

ATTACHMENTS



NEWS

News media Information 202 / 418-0500
Fax-On-Demand 202 / 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

Federal Communications Commission
1919 - M Street, N.W.
Washington, D. C. 20554

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

January 14, 1999

FCC RELEASES CARRIER LOCATOR REPORT

The FCC has released its annual report: *Carrier Locator: Interstate Service Providers*, listing 3,604 telecommunications carriers that provide interstate services. The report provides an address and telephone number for each carrier and identifies whether the carrier provided local, wireless or toll services. The report can be used by customers and other carriers to identify and locate sources of telecommunications service, by equipment vendors to identify potential customers, and by anyone seeking to locate a specific carrier.

Information contained in this report was taken from Telecommunications Relay Services (TRS) worksheets filed by interstate service providers. The Americans with Disabilities Act of 1990 requires all providers of interstate telecommunications service to share in the costs of financing interstate TRS. TRS is a telephone transmission service that allows persons with hearing or speech disabilities to use the telephone. Annually, each carrier files a TRS Fund Worksheet which is used to calculate the carrier's contribution to the TRS fund. The worksheets filed by carriers are not available to the public.

The *Carrier Locator* report is prepared by the Common Carrier Bureau's Industry Analysis Division. This report is available for reference in the Common Carrier Bureau's Public Reference Room, 2000 M Street, N.W. Washington DC, Room 575. Copies may be purchased by calling International Transcription Service, Inc. at (202) 857-3800. The report can also be downloaded [file names: LOCAT-98.ZIP, LOCAT-98.PDF] from the FCC-State Link Internet site at <http://www.fcc.gov/ccb/stats> on the World Wide Web. The report can also be downloaded from the FCC-State Link computer bulletin board system at (202) 418-0241.

FCC

For additional information, contact Jim Lande or Katie Rangos of the Common Carrier Bureau's Industry Analysis Division, (202) 418-0940 or for users of TTY equipment, call (202) 418-0484.



THE PRINCE GEORGE'S COUNTY GOVERNMENT



OFFICE OF LAW

**Room 5121, County Administration Building
Upper Marlboro, Maryland 20772
(301) 952-4028
Fax: (301) 952-3071**

November 25, 1998

**FACSIMILE (410) 385-3700
AND FIRST CLASS MAIL**

**Mr. James P. Garland, Esquire
Miles and Stockbridge
10 Light Street
Baltimore, MD 21202**

Re: Prince George's County Telecommunications Policy

Dear Mr. Garland:

The following is in response to your letter dated October 21, 1998, regarding the Prince George's County ("County") construction permits for certain Bell Atlantic-Maryland Inc. ("Bell Atlantic") telecommunications facilities located in the County's rights-of-way.

Action on Bell Atlantic's permits was initially reviewed and delayed by the County Department of Public Works and Transportation ("DPW&T") because County engineers observed that the scope of Bell Atlantic's work within the County's rights-of-way was beyond the proper and authorized scope of Bell Atlantic's blanket permit. Bell Atlantic's blanket permit expired on June 30, 1998; however, the County allowed Bell Atlantic to continue with all maintenance work on existing facilities under the expired permit. DPW&T informed Bell Atlantic that a new permit would be required for all new facilities in the County and that any installation of fiber optic for telecommunications purposes required an interim franchise agreement with the County. In October, County inspectors noticed that Bell Atlantic was engaging in construction along Contee Road without the proper permits and consequently issued a "stop-work" order against Bell Atlantic.

Subsequent to the "stop-work" order issued by the County, the County has adopted a comprehensive new policy for telecommunications providers' rights-of-way occupancy. On October 28, 1998, the County Council adopted new legislation, CB-98-1998, which enables the County's authority to manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers for the use of the County's rights-of-way on a competitively neutral and nondiscriminatory basis. Each such provider is now required to enter into a franchise agreement with the County for authority to use the rights-of-way. As you know,

County Administration Building — Upper Marlboro, Maryland 20772

Mr. James F. Garland, Esquire

November 25, 1998

Page Two

the Telecommunications Act of 1996 (the "Act") preserved the County's authority to manage the public rights-of-way and to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the public rights-of-way, as long as such compensation is publicly disclosed. Consistent with the goals and spirit of the Act, CB-98-1998 will subject all telecommunications providers to the same rules, regulations, and rental fees.

It must be stressed that the County remains committed to providing telecommunications providers with access to its rights-of-way. Thus, the County is waiving its objection to Bell Atlantic's construction on an interim basis to allow a reasonable transition until the effective date of the new legislation, January 4, 1999. The County will immediately issue Bell Atlantic's pending and requested permits during this interim period. However, the County is also committed to managing its rights-of-way for the protection and benefit of its residents, including obtaining fair and reasonable compensation for the use of the public rights-of-way. Accordingly, Bell Atlantic is hereby notified that after the effective date of CB-98-1998, January 4, 1999, its continued use of the County's rights-of-way for the provision of telecommunications services as defined in the Ordinance, must fully comply with the terms and conditions of that Ordinance.

Sincerely,



Stephanie Pratt Anderson
Deputy County Attorney

SPA:EHR:s

\\EHR\TELECOM\BELL\PERMIT4.WPD

Case No. 99-1784

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PRINCE GEORGE'S COUNTY, MARYLAND,)

Appellant,)

vs.)

BELL ATLANTIC-MARYLAND,)

Appellee.)

Appeal from the
United States District Court
for the District of Maryland

BRIEF FOR PRINCE GEORGE'S COUNTY

Sean D. Wallace
County Attorney
Prince George's County
14741 Governor Oden Bowie Drive
Room 5121
County Administration Building
Upper Marlboro, MD 20772
(301) 952-5237

Nicholas P. Miller
William Malone
MILLER & VAN EATON, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 785-0600

Attorneys for Prince George's County

August 1999

Corporate Disclosure Statement

No. 99-1784

Bell Atlantic—MD v. Prince George's County

Pursuant to FRAP 26.1 and Local Rule 26.1, Prince George's County who is Appellant-Defendant herein, makes the following disclosure: As a County government, Appellant is not subject to FRAppP 2.6.1.

1. Is the party a publicly held corporation or other publicly held entity: () Yes (X) No
2. Does the party have any parent corporations?() Yes (X) No
3. Is 10 percent or more of party's stock owned by a publicly held corporation or other publicly held entity?() Yes (X) No
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? (X) Yes () No

If yes, identify entity and nature of interest:

Appellee Bell Atlantic claims a franchise from the County.

5. Is the party a trade association?() Yes (X) No



William Malone



August 2d, 1999

Table of Contents

Corporate Disclosure Statement i

Table of Authorities v

Jurisdictional Statement 1

 A. Jurisdiction Below 1

 B. Appellate Jurisdiction 1

 C. Timeliness 1

 D. Finality 2

Statutes Involved 2

Questions Presented 2

Statement of the Case 4

 A. Nature of the Case 5

 B. Course of Proceedings Below 5

 C. Disposition 5

Statement of Facts 7

The County Responds to Competition in Telecommunications 7

The Terms of the Ordinance 10

The District Court’s Ruling 12

Summary of the Argument 15

Argument 17

Standard of Review	17
I. THE DISTRICT COURT’S CONSTRUCTION OF SECTION 253 MISREADS CONGRESS’S PLAIN LANGUAGE AND INTENT, WOULD TAKE THE COUNTY’S PROPERTY, AND WOULD VIOLATE FUNDAMENTAL PRINCIPLES OF FEDERALISM EMBODIED IN THE CONSTITUTION.	17
A. The Court’s Finding that the Ordinance on its Face has a “Prohibitive Effect” is Based on a Plain Misreading of Section 253.	18
1. <i>The Decision Fails to Give Effect to the Safe Harbor Provisions of Subsection (c).</i>	20
2. <i>The Court’s Reliance on Cumulative Prohibitive Effect under Subsection (a) Improperly Includes Effects Excluded from Subsection (a) by Subsection (c).</i>	22
3. <i>The Court Incorrectly Concluded that Any Local Requirement that Increases a Provider’s Cost of Doing Business Constitutes an “Effective Prohibition.”</i>	24
B. The Court’s Construction of Section 253 Should be Rejected Because it Raises Constitutional Questions.	26
1. <i>The County Has a Compensable Property Right in the Rights-of-Way.</i>	32
2. <i>Preemption of Municipal Franchising Would Effect a Taking of the County’s Property Rights.</i>	34
3. <i>Congress Meant to Include Compensation Based on Value within “Fair and Reasonable Compensation for Use” of Rights-of-Way.</i>	35

4.	<i>The Parties to the Franchise: not the District Court. Determine the Interests Conveyed, the Value of those Interests, and the Form and Amount of Compensation.</i>	41
5.	<i>A Gross-Receipts-Based Fee is a Fair and Reasonable Measure of the Rental Value of the County's Rights-of-Way.</i>	44
6.	<i>Congress Cannot Constitutionally Preempt Municipal Franchising under the Tenth Amendment and the Guaranty and Commerce Clauses.</i>	49
II.	THE MANAGEMENT PROVISIONS OF THE COUNTY'S FRANCHISE ORDINANCE RESPOND APPROPRIATELY TO THE NEW PROBLEMS ARISING FROM MULTIPLE ENTRIES INTO THE PUBLIC RIGHTS-OF-WAY.	55
	Conclusion	60
	Request for Oral Argument	60
	Addendum	
	Excerpt from 141 Congressional Record for August 2, 1995, pp. H 8273-74 (daily ed.)	
	Excerpt from 141 Congressional Record for August 4, 1995, pp. H 8460-61, H 8477 (daily ed.)	
	Clipping from <u>St. Paul Pioneer-Press</u>	
	Certificate of Compliance	
	Certificate of Service	

Table of Authorities

Cases

<u>Amos v. Maryland Dept. of Corrections</u> , 126 F.3d 589 (4th Cir. 1997)	54
<u>AT&T v. City of Austin</u> , 975 F. Supp. 928 (W.D. Tex. 1997).....	36
<u>AT&T v. City of Dallas</u> , 8 F.Supp. 2d 582 (N.D. Tex. 1998)	36
<u>AT&T v. Iowa Util. Bd.</u> , 119 S.Ct. 721 (1999).....	25
<u>Bell Atlantic v. FCC</u> , 306 U.S.App.D.C. 333, 24 F.3d 1441 (1994).....	27, 34, 38
<u>Blanchette v. Connecticut Gen. Ins. Corps.</u> , 419 U.S. 102 (1974)	38
<u>Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R.R.</u> , 4 G.&J. 1 (Md. 1832)	50
<u>Cipollone v. Liggett Group</u> , 505 U.S. 504 (1992).....	18, 31
<u>City of Dallas v. FCC</u> , 118 F.3d 393 (5th Cir. 1997)	33, 34
<u>City of St. Louis v. Western Un. Tel. Co.</u> , 148 U.S. 92 (1893), <u>opinion on reh'r'g</u> 149 U.S. 465 (1893).....	33, 34, 38
<u>Condon v. Reno</u> , 155 F.3d 453 (4th Cir. 1998), <u>cert. gr.</u> , 119 S.Ct. 1753 (1999).....	50, 51
<u>DeBartolo Corp. v. Florida Gulf Coast States Trade Council</u> , 485 U.S. 568 (1988).....	54
<u>Denver & Rio Grande Ry. v. Canon City & San Juan Ry.</u> , 9 Otto (99 U.S.) 463 (1878).....	50
<u>Dept. of Commerce v. House of Representatives</u> , 119 S.Ct. 765 (1999).....	26
<u>In re Duncan</u> , 139 U.S. 449 (1891).....	53-54

<u>Eastern Enterprises v. Apfel</u> , 118 S.Ct. 2131 (1998).....	35
<u>English v. General Electric</u> , 496 U.S. 72 (1990)	18
<u>Feikema v. Texaco</u> , 16 F.3d 1408 (4th Cir. 1994).....	54
<u>Front Royal Industrial Park v. Town of Front Royal</u> , 135 f.3d 275 (4 th Cir. 1998).....	35
<u>Garcia v. San Antonio Met. Transit Auth.</u> , 469 U.S. 528 (1985).....	50
<u>Gregory v. Ashcroft</u> , 501 U.S. 452 (1991)	52, 54
<u>Harmon v. Brucker</u> , 355 U.S. 579 (1958).....	26
<u>Hodel v. Virginia Surface Mining Ass'n.</u> , 452 U.S. 264 (1981).....	50, 53
<u>Jablonski v. Pan Am</u> , 863 F.2d 289 (3d Cir. 1988)	14
<u>Johnson v. Mayor</u> , 731 F.2d 209 (4 th Cir. 1984), <u>rev'd on other gnds</u> , 472 U.S. 353 (1985).....	27
<u>Loretto v. Teleprompter Manhattan CATV Corp.</u> , 458 U.S. 419 (1982).....	34
<u>Lucas v. South Carolina Coastal Council</u> , 505 U.S. 1003 (1992).	42
<u>Luther v. Bordon</u> , 7 How. (12 U.S.) 1 (1849).....	53
<u>Medtronic v. Lohr</u> , 518 U.S. 470 (1996)	30, 32, 55
<u>New York v. U.S.</u> , 505 U.S. 144 (1992).....	passim
<u>Pacific Ins. Co. v. American Nat'l Fire Ins. Co.</u> , 148 F.3d 396 (4th Cir. 1998)	17
<u>Plyler v. Moore</u> , 129 F.3d 728 (4th Cir. 1997)	17
<u>Printz v. U.S.</u> , 521 U.S. 98 (1997)	50, 51, 52, 53
<u>South Dakota v. Dole</u> , 483 U.S. 203 (1987).....	51

Anti-Deficiency Act, 31 U.S.C. §§ 1341 ff	39
Cable Act of 1984, as amended:	
Section 622(b), 47 U.S.C. § 542(b)	45
Communications Act of 1934, as amended:	
Section 224, 47 U.S.C. § 224	50
Section 251(d)(2)(B), 47 U.S.C. § 251(d)(2)(B)	25
Section 253, 47 U.S.C. § 253	passim
Section 253(a), 47 U.S.C. § 253(a)	passim
Section 253(c), 47 U.S.C. § 253(c)	passim
Section 414, 47 U.S.C. § 414	9
Express Powers Act of 1957, Ann. Code Md. Art. 25A:	
Section 5 (B)	9
Judicial Code:	
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1337	1
28 U.S.C. § 1343	1
28 U.S.C. § 1358.....	39
28 U.S.C. § 1367	1, 60
Post Roads Act of 1866, 14 Stat. 221 (repealed)	38

<u>Spector Motor Svc. v. McLaughlin</u> , 323 U.S. 101 (1944).....	26
<u>Taylor v. Beckman</u> , 178 U.S. 548 (1900).....	53
<u>TCG v. City of Dearborn</u> , 16 F.Supp.2d 785 (E.D. Mich. 1998). <u>cross-appeals pending</u> , 4th Cir. Nos. 98-2034 and 98-2035	36, 44
<u>U.S. v. 50 Acres of Land</u> , 469 U.S. 24 (1984).....	32
<u>U.S. v. Carmack</u> , 329 U.S. 230 (1946)	33
<u>U.S. v. Darby</u> , 312 U.S. 100 (1941).....	54
<u>U.S. v. Dickerson</u> , 166 F.3d 667 (4th Cir. 1999).....	27
<u>U.S. v. Western Electric Co.</u> , 552 F.Supp. 131 (D.D.C. 1982)	7
<u>Western Un. Tel. Co. v. Ann Arbor Ry.</u> , 178 U.S. 239 (1900)	39
<u>Western Un. Tel. Co. v. Pennsylvania R.R.</u> , 195 U.S. 540 (1904).....	39

U.S. Constitution

Commerce Clause, Art. I, Section 8	3
Guaranty Clause, Art. IV, Section 4	3
Amendment V	3
Amendment X	4

Statutes

40 U.S.C. § 257	39
40 U.S.C. § 258(a).....	39

Prince George’s County Code, 23-112--124 (23)	10
Telecommunications Act of 1996, P.L. 104-104:	
Section 601(c)(1), 47 U.S.C. § 152 nt	18, 24, 31
Third Force Bill of 1871, 42 U.S.C. § 1988(6)	1
Tucker Act, 28 U.S.C. § 1491(a)	39
Unfunded Mandates Act Section 2(6), 2 U.S.C. § 1501 et seq.	40
P.L.Md. 1904, ch. 591, art. 17	33

Other Authorities

141 Congressional Record (daily edition):

H 8460-61 (August 4, 1995)	passim
H 8477 (August 4, 1995)	29, 46
The Federalist Papers No. 21 (Hamilton)	53
The Federalist Papers No. 39 (Madison)	54
The Federalist Papers No. 43 (Madison)	53
FRCP 12(b)(6).....	12
H. Rpt. 104-458 (Conference Report on S. 652) (1996).....	31

Jurisdictional Statement

A. Jurisdiction Below

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, because the action is one arising under the laws of the United States regulating commerce; under 28 U.S.C. § 1343, because of a claim under the Third Force Bill of 1871, now 42 U.S.C. § 1988(b); and under 28 U.S.C. § 1367 (Supplemental jurisdiction). Appellant denies that the court had jurisdiction under 28 U.S.C. § 1361 to order relief in the nature of mandamus against a non-federal officer.

B. Appellate Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1291 of appeals from a final decision of a federal district court.

C. Timeliness

The order of the district court appealed from was entered on May 25, 1999. (JA 290) The County filed a timely notice of appeal on June 4, 1999. (JA 333)

D. Finality

The district court entered a final judgment in this matter disposing of all claims against the only remaining party-defendant.

Statutes Involved

This case turns on the district court's construction of Section 253, 47 U.S.C. § 253 (Removal of Barriers to Entry), added to the Communications Act of 1934, by the Telecommunications Act of 1996, P.L. 104-104. The pertinent part of the statute is as follows:

(a) In General. — No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State Regulatory Authority. — Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and Local Government Authority. — 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.

(d) Preemption. — If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

* * *

In addition, the district court's construction of Section 253 implicates four provisions of the U.S. Constitution:

Article I

Section 8. The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States * * *.

Article IV

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Amendment V

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

* * *

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Questions Presented

Whether the District Judge properly construed Section 253 (Removal of Barriers to Entry) of the Telecommunications Act of 1996 to pre-empt the County's telecommunications right-of-way ordinance,

- where the ordinance falls within the County's authority to manage the public rights-of-way and to require fair and reasonable compensation for the use of thereof, which Congress intended to preserve from federal pre-emption by the "safe harbor" provision of subsection (c);
- where the Court's construction of Section 253 would effect an uncompensated taking of the County's property in violation of the Fifth Amendment;
- where the Court's construction of subsection (a) would commandeer the County's public officials and property for private use in violation of the Guaranty Clause and the Tenth Amendment and in excess of Congress' powers under the Commerce Clause;
- where the Court ignored subsection (c)'s safe-harbor exclusions from subsection (a) in finding that the ordinance had the cumulative effect of prohibiting entry in violation of subsection (a).

Statement of the Case

A. Nature of the Case

This case involves a suit for declaratory judgment, injunctive relief, mandamus, damages, attorneys' fees, and costs, arising out of the County Council's enactment of a telecommunications right-of-way franchising ordinance, which the plaintiff telephone company alleged violated federal law and its vested franchise rights under state law.

B. Course of Proceedings Below

Plaintiff telephone company filed a complaint against the County and various County officials seeking (i) a declaration that the County's new right-of-way franchising ordinance was invalid on its face, (ii) to enjoin enforcement of the ordinance, (iii) to mandamus County officials to issue right-of-way permits to the company, (iv) damages, costs, and reasonable attorneys' fees, and (v) other relief. (JA 9) Concurrently the plaintiff filed a motion for preliminary injunction to enjoin enforcement of the ordinance and to require the County "to issue ... permits for access to and the ongoing use of all rights-of-way, easements, and public places under the County's control and jurisdiction...." (JA 42)

The motion for preliminary injunction was brought on before Chief Judge Motz, to whom the case had been assigned, on January 6, 1999. Judge Motz found it unnecessary to rule on the motion for preliminary injunction and directed the County to file a motion to dismiss the complaint. The County filed such a motion on January 26, 1999. The Company filed its memorandum in opposition on February 16, 1999, followed by a supplemental memorandum on April 6, 1999. Pursuant to Judge Motz' suggestion at the scheduling conference, Bell Atlantic dismissed the individual defendants. (JA 94)

Additional complaints were filed collaterally by two other telephone companies,¹ and all three cases were assigned to Judge Blake on February 26, 1999. Judge Blake allowed the plaintiffs in the two other cases to file memoranda and to participate in oral argument as amici on April 16, 1999.

The pleadings were never closed, since no answer was due from the County by reason of FRCP 12(a)(4).

C. Disposition

On May 24, 1999, Judge Blake signed a memorandum and an order denying

¹ Sprint v. Prince George's County, Civ. No. JFM-99-288, filed February 2, 1999; AT&T v. Prince George's County, Civ. No. JFM-99-465, filed February 18, 1999.

the County's motion to dismiss. Treating Bell Atlantic's opposition to the County's motion to dismiss as a motion for judgment on the pleadings, the court (i) declared the ordinance preempted under the Telecommunications Act of 1996, P.L. 104-104; (ii) enjoined its enforcement; (iii) denied the preliminary injunction as moot; and (iv) denied the balance of the relief requested by the company. (JA 290)

Statement of Facts

The County Responds to Competition in Telecommunications

On October 28, 1998, after public hearings, the County Council adopted an ordinance to manage multiple telecommunications providers in the public rights-of-way and to require compensation from the telephone companies for their use of the public rights-of-way in their businesses. Ordinance CB98-1998 (JA 62). This ordinance reflected the break-up of the Bell System by the Department of Justice² and further legislation by Congress, so that Plaintiff Bell Atlantic was no longer the sole provider of telecommunications services on a monopoly basis. Large numbers of carriers had begun to compete with the incumbent telephone compa-

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

nies,³ so that Bell Atlantic was no longer the only telephone company wanting to provide telecommunications services through the County's rights-of-way.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996, P.L. 104-104. One of the purposes of the new act was to foster the competitive provision of telecommunications services to the public.⁴ Among the provisions of the Act was Section 253, 47 U.S.C. § 253, which was designed to remove legal barriers to entry of competitive providers. Maryland, similarly, has encouraged multiple providers of intrastate telecommunications services.

In the bill, Congress distinguished the absence of barriers to entry from free or unregulated access to public rights-of-way. Congress, of course, realized that the federal government could not practicably supervise the local rights-of-way in the more than 36,000 local jurisdictions, so it very carefully preserved from pre-emption by Section 253(a) the independently existing property rights and duties of the non-federal governments. This it did in subsection (c) (State and local government authority), printed above, which supplemented the prior-existing

³ On January 14, 1999, the Federal Communications Commission reported that there were 3,604 interstate telephone companies. See FCC Press Release, dated January 14, 1999. (JA 103)

⁴ 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.

savings clause, Section 414, 47 U.S.C. § 414, preserving the County's common law and statutory rights.

The County has long had rights and responsibilities with respect to the public rights-of-way within the County. It has had title and control to some of its roads by deed⁵ and statute⁶ since before this century. It issued telephone franchises for aerial telephone lines to the Company and a predecessor in 1904 and 1905. (JA 59) In 1970 Prince George's County adopted a charter form of government. Under the Express Powers Act of 1957 it assumed the power to franchise for the protection of the public rights-of-way and to lease county property under Ann. Code Md. Article 25A, Section 5(B) ("to grant ... any right or franchise in relation to any highway, street, road, lanes, alley, or bridge...."). Plaintiff Company concedes that it is subject to the County's police power to manage the public right-of-way.⁷

⁵ By way of example, copies of highway deeds to the County in fee simple were submitted to the trial court, including one from the Plaintiff company. (JA 200, 202, 207).

⁶ P.L. Md. 1904, ch. 591, art. 17, reaffirmed the County's ownership and control "to all public roads".

⁷ Complaint, Whereas clause (iii) to Count 1. (JA 20)

The Terms of the County's Ordinance

Conceptually CB-98-1998 is a franchising ordinance adopted by the County under its home rule powers (i) to facilitate entry of multiple telecommunications providers into the public rights-of-way and (ii) to receive compensation for their use thereof in their competitive businesses for profit. (JA 63) The court took a non-functionally oriented approach to canvassing these provisions in Part I of its memorandum. (JA 292-302).

The ordinance established procedures for managing uses of the rights-of-way, supplementing the long-existing permitting ordinance in Subchapter 23 -112-124 of the County Code. The ordinance established a procedure to enable providers to apply for franchises and for their grant, as a legislative act, by the County Council. The franchises were to be implemented through franchise agreements administered by the County Executive. The franchise provisions were designed to implement the County's police powers and proprietary rights by minimizing unnecessary inconvenience to the public and damage to others' facilities in the rights-of-way, by protecting the County from liability for providers' use of the rights-of-way, by coordinating users' conflicting placements in the rights-of-way, by preventing premature exhaustion of limited right-of-way capacity, by providing for removal of facilities abandoned in the rights-of-way, etc.

§§ 5A-155, -158. The ordinance provided for recovery of some of the County's costs of processing franchise applications. § 5A-152.

In addition, the ordinance provided for compensation for the use of the property rights granted, i.e., rent. § 5A-154. The intensity of use was to be measured by the gross receipts generated by that use, and the amount of fee was set at three percent of gross receipts, net of generous exclusions for basic telephone service. § 5A-154(c). (JA 62-93)

In adopting the ordinance the County was very aware of the requirements of the 1996 federal act. The Council held public hearings and private meetings with the various companies. The legislation was drafted (1) to neither directly nor indirectly prohibit entities from offering telecommunications services in the County; (2) to assert reasonable management requirements for rights-of-way activities in a manner that allowed all applicants a common process and similar rights; and (3) to require reasonable compensation for the value of the public property that the telecommunications companies sought to use.

The County didn't kid itself – Bell Atlantic and its competitors said from the beginning they would challenge any ordinance that required them to pay compensation, even if based on reasonable valuations for the rights-of-way privileges conveyed in the proposed franchises. The week before the new

ordinance took effect. Bell Atlantic brought this facial challenge to the County's ordinance in federal district court. Bell Atlantic claimed that it had a pre-existing state-granted franchise or right to use the County's rights-of-way and, supported by its competitors, claimed that the compensation requirements violated the 1996 act.

The District Court's Ruling

At the scheduling conference on January 6, 1999, Chief Judge Motz made it plain that he thought Bell Atlantic's grandfathering claim was the pivotal issue, as to which there was no factual dispute. He directed the County to file a motion to dismiss Bell Atlantic's complaint under FRCP 12(b)(6). (JA 96) The County filed its motion, extensively briefing the issues surrounding Bell Atlantic's claim of a pre-existing state grant or franchise. Bell Atlantic opposed, arguing strongly that it did have a pre-existing state-granted franchise.

Meanwhile, Bell Atlantic's complaint and the related complaints by U S Sprint and AT&T had been assigned to Judge Blake. After oral argument in April, the court issued a memorandum ruling on the Bell Company's claims on May 24, treating the Company's opposition as a motion for judgment on the pleadings, although the County's answer had not yet been filed. (JA 290) The court first ruled that the ordinance violated Section 253(a) based on a facial review of the ordinance. The court concluded, without any factual showing by the Company,

that the ordinance “unquestionably has the effect of prohibiting the provision of telecommunications services” because it “imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way....” (JA 309-310)⁸ The court listed various requirements of the ordinance imposed in the course of application for, and grant of, the right-of-way franchises. Individually, “each of these requirements ... may or may not have the effect of prohibiting” provision of telecommunications services in the County. In combination, “the court believes that ... they create a substantial and unlawful barrier to entry....” (JA 310-311)

Only then did the opinion turn to the question of whether the requirements identified by the opinion fell “within the ‘safe harbor’ provision” of subsection (c). While recognizing that the 1996 act permitted the County to require users of the public rights-of-way to obtain a County-issued franchise (JA 314), the court opined that the management provisions of the County’s ordinance were beyond the “fairly narrow” scope defined by subsection (c). (JA 315) The County might demand compensation from providers for their use of the public rights-of-way, but the court stated “that any franchise fees that local governments impose ... must be directly

⁸ The opinion ignored the fact that Bell Atlantic was doing business, and would continue to do business, in the County, even if the ordinance took effect.

related to the companies' use of the local rights-of-way," i.e., they may not exceed recovery of the County's costs of administering the franchising process and of maintaining and improving their public rights-of-way. (JA 318) Further, the gross-receipts-based fee in the County's ordinance was not authorized by the act because a gross-revenues-based fee did not "appear to be directly related to Bell Atlantic's actual physical use of the County's public rights-of-way" and proportionate thereto. (JA 320) The court also ruled on an issue not raised by the Plaintiff that the County could not collect compensation for use of the rights-of-way by non-facilities-based resellers operating in the County.⁹ The opinion named Sprint in particular, although the extent and type of Sprint's use of the County's rights-of-way was strenuously disputed by the County in CCB 99-CV-288. Cf. Jablonski v. Pan Am, 863 F.2d 289, 290-91 (3d Cir. 1988) (movant must establish "that no material issue of fact remains to be resolved").

In the end the court held the provisions of the ordinance were not severable, despite explicit language in the ordinance to the contrary. (JA 86-87) Having ruled the ordinance totally invalid under federal law, the court declined to rule on the balance of the arguments offered by Plaintiff Company, including challenges to

⁹ "Resellers" are telecommunications service providers that obtain service or facilities from other carriers to resell or repackage for sale to the resellers' subscribers.

the ordinance on four state-law grounds. Among these was the Company's claim that it was grandfathered in the state's rights-of-way under its nineteenth century corporate charter. (JA 329-330)

Summary of the Argument

Construing Section 253 as Congress instructed that it be construed, there is no basis in Section 253(a) for preempting the County's right-of-way franchising ordinance – in toto or in any material respect. In the absence of any evidence of impermissible “prohibitory effects,” the District Judge acted on a mere “belief” that certain provisions, taken together “in combination,” created an unpermitted barrier to entry. The court's conclusion violates the Congressionally devised language and structure of Section 253, because subsection (c) forecloses any preemptive diminution by subsection (a) of the County's authority to manage its rights-of-way and to collect “compensation ... for use of public rights-of-way”. The legislative history is, if anything, stronger on this point than the text. Congress unmistakably said what it meant and meant what it said.

The District Judge's attempt to narrowly construe the “savings clause,” subsection (c), to physical occupancy on the basis of a generalized notion of the purpose of the Act as a whole, should be rejected. It is far outside the Congressional intent expressed in subsection (c). Congress expressly preserved the

local governments' authority to obtain "compensation for use by providers," not just to recover the local governments' costs related to occupancy.

Moreover, the court's narrow construction of subsection (c) should be avoided. It raises serious questions of constitutional validity under the Fifth and Tenth Amendments and the Guaranty Clause and exceeds Congress' legislative authority under the Commerce Clause. The County has property rights in its rights-of-way, and among those rights is the right to receive compensation for use based on full value. As a legislative body the County Council reasonably chose a percentage of gross receipts for other than basic telephone service as the measure of the intensity of a providers' right-of-way use.

In enacting the 1996 act, Congress adopted a policy of fostering the entry of multiple providers into the local rights-of-way on a free-market basis. It then stepped aside, leaving the traditionally local process of managing the public rights-of-way and collecting compensation for the value of local property under these changed conditions to the local governments as the regulators and owners of those rights-of-way. The County responsibly enacted new legislation to meet these new conditions. Now the district court has said, without requiring evidence of prohibitive effect, it will not tolerate a reasonable local effort to accommodate the

problems of multiple providers in a non-discriminatory process intended to protect the rights of taxpayers, rights-of-way users, and telecommunications competitors.

Argument

Standard of Review

This Court reviews de novo a district court's judgment on the pleadings. See Pacific Ins. Co. v. American Nat'l Fire Ins. Co., 148 F.3d 396, 405 (4th Cir. 1998). The opinion below correctly identifies the standard for judgment on the merits in the section of the opinion headed "Standard of Review" as "similar to the standard for granting summary judgment under Rule 56(c)." (JA 304-05) See also Plyler v. Moore, 129 F.3d 728, 734 (4th Cir. 1997).

I. THE DISTRICT COURT'S APPLICATION OF SECTION 253 MISCONSTRUES CONGRESS'S PLAIN LANGUAGE AND INTENT, WOULD TAKE THE COUNTY'S PROPERTY, AND WOULD VIOLATE FUNDAMENTAL PRINCIPLES OF FEDERALISM EMBODIED IN THE CONSTITUTION.

The district court erroneously enjoined the County's ordinance in toto based on its facial misconstruction of Section 253 and its underlying misperception of Congress' intent to preserve local authority, as embodied in the carefully drawn structure and language of the section. The court gave Section 253 a construction very pre-emptive of the local governments' traditional right-of-way authority,