by All Telecommunications Providers.

The 1996 Federal Act makes it imperative for a community to set up a comprehensive arrangement for telecommunications providers' use of the public rights-of-way. The goal of

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[8] The County's present permitting ordinance for roads and sidewalks is found at Subtitle 23, Sections 23-101, et seq., "Roads and Sidewalks" of the Prince George's County Code, 1995 Edition and has been the County's vehicle for right-of-way management and the permitting process. The permitting ordinance for Roads, Subtitle 23, remains in force, unchanged by Ordinance CB-98-1998.

[9] The County Commissioner's grant required the C&P Telephone Co. of Balt. City (and its successors) to locate the poles and wires so that they will not interfere with traffic or the use of said road by the public, nor with the safe condition in which said County Commissioners are bound by law to keep the public roads of said County. (Ordinance 282).

such an arrangement is to *enable*, not to *limit*, access to County business and residential customers of telecommunications providers.

The County's ordinance is not a prohibition against entry, and thus, is not preempted by Section 253(a) of the Federal Act. The ordinance, neither on its face, nor in its application, prohibits entry. The ordinance merely implements an optional process for entry. The County ordinance encourages *competitive* entry. It strives not to give undue special advantage to any particular carrier, such as the incumbent, Bell Atlantic.[10]

While the County Council was reviewing and enacting the County law, the County took steps to allow telecommunications providers access to the public rights-of-way. It did so by entering into interim agreements, which were explicitly drawn to terminate upon the enactment of a general ordinance. This approach sought to preserve the goal of a comprehensive general arrangement, while enabling new entrants to enter the market as quickly as possible in the meantime.

Two companies – e.spire (ACSI) and Metricom – have been operating in the County's public rights-of-way under such agreements, since 1997 and 1996 respectively. Each has been paying a rights-of-way charge of five percent of gross revenues.

In addition, other companies have made inquiries as to the application process under the new ordinance since it was passed.

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[10] The fact that the County charges users reasonable compensation for the use of its property does not make this a limiting or restrictive ordinance, any more than Bell Atlantic is restricting commerce by charging *its* users a fair price for service.

Bell Atlantic, by contrast, has made no attempt to comply, or even to discuss with the County what compliance would involve. Instead, it brought this action.

2. The Ordinance is Consistent with Federal Law.

Contrary to Bell Atlantic's allegations in Count V of its Complaint, Section 253(c) specifically authorizes the County's regulation of the rights-of-way and reasonable compensation for the use thereof. The pertinent provisions of Section 253 are printed under Point I *ante* and in the statutory appendix to this memorandum.

The *prohibition* of Section 253(a) would not even come into play unless the County law were to prohibit entry. In Bell Atlantic's case, it is obviously inapplicable. Bell Atlantic is already there, and has made no showing that the County law would in some way force it out of the market – a truly implausible scenario.

Even if Bell Atlantic could somehow make a case under Section 253(a) that the County's ordinance would "have the effect of prohibiting entry," the County ordinance would fall outside subsection (a) by reason of the subsection (c) exclusion. The administrative provisions of the ordinance to which Bell Atlantic objects at paragraph 11(a), (c)-(l) of its Complaint, properly construed,[11] are merely part of the County's process of managing the public rights-of-way within the meaning of subsection 253(c). They are necessary regulations to a coherent system of right-of-way management accommodating multiple competitors on an even-handed basis. Bell Atlantic is not entitled to be preferred over its competitors in the management of the public rights-of-way. It is in Bell Atlantic's own long-term interest that the public rights-of-way be

[11] The characterizations of the Ordinance in paragraph 11 of Bell Atlantic's Complaint, on the whole, do not survive a careful comparison with the provisions of the Ordinance itself.

managed carefully to prevent premature exhaustion of a finite resource or disruption of pre-existing facilities by new construction activity.

As to the compensation provisions challenged in paragraph 11(b) of Bell Atlantic's Complaint, the Ordinance recognizes and protects Bell Atlantic's role in providing universal service to all parts of the County.[12] A substantial portion of Bell Atlantic's revenues will be exempted under the exclusion. Section 5A-154(c) of the ordinance excludes from the gross-revenue base to which the three percent right-of-way fee is charged, all revenues derived from universal telephone service. See Sections 214(e) (Provision of Universal Service) and 254 (Universal Service), 47 U.S.C. §§ 214(e), 254, added to the Communications Act by the Telecommunications Act of 1996.

3. The County's Ordinance is Consistent with Maryland Law.

The County Ordinance does not conflict with the role of the Maryland Public Service Commission or its enabling laws. See, Public Utility Companies Article of the Md. Annot. Code, Section 2-113. The Public Service Commission is a regulatory agency that is authorized to regulate the provision of telecommunications *services* and, to some extent, the prices Bell Atlantic charges for such services. The County Ordinance, in contrast, requires a franchise, governs Bell Atlantic's physical impact on the public rights-of-way and charges a reasonable rent for Bell Atlantic's use of these public resources.[13] The County's authority to franchise is a legislative grant of rights to occupy portions of the public grantor's rights-of-way. The Public

[12] Bell Atlantic fails to recognize this exclusion in its description in Complaint ¶ 11b.

[13] Bell Atlantic confuses these roles in Complaint at 7-8, ¶ 11d. Bell Atlantic erroneously claims that Bell Atlantic's "right to continue to operate as a telecommunications carrier" is threatened by the County law.

Service Commission may not grant a franchise, as that is a legislative function which may be granted only by the legislature or by a municipal corporation to which the power has been delegated. See Charles County Sanitary District v. Charles Utilities, Inc., 267 Md. 590, 598, 298 A.2d 419, 425(1973); cf. West v. Maryland Gas Xmission Corp. 162 Md. 298, 303, 159 Atl. 758, 763 (1932); Md. Const. Act. XI-A, § 2; Md. Annot. Code, Art. 25A, § 5 (1957), as amended. Cambridge v. Eastern Shore Pub. Svc. Co., 192 Md. 333, 339, 64 A.2d 151, 154 (1949). The regulatory authority of the Public Service Commission no more forbids the County from charging Bell Atlantic rent than it forbids a private landowner from charging Bell Atlantic rent to operate a central switching office or a business office on that landowner's property. Indeed, from the inception of the Public Service Commission in 1910, a condition of the Public Service Commission's issuance of a certificate of operating authority is that the carrier show that it has a franchise from the local authority.[14] The evolution of the Public Service Commission laws has not affected this rule.

II. THE COUNTY ORDINANCE LAWFULLY IMPOSES REASONABLE RENT CHARGES ON BELL ATLANTIC'S USE OF THE COUNTY RIGHTS-OF-WAY.

Bell Atlantic has no vested rights in the public rights-of-way in Maryland. Bell Atlantic's use of the public rights-of-way in Maryland has always been subject to reservations and conditions – express or implied. The County's Ordinance is an exercise by delegation of the State's police powers of the state. The State has reserved the police power as an express or implied term in every public grant. (See Glascock v. Baltimore County, 321 Md. 118, 122, 581 1.2d 835 (1990) (The Counties of Maryland are agencies and parts of the State.); Stone v.

[14] Section 5-201(b) of the Public Utility Companies Article.

Mississippi, 101 U.S. 814, (1880). The Act of 1884, on which Bell Atlantic principally relies, is subject to these same express reservations of sovereign power, which prevent unconditional vesting of any rights under the Act of 1884. Bell Atlantic's alleged "statewide perpetual franchise" is subject to compensation for use of the public rights-of-way. A long line of Maryland Court cases upholds this principle.

A. Bell Atlantic Does Not Hold An Unconditional, Vested Statewide Franchise Under the Act of 1884.

Bell Atlantic's incorporation in 1884 did not confer any vested rights on the Company.[15] Nor does the series of statutes that authorized Bell Atlantic's predecessors to enter the public rights-of-way. The Acts of 1868, Ch. 471, amended the provisions of the Telegraph Incorporation Act of 1852. These provisions, as amended, were applied to telephone companies by Acts of Maryland 1884, Ch. 360. Section 77 of Ch. 471 of the 1868 Corporation Act itself contained explicit reservations making inapplicable the Contract Clause doctrine[16] concerning contractual vested rights:

> [e]very corporation formed under the provisions of this article, shall be subject to any and all provisions and regulations which may hereafter, by any change in or amendments of the laws of the State, be made applicable to such corporation."

Bell Atlantic's 1884 incorporation is subject to this provision.

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[15] This proposition has been settled law in Maryland since at least 1918. In C&P Tel. Co. v. State Roads Comm'n., 132 Md. 194, 197, 103 Atl. 447, 448 (1919), the Court of Appeals rejected Bell Atlantic's contention that its incorporation under the 1884 law constituted a vested contract barring compensation.

[16] See, e.g., Fletcher v. Peck, 6 Cr. (10 U.S.) 87, 136-39 (1810) (Marshall, C.J.); Trustees of Dartmouth College v. Woodward, 4 Wheat (17 U.S.) 518, 712 (1819) (Story, J.); and New Jersey v. Yard, 95 U.S. 104, 111-13 (1877).

Article 3, Section 48 of the State Constitution continues this reservation to pre-existing corporate charters and allows the legislature the right to alter or repeal corporate charters.[17]

It is normal for federal and Maryland Courts to read all corporate contracts, such as franchises, as subject to these reservations. See Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 129 (1991); State v. Good Samaritan Hosp., 229 Md. 310, 319, 473 A.2d 892, 886 (1984), appeal dismissed, 469 U.S. 802 (1984). For example, Mr. Justice Holmes construed a similar corporate charter reservation as not being defeated by a contract the corporation might have entered into, viz.:

> The only question that we can consider is whether there is anything relevant to the present case ... that goes beyond the power that the charter expressly reserved.
>
> The charter provides that "The legislature may at any time hereafter amend or repeal this act." Laws of 1849, Act. No. 223, § 11. Now, in the first place, with regard to the reference in argument to the bondholders. ... By making a contract or incurring a debt the defendants, so far as they are concerned, could not get rid of an infirmity inherent in the corporation. They contracted subject, not paramount, to the proviso for repeal, as is shown by a long line of cases.... It would be a waste of words to try to make clearer than it is on its face the meaning and effect of this reservation of the power to repeal.

Calder v. Michigan, 218 U.S. 591, 598-99 (1910).

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[17] The earlier corresponding provision of the State Constitution of 1851, Article III, Section 47, reserved the right to alter or repeal general corporation laws "and special acts ... from time to time ...." See also, Constitution of 1867, Article 3, Section 48 for a similar provision. Thus only charters granted before the Constitution of 1851 are irrepealable or unamendable, creating vested rights. See State v. B&O, 127 Md. 4343, 96 Atl. 636 (1916); Hodges v. Baltimore Union Passenger Ry., 58 Md. 603 (1882) (upholding amendment of Charter under 1876 corporation law). Kelly v. Consolidated Gas Co., 153 Md. 523, 138 Atl. 487, 490-91 (1927) (finally and distinctly settled in this court and the U.S. Supreme Court).

The efficacy of such general statutory reservations against a charge of impairment of corporate charters in violation of Art. I, § 10, cl. 1, was recognized in decisions of the U.S. Supreme Court as early as 1869, in Home of the Friendless v. Rouse, 8 Wall. (75 U.S.) 430, 438 (1869). See also Calder v. Michigan, supra, at 599. The U.S. Supreme Court recently discussed at length the implied reservations of sovereign powers in contracts between sovereign governments and private parties in U.S. v. Winstar Corp., 518 U.S. 839 (1996). While the case was decided against the federal government by a 4-3-2 vote, accompanied by four opinions, there was no dispute among the Justices on the general principle that all contracts of a government carry with them an implicit reservation of sovereign powers, This can be negated only by express contractual provisions unmistakably negating the impliedly reserved right to modify. Id. at 871-79, 910, 920-21, 924-26.

The point of this review of old Maryland Statutes and related Supreme Court and Maryland case law is simple. The County, as successor to the State's sovereign police powers, has the right to impose general police power conditions on pre-existing, state-granted, corporate charters.[18]

Even if, *arguendo,* Bell Atlantic had a vested statewide franchise, the County law is consistent with a pre-existing Bell Atlantic franchise. The County law provides that a right-of-way user must *have* a franchise, must obey reasonable right-of-way rules, and must pay fair compensation. It does not say Bell Atlantic must *get* a new franchise from the County if it

[18] Those include the police powers delegated under Article 25A, Section 5(S), the Express Powers Act. A county is one of the public territorial divisions of the State, created and organized for public political purposes connected with the administration of state government, and specially charged with the administration and superintendence of the local affairs of the community. Glascock v. Baltimore County, 321 Md. 118, 122, 518 A.2d 822 (1990).

already has one.[19] Thus, the County's November 25, 1998 letter (Attachment 2) did not tell Bell Atlantic it had to get a franchise. It only advised Bell Atlantic that it had to be "in compliance with the Ordinance by January 4, 1999." Thus, even if the court should conclude that Bell Atlantic in fact has a pre-existing franchise from the state or the County, this would not conflict with the County's Ordinance. The County would treat such a pre-existing franchise as satisfying the basic requirement of a franchise and go on to apply the right-of-way management and compensation provisions to Bell Atlantic as conditions of that franchise. See Board of Comm'rs of Garrett County v. Bell Atlantic, 346 Md. 160, 174, 695 A.2d 171, 177 (1997), discussed below under Point IV(B).

B. The County is Entitled to Charge Bell Atlantic Rent for the Company's Use of the Public Rights-of-Way.

By statute antedating Bell Atlantic's franchise grant, title to the County's roads is in the County Commissioners as a corporate entity. 1904 Laws of Maryland, Ch. 591, Article 17, Section 285, Code of Public Local Laws. cf. Kelly v. Consolidated Gas Co., 153 Md. 523, 528, 138 487, 492. Where the County is owner of the fee, Bell Atlantic's rights under the 1884 Act "are ... nugatory and inoperative" against, and "subordinate to the property rights of the [County as] owner." C&P Telco v. MacKenzie, 74 Md. 36, 31 Atl. 690, 693, 28 Am.St.Rep. 219 (1891).

The County may require Bell Atlantic to compensate it for the company's use of the public rights-of-way in the company's private business for profit. The County's requirement for

[19] Contrary to Bell Atlantic's assertions in Complaint at 6-7, ¶ 11a; 8, ¶ 11e; 17, ¶ 39; Bell Atlantic's Memo in Support of Preliminary Injunction ("PI Memo") at 5. In fact, Section 5A-159(c) of the County law contemplates an application under the ordinance by an entity that *does* have "existing permits, licenses or franchises."

compensation is consistent with of the Act of 1886.[20] Section 129 of the 1886 Act implemented the sovereign police power of the State. Section 129 had a limited purpose to negate common law nuisance actions that would otherwise lie against telephone companies by reason of the companies' poles' obstructing public use of the roads. Section 129 does not explicitly or implicitly limit the County's right to compensation for use of the rights-of-way. The County's Ordinance at issue in this case relates to compensation, not sovereignty, over Bell Atlantic's use of the rights-of-way.

This point is significant and warrants further explanation. Section 129 of the 1868 Act parallels wording in the federal Post Roads Act of 1866. It is the Supreme Court that recognized the distinction between sovereign rights and proprietary rights in the Post Roads Act. This Supreme Court analysis of the Post Roads Act should similarly inform the Court, as the Supreme Court explains the scope of rights granted telephone companies in the Act of 1868, which is *in pari materia*:

Act of 1868	**Post Roads Act of 1866**
Sec. 129 ... [Telegraph corporations] may construct ... lines of telegraph through this State ... and along and upon any postal roads and postal routes, roads, streets and highways ...; provided, the same shall not be constructed as to incommode injuriously the public use of said postal roads or postal routes, roads, highways	Sec. 1 ... [A]ny telegraph company ... shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military of postroads of the United States...: *Provided,* That such lines of telegraph shall be so constructed and maintained as not to ... interfere with the ordinary travel

[20] Made applicable to telephone companies by Section 2 of chapter 360 of the Laws of Maryland (1884), printed as Exhibit 5 to Plaintiff's Motion for Preliminary Injunction as Section 136A of telegraph corporation law of 1868, printed as Exhibit 4.

	on such military or post roads. * * *

The interpretation placed on Section 1 of the Post Roads Act of 1866 by the U.S. Supreme Court is instructive in interpreting Section 5 of the Telegraph Act of 1868. Of the rights acquired by Western Union under the former Post Roads Act, 14 Stat. 221, the Court, speaking through Mr. Justice Holmes, said:

> That complaint [of a taking by City ordinance] opens the question of what property the appellant [telegraph company] has. The act of Congress of course conveyed no title and did not attempt to found one by delegating the power to take by eminent domain. Western Union Tel. Co. v. Pa. R.R. Co., 195 U.S. 540, 574. ... But except in this negative sense [of preventing the states from excluding the telegraph company or stopping its operations], the statute is only permissive, not a source of positive rights. The inability of the State to prohibit the appellant from getting a foothold within its territory ... gives the appellant no right to use the soil of the streets, even though postroads, as against private owners or as against the city .... St. Louis v. Western Union Tel. Co., 148 U.S. 92, 101 .... Richmond v. Southern Bell Tel. Co., 174 U.S. 761, 771....

Western Union Tel. Co. v. City of Richmond, 224 U.S. 160, 169 (1912). Applying this analysis to Maryland's 1868 Act, the 1868 Act is only *permissive* with respect to corporations and *not a source of substantive rights*. See also City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92-93 (1893), on rehearing, 149 U.S. 465 (1893) *post.*

This view of the 1868 Act is important to avoid unnecessary intrusion into important public proprietary rights. The ability of local governments to obtain compensation for use of their streets has long been recognized by the courts. "It is more in the nature of a charge for the use of property belonging to the city–that which may properly be called rental." It "is a demand of proprietorship." City of St. Louis v. Western Un. Tel. Co., 148 U.S. 92, 97 (1893), reh'r'g denied, 149 U.S. 465 (1893). Rejecting as erroneous the circuit court's conclusion that the

charge was a tax, the Court continued, "The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and places of the city. It is seeking to collect rent." Id. at 98.

The Supreme Court had earlier rejected a circuit court finding that St. Louis's franchise fee charged Western Union was a privilege or license tax, saying:

> It [the franchise fee] is more in the nature of a charge for the use of property belonging to the city – that which might properly be called rental. "A tax is a demand of sovereignty; a toll is a demand of proprietorship." State Freight Tax Case, 15 Wall. [82 U.S.] 232, 278 [1872]. If, instead of occupying the streets and public places with its telegraph poles, the company should do what it may rightfully do, purchase ground in the various blocks from private individuals, and to such ground remove its poles, the section would no longer have any application to it. That by it the city receives something which it may use as revenue, does not determine the character of the charge or make it a tax. The revenues of a municipality may come from rentals as legitimately and as properly as from taxes.
>
> * * *
>
> The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent.

148 U.S. at 97-98.[21]

The line of federal cases reaching this conclusion is both long and recent. For example, the Fifth Circuit had it right in rejecting the Federal Communications Commission's contention that an itemization on cable subscribers' bills of the respective cable operator's franchise fees for

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[21] The Court in the Western Union case presciently anticipated the potential for congestion of facilities in the rights-of-way created by the open entry mandated by Section 253 (Removal of barriers to entry) of the Telecommunications Act of 1996, 47 U.S.C. § 253:

> By sufficient multiplication of telegraph and telephone companies the whole space of the highway might be occupied, and that which was designed for general use ... entirely appropriated to the separate use of companies and for the transportation of messages.

Id. at 99.

right-of-way occupancy was the pass-through of a tax in Cities of Dallas and Laredo v. FCC, 118 F.3d 393, 397-398 (1994). There it said:

> Franchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of public right-of-ways. See, e.g., City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893) (noting that the fee paid to a municipality for the use of its rights-of-way were rent, not a tax); Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (1955)(same); Erie Telecommunications v. Erie, 659 F.Supp. 580, 595 (W.D.Pa. 1987), affirmed on other grounds, 853 F.2d 1084 (3d Cir. 1988) (same in cable television context).

The County's demand for rent is but an economic component of on-the-scene management of competing uses of a scarce local resource owned by the County and controlled by the County under State law.

Maryland Courts recognize and validate this conclusion: the right to compensation exists even where the grant of access to the public property is silent as to compensation. The Maryland Act of 1884, like the Federal Post Roads Act, does not immunize the telephone company from an obligation to compensate the property owner (here the County) for the Company's use of property. Five decisions that make this point occurred in the Maryland Court of Appeals between 1894 and 1923, viz.: Postal Tel. Cable Co. v. Baltimore, 79 Md. 502, 29 Atl. 819 (1894), aff'd 156 U.S. 210 (1895); C&P Telco v. State Roads Comm'n, 134 Md. 1, 2, 106 Atl. 257 (1919), appeal dismissed 254 U.S. 662 (1920); AT&T v. State Roads Com'n, 134 Md. 11, 106 Atl. 260 (1919), appeal dismissed, 254 U.S. 662 (1920); Postal Tel. Cable Co. v. State Roads Com'n, 127 Md. 243, 96 Atl. 439 (1915); Baltimore v. C&P Telco, 142 Md. 79, 120 Atl. 229, 231 (1923). These cases are best summarized by the following excerpt. In 1919 the Maryland Court of Appeals observed, "it seems to be well settled ... that ... § 129 ... did not confer upon or give the right to telephone or telegraph companies to make special use of the

state's property without compensation or to give these companies the exclusive use of the highways of the state free of charge." C&P Telco of Balto. v. State Roads Comm'n, 134 Md. 1, 2, 106 Atl. 257, 258 (1919).

So, it does not matter whether or not Bell Atlantic has a statewide, vested, and/or perpetual right to occupy the public roads in Maryland. Whatever right Bell Atlantic holds does not include the right to occupy the roads *without compensation.* Loretto v. TelePrompTer Manhattan, 458 U.S. 419 (1982); and Bell Atlantic v. FCC, 306 U.S. App. D.C. 333, 337- 38, 24 F.3d 1441, 1445 (1994), both recognize that telephone companies cannot use the property of others' under government mandate without compensation; See also City of Dallas, et al. v. FCC, Fifth Circuit Nos. 96-60502 etc. (decided January 19, 1999), slip op. at 6, 14 (upholding municipal franchising of rights-of-way against federal preemption).

The foregoing distinction between police powers and proprietary powers is the law of Maryland. In the very case Bell Atlantic considers critical to its claim, the Maryland Court of Appeals makes this very point. In Board of Com'rs of Garrett County v. Bell Atlantic–Maryland, supra, the Maryland Court of Appeals' unanimous decision is instructive in this case. In Garrett County, Bell Atlantic sued the County for failure to comply with the provisions of the "Miss Utility Act," concerning excavations in the vicinity of underground utility lines, whether on public or private property.[22] Bell Atlantic alleged that Garrett County's Roads Department had negligently failed to comply with the Act. Garrett County defended on the ground, *inter alia,* that the Company was not within the protection of the Miss Utility Act because the Company was not the "owner" of the underground facilities in question in the two County roads.

[22] Md. Annot. Code, Art. 78, § 28A, (now Recodified at Title 12, Sections 12-101, et seq. Public Utility Companies Article).

The Count relied on the fact that Bell Atlantic had no right derived from an easement since the Count had never authorized emplacement of the cables by deed or otherwise.

The Court held that Bell Atlantic had a sufficient right to bury the cable, but observed that Bell Atlantic's rights under the 1884 and successor acts were *not unconditionally vested*, but were conditional in a number of respects. Id. at 174 n.10, 695 A.2d at 178 n. 10.[23]

In deriving this conclusion the Court traced this history of Section 318 from its inception. In holding that the 1884 Act gave Bell Atlantic a status in the right-of-way greater than that of a trespasser, the Court affirmed that the 1884 Act didn't grant Bell Atlantic a property right, id. at 175, 695 A.2d at 177. It also reaffirmed the earlier cases holding that telephone companies were subject to paying compensation, notwithstanding Sections 318 and 340.

While Bell Atlantic cites the Garret County decision favorably, the Court should read the case carefully. The Garrett County Court pointed out a significant point about the origins of Section 318. The Section fell in the midst of a recitation of corporate powers of telegraph

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[23] The Court said: "That the right [to occupy the State's public roadways] is in some measure conditional n. 10 in no way negates its existence.

"n.10 See, e.g., American Tel. & Tel. Co. v. Pearce, 71 Md. 535, 18 A. 910 (1889) (notion that statute authorizes public utility to occupy private land prior to compensation is inconsistent with Md. Const., Art. III, § 40); Postal Tel. Cable Co. v. State Roads Comm'n., 127 Md. 243, 96 A. 439 (1915); C&P Tel. Co. v. State Roads Comm'n, 132 Md. 194, 103 A. 447 (1918); C&P Tel. Co. v. State Roads Comm'n, 134 Md. 1, 106 A. 257 (1919) (state entitled to recover compensation for corporation's use of public highways and bridges); Mayor and City Council of Baltimore v. C & P Tel. Co., 142 Md. 79, 120 A. 229 (1923) (City of Baltimore within rights to exact a pole rental fee for telephone company's use of the streets); Johnson v. Consolidated Gas & Elec. Light & Power Co., 187 Md. 454, 50 A.2d 918 (1947) (pole which endangers public safety must be regarded as incommoding the public and therefore subject to abatement). See also Md. Code (1957, 1965 Repl. Vol.), Art. 78 § 24(a) (no public service company shall exercise any franchise granted by law except to the extent authorized by the Public Service Commission)."

associations or corporations. For example, Section 3 of Ch. 369 provided that upon complying with the incorporation process, such association is declared to be a body corporate. Section 4 of Ch. 369 gave the association certain corporate powers. In other words, the better construction of Section 318 is that it is a grant of corporate powers and is not intended as a grant of a property right. This conclusion is strengthened by the language that the power was to be exercised by an association, not a "person." It was limited to domestic corporations established in a county or Baltimore City. (See Section 2 of Ch. 369). Telegraph companies owned by individuals, partnerships, and joint ventures, are common law entities. They would not have this same corporate power. The legislature would not have denied a comparable property right to all telegraph companies wherever or however formed.[24]

C. Bell Atlantic's 1904 and 1905 Agreements With the County Subject Bell Atlantic To Reasonable Rent Charges As Determined by the County.

Bell Atlantic presents the Court with two agreements between the County and two predecessor companies, adopted by the County Commissioners in 1904 and 1905. These agreements, in similar language, grant the companies authority to erect and maintain *aerial* plant on county roads respectively. No time limit or monetary compensation is mentioned in either.

The Courts have held that such agreements must be strictly construed against the grantee. See Charles River Bridge v. Warren Bridge, 11 Pet. (36 U.S.) 420, 546, 549 (1837); 37 C.J.S., "Franchises," § 21(b); Richmond v. C&P Telco, 205 Va. 919, 923, 140 S.E.2d 683, 686 (1965) (language of franchise must be taken most strongly against grantee); Baltimore v. C&P Telco, 92

[24] This section was extended to telephone *corporations* but not individuals, etc., by the Act of 1884, Ch. 360, and 1886 Laws of Maryland, Ch. 161.

Md. 692, 696, 48 Atl. 465, 466 (1901). "[W]hatever is not unequivocally granted is withheld; nothing passes by mere implication." Knoxville Water Co. v. Knoxville, 200 U.S. 22, 34 (1906).

Applying these principles for continuing governmental grants to the 1904 and 1905 agreements leads to the conclusions that the franchises (1) do not extend to underground plant; (2) do not exempt the Company from paying rent;[25] and (3) are not perpetual.

III. BELL ATLANTIC's CLAIMS ARE EACH WITHOUT MERIT.

A. Bell Atlantic's Contract Clause Claim (Count I)

Bell Atlantic asks the Court to declare that the ordinance would impair the Company's contractual rights under its statewide franchise.[26] However, the General Assembly cannot bargain away the police power of the state. The Contract Clause does not require a state to adhere to a contract that at most implicitly surrenders an essential attribute of its sovereignty. See Point IV(a) *ante*. Nor can one legislature abridge the powers of a succeeding legislature. Board of County Comm'rs of Calvert County v. East Prince Frederick Corporation, 80 Md. App. 78, 84, 559 A.2d 822 (1989). The state did not intend to bargain away its police power over Bell Atlantic for all time. Neither the 1884 Act, nor the 1904 ordinance can be so construed. This facet of the police power now resides in Prince George's County. See Point II *ante*. As demonstrated above, under Point IV, Bell Atlantic has no unconditional vested rights that are

[25] Furthermore, Baltimore v. C&P Telco, 142 Md. 79, 82, 120 Atl. 229, 231-32 (1923), stands for the proposition that there is no constitutional or statutory impediment to a new charge for existing facilities in newly annexed territory.

[26] Complaint at 12-13, ¶ 21, 23; Pl. Memo at 11-15.

impaired by the ordinance and the ordinance consequently does not violate Act I, Sec. 10 of the U.S. Constitution.

B. Bell Atlantic's Commerce Clause Claim (Count II)

Bell Atlantic claims the County law somehow creates "obstacles to the free flow of interstate and foreign commerce."[27] Charging a fair rental for use of one's property is not an obstacle to the free flow of commerce.

The claim, insofar as it attempts to invoke the "silent commerce clause" doctrine, is wrong. "Dormant commerce clause" cases are irrelevant where Congress has legislated explicitly. See Willson v. Black Bird Marsh Creek Co., 2 Pet. (27 U.S.) 245, 252 (1829) (Marshall, C.J.). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce." Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883). See also Southern Pacific Co. v. Arizona, 325 U.S. 761, 765 (1945) (dictum) ("undoubted power" of Congress). Section 253(a) deals with any "State or local statute or regulation, or other State or local legal requirement," and subsection (c) cannot be read otherwise than as a direction to the courts to leave rights-of-way to the states and localities. This non-pre-emptive stance is reinforced by Section 601(c) of the 1996 Act, 47 U.S.C. § 152 note, printed in the statutory addendum hereto, which negotiates implied preemption.

C. Bell Atlantic's Due Process Claims (Counts III and VIII)

Bell Atlantic claims the County law deprives Bell Atlantic of its "vested property rights" under (a) its statewide franchise and (b) its 1904 franchise; (c) interferes with its sale of shares

[27] Complaint at 13-14, ¶ 28; Pl. Memo at 16-18.

under the transfer provisions; (d) deprives it of "a percentage of its gross revenues"; and (e) requires it to provide services, facilities and equipment without compensation.[28]

Points (a), (b), and (d) are the same compensation issues discussed above. Bell Atlantic is arguing a substantive due process violation for deprivation of property.[29] It also briefly argues procedural due process, claiming the County has excessive discretion under the County law.[30] Bell Atlantic has no exemption under Maryland law from the payment of right-of-way fees. See Point IV (b) *ante*.

Point (c) seems to assume that normal public stock transactions would implicate the transfer provisions of the County law. A transfer of *control* of a user of the public rights-of-way within the meaning of Section 5A-156 of the ordinance is clearly within the right-of-way management function of the County. Normal stock transactions that are less than a controlling interest are unaffected.

Point (e) is dependent on Bell Atlantic's overall argument that it is not subject to rent. In-kind compensation and cash compensation are both appropriate forms of rent, if authorized and if appropriately administered.

The due process test in Article 24 of the Maryland Declaration of Rights is equivalent to that of the Fourteenth Amendment, Sanners v. Trustees of Pratt Hosp., 278 F.Supp. 138 (D.Md. 1968), aff'd 398 F.2d 226 (4th Cir. 1968), cert. denied, 393 U.S. 982 (1968), and not broader. See Lodowski v. Strite, 307 Md. 233, 513 A.2d 229 (1986).

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[28] Complaint at 15-16, ¶ 35; PI Memo at 18-21.

[29] PI Memo at 19-20.

[30] PI Memo at 21.

The due process clause does not, any more than the contract clause, inhibit the state from insisting that all contract and property rights are held subject to the fair exercise of the police power. Aero Motors v. MVA, 274 Md. 567, 337 A.2d 685 (1975). Bell Atlantic's due process claim was specifically rejected in C&P Telco v. State Roads Comm'n, 132 Md. 194, 195, 103 Atl. 447, 448 (1918).

D. Bell Atlantic's Civil Rights Claim (Count IV)

Bell Atlantic seeks to piggyback on its first three counts a further claim under the Third Force Bill of 1871, now 42 U.S.C. § 1983, alleging that the County acted to deprive the Company of its constitutional rights "under color of law."[31] As to Bell Atlantic's claim that its rights under the Commerce Clause have been violated, the County has already shown under Point V(B) *ante* that the dormant commerce clause is not applicable because Congress has acted, and the ordinance does not violate the supplanting federal statute, viz., Section 253 (Removal of Barriers to Entry).

Section 1983 does not create any substantive rights, rather it is a vehicle for bringing lawsuits in federal court for violations of the U.S. Constitution as well as other Statutes. The County may be considered a person for Section 1983 purposes. However, Bell Atlantic has failed the second part of any Section 1983 inquiry because it has not established that a substantive constitutional or statutory violation has occurred, and therefore its Section 1983 claim must fall. If there is no violation of a federal right, there is no basis for a civil rights action under Section 1983. Hodge v. Jones, 31 F.3rd 157, 167 (C.A. 4 (Md.) 1994), cert. denied, 513 U.S. 1018, 115 S. Ct. 581, 130 L.Ed.2d 496.

[31] Complaint at 16-20, ¶ 52-53; PI Memo at 21-22.

In any case, since Counts I-III fall substantively, Count IV falls with them.

E. Bell Atlantic's Federal Communications Act Claim (Count V)

Bell Atlantic claims that the County law is an "additional scheme of regulation and restrictions" and *therefore* impairs Bell Atlantic's ability to provide telecommunications services.[32]

In the first place, Bell Atlantic has not alleged facts sufficient to support this claim. Bell Atlantic has not shown that any part of the County's scheme both (1) falls outside the Section 253(c) safe harbor and (2) would impair its ability to provide services. There can be no valid claimed of implied preemption for the reasons set forth under Points V(b) (federal) and III(c) (state) *ante*.

In any event, the application procedures of which Bell Atlantic complains, PI Memo at 22-24, are within the County's legislative authority. See Point II *ante*.

F. Bell Atlantic's Breach of Contract Claim (Count VI)

Bell Atlantic claims the County law breaches its 1904 contract with the County.[33] Construing the contract narrowly as is required, see Point II(C) *ante*, Bell Atlantic's rights under the contract have not been impaired. As shown above, the County law is consistent with any rights Bell Atlantic may have under that document. Unlike the Yazoo Land Frauds which resulted in Fletcher v. Peck, which involved a land grant, the Maryland Court of Appeals in

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[32] Complaint at 20-22, ¶ 62.

[33] Complaint at 22-23, ¶ 67; Pl. Memo at 26.

Garrett County, supra, at 170-71, 695 A.2d at 176, held that whatever rights Bell Atlantic's predecessor got by the Act of 1884, it was not an interest in real property.

G. Bell Atlantic's "Supreme Law of the State" Claim (Count VII)

Bell Atlantic seeks to piggyback a state-law claim on Counts I-III by asserting that the Maryland constitution incorporates the federal constitutional prohibitions on which Bell Atlantic relies in those counts.[34] Article VI, cl. 2 does not create a private cause of action.

This count falls with Counts I-III.

Similarly, Bell Atlantic claims that the Maryland due process clause prohibits deprivation of its "vested property rights" without due process.[35] Since there is no such deprivation of property rights, as explained above, this claim is meritless.

H. Bell Atlantic's Public Service Commission Claim (Count IX)

Bell Atlantic claims that (a) Bell Atlantic cannot enter into a contract affecting a franchise right without prior approval of the Maryland Public Service Commission; (b) the Public Service Commission has exclusive jurisdiction over the regulation of public service companies – "occupies the field" – and the County law attempts to regulate public utilities.[36]

Bell Atlantic's argument confuses the role of the Public Service Commission in regulating a carrier's provision of telecommunications *services* to the public for hire. See Point I(C)(3) *ante*. As indicated above, the County's provisions for fair compensation and right-of-way

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[34] Complaint at 23-25, ¶ 70-71.

[35] Complaint at 25-26, ¶ 80.

[36] Complaint at 26-28, ¶ 86-93; Pl. Memo at 24-26.

management are distinct from the Public Service Commission's role in certificating public service companies to provide service in the State. Thus, there is no conflict between the Public Service Commission statute and the County law.

I. Bell Atlantic's Injunctive Relief Claim (Count X)

Bell Atlantic's Count X essentially reiterates its claims above and leads out a parade of anticipated effects that would allegedly flow from Bell Atlantic's compliance with the County law.

All these alleged consequences are not based on the assumption that Bell Atlantic *would comply* with the law and pay fair compensation. Instead Bell Atlantic assumes it will *refuse* to comply and that the County would then, after exhausting all other alternatives to require Bell Atlantic to obey the law, take steps to *evict* Bell Atlantic.[37] Certainly this line of argument, if it has any validity, is not yet ripe. In any case, it reflects, not any harmful effect of the County law *if it were consistently applied*, but the harmful effects of *Bell Atlantic's refusal to comply* with the County law.

This count states no new claims, but merely attempts to base a petition for injunction on the claims dealt with above.

[37] *See, e.g.*, Pl. Memo at 9.

Conclusion

The County's Ordinance does not violate any Bell Atlantic vested rights. Application of the County's ordinance to the Company would comport with applicable laws. The complaint should be dismissed with prejudice.

Respectfully submitted,

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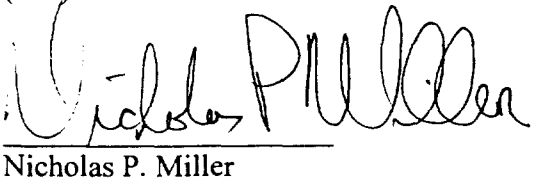

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January 26, 1999

Attachments

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POST ROADS ACT OF 1866, 14 STAT. 221

An act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postroads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided,* That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use form such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

* * *

SEC. 4. *And it be further enacted,* That before any telegraph company shall exercise any of the powers or privileges conferred by this act such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act.

Approved July 24, 1866; later amended; repealed July 16, 1947, 61 Stat. 327.

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Sec. 3. *And be it enacted,* That the sad body corporate shall have the right to install, maintain and operate telephone plants and exchanges, to build, construct, equip, lease, own acquire, and operate telephone lines from Leonardtown to Charlotte Hall, in St. Mary's County, and in and through the State of Maryland and elsewhere, and to engage generally in the telephone business and in all the branches of the same, and in the business of transmitting and communicating or of providing for the transmission or communicating of messages, news, information and intelligence of all kinds from place to place by means of electric currents

or effects through wires or by wireless means or systems, or by any other unfound methods of telephonic communication, with or without wires, and to building, install, lease, acquire, hold, dispose of an operate all electric and telephonic plant or plants or other machinery, equipment, apparatus and appurtenances necessary, useful and proper for the conduct of such business and branches of business as aforesaid.

Sec. 4. *and be it enacted,* That the said body corporate shall have the right, for the purpose of its business as aforesaid, to transmit or to provide for the purpose of its business as aforesaid, to transmit or to provide for the transmission of its electric currents or effects, either above or below ground, from Leonardtown to Charlotte Hall, in St. Mary's County, and through the State of Maryland and elsewhere, and for said purposes to erect poles and string wires and to construct and operate above ground telephone systems, with all the usual appurtenances, or without wires or by other improved means, with whatever form of equipment may be necessary or suitable; to cross navigable rivers or other streams by sunken cables or overhead construction provided that navigation is not thereby interfered with; and further, when necessary or desirable, the said corporation shall have the right to lay down and maintain an underground telephone system, with all the necessary conduits, ducts and mechanical and electrical devices, appliances and appurtenances pertaining thereunto and necessary, useful and proper for the carrying on and operation of the business of said corporation as aforesaid; provided, further, that before using the public or county roads the assent of such use by the Board of County Commissioners must be first had and obtained; and provided, further, that before using any of the lanes, alleys and streets of any incorporated town or municipality the assent of the authorities of said town or municipality must be first had and obtained.

Sec. 5. *And be it enacted,* That the said body corporate shall have an enjoy all the general powers, provisions, rights and privileges, and be subject to the general regulations contained in Article 23 of the Code of Public General Laws of Maryland, and the supplements and amendments thereto; the said Article being the Article providing for the formation, powers and regulations of corporations, so far as the same may not be inconsistent or in conflict with the special or generation regulations or provisions, powers, rights and advantages conferred or intended to be conferred by this Act, and that said corporation shall especially have the power to acquire land or rights and easements therein or thereon by purchase or by condemnation under the regulations and provisions set forth in said Article 23, of the Code of Public General Laws and the amendments or supplements thereto.

* * *

Sec. 7. *And be it enacted.* That the said body corporate shall have the right and power at any time to unite or consolidate with any other telephone company or companies which may be incorporated for the purposes set forth in this Act, or which may be authorized to exercise the power conferred on the corporation hereby incorporated,

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Sec. 8. *And be it enacted*, That the home office of the home corporation hereby incorporated shall be at Mechanicsville, St. Mary's County, Maryland.

Sec. 9. *And be it enacted*, That this Act shall take effect from the date of its passage.

Approved April 12, 1904.