

C. A Cable Operator May Provide Programming Through An OVS, But Only If Consistent With Its Cable Franchise and the Public Interest.

The Act seems clearly to contemplate that a cable operator may be eligible to be among the independent, unaffiliated video programmers on an OVS, at least in some instances — but only to the extent the Commission deems such carriage "consistent with the public interest, convenience, and necessity."⁶² The NPRM, however, disturbingly suggests that it should be left to the "discretion" of the OVS operator to decide whether a cable operator may become a programmer on the OVS system.⁶³

While such discretion might certainly be convenient to the OVS operator, there is no reason to think it would be so to the public. To the contrary, allowing the incumbent cable operator and the OVS operator to engage in such arrangements — perhaps trading carrier and programmer relationships in different geographic areas — raises the troubling possibility of effectively allowing LECs and cable operators to end-run the Act's prohibitions on mergers between cable operators and LECs in the same area. Conversely, in some cases, allowing cable operators to consume capacity on an OVS might be construed as anticompetitive foreclosure of capacity otherwise available to its competitors.

These are not matters that should be left to the "discretion" of either the OVS operator or the cable operator.

⁶² 1996 Act, section 302 (adding new § 653(a)(1)).

⁶³ NPRM ¶ 15.

Instead, the Commission should review and apply the requisite public-interest analysis on a case-by-case basis.

V. THE OVS CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY.

Any OVS rules adopted by the Commission must acknowledge local governments' rights — specifically, their property interests in the public rights-of-way within their jurisdictions that OVS systems will use. Thus, an OVS certification must show that the prospective OVS operator has obtained all necessary local consents to use of the rights-of-way for OVS, and any approval of an OVS certification by the Commission should be expressly conditioned on the applicant's having and maintaining those consents.

A. An OVS Remains Subject To the Right of Local Communities To Manage Their Public Rights-of-Way and To Receive Fair Compensation For Their Use.

While the 1996 Act makes the Commission responsible for approving a LEC's certification of compliance with Commission rules, the FCC, as a federal agency, lacks the power to grant an OVS operator permission to use local public rights-of-way that do not belong to the federal government. Any suggestion in the OVS rules that the Commission's approval makes separate approval by local rights-of-way owners unnecessary would violate the Takings Clause of the Fifth Amendment.

1. Local governments have an inherent right to manage and receive compensation for their rights of way.

Local governments are landlords responsible for managing the use and occupation of the public rights-of-way. It is the responsibility of local governments (or in some cases state governments, as noted below), to schedule common trenching and street cuts for the most efficient use of local rights-of-way; to repair and resurface streets damaged by such construction; to ensure public safety in the use of the rights-of-way by gas, telephone, electric, cable, and similar companies; to keep track of the various systems using the rights-of-way so that one system operator does not interfere with another's facilities; and, not least, to obtain fair compensation for the public from the private, profit-making use of this valuable public property.⁶⁴

Neither the Commission nor the federal government can grant a right to use public rights-of-way that do not belong to the federal government. Over a century ago, the Supreme Court recognized the limits on federal authority to infringe on the rights of local governments to control their property, including local rights-of-way.

⁶⁴ In the vast majority of states, the right to manage and receive compensation for the public rights-of-way belongs to the local government within whose jurisdiction the rights-of-way exist. Thus, these comments speak generally in terms of local government authority. In some states, however, that right is in part reserved by the state government, and that authority over the rights-of-way is exercised at the state level. But in no case may the federal government dispose of that right at will (except, of course, with respect to property owned by the federal government). The Commission must therefore ensure in its rules that right-of-way issues are left to be addressed according to the way each state has chosen to allocate this responsibility.

It is a misconception . . . to suppose that the franchise or privilege granted by the act of 1866 [the federal post roads act] carries with it the unrestricted right to appropriate the public property of a state. . . . No one would suppose that a franchise from the federal government . . . would authorize it to enter upon the private property of an individual, and appropriate it without compensation. . . . And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state.⁶⁵

In the 1996 Act, Congress explicitly recognized local governments' right to manage and receive compensation for use of local rights-of-way by telecommunications service providers and OVS providers. In discussing the OVS provisions of the Act, for instance, the Conference Report states that "The conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner."⁶⁶ Similarly, new § 253(c) provides:

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 . . .⁶⁷

⁶⁵ City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 95, 13 S.Ct.485, 488 (1893). See also Western Union v. Penn. R.R., 195 U.S. 540, 557 (1904) (citing St. Louis v. Western Union) (franchise privilege could only be exercised subordinate to public rights and only upon payment of just compensation).

⁶⁶ Conference Report at 178.

⁶⁷ 1996 Act, section 101(a) (adding new § 253(c)). New § 653(c)(2)(B) provides that an OVS provider "may" be charged a fee "in lieu of" a cable franchise fee. As noted in section

apartment building owner has the right to grant or deny consent to a telecommunications company that wishes to run cables through or on its building,⁷¹ a local government may grant or deny consent to a telecommunications company that wishes to run cables through rights-of-way belonging to that local government, and any attempt by the federal government to take away that right of consent is subject to the Takings Clause.⁷²

3. Any Commission intrusion into local governments' property rights would violate the Fifth Amendment.

a. Commission-mandated access to local rights-of-way would be an impermissible permanent physical occupation.

Any attempt by the FCC in its OVS rules to give OVS providers the right to place OVS systems in local rights-of-way, without regard to local governments' proprietary interests in such rights-of-way, would violate each affected local government's rights under the Fifth Amendment. Any federal grant of authority to build and operate an OVS system on a local governments' rights-of-way would be a "taking" within the meaning

⁷¹ Loretto v. TelePrompster Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

⁷² The property interests protected against federal takings are not confined to fee simple interests. Thus, courts have held that property rights protected by the Fifth Amendment broadly include rights-of-way held either in fee or otherwise for the public trust, including easements and leasehold interests. See, e.g., Donnell v. United States, 834 F. Supp. 19 (D. Me. 1993) (easements are property protected under the Fifth Amendment); National R.R. Passenger Corp. v. Faber Enterprises Inc., 931 F.2d 438 (7th Cir. 1991) (leasehold interests are property interests protected by Fifth Amendment).

of the Fifth Amendment, subject to the constitutional requirement of just compensation.⁷³

To require a local government to permit a private party to occupy space and construct an OVS system in its rights-of-way without the local government's consent would be directly analogous to Loretto, where the Court ruled that such a physical intrusion plainly crossed the line between permissible regulation and impermissible taking. Where the "character of the governmental action" is "a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."⁷⁴

b. Forced OVS provider access rises to the level of an unconstitutional taking.

An OVS system will inherently make a physical intrusion into the local public rights-of-way. Nor is this a merely minimal intrusion: every new line (or replacement of pre-existing telephone wire with new fiber or video cable) places an increased burden on the rights-of-way in the form of immediate damage from

⁷³ Nor would a mere offer or claim of compensation (such as the "fee in lieu of" provisions in new § 653(c)(2)(B)) render such a federal grant constitutional. As the Court said in Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1524 n.95 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), "the fundamental first question of constitutional right to take cannot be evaded by offering 'just compensation'."

⁷⁴ Loretto, 458 U.S. at 434-35 (emphasis added) (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

new trenching and street cuts, more frequent street resurfacing due to reduced life from cuts, new facilities on crowded poles, and the like. OVS construction also will cause increased traffic congestion, disruption and inconvenience for the local government and the residents it represents. Practically speaking, any invasion of the local public rights-of-way by OVS operators will be far more extensive than the intrusion in Loretto.⁷⁵

In any case, no de minimis test can validate a physical taking. The size of the affected area is constitutionally irrelevant.⁷⁶ Any forced access to the local rights-of-way contemplated by an OVS certification would be legally indistinguishable from the intrusion in Loretto, where the Court found a "permanent physical occupation" of the property.

4. Because Congress did not explicitly authorize a taking for OVS, the 1996 Act must be construed so as not to require such a taking.

The authority to take property must be explicitly authorized by Congress.⁷⁷ Courts will look to the plain language of the 1996 Act to determine if Congress has explicitly declared its intent to authorize a taking. If such language is ambiguous,

⁷⁵See, e.g., Mary Anne Ostrom, Residents Say Pac Bell Is Out Of Order, San Jose Mercury, Aug. 14, 1995, at 1A, 8A (impact of Pacific Bell construction in San Jose).

⁷⁶ In Loretto, the Court reaffirmed that the "the rights of private property cannot be made to depend on the size of the area permanently occupied." 458 U.S. at 436-37.

⁷⁷ See Hooe v. United States, 218 U.S. 322, 31 S. Ct. 85 (1910).

courts will look to the legislative history.⁷⁸ And courts will not construe any law to be a taking if it can be construed to avoid such a result.⁷⁹

The OVS provisions of the 1996 Act language contain no language authorizing the FCC to appropriate local governments' property rights. Nor does the legislative history reveal any intent by Congress to effect a taking of local government property.⁸⁰

Under such circumstances, the OVS provisions of the 1996 Act must be construed to avoid sanctioning a taking of local public property interests. In the analogous context of construing Section 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), which allows cable operators to use compatible public utility easements under certain circumstances, courts have consistently construed the provision to avoid a takings problem. Thus, in Media General Cable, the Fourth Circuit refused to extend 47 U.S.C. § 541(a)(2) to cover the installation of cable wires in compatible private easements in common areas of a condominium. Joining the Eleventh Circuit's view earlier in Cable Holdings, the court reasoned that any other construction of the statute would render

⁷⁸ See Cable Holdings of Georgia vs. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir. 1992), reh'g en banc denied, 988 F.2d 1071, cert. denied, 506 U.S. 862.

⁷⁹ See Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (4th Cir. 1993).

⁸⁰ By contrast, Congress made specific provision when it intended to dedicate federal property — which Congress could rightfully control — for the use of new telecommunications services. See 1996 Act, section 704(c).

Section 541(a)(2) indistinguishable from the New York statute held unconstitutional in Loretto.⁸¹ The Fourth Circuit recognized that it had a general duty to "avoid any interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction."⁸²

Given the lack of any clear intent in the 1996 Act to provide for takings in an area where Congress, as shown in the legislative histories of the 1984, 1992, and 1996 Acts, has consistently been sensitive to such issues, courts are unlikely to be willing to construe the OVS provisions of the Act to grant the FCC authority to promulgate any rules that would effect a taking of local public property. Any contrary construction, of course, would subject the federal government to liability for just compensation.

B. Congress Did Not Give the Commission Power to Take the Property Interests of Local Governments for OVS.

1. The Commission has no power of eminent domain.

As the D.C. Circuit made clear in the Bell Atlantic case, Congress did not confer the power of eminent domain on either the

⁸¹ Media General, 991 F.2d at 1175.

⁸² Id. at 1174-75. Accord, Bell Atlantic, 24 F.3d at 1447; Cable Investments v. Woolley, 867 F.2d 151 (3d Cir. 1989) (Congress had considered and rejected a provision that would have required access to privately owned multi-family buildings or trailer parks for purposes of installing cable wiring, thereby effecting a taking); Century SW Cable TV v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994) (no evidence of an express dedication); TCI of North Dakota, v. Shriock Holding Co., 11 F.3d 812 (8th Cir. 1993) (same).

Commission or the communications companies it regulates.⁸³ Only Congress, not the Commission, has the power of eminent domain, and such power must be exercised pursuant to specific legislation.⁸⁴ Unless Congress specifically delegates that power, no administrative agency may exercise it.⁸⁵ A delegation of the right of eminent domain must be in express terms or by necessary implication.⁸⁶

The OVS provisions of the 1996 Act, however, make no such delegation by express terms. Moreover, since the Commission certainly could promulgate OVS rules without infringing on the property interests of local governments (simply by requiring OVS operators to obtain any required local consents), the 1996 Act does not create any such right by necessary implication. The Commission therefore has no authority to appropriate local rights-of-way by eminent domain.

Moreover, even if the 1996 Act were implausibly viewed as conferring on OVS providers some right to use local public rights-of-way that belong neither to the federal government nor those providers (and it cannot), it would not follow that those providers could use the rights-of-way free of charge. In City of St. Louis v. Western Union Telegraph Company, the Court made it

⁸³ Bell Atlantic, 24 F.3d at 1445.

⁸⁴ Carmack v. United States, 135 F.2d 196 (8th Cir. 1943).

⁸⁵ Eden Memorial Park Ass'n v. Superior Court in and for Los Angeles County, 11 Cal. Rptr 189, 189 Cal. App. 2d 421 (Cal. App. 1961).

⁸⁶ Hooe, 31 S. Ct. at 85, 88.

perfectly clear that even if Congress authorized carriers to use local public rights-of-way, such authorization did not carry with it the power to take non-federal property without compensation.⁸⁷

Where a taking of real property for public uses is involved, the usual procedure is for the Department of Justice to initiate judicial proceedings at the request of the agency pursuant to 40 U.S.C. § 257 or § 258a in U.S. district court under 28 U.S.C. § 1358. Nothing in the 1996 Act authorizes the Commission to deviate from this prescribed procedure.

2. Congress gave the Commission no implied authority to expose the federal government to fiscal liability.

The Commission's lack of explicit statutory authority to engage in a taking of property cannot be rectified by any reliance on implied authority. The courts have long interpreted statutes narrowly so as to prohibit federal officers and personnel from exposing the federal government under the Tucker Act, 28 U.S.C. § 1491(a), to fiscal liability not contemplated or authorized by Congress.⁸⁸ Since the Constitution assigns Congress exclusive control over appropriations,⁸⁹ the courts have required a clear expression of intent by Congress to obligate the federal government for claims that require an appropriation of money.

⁸⁷ St. Louis v. Western Union Tel. Co., 148 U.S. at 92. See also Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904) (citing Western Un. Tel. Co. v. Ann Arbor Ry., 178 U.S. 239 (1900)).

⁸⁸ See generally Hooe v. U.S., 31 S. Ct. at 87.

⁸⁹ See U.S. Const., Art. I, §§ 8 and 9.

In Bell Atlantic, the D.C. Circuit declared that where an administrative application of a statute constitutes a taking for an identifiable class of cases, the courts must construe the statute to avoid such a taking wherever possible. The court further made clear that this narrow construction of the laws is necessary to prevent encroachment on the exclusive authority of Congress over appropriations.⁹⁰

This means that any FCC rules that would accomplish a taking will not receive the traditional deference accorded to administrative agency interpretations.⁹¹ The reason is that any deference on such a matter would provide the FCC with unbounded power to use statutory silence or ambiguity on a particular issue to create unlimited liability for the U.S. Treasury.⁹²

⁹⁰ Bell Atlantic, 24 F.3d at 1445.

⁹¹ See Chevron v. NRDC, 467 U.S. 837 (1984).

⁹² Even if the 1996 Act could be construed to give the Commission authority to effect a taking in this instance (and it does not), any such taking would be unlawful under the Anti-Deficiency Act, because Congress has not appropriated funds to compensate property owners. See 31 U.S.C. § 1341. The purpose of the Anti-Deficiency Act is to keep all governmental disbursements and obligations for expenditures — including those caused by executive agencies — within the limits of amounts appropriated by Congress. Only weeks ago, the Supreme Court affirmed the Comptroller General's interpretation that the Anti-Deficiency Act is violated where a federal government agency enters into indemnity contracts, either express or implied in fact, which expose the Government to unlimited liability. See Hercules v. U.S., 64 U.S.L.W. 4117, 4120 & n.9, 116 S. Ct. 981 (1996). The Anti-Deficiency Act prohibits the Commission from interpreting the OVS provisions of the 1996 Act in such a way as to expose the federal government to the inevitable filing of claims by local governments founded on the Fifth Amendment.

3. The "Fee In Lieu Of" provision in Section 653 does not satisfy the requirement of just compensation.

As noted above, any federal statute that is construed to authorize a lawful taking must provide for just compensation in order to be valid.⁹³ But the FCC cannot avoid the takings objection to any mandated access to the local public rights-of-way its rules might allow by requiring the OVS provider benefitted thereby to make a nominal payment to the local government for access. In Loretto, the New York statute at issue provided for a one-dollar fee payable to the landlord for damage to the property. The Court concluded that the state legislature's assignment of damages equal to one dollar did not constitute the "just compensation" required by the Fifth Amendment. Thus, neither the Commission nor Congress can prescribe a nominal amount as compensation for right-of-way access. Rather, the affected local government would be constitutionally entitled to compensation measured by fair market value.⁹⁴

⁹³ See United States v. 50 Acres of Land, 469 U.S. at 25; Western Union Tel. Co. v. Penn. R.R., 195 U.S. at 557 (no right-of-way can be appropriated without payment of just compensation); United States v. Acquisition, 753 F.Supp. 50 (D. Puerto Rico 1990) (power to extinguish easement rights is subject to compensation requirements); United States v. Carmack, 329 U.S. 230, 241-42, 67 S.Ct. 252, 257 (1946) (federal government can only take state land subject to limits of Fifth Amendment, including payment of just compensation).

⁹⁴ See United States v. Commodities Trading Corp., 339 U.S. 121, 126 (1950) (current market value); Bell Atlantic, 24 F.3d at 1445 n.3.

It is therefore no answer to the takings problem that the Act provides that any OVS operator "may" be required to pay a fee to the local government in lieu of the cable franchise fee.⁹⁵ To the extent that such a fee falls short of what the local government receives from cable operators, it does not represent the fair market value of the local government's property interests.

It is important to note in this regard that a cable franchise may — and typically does — include compensation to the local government above and beyond the cable franchise fee. Such compensation includes payments or in-kind contributions that fund public, educational, and governmental ("PEG") access facilities and (for franchise agreements entered into prior to the 1984 Cable Act) PEG operations.⁹⁶ Local governments' compensation from cable operators for use of local rights-of-way also often includes in-kind compensation in the form of dedicated PEG channels and facilities and institutional networks, which are explicitly authorized under 47 U.S.C. §§ 531 and 544.⁹⁷ Such facilities and local requirements contribute directly to the development of the nation's information infrastructure, filling

⁹⁵ 1996 Act, section 302(a) (adding new § 653(c)(2)(B)).

⁹⁶ See 47 U.S.C. § 542(g)(2)(B)-(C).

⁹⁷ The NPRM recognizes that cable operators provide PEG channel capacity, but fails to recognize the substantial cash and in-kind contributions cable operators have agreed to provide pursuant to franchise agreements to support PEG facilities. See NPRM at ¶ 19 n.33. And the NPRM completely overlooks institutional networks that many cable operators must provide under their franchises.

the gaps that would otherwise be left by commercial networks. For example, more schools have been wired pursuant to cable franchises than by telephone companies.⁹⁸ Similarly, institutional networks make feasible the dissemination of computerized information by local governments to citizens. Thus, the in-kind compensation agreed to in cable franchises helps serve the purposes of the Act.⁹⁹

The total compensation cable operators pay for use of the local public rights-of-way, then, consists of both franchise fees and the additional types of compensation described above. Thus, cable franchise fee payments alone do not represent the full market value of the compensations for use of local rights-of-way that a cable operator pays to a local government. Thus, a "fee in lieu of" of a franchise fee that equals the cable franchise fee alone (much less "a fee in lieu of" that is less than a cable franchise fee), would fall short of the fair market value of the local public rights-of-way in any particular jurisdiction.

Unless the Commission interprets the "fees in lieu of" provision to include compensation over and above cable franchise fees, that provision in the Act fails to provide full compensation to a local government for an OVS operator's use of local rights-of-way. It is therefore insufficient to validate

⁹⁸ See Appendix A at p. 31 & n.38.

⁹⁹ See, e.g., 1996 Act, sections 706-708 (incentives to promote advanced telecommunications services to schools in particular).

any taking of the local government's property rights by OVS operators under color of Commission rules.

C. LECs' Existing Authorizations to Use Local Rights-of-Way to Provide Local Telephone Service do not Extend to OVS.

LECs will no doubt argue, as they did in the video dialtone proceedings, that even though a LEC needs local permission to use the local public rights-of-way, a LEC that is currently using those rights-of-way to provide telephone service needs no additional permission to build an OVS system and provide OVS service. This is incorrect. OVS falls far outside the scope of any pre-existing authority granted to LECs.

Grants made to LECs in the past gave them only the authority to use the rights-of-way to build and operate a local telephone network to provide telephone service subject to state law definitions of telephone service and subject to Title II of the Communications Act. But the 1996 Act specifies that an OVS is not a telephone network subject to Title II.¹⁰⁰ And the new creature called OVS certainly does not fall within the scope of the "telephone service" for which LECs were granted authority to use local rights-of-way by local governments or states decades ago. Thus, no past grant of authority to a LEC could be construed to include a right to use the rights-of-way for OVS, which is not telephone service and which did not exist at the time of such grants.

¹⁰⁰ See 1996 Act, section 302(a) (adding new §§ 651(b), 653(c)(3)).

Because an OVS is not subject to Title II, it cannot be considered part of the original regulatory arrangement — an implicit or explicit contract with the public — that a LEC made with state and local governments and that was subject to corresponding state regulation. Any prior grants to LECs were made to public utilities subject to comprehensive state and local price and service quality regulation, which required universal service under established regulatory structures. It appears, however, that an OVS will use the public rights-of-way on a non-utility basis, free from the comprehensive state and local price and service quality regulation and universal service requirements that were part of the LEC's original compact to use local rights-of-way. Thus, any ancient telephone right-of-way grant will not apply to OVS usage.

There are additional policy reasons not to construe any pre-existing LEC right-of-way grant to include authority to provide OVS. Unlike the case with traditional telephone service, the consumers of OVS services will not be synonymous with the taxpayer public in general, because some taxpayers will subscribe to OVS while others will not. Thus, taxpayers as a whole should not be required to subsidize OVS, though the grant of below-market access to taxpayer-funded local rights-of-way. An OVS operator should therefore have to make new arrangements with the local government to provide fair compensation for the crucial resource — the local rights of way — that the community is contributing to the OVS operator's new business. This

compensation represents a user fee charged directly against the entities that make a profit from using the rights-of-way, rather than the taxpayer subsidy that would result if an OVS operator did not pay just compensation.¹⁰¹

D. An OVS certification must demonstrate that the operator has obtained local authority to use the public rights-of-way.

To avoid a takings problem, a prospective OVS operator must be required to demonstrate that it has obtained the authorizations necessary under state and local law to use local public rights-of-way for OVS. The conditions laid down by the Act, however, require that this be done in the LEC's initial certification filed with the Commission. This is because the statutory ten-day certification requirement precludes any more than a facial review by the Commission. Moreover, although the statute does require public notice when the Commission receives a certification, the ten-day time period effectively precludes any meaningful opportunity for interested parties to comment on or oppose the certification filing — for example, by informing the Commission that the OVS applicant has not obtained the necessary local right-of-way authorizations.

Consequently, the Commission cannot assume that affected parties will bring any problems to the Commission's attention: they will not have time. Indeed, unless the Commission's rules

¹⁰¹ The commenters endorse the comments of the City of Dallas, Texas, et al., on this issue.

provide clear and immediate notice to all affected parties, they may not even know that such a filing has been made.

For this reason, FCC rules must require the OVS operator's application to prove that it has done all of its homework beforehand. Since, as noted above, the Act does not give the FCC authority to infringe on local government control over local rights-of-way, the Act must be construed to require an OVS operator to obtain authority from the local right-of-way owner as a pre-condition to certification (or at least as a pre-condition to constructing and operating an OVS).

The Commission's requirements for the OVS certification must therefore ensure that OVS operator clearly and unmistakably demonstrates, on the face of its filing, that it has obtained all the necessary approvals and authority to use local rights-of-way. The certification must include incontestable evidence of specific authorization from each affected local government to use its public rights-of-way for OVS purposes — either in the form of attached licenses or franchises from each local community, or through written certifications by each affected community that such authority has been granted.¹⁰²

If a prospective OVS operator were to obtain Commission approval without obtaining the necessary local authorizations, and the operator were to proceed to invade the public rights-of-way under color of a claim to Commission authorization, then the Commission and the federal government would be subject to an

¹⁰² NPRM ¶ 69.

immediate takings claim.¹⁰³ To avoid subjecting the federal government to such major fiscal liabilities, not to mention extensive litigation, the Commission's OVS rules should not allow OVS operators to certify without clear local authorization.

Any other approach would not only impose unnecessary costs on federal and local taxpayers and the Commission, but would also unduly delay the entire OVS experiment. For this reason, the NPRM's proposal (at ¶ 68) for facial approval subject to later review is unacceptable. Such a rule would encourage LECs to file OVS certifications and then, on the strength of an incompletely informed Commission approval, seek to circumvent local authorities altogether: either by beginning to build OVS systems without authorization, forcing local governments to sue the LECs (and the Commission) to preserve their rights, or by claiming that local governments cannot reject the OVS operator's intrusion where the Commission has given its blessing. The only way to avoid such a labyrinth of litigation is to require that the OVS applicant have its ducks in a row before filing for certification — that is, by requiring unmistakable evidence of local consent to accompany the certification itself.

As noted in Section III.C above, the OVS operator also should be required to show in its certification application that it has met PEG and other local requirements. The local authorization attached to the operator's certification can thus do double duty by satisfying the PEG criterion as well. The

¹⁰³ See section V.A.3.a supra.

operator should be able to show that it will meet each applicable PEG requirement through a similar showing of local approval, since the affected local governments are the only ones who will be in a position to verify that the OVS operator will match the PEG obligations of the incumbent local cable operator.

Requiring OVS applicants to make the necessary arrangements prior to filing for certification should not cause undue delay. Local governments are not only willing, but eager to invite competition to the incumbent cable operator. Thus, LECs should not have difficulty in securing the necessary permissions, as long as they are willing to negotiate fairly and in good faith.¹⁰⁴

By the same token, any FCC approval of an OVS certification should be made expressly subject to the applicant's obtaining and maintaining all necessary local approvals. Such a condition is directly analogous to the approach the Commission has taken by imposing conditions on its consent to CARS license transfers by cable operators.¹⁰⁵

¹⁰⁴ It may be noted in this regard that Ameritech has already obtained twelve local cable franchises. Communications Daily, March 27, 1996, at 6.

¹⁰⁵ See, e.g., Letter to Jill Abeshouse Stern, 4 F.C.C. Rcd 5061 (1989).

- E. **The Commission's rules should recognize that disputes regarding an OVS's right to be in the local public rights-of-way cannot be resolved by the Commission, but only by the courts.**

New section 653(a)(2) gives the Commission authority to resolve disputes "under this section." A dispute over an OVS operator's local right-of-way authority, however, would not arise under § 653. Rather, such a dispute would be arise from more fundamental constitutional issues regarding local communities' property interests. Thus, the Act gives the FCC no jurisdiction to resolve such disputes.

Moreover, the FCC has no expertise — or fact-finding capacity — to resolve disputes concerning the conditions under which an OVS operator should be permitted to use the local rights-of-way, which will vary depending on local circumstances and local law. It will simplify matters if any such claims are excluded from Commission responsibility at the outset. Thus, in bringing any OVS dispute to the Commission, the petitioner should be required to certify that the dispute does not involve a local right-of-way controversy.¹⁰⁶ Parties may pursue right-of-way issues simultaneously, if necessary, in court.

VI. CONCLUSION

OVS is intended to be distinctively different from cable. It is not intended to allow an OVS operator to be a cable operator in disguise, subject to different regulatory

¹⁰⁶ See NPRM, ¶ 72 (seeking ways to simplify dispute resolution).

requirements than its cable operator competitor. The market will determine whether the OVS or the cable operator model is more feasible. If the Commission were to give OVS special regulatory advantages over cable, this would substitute federal planning for the free market. Accordingly, the flexibility of an OVS operator must be bounded by the requirements of the statute and the policy objectives of the OVS provision.

Based on the foregoing, the attachments that should be required for every OVS certification filing must, at a minimum, include the following.

- Authorization from all affected state or local authorities to use the public rights-of-way in each affected area.
- Certification from all affected local governments that the proposed OVS will fulfill PEG obligations no less than those of any incumbent cable operator in each jurisdiction, either through directly matching such obligations or through a negotiated agreement with each affected local government.
- All necessary amendments to the LEC's Cost Allocation Manual and the date such amendments were filed with the Commission.¹⁰⁷

If the Commission cannot clearly determine on the face of each certification that it is accompanied by all the necessary attachments, the certification must be rejected. Only such a clear "checklist" approach will permit the Commission to verify

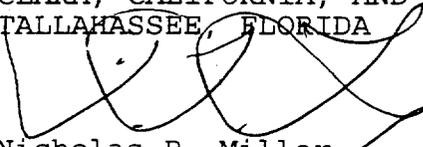
¹⁰⁷ See NPRM ¶ 70.

that the certification meets minimal statutory requirements within the required ten-day period.

Respectfully submitted,

THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF LOS ANGELES, CALIFORNIA; THE CITY OF CHILLICOTHE, OHIO; THE CITY OF DEARBORN, MICHIGAN; THE CITY OF DUBUQUE, IOWA; THE CITY OF ST. LOUIS, MISSOURI; THE CITY OF SANTA CLARA, CALIFORNIA; AND THE CITY OF TALLAHASSEE, FLORIDA

By


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April 1, 1996

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APPENDIX

- A. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Comments of the United States Conference of Mayors; the National Association of Counties; the City of Alexandria, Virginia; the Alliance for Communications Democracy; Anne Arundel County, Maryland; the City of Baltimore, Maryland; Baltimore County, Maryland; the City of Dallas, Texas; Howard County, Maryland; the City of Indianapolis, Indiana; the City of Los Angeles, California; Manatee County, Florida; Montgomery County, Maryland; Prince George's County, Maryland; and the City of Santa Clara, California, on the Fourth Further Notice of Proposed Rulemaking (March 21, 1995)
- B. In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, Reply Comments of the United States Conference of Mayors; the National Association of Counties; the City of Alexandria, Virginia; the Alliance for Communications Democracy; Anne Arundel County, Maryland; the City of Baltimore, Maryland; Baltimore County, Maryland; the City of Dallas, Texas; Howard County, Maryland; the City of Indianapolis, Indiana; the City of Los Angeles, California; Manatee County, Florida; Montgomery County, Maryland; Prince George's County, Maryland; and the City of Santa Clara, California, on the Fourth Further Notice of Proposed Rulemaking (April 11, 1995)

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