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FAIR AND REASONABLE COMPENSATION MEANS JUST THAT: HOW § 253 OF THE TELECOMMUNICATIONS ACT PRESERVES LOCAL GOVERNMENT AUTHORITY OVER PUBLIC RIGHTS-OF-WAY

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Abstract: Section 253(c) of the 1996 Telecommunications Act expressly preserves local government authority to require fair and reasonable compensation from telecommunications providers for use of public rights-of-way. Although local government authority to require compensation for franchises is based in state law, some courts have overlooked state law when evaluating the validity of franchise fees. In addition, courts have interpreted § 253(c) narrowly, allowing local governments to recover only direct costs. This narrow interpretation of § 253(c) contradicts its text and legislative history, as well as analogous United States Supreme Court precedent. Further, this interpretation could lead to unconstitutional results, by allowing a taking of public property without just compensation and permitting Congress to commandeer local governments into implementing a federal regulatory program.

A new technology emerged and transformed peoples’ lives. The technology brought remarkable advances in communications—families separated by vast distances became connected, businesses explored new markets and served previously unreachable customers. At the same time, new concerns surfaced. Who was in control of this technology? What mechanisms were in place to ensure privacy for the information transmitted through this medium? How could the majority of people access and benefit from the technology, rather than the privileged few? Understanding the importance of this technology to the nation, the federal government took action to encourage its proliferation. Local governments, eager to benefit their citizens, struggled to retain traditional control over companies doing business within their jurisdictions and to protect public rights-of-way.

What was this new technology that opened so many doors yet created so many issues for the nation? The internet? The cell phone? No—the telegraph, in the nineteenth century. Over one hundred years later, local governments face strikingly similar issues with the proliferation of telecommunications technologies.

2. See infra Part IV.
In 1866, Congress passed the Post Roads Act (Telegraph Act) to encourage the development of new telegraph technology.\(^3\) One hundred thirty years later, Congress passed the Telecommunications Act of 1996\(^4\) (1996 Act) to encourage the development of telecommunications technology, including broadband access to the internet.\(^5\) Section 253(a) of the 1996 Act prevents state and local governments from prohibiting the entry of telecommunications providers into local markets.\(^6\) At the same time, §253(c) expressly preserves local governments' rights to require compensation from telecommunications companies that use public rights-of-way.\(^7\) Courts have disagreed about how much compensation local governments can require, and how to calculate this compensation.\(^8\)

This Comment argues that under §253, courts should first consider state law to determine the local government's authority to impose a franchise fee, and then apply a "totality of the circumstances" approach to determine whether the fee is fair and reasonable. Part I of this Comment discusses public rights-of-way and franchising under state law, and the scope of federal authority over these areas. Part II explains how §253(c) of the 1996 Act preserves local government authority over public rights-of-way, and Part III summarizes the various ways courts have interpreted this section. Part IV describes the United States Supreme Court's interpretation of the Telegraph Act of 1866,\(^9\) which upheld the authority of local governments to require right-of-way fees. Part V argues that the correct way for courts to apply §253(c) is to first examine local government franchise and right-of-way authority under state law, and then consider the totality of the circumstances to determine if a franchise fee is fair and reasonable. Part V further argues that unless courts interpret §253(c) in this way, unconstitutional results could occur, such as the taking of public property without just compensation, or the federal government commandeering local governments to implement a federal regulatory program.

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5. See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1170 (9th Cir. 2001).
8. See infra Part III.B.
I. LOCAL GOVERNMENTS CAN REQUIRE COMPANIES USING PUBLIC RIGHTS-OF-WAY TO PAY COMPENSATION AND OBTAIN FRANCHISES

State law governs how local governments own and control property. Under state law, local governments control public rights-of-way, which are segments of land designated for public use. Local governments use franchise agreements to grant utilities access to these rights-of-way, and state law constrains the terms of these agreements. State governments, and not the federal government, are sovereign over local governments in the context of public rights-of-way and franchising authority. Nevertheless, federal constitutional guarantees protect local governments from congressional overreaching.

A. State Law Controls Local Government Interests in Public Rights-Of-Way

Public rights-of-way are "public corridors or strips of land," such as streets and alleys, designated for public travel. Portions of rights-of-way are often used for utility infrastructure. This infrastructure can include wires strung on poles above and through streets and alleys, wires and cables buried below streets in conduits, and utility boxes installed on public property. Public rights-of-way are a valuable

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11. See id., § 30.40.
12. See id., § 30.39.
14. See id., § 30.10.
16. See infra Part I.A-B.
17. See infra Part I.C.
18. See id.; see also id., supra note 10, § 30.03.
19. See Devaney, supra note 17, § 3.3.
20. See id., supra note 10, § 30.06.
22. See AT&T Communications v. City of Dallas, 52 F. Supp. 2d 763, 766 (N.D. Tex. 1999), vacated as moot by 243 F.3d 928 (5th Cir. 2000); Cox Communications v. City of San Marcos, 204 F. Supp. 2d 1272, 1274–75 (S.D. Cal. 2002).
asset—they have value as land and are necessary for utilities. The recent increase in telecommunications technologies in the United States has depended on the availability of public rights-of-way for facilities installation.

State law controls local governments' property interests in public rights-of-way. Although there are many models of local government authority over rights-of-way, they fall into three general categories. First, local governments can own rights-of-way in fee, with an undivided ownership interest and full title. Second, local governments can hold easements in rights-of-way, giving them a possessory interest in the land while allowing abutting property owners to retain title. Finally, local governments can hold rights-of-way in trust for the public. Even if the local government does not hold title to the property, it has certain rights and responsibilities, such as improving and maintaining the property.

B. Local Governments Grant Franchises to Private Companies for Use of Public Rights-of-Way

A franchise is a method developed by governments to grant use of public land to private companies for purposes benefiting the general public. Franchises are common law creations dating back to

25. See McQuillin, supra note 10, § 30.44.
27. See Mayor of Baltimore v. United States, 147 F.2d 786, 788 (4th Cir. 1945).
28. See McQuillin, supra note 10, § 30.32.
29. See id.
31. See McQuillin, supra note 10, § 30.32.
32. See Nelson et al., supra note 30, at 688.
33. See McQuillin, supra note 10, § 30.32.
35. See Mayor of Baltimore, 147 F.2d at 788.
fourteenth-century England, where the sovereign granted private parties use of public property under certain conditions. A franchise allowed a private party to provide a service that was both a public necessity and a natural monopoly. In the United States, local governments use franchises to give right-of-way access to companies providing services that require intensive infrastructure, such as electrical and telephone utilities.

Telecommunications companies often need access to public rights-of-way for their equipment, and must obtain local government permission before installation. Telecommunications infrastructure is created by stringing wire to utility poles, burying wire in below-ground conduit, or, in the case of wireless facilities, by placing utility boxes in strategic locations. To obtain a franchise, telecommunications companies often agree to requirements such as plan notification, performance bonds, access to books and records, and fees.

Local governments traditionally charge private companies franchise fees to access public rights-of-way. Most cities have ordinances establishing these fees. The ordinance can require compensation in the form of a percentage of the company’s gross revenue within the local

40. See id. at 175–76.
41. See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1308 (D.N.M. 2002).
42. See id.; Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1254 (D. Or. 2002); see also MCQUILLIN, supra note 10, § 34.10.
44. See TCG N.Y. v. City of White Plains, 305 F.3d 67, 71 (2d Cir. 2002); Qwest Communications v. City of Berkeley, 202 F. Supp. 2d 1085, 1086 (N.D. Cal. 2001).
45. See sources cited supra note 22.
47. See Bellsouth Telecommms. v. Town of Palm Beach, 252 F.3d 1169, 1181 (11th Cir. 2001).
48. See id.
51. See Town of Palm Beach, 252 F.3d at 1175.
franchising area, permit charges, in-kind services for the local government, or fees per linear foot of right-of-way used. The local government may use the fees to pay for right-of-way management, such as permitting, inspection, and decreased road life, or for general governmental purposes.

State law controls franchise authority, including the conditions local governments can place on telecommunications providers, and the compensation allowed for use of the public rights-of-way. States can directly grant communications providers access to local public rights-of-way. But, a local government cannot require compensation beyond that authorized by its state. For example, Colorado prohibits local governments from requiring compensation from telecommunications companies beyond "costs directly incurred." Oregon, however, allows local governments to charge franchise fees of up to seven percent of a telecommunications provider's gross revenue. Other states, such as Alabama, do not restrict franchise fees, and local governments can require fair and reasonable compensation based on a telecommunications provider's gross revenue.

52. See TCG Detroit v. City of Dearborn, 206 F.3d 618, 621 (6th Cir. 2000); City of Orangeburg, 522 S.E.2d at 805.
56. See id. at 1034.
57. See City of Orangeburg, 522 S.E.2d at 805.
58. See Mcl Quinn, supra note 10, § 34.10.
59. See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1174 (9th Cir. 2001); City of Orangeburg, 522 S.E.2d at 807.
63. COLO. REV. STAT. § 38-5.5-107(1)(b).
64. OR. REV. STAT. § 221.515 (2002).
C. The Federal Government Cannot Infringe Local Government Property Rights or Commandeer Local Governments into Implementing Federal Regulatory Programs

The U.S. Constitution grants limited enumerated powers to the federal government. The powers that remain are reserved to the states or the people. States, therefore, have broader general powers than the federal government. The Commerce Clause is an example of a limited grant of federal power. Under the Commerce Clause, Congress can exercise broad authority over interstate commerce and related issues. But Congress' authority is not unlimited. For example, Congress may not commandeer state or local governments into enacting legislation on behalf of a federal regulatory program. Instead, state and local governments must have a meaningful choice regarding whether to implement a federal directive. Further, the federal government may not compel local governments to subsidize private companies, and may not require a state or local government to transfer its property to benefit a private company.

Additionally, the federal government may not take local government property without compensation. The Fifth Amendment prohibits the federal government from taking private property "for public use without just compensation." The Takings Clause prohibits the federal government from freely taking either privately owned property or the

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68. See Lopez, 514 U.S. at 552.
70. See Lopez, 514 U.S. at 557–58.
73. See id. at 173–74.
74. See id. at 175.
75. See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1329 (D.N.M. 2002).
77. U.S. CONST. amend. V.
public property of state and local governments. Further, the Takings Clause protects rights-of-way and even limited property rights, such as the right to exclude others, so that the federal government may not authorize a physical occupation of the property of another without paying just compensation.

The U.S. Supreme Court has held that if a private company occupies public rights-of-way, it must pay just compensation to the owner even if the occupation is authorized by the federal government. When a private company uses public rights-of-way, it asserts control over a certain portion of the space that could be used by others. Any amount of physical presence on private or public property could constitute a taking that deserves just compensation under the Takings Clause. Wires, cables, and transmission boxes installed by telecommunications companies have a permanent physical presence. Thus, their occupation of public property without just compensation could be a taking, even if it is authorized by the federal government.

Just compensation is generally calculated to be the fair market value of the subject property under the rationale that compensation should put the owner in as good a position as before the taking. The U.S. Supreme Court has measured this amount by the owner's loss rather than the taker's gain, and has applied this doctrine to different forms of infringed property interests, including easements and the right to

82. See Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) (holding that Congress had the right to grant public access through privately-owned waters, but that just compensation must be paid to the property owners).
83. See City of St. Louis, 148 U.S. at 100–01.
84. See id. at 99.
85. See Loretto, 458 U.S. at 430.
89. See Olson v. United States, 292 U.S. 246, 255 (1934).
90. See United States v. Causby, 328 U.S. 256, 261 (1946).
91. See id.
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exclude others.92 For public property, the “substitute facilities” doctrine is often used to calculate just compensation if the fair market value is not readily ascertainable.93 Under this doctrine, compensation is the replacement cost of similar property.94

The nature of the local government’s property interest under state law influences the type of compensation it may require when the federal government takes, or authorizes the taking of, a public right-of-way.95 If the local government owns the property in fee,96 it has the same rights as a private property owner, and can seek fair market value for taken property.97 In contrast, if the local government has an easement,98 compensation is typically based on the value of the easement.99 Finally, if the local government holds the right-of-way in trust for the public, it can require compensation based on the public’s right to control the property.100

It has been argued that local governments have a duty to require compensation from private companies because not to do so would be inadequate management of a public resource.101 Many state constitutions support this principle by prohibiting gifting of public resources.102 The federal government follows this principle as well. For example, when the federal government grants access to its own rights-of-way, it requires fair rental value for the property.103

In sum, state law grants local governments property interests in rights-of-way to manage on behalf of the public. Telecommunications companies pay fees and obtain franchises to access these rights-of-

93. See California v. United States, 395 F.2d 261, 266 (9th Cir. 1968).
94. See id.
95. See California, 395 F.2d at 264.
96. See MCQUILLIN, supra note 10, § 30.32.
98. See Mayor of Baltimore v. United States, 147 F.2d 786, 789 (4th Cir. 1945).
99. See United States v. Causby, 328 U.S. 256, 265 (1946); see also Caporal v. United States, 577 F.2d 113, 117 (10th Cir. 1978).
102. See, e.g., ALASKA CONST. art. IX, § 6; CAL. CONST. art. XVI, § 6; N.Y. CONST. art. VII, § 8; WASH. CONST. art. VIII, § 7.
way. Although the state government can preempt the authority of local governments over rights-of-way, the federal government cannot because it does not hold the same sovereign position over local governments as does the state. Further, if the federal government tried to assert this power, it could result in an unconstitutional taking of local government property, or commandeering local governments into administering federal regulatory programs.

II. THE 1996 ACT PRESERVED LOCAL GOVERNMENT AUTHORITY TO REQUIRE COMPENSATION FOR USE OF PUBLIC RIGHTS-OF-WAY

With passage of the 1996 Act, Congress clarified federal regulation of telecommunications providers while simultaneously protecting the franchise authority of local governments. The text and legislative history of § 253(c) expressly preserve the franchising authority of local governments, and allow local governments to require "fair and reasonable compensation" for use of their rights-of-way. However, because Congress left "fair and reasonable compensation" undefined, litigation has ensued over the appropriate nature and extent of this compensation.

A. The Telecommunications Act of 1996

Congress passed the 1996 Act "to promote competition and reduce regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The 1996 Act is a comprehensive federal regulatory program that clarifies federal authority over different communications providers.

The 1996 Act provides regulatory schemes for various technologies and defines the services within its purview. "Telecommunications" is

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104. See MCQUILLIN, supra note 10, § 34.37.
106. See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001).
108. 47 U.S.C. § 253(c); see infra Part II.B.
110. For example, Title II addresses telecommunications technologies and sets forth common carrier requirements, see 47 U.S.C. §§ 201–276, and Title VI incorporates the previous Cable
"the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."\textsuperscript{111} This definition encompasses both telephone service and the ability to access the internet over telephone lines, but not the provision of internet service itself.\textsuperscript{112} "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."\textsuperscript{113} A company that provides telecommunications services is a "telecommunications carrier."\textsuperscript{114}

Despite introducing many changes to federal telecommunications regulation, the 1996 Act preserved local franchising authority.\textsuperscript{115} The 1996 Act distinguishes between the regulatory authority of local governments, which it largely preempts,\textsuperscript{116} and the proprietary rights of local governments,\textsuperscript{117} which it preserves.\textsuperscript{118} For example, the 1996 Act preempts local government franchising authority by compelling local governments to allow companies to provide telecommunications services.\textsuperscript{119} At the same time, the 1996 Act recognizes the authority of local governments to require franchises\textsuperscript{120} and to charge franchise fees of up to five percent of the gross revenue of cable television companies.\textsuperscript{121} Further, the 1996 Act preserves local government authority over companies that provide video programming over telephone lines (OVS).\textsuperscript{122} Although OVS operators are exempt from federal franchise requirements, they remain subject to local franchise authority.\textsuperscript{123} Thus, the 1996 Act preserves the franchise authority of local governments by ensuring their ability to assess and require fees.

Communications Act with regard to the regulation of cable television, see id. §§ 521-573.

\textsuperscript{111} 47 U.S.C. § 153(43).

\textsuperscript{112} See California v. FCC, 39 F.3d 919, 923-25 (9th Cir. 1994).

\textsuperscript{113} 47 U.S.C. § 153(46).

\textsuperscript{114} Id. § 153(44).

\textsuperscript{115} See City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999).

\textsuperscript{116} See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001).

\textsuperscript{117} Proprietary interest in this context refers to the obligation of local governments to hold the property in trust for its citizens. See City of Gary v. Ind. Bell Tel. Co., 732 N.E.2d 149, 153 (Ind. 2000).

\textsuperscript{118} See City of Dallas, 165 F.3d at 347.

\textsuperscript{119} See 47 U.S.C. § 253(a).

\textsuperscript{120} See id. § 541(a)(1).

\textsuperscript{121} See id. § 542(b).

\textsuperscript{122} See id. § 573(c)(2)(B).

\textsuperscript{123} See City of Dallas, 165 F.3d at 347.
B. Section 253 of the 1996 Act Preserves Local Government Authority to Require Compensation for Use of Public Rights-of-Way

Although § 253 of the 1996 Act preserves local authority over public rights-of-way, it also limits local governments’ regulatory authority over telecommunications providers.124 In relevant part, § 253 reads:

Removal of Barriers to Entry

(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.

. . . . .

(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.125

Thus, section 253 contains both an express recognition of local government’s authority to require compensation for use of public rights-of-way, and a limitation of local government’s authority to regulate telecommunications providers.

Subsection 253(c) expressly allows local governments to obtain “fair and reasonable compensation” from telecommunications providers for their use of public rights-of-way. This provision was included in response to concerns of House126 and Senate127 members that local governments must retain their authority over public rights-of-way. In the House, the co-sponsors of the amendment that became § 253(c)128 did not want local governments to subsidize private telecommunications companies’ use of public rights-of-way.129 Instead, they preferred that

125. Id. (emphasis added). Section 253(b) addresses state regulatory authority with regard to such issues as universal service and public safety. Id.
129. See 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995). Congressman Joe Barton of Texas presented statistics indicating that local governments spend approximately $100 billion per year.
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cities set the amount of compensation without interference from the federal government. Congressman Barton stated that the amendment "guarantees that cities and local governments have the right . . . to set the compensation level for use of [their] right-of-way." The House adopted the amendment despite concern that allowing cities to charge a percentage of gross revenue for use of their rights-of-way would stifle the competition that the 1996 Act was designed to promote. The Senate adopted a similar amendment to the House Act.

After reconciling the amendments, Congress enacted § 253 without defining "fair and reasonable compensation." In the absence of a clear definition, telecommunications providers have suggested that courts interpret § 253(c) in a similar manner as the section of the 1996 Act that regulates pole attachments. The Pole Attachment Act includes language that requires utilities to charge other utilities "just and reasonable" rates for use of their poles. The Federal Communications Commission (FCC) is authorized to set these rates, and has limited payment to the first utility's direct costs for providing the attachment. Some telecommunications providers have taken the position that courts should interpret the “fair and reasonable” language of § 253(c) similarly, and have argued by analogy that cities should recover only direct costs associated with use of public rights-of-way.

However, courts have not reached a consensus on the basis on which to calculate fair and reasonable compensation. Courts have adopted either a “cost-recovery” approach or a “totality of the circumstances” approach. Under the cost-recovery approach, courts have limited local

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130. Congressman Barton stated that in a “free market society, the companies should have to pay a fair and reasonable rate to use public property.” Id.
131. Id.
132. See id.
135. See id.
137. See id.
139. See City of Dearborn, 16 F. Supp. 2d at 788.
140. See infra Part III.
141. See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002) (describing
governments to recovering only the direct costs caused by telecommunications providers using public rights-of-way. In contrast, under the totality of the circumstances approach, courts look at various factors to determine whether the compensation required by the local government is fair and reasonable.

In sum, the 1996 Act simultaneously affirmed federal regulatory authority over telecommunications providers while preserving the power of local governments to require compensation for public rights-of-way. The text and legislative history of § 253(c) show that Congress intended to give telecommunications companies a permissive grant to access local rights-of-way subject to local government conditions, including the power to charge fair and reasonable compensation for use of the rights-of-way. However, Congress did not define “fair and reasonable” compensation in § 253(c), leaving it up to the courts to determine the extent of local government compensation setting authority.

III. CASES INTERPRETING THE 1996 ACT HAVE REACHED DIFFERENT CONCLUSIONS REGARDING LOCAL GOVERNMENT AUTHORITY

Since passage of the 1996 Act, telecommunications providers have brought suit under the Supremacy Clause and under § 253 when cities have required them to obtain franchises or satisfy other requirements in exchange for use of public rights-of-way. Decisions made under § 253 have been very fact-specific, and courts’ analyses have differed depending on state law and the technologies at issue.


143. See TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000); Qwest Communications v. City of Berkeley, 208 F.R.D. 288, 294 (N.D. Cal. 2002).

144. See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1175 (9th Cir. 2001); City of Santa Fe, 224 F. Supp. 2d at 1316.

145. See City of Dearborn, 206 F.3d at 624.

146. See City of Auburn, 206 F.3d at 1175; City of Dearborn, 206 F.3d at 621; Cox Communications v. City of San Marcos, 204 F. Supp. 2d 1272, 1275 (S.D. Cal. 2002).

147. See City of Berkeley, 208 F.R.D. at 294.

148. For example, state law may differ with regard to the legal status of public rights-of-way, and the amount of compensation local governments may require. See infra Part III.A.

149. See City of Auburn, 260 F.3d at 1174 (reaching different conclusions for wireless versus wireline facilities).
However, these decisions can be divided into certain categories. One category includes courts that have considered the effect of state law on compensation and those that have not. Another includes courts that have interpreted § 253(c) to establish a "cost-recovery" approach, limiting cities to recovering only direct costs, and courts that have adopted a "totality of the circumstances" approach to determine if the compensation is fair and reasonable.

A. Some Courts Have Considered State Law When Deciding Whether a Franchise Fee Is Fair and Reasonable Under § 253(c)

State law can impact the analysis of a particular telecommunications franchise agreement in two ways. First, state law determines the nature of a local government’s interest in the public rights-of-way, thereby influencing a court’s determination of whether compensation is fair and reasonable. Second, a state statute can prescribe the type of compensation that local governments can require of telecommunications providers. Although some courts have grounded their § 253(c) analysis in consideration of state law, others have not.

Courts that have considered state law as part of their § 253(c) analysis have done so in different ways. Some courts have merely acknowledged state law, without relying heavily on it in their analyses. For example, in Bell Atlantic-Maryland v. Prince George's County, the court noted without further discussion that the county was a home-rule county, authorized to exercise certain powers under the state constitution. Similarly, in City of Rome v. Verizon Communications, the court noted

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150. See id. at 1175; Grant County v. Qwest Corp., 169 F. Supp. 2d 1243, 1249 (D.N.M. 2001).
151. See City of Dearborn, 206 F.3d at 624-25.
152. See supra Part I.A.
157. See id. at 807.
the possibility that the defendant telephone company had state authorization to occupy the public rights-of-way, but then analyzed the franchise fee under § 253 without considering the issue.

In contrast, other courts have focused heavily on state law to determine the source of local government authority to require compensation under § 253(c). For example, in *New Jersey Payphone Association v. Town of West New York*, the town argued that it could require a fee from pay telephone providers from using the public rights-of-way based on its ownership of the property. The court rejected this argument, finding that under state law the town held an easement in the right-of-way as a public trustee, which only granted it police powers over the property. Thus, the court found the city could not exert the same control over the streets as it could if it owned them in fee. Similarly, in *Qwest Corp. v. City of Santa Fe*, the court considered the state constitution and the New Mexico Telecommunications Act to identify the city’s source of franchise authority before it conducted its § 253(c) analysis. After the court determined that the city owned the public rights-of-way and had the power to enter into franchises under state law, it concluded that the particular franchise provision in question was unreasonable under the circumstances.

Other courts have analyzed state law to determine the appropriate limits of local government authority without considering the nature of the property interest held by the local government. For example, in *Bellsouth Telecommunications v. City of Coral Springs*, the court determined that the authority of the state Public Service Commission preempted most local authority to franchise telecommunications companies. However, because both state and federal law allowed for a collection of a reasonable fee for right-of-way use, the city could require

159. *See id.* at 177.
161. *See id.* at 638.
162. *See id.*
163. *See id.*
166. *See id.* at 1322.
167. *See id.* at 1331.
169. *See id.* at 1308.
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up to a one percent franchise fee on the company’s gross revenue.\textsuperscript{170} Similarly, in \textit{City of Denver v. Qwest Corp.},\textsuperscript{171} the Colorado State Supreme Court held that, although Denver was a home-rule municipality under the Colorado Constitution,\textsuperscript{172} its franchise ordinance was preempted in its entirety by the state telecommunications act, which allowed telecommunications providers “to occupy public rights-of-way without additional authorization” from local governments.\textsuperscript{173}

\textbf{B. Courts Have Adopted Different Analytic Approaches to the Meaning of Fair and Reasonable Compensation Under § 253(c)}

Courts are divided over the extent of local government authority under § 253(c), with some courts adopting a very narrow “cost-recovery” approach,\textsuperscript{174} and other courts allowing broader compensation under a “totality of the circumstances” approach.\textsuperscript{175} The cost-recovery approach limits the local government’s compensation to the costs it incurred from physical impacts to public rights-of-way.\textsuperscript{176} Courts adopting this approach usually preclude compensation based on gross revenue as a method for cities to recover costs.\textsuperscript{177} In contrast, the totality of the circumstances approach allows local governments to base their compensation on factors other than actual costs, including gross revenue.\textsuperscript{178}

\begin{itemize}
  \item \textsuperscript{170} See id. at 1309.
  \item \textsuperscript{171} 18 P.3d 748 (Colo. 2001).
  \item \textsuperscript{172} See id. at 754.
  \item \textsuperscript{173} Id. at 752.
  \item \textsuperscript{176} See Grant County, 169 F. Supp. 2d at 1251. This analysis appears to derive from decisions that have interpreted franchise provisions as inconsistent with federal law if they attempt to regulate telecommunications providers themselves, rather than just their use of the public rights-of-way. For example, the Ninth Circuit struck down ordinances that required telecommunications companies to submit information regarding their financial qualifications as insufficiently related to right-of-way management. See City of Auburn v. Qwest Corp., 260 F.3d 1160, 1178 (9th Cir. 2001).
  \item \textsuperscript{177} See Grant County, 169 F. Supp. 2d at 1249; Township of Haverford, 1999 WL 1240941, at *8.
  \item \textsuperscript{178} See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1328 (D.N.M. 2002).
\end{itemize}
1. Some Courts Have Adopted a Cost-Recovery Approach to Fair and Reasonable Compensation

Although later vacated on other grounds by the Fourth Circuit, Bell Atlantic-Maryland v. Prince George's County remains a significant development in the judicial interpretation of § 253(c). Prince George's County, Maryland required a telephone company to obtain a franchise and pay a percentage of its gross revenue when it installed lines in the county's right-of-way. The federal district court held that the county could require compensation, but the fees had to be directly related to maintenance and improvement of the public rights-of-way, otherwise the fees would be a "barrier to entry" prohibited by § 253(a). The court held that "fair and reasonable" compensation must be based on the degree of physical use by the company, rather than on a percentage of its gross revenue. Thus, the court adopted a "cost-recovery" approach to § 253(c). The decision turned on the court's interpretation of the phrase "use of the public rights-of-way," which it defined as "physically impact[ing] the public rights-of-way by installing, modifying, or removing telecommunications lines and facilities."

Although the Prince George's County decision was later vacated, it influenced other courts to hold that "cost-recovery" was the only permissible form of compensation under § 253(c), and to reject compensation based on a percentage of gross revenue. For example, in PECO Energy Co. v. Township of Haverford, a Pennsylvania federal district court struck down an ordinance requiring a telecommunications provider to pay four different fees to string fiber-optic cable on utility poles in the town's streets. The court held that the town had not adequately demonstrated the relationship between the fees charged and

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179. See Bell Atl.-Md. v. Prince George's County, 212 F.3d 863 (4th Cir. 2000) (vacating and remanding with an admonition for the district court to consider the state law questions at issue before deciding the federal claims).
180. 49 F. Supp. 2d 805 (D. Md. 1999), vacated on other grounds by 212 F.3d 863 (4th Cir. 2000).
181. See id. at 807-08.
182. See id. at 817.
183. See id. at 814.
184. See id. at 818.
185. See id. at 819 (emphasis added).
187. See id. at *1–2.
the use of public rights-of-way.\textsuperscript{188} Further, the court held that a fee based on revenue “by definition” could not be compensation for use of the public rights-of-way.\textsuperscript{189} A federal district court in New Mexico reached a similar conclusion in \textit{Grant County v. Qwest Corp.},\textsuperscript{190} and invalidated a county “user fee” on telecommunications providers in the public rights-of-way because it was revenue-based.\textsuperscript{191} The court held that although the county was not precluded from charging a fee, the fee must “directly relate to the County’s expenses incurred in managing the actual physical use” of the right-of-way.\textsuperscript{192} Without further explanation, the court stated that a revenue-based fee did not meet this criterion.\textsuperscript{193}

2. \textit{Other Courts Have Adopted a Totality of the Circumstances Approach to Fair and Reasonable Compensation}

In contrast, other courts have upheld local governments’ rights to obtain broader compensation for telecommunications providers’ use of public rights-of-way under §253(c), adopting a “totality of the circumstances” model.\textsuperscript{194} Under this approach, courts consider a number of factors when deciding whether to uphold compensation as fair and reasonable.\textsuperscript{195} These factors include the local government’s authority under state law,\textsuperscript{196} what other providers are willing to pay for similar use of the public rights-of-way,\textsuperscript{197} and whether the telecommunications provider previously had agreed to pay similar compensation.\textsuperscript{198}

A year after the \textit{Grant County} decision adopting the cost-recovery approach, another New Mexico district court held otherwise and adopted the totality of the circumstances approach to determine whether a franchise fee was fair and reasonable. In \textit{Qwest Corp. v. City of Santa

\textsuperscript{188} See id. at *7.
\textsuperscript{189} See id. at *8.
\textsuperscript{190} 169 F. Supp. 2d 1243 (D.N.M. 2001).
\textsuperscript{191} See id. at 1251.
\textsuperscript{192} See id.
\textsuperscript{193} See id.
\textsuperscript{195} See \textit{City of Dearborn}, 16 F. Supp. 2d at 789–90.
\textsuperscript{196} See \textit{Qwest Corp. v. City of Santa Fe}, 224 F. Supp. 2d 1305, 1318 (D.N.M. 2002).
\textsuperscript{197} See \textit{id.} at 1329; \textit{City of Dearborn}, 16 F. Supp. 2d at 790.
\textsuperscript{198} See \textit{City of Dearborn}, 206 F.3d at 625; \textit{City of Portland}, 200 F. Supp. 2d at 1259.
the court recognized the city’s right to charge franchise fees based on its status as a home-rule municipality. The court noted three advantages to the totality of the circumstances approach. First, compensation can be related to actual use of public rights-of-way without being cost-based. Second, the approach allows courts to give appropriate attention to variations in state and local law. Finally, it is consistent with U.S. Supreme Court jurisprudence concerning the limits of congressional authority.

The South Carolina State Supreme Court also adopted the totality of the circumstances approach, but considered different factors in Bellsouth Telecommunications, Inc. v. City of Orangeburg. The court held that the city had the authority, under both § 253 and state law, to require a telephone company to compensate it by paying a five percent gross-revenue fee to place poles and wires in the city’s streets. The court reasoned that because the company paid the fee in exchange for using the public rights-of-way, the compensation was fair and reasonable for “the franchise’s value as a business asset to the franchisee.”

In TCG Detroit v. City of Dearborn, the Sixth Circuit held that a franchise fee equal to four percent of the telecommunications provider’s gross revenue was fair and reasonable compensation because it was merited by the circumstances. The court considered the amount of right-of-way used, the fact that other providers had agreed to pay similar fees, and that the provider had previously agreed to pay the fee.

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200. See id. at 1321. The court thus distinguished its holding from that of the Grant County court because New Mexico counties lack express authority to require such fees. See id. at 1321–22.
201. See id. at 1327. However, the court struck down the fee at issue as unreasonable when compared to the previous fee. Id. at 1329–30.
202. See id.
203. See id. at 1328.
204. 522 S.E.2d 804 (S.C. 1999).
205. See id. at 808.
206. See id.
207. See id. at 807.
208. 206 F.3d 618 (6th Cir. 2000).
209. See id. at 625.
210. See id.
courts have agreed with the *City of Dearborn* court and considered the last factor, that the telecommunications provider had been conducting business while paying the "allegedly prohibitive" fee, to be persuasive in rejecting arguments by telecommunications providers that the fees were prohibitive.\(^2\)

As these cases illustrate, courts have used various approaches to analyze franchise fees under § 253(c). Not every court has looked to state law to determine the source of local government authority, and courts have differed over the proper interpretation of the words "use" and "compensation." Some courts have concluded that compensation is limited to the costs incurred by a city for a telecommunications provider’s physical use of the public rights-of-way, such as repair of street cuts or inspection fees.\(^2\) Other courts have interpreted "use" broadly as any presence in the right-of-way, and concluded that a city can require compensation based on a percentage of the telecommunication provider’s gross revenue.\(^2\)

### IV. THE U.S. SUPREME COURT HAS UPHeld LOCAL GOVERNMENT AUTHORITY TO REQUIRE COMPENSATION FOR USE OF PUBLIC RIGHTS-OF-WAY

In the nineteenth and early twentieth centuries, the U.S. Supreme Court addressed challenges to local government control of public rights-of-way in cases involving telegraph companies.\(^2\) Although the companies had received a congressional grant to occupy public rights-of-way, the Court held that this grant was subordinate to the right of

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214. See generally Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252 (1919) (holding that a city’s imposition of a telephone pole fee was not a burden on interstate commerce); W. Union Tel. Co. v. Borough of New Hope, 187 U.S. 419 (1903) (holding that a city could charge telegraph companies reasonable license and permitting fees); City of St. Louis v. W. Union Tel. Co., 148 U.S. 92 (1893) (holding that a city could charge reasonable fees for use of public rights-of-way).
local governments to condition access to and receive compensation for use of their rights-of-way. More recent cases have affirmed this precedent with respect to modern technologies.

In 1866, Congress passed the Post Roads Act (Telegraph Act), granting telegraph companies "the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain... over and along any of the military or post roads of the United States," including routes in cities and towns. When a later Act of Congress declared "all public roads and highways... to be post routes," it appeared that Congress had granted telegraph companies with free access to all public rights-of-way in the nation. Yet, cities continued to require telegraph companies to obtain franchises and pay compensation for access. Telegraph companies claimed that these fees obstructed their congressionally granted privilege and impermissibly interfered with interstate commerce. Ultimately, however, the U.S. Supreme Court interpreted the Telegraph Act as a "permissive" grant, subordinate to both public and private property rights.

In City of St. Louis v. Western Union Telegraph Co., the city sued Western Union for failing to comply with an ordinance requiring telegraph companies to pay five dollars per year for each pole in the public rights-of-way. As a defense, Western Union claimed that the Telegraph Act of 1866 granted it free right-of-way access.

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215. See City of Richmond, 249 U.S. at 260-61; Borough of New Hope, 187 U.S. at 427; City of St. Louis, 148 U.S. at 100.
218. See City of St. Louis, 148 U.S. at 100 (quoting 18 Rev. Stat. 768, § 3964).
220. See Postal Tel.-Cable Co. v. City of Richmond, 249 U.S. 252, 256 (1919); W. Union Tel. Co. v. Borough of New Hope, 187 U.S. 419, 419 (1903); City of St. Louis, 148 U.S. at 95.
221. See City of St. Louis, 148 U.S. at 100.
223. See W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 169 (1912); City of St. Louis, 148 U.S. at 102.
224. See City of St. Louis, 148 U.S. at 100-01.
226. Id. at 95.
227. See id. at 100.
rejected Western Union's argument, characterizing Western Union's poles and wires as a physical occupation that permanently removed a portion of land from public use. The Court held that just as an act of Congress could not authorize a company to occupy private property without payment, neither could it do so for public property. Thus, local governments, like individuals, were entitled to “just compensation” for use of their property. The Court determined that compensation for the use of public rights-of-way, such as franchise fees, represented payment “in the nature of rental” to the public for use of its property. Although the fees were charged as rent, the local government could use the fees for revenue as if they were taxes, and the Court suggested in dicta that the fees could be based on the company’s gross revenue. Thus, the Court upheld the city’s authority to charge the fees, as long as the amount was not excessive.

In other cases litigated under the Telegraph Act, the Court upheld various models of compensation. In City of St. Louis, the Court affirmed basing compensation on a flat rental fee. In Western Union Telegraph Company v. Borough of New Hope, the Court upheld a city’s “license fee” for use of its streets, even though it exceeded the city’s cost for providing the service. Similarly, in Atlantic & Pacific Telegraph Company v. City of Philadelphia, the Court upheld fees for “the enforcement of local government supervision,” noting that the city did

228. See id. at 104–05.
229. See id. at 99.
230. See id. at 101.
231. Id. Although the Court did not directly refer to the Fifth Amendment, its use of the phrase “just compensation” in exchange for a property right indicates that this holding has a constitutional basis, which was later confirmed in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428–30 (1982).
233. See id. at 97.
234. See id. at 98.
235. See id.
236. See id. at 99, 105.
237. 187 U.S. 419 (1903).
238. See id. at 425.
239. 190 U.S. 160 (1903). Although the Second Circuit has suggested that the interpretation of the “dormant Commerce Clause” in this case has since been repudiated by the U.S. Supreme Court, the propositions cited here are still valid. TCG New York v. City of White Plains, 305 F.3d 67, 78 (2d Cir. 2002).
240. City of Philadelphia, 190 U.S. at 164.
not have to precisely estimate the cost to provide the services, but could set the charge at a reasonable amount to cover its expenses.\textsuperscript{241}

In determining local governments' authority over telegraph companies, the Court recognized the importance of state law.\textsuperscript{242} In \textit{Postal Telegraph-Cable Company v. City of Richmond},\textsuperscript{243} the Court held that the city's "police power"\textsuperscript{244} under Virginia law\textsuperscript{245} was sufficient authority to impose an annual charge per utility pole on a telegraph company.\textsuperscript{246} Further, in \textit{City of St. Louis}, the Court stated that, "under the constitution and laws of Missouri, the city of St. Louis has the full control of its streets, and in this respect represents the public in relation thereto."\textsuperscript{247} Thus, the Court acknowledged that cities could charge rent based on their interest in holding the land in trust for the public.\textsuperscript{248}

The U.S. Supreme Court and other courts have applied the principles of \textit{City of St. Louis} in cases involving more modern technologies.\textsuperscript{249} In \textit{Loretto v. Teleprompter Manhattan CATV Corp.},\textsuperscript{250} the Court examined a New York state law authorizing cable television companies to install facilities on privately owned buildings, in exchange for one dollar.\textsuperscript{251} Characterizing the presence of the cable, although minimal, as a "permanent physical occupation," the Court held that the law effected a taking under the Fifth Amendment and that the state could not prevent the payment of just compensation.\textsuperscript{252} Applying the "physical occupation" principle it recognized a century before in \textit{City of St. Louis}.

\begin{itemize}
  \item \textsuperscript{241} \textit{Id.} at 164–65.
  \item \textsuperscript{242} Although one commentator has suggested that the Court misunderstood the nature of the cities' interest in the public rights-of-way in these early telegraph cases and that this undermines their validity, see Gardner F. Gillespie, \textit{Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators}, 107 \textit{DICK. L. REV.} 209, 219 (2002), as discussed in this Part, the language of the decisions indicates otherwise.
  \item \textsuperscript{243} 249 U.S. 252 (1919).
  \item \textsuperscript{244} \textit{Id.} at 259.
  \item \textsuperscript{245} \textit{Id.} at 257.
  \item \textsuperscript{246} \textit{Id.} at 256.
  \item \textsuperscript{247} \textit{City of St. Louis} v. W. Union Tel. Co., 148 U.S. 92, 100 (1893).
  \item \textsuperscript{248} \textit{Id.} at 99–100.
  \item \textsuperscript{250} 458 U.S. 419 (1982).
  \item \textsuperscript{251} See \textit{id.} at 423–24.
  \item \textsuperscript{252} See \textit{id.} at 421.
\end{itemize}
Fair and Reasonable Compensation

The Court confirmed that the action was a taking even though the law merely authorized, rather than accomplished, the occupation. Although the cable box, like the telegraph wires at issue in *City of St. Louis*, occupied "relatively insubstantial amounts of space," the property owner, like the city in *City of St. Louis*, could require reasonable compensation.

Lower courts have also applied the principle that a private company cannot occupy public property without compensating the local government in the telecommunications context. In *TCG Detroit v. City of Dearborn*, a Michigan district court relied on *City of St. Louis* to hold that there was "nothing inappropriate" about the city charging rent for the telecommunications provider's facilities on city property. Similarly, in *City of Gary v. Indiana Bell Telephone Co.*, the Indiana State Supreme Court cited *City of St. Louis* in affirming a city's authority to require compensation for private use of public property "irrespective of the label placed on the compensation."

In sum, the U.S. Supreme Court's interpretation of the Telegraph Act established three important principles concerning local governments' authority over public rights-of-way. First, local governments have the authority to require compensation from private companies using public right-of-way, even if the companies are acting pursuant to a congressional grant. Second, the compensation can take many forms, including rental and license fees, and still be reasonable. Third, in determining the appropriate amount of compensation, it is important to consider state law. These cases have had a continuing vitality. The principle that a small amount of physical intrusion is a taking that requires just compensation was affirmed in *Loretto*, and the idea that

253. *See id.* at 429.
254. *See id.* at 429 n.6.
255. *See id.* at 430.
256. *See id.* at 421.
258. *Id.* at 789.
262. *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252, 257 (1919); *City of St. Louis*, 148 U.S. at 100.
local governments can charge rental for their property has been applied by courts in the telecommunications context.  

V. LOCAL GOVERNMENTS ARE ENTITLED TO REQUIRE FAIR AND REASONABLE COMPENSATION FOR USE OF PUBLIC RIGHTS-OF-WAY

Local governments, in accordance with state law and established federal doctrine, are entitled to require compensation from telecommunications providers for use of public rights-of-way beyond the costs incurred from the physical impact and direct regulation. When evaluating a franchise fee under § 253(c), courts should examine state law for the source of local government franchising authority, and then use a totality of the circumstances approach to determine if the compensation is fair and reasonable. The text and legislative history of § 253(c) and analogous U.S. Supreme Court precedent support this approach. Courts that narrowly interpret § 253(c) to allow only direct cost-recovery potentially permit both a taking of local government property without just compensation, and a commandeering of local governments to implement a federal regulatory program.

A. Approaches to the Issue of Fair and Reasonable Compensation Can Be Generally Grouped Into Four Categories

When analyzing a particular ordinance under § 253(c), courts have placed varying levels of importance on state law. Courts have also adopted one of two approaches: a cost-recovery approach, which limits the local government's reimbursement to its direct costs, or a totality of the circumstances approach, which considers a variety of factors and allows more expansive compensation. These inconsistent approaches have resulted in four analytic frameworks courts use to determine if

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265. See supra Part II.B.
266. See supra Part IV.
267. See supra Part I.A.
268. See supra notes 71–74 and accompanying text.
269. See supra Part III.A.
270. See supra notes 176–93 and accompanying text.
271. See supra notes 194–211 and accompanying text.
compensation is fair and reasonable under § 253. The following matrix represents the possible approaches and provides an example of each:

<table>
<thead>
<tr>
<th>Totality of the Circumstances</th>
<th>Cost Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Considers State Law</td>
<td>City of Santa Fe(^{272}) Prince George’s County(^{273})</td>
</tr>
<tr>
<td>Does Not Consider State Law</td>
<td>City of Dearborn(^{274}) Township of Haverford(^{275})</td>
</tr>
</tbody>
</table>

These inconsistent approaches create confusion for local governments and telecommunications providers. The text of § 253(c), its legislative history, and analogous U.S. Supreme Court precedent dictate an approach that first analyzes the relevant state law and then considers the totality of circumstances surrounding the franchise agreement to determine if the compensation is fair and reasonable.

**B. Courts Should Examine State Law When Interpreting “Fair and Reasonable Compensation” Under § 253(c)**

To analyze “fair and reasonable compensation” under § 253(c), courts should first examine state law to determine the source of the city’s franchise authority. The text of § 253(c) states that “[n]othing in this section affects the authority...of local government[s].”\(^{276}\) Thus, § 253(c) expressly preserves local government authority to require compensation. Such authority invariably derives from state law, because state law governs the nature of local governments’ property interest in

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\(^{272}\) 224 F. Supp. 2d 1305 (D.N.M. 2002). The Santa Fe court held that the local government had authority to require franchise fees under the state constitution, *id.* at 1318, and then examined the totality of the circumstances to see if the particular fee was reasonable, *id.* at 1329.

\(^{273}\) 49 F. Supp. 2d 805 (D. Md. 1999), *vaccated on other grounds by 212 F.3d 863 (4th Cir. 2000). The Prince George’s County court recognized the county’s authority to require fees from its status as a “home-rule” county, *id.* at 807, but then adopted a cost-recovery approach to invalidate the fee under federal law, *id.* at 817–18.

\(^{274}\) 206 F.3d 618 (6th Cir. 2000). The City of Dearborn court only examined the totality of the circumstances surrounding the franchise fee and did not consider the city’s authority to impose such a fee, *id.* at 624–25.


their rights-of-way\textsuperscript{277} and their ability to franchise.\textsuperscript{278} An initial inquiry into state law is necessary to provide courts with a basis for interpreting whether the compensation is fair and reasonable.

State law governs local government authority over public rights-of-way.\textsuperscript{279} If a local government asserts a right to receive compensation based on its interest in the rights-of-way, a court should know the nature of the interest to determine whether the compensation is appropriate.\textsuperscript{280} In this context, it is important whether the local government owns the right-of-way in fee, has an easement, or holds the property in trust for the public.\textsuperscript{281} If a court attempts to analyze an ordinance without understanding the character of the local government’s property interest under state law, it will lack the necessary foundation to evaluate the reasonableness of the compensation.

Furthermore, the state may have a telecommunications statute that limits or proscribes the type or amount of compensation that the local government can require.\textsuperscript{282} For example, in \textit{City of Coral Springs}, the court held that under state law, only franchise fees equal to or less than one percent of the telecommunication provider’s gross revenue were valid, an amount the court held was also fair and reasonable under federal law.\textsuperscript{283} Likewise, in \textit{City of Denver} the court held that a local franchise was completely preempted by state law, so a \textsection 253(c) analysis was unnecessary to determine whether the compensation was fair and reasonable.\textsuperscript{284} If the \textit{City of Denver} and \textit{City of Coral Springs} courts had not evaluated the fees in the context of state law, they might have held that the fee was “fair and reasonable” even if it violated state law.

Furthermore, principles of federalism require courts to examine local authority under state law for \textsection 253(c) analysis.\textsuperscript{285} Cases that interpret \textsection 253(c) without proper analysis of the local government’s authority

\textsuperscript{277} See supra Part I.A.
\textsuperscript{278} See supra Part I.B.
\textsuperscript{279} See supra Part I.A.
\textsuperscript{280} See N.J. Payphone Ass’n v. Town of W. New York, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), aff’d, 299 F.3d 235 (3d Cir. 2002); see also supra notes 95–100 and accompanying text.
\textsuperscript{281} See N.J. Payphone, 130 F. Supp. 2d at 638; see also McQuillin, supra note 10, \textsection 30.37; supra notes 95–100 and accompanying text.
\textsuperscript{282} See supra notes 58–65 and accompanying text.
\textsuperscript{283} Bellsouth Telecommns. v. City of Coral Springs, 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999), aff’d in part and rev’d in part sub nom. Bellsouth Telecommns. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001).
\textsuperscript{284} 18 P.3d 748, 758 (Colo. 2001).
\textsuperscript{285} See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1317 (D.N.M. 2002).
under state law allow the federal government to fill what is more properly the role of the states. The federal government has limited, enumerated powers, and all other powers are reserved to the states or the people. Local government authority over franchises and public rights-of-way is governed by state law, and the federal government can neither attribute nor ignore local powers that are removed or conferred by the states. To do so could lead to unconstitutional results, because the court would be granting power to the federal government that properly resides with the state.

Thus, under § 253(c), courts should first identify the source and nature of local government franchise authority, and then determine if the local government is properly exercising that authority. The source of franchise authority can be found in the property rights of the local government or through express delegation by the state. Even if this authority is granted, its exercise could still be removed by a preemptive state telecommunications statute or by delegation of franchise powers to a state utility commission. Only if the franchise is consistent with state law can the court consider whether the compensation is fair and reasonable under federal law.

C. Courts Should Use the Totality of the Circumstances Approach to Determine Whether the Compensation Required by the Local Government Is Fair and Reasonable

Once a court has determined that a local government’s franchise fee complies with state law, the court should consider the totality of circumstances to decide if the compensation is fair and reasonable under § 253(c). The text and history of § 253(c), as well as analogous U.S. Supreme Court precedent, support this approach. Failure to adopt this

288. U.S. CONST. amend. X.
289. See supra Part I.A–B.
290. See supra Part I.C.
292. See, e.g., Bellsouth Telecomm. v. Town of Palm Beach, 252 F.3d 1169, 1177 (11th Cir. 2001).
293. See supra Part II.B.
294. See supra Part IV.
approach could potentially lead to an unconstitutional taking of local government property or commandeering of local governments.\footnote{See infra Part V.C.3.}

\section{The Text and Legislative History of § 253(c) Support a Broad Interpretation of Fair and Reasonable Compensation}

Courts that have limited local government compensation to costs for actual use of the public rights-of-way, such as repair of street cuts, have interpreted § 253(c) too narrowly. The text of § 253(c) reads in relevant part, "[n]othing 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 . . . for use of public rights-of-way . . . ."\footnote{47 U.S.C. § 253(c) (2000) (emphasis added).} The wording of this section strongly suggests an affirmation, not a limitation, of local government authority. The section begins with a broadly worded admonition, and is followed by a general authorization, signaling that Congress did not intend to limit local government to a narrow cost-recovery interpretation, but instead intended to preserve traditional local government control.

In addition, Congress’ use of the word “compensation,” rather than “costs” is instructive. The word “compensation” indicates a more expansive interpretation than the cost-recovery method adopted by many courts.\footnote{See supra Part II.B.} In other areas of the 1996 Act, notably the Pole Attachment Act, Congress expressly limited fees to incurred costs.\footnote{47 U.S.C. § 224(d)(1).} It did not do so for § 253(c). This suggests Congress intentionally chose the term “compensation” rather than “costs.”\footnote{See TCG Detroit v. City of Dearborn, 206 F.3d 618, 624–25 (6th Cir. 2000); Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002).} Furthermore, Congress authorized the FCC to set rates for pole attachments, but did not authorize the FCC to set rates for use of public rights-of-way, indicating its intention to leave this authority to local governments.\footnote{See 47 U.S.C. §§ 224(b)(1), 253.} If Congress had intended to restrict local governments to recover only physical costs, it could have included language to that effect.

Further, the legislative history of the phrase “fair and reasonable compensation” in § 253(c) suggests that Congress intended local governments to set their own levels of compensation for public rights-of-

\begin{footnotes}
\footnote{295. See infra Part V.C.3.}
\footnote{296. 47 U.S.C. § 253(c) (2000) (emphasis added).}
\footnote{297. See supra Part II.B.}
\footnote{298. 47 U.S.C. § 224(d)(1).}
\footnote{299. See TCG Detroit v. City of Dearborn, 206 F.3d 618, 624–25 (6th Cir. 2000); Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1327 (D.N.M. 2002).}
\footnote{300. See 47 U.S.C. §§ 224(b)(1), 253.}
\end{footnotes}
way. The House floor discussion demonstrates an unwillingness by Congress to have local governments subsidize telecommunications providers, and indicates an awareness that § 253(c) would allow local governments to set their own rates for compensation by telecommunications providers. For example, Congressman Barton specifically stated that cities should be allowed to set the compensation for use of their public rights-of-way. Taken together, it is apparent that Congress intended to allow local governments to set the amount of fair and reasonable compensation for use of their rights-of-way, without limiting recovery to actual costs.

2. Analogous U.S. Supreme Court Precedent Supports the Totality of the Circumstances Approach

In cases interpreting the Telegraph Act, the U.S. Supreme Court firmly sustained the authority of local governments to require fees from private companies using public rights-of-way. Marked similarities between the telegraph and telecommunications context make this precedent applicable to telecommunications companies. Both telegraph and telecommunications companies require access to public rights-of-way to deploy their facilities. Cities offer this access in exchange for payment. At the turn of the nineteenth century, the Court approved this arrangement in City of St. Louis and did not limit the form or method of payment required of telegraph companies as long as it was reasonable. The Court upheld a variety of fees as reasonable, including those charged for rental, licensing, and general governmental supervision. In no case did the Court require that the fees be tied to the physical or actual costs of the telegraph providers’ use of the public

301. See supra notes 126–33 and accompanying text.
303. Id.
304. Id.
305. See supra Part IV.
307. See McQuillin, supra note 10, § 34.37.
rights-of-way. This precedent was expressly followed in *City of Dearborn* and *City of Gary*, which applied the principles set forth in the early telegraph cases to the telecommunications context.

The 1996 Act, like the Telegraph Act, offers communications companies a permissive grant to access local public rights-of-way. Congress designed both Acts to promote new technologies that were important to the nation's economic development, but in both cases the importance of local control remained paramount. In *City of St. Louis*, the Court judicially preserved the authority of local governments to require compensation under the Telegraph Act. In § 253(c), Congress issued a permissive grant expressly and statutorily subject to local control.

In sum, U.S. Supreme Court cases interpreting the Telegraph Act recognized that local governments have property interests in public rights-of-way and can require compensation when this property is used by private companies. The Court reaffirmed the continuing vitality of this doctrine in *Loretto*, and lower courts have applied these principles in the telecommunications context. Because of the similarities between the Telegraph Act and the 1996 Act, this precedent provides valuable guidance to courts interpreting the 1996 Act.

3. **Unconstitutional Results Can Occur if § 253(c) Is Interpreted Too Narrowly**

An interpretation of § 253(c) that limits local governments to recovering only actual costs, rather than compensation for the value of its property, could create unconstitutional results. Courts interpreting federal legislation must construe statutory language to avoid

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311. See supra notes 257–59 and accompanying text.


313. 47 U.S.C. § 253(c).

314. See supra Part IV.


317. See *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305, 1328–29 (D.N.M. 2002); see also *Worstell*, supra note 86, at 467–69.
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constitutional conflicts whenever possible. Under the Fifth Amendment, the federal government cannot take local government property without providing just compensation. Further, under the Commerce Clause, Congress cannot compel local governments to subsidize private companies as part of a federal regulatory scheme. To avoid these constitutional conflicts, courts should interpret § 253(c) broadly to recognize the property rights of local governments under state law and to provide adequate compensation when telecommunications companies use public rights-of-way.

In *City of St. Louis*, the U.S. Supreme Court held that local governments can require just compensation even if the federal government allows private access to public rights-of-way. Federal seizure of local government property is prohibited in the same way that taking private property is barred. If a local government has a property right for which it can obtain value and the federal government prevents it from doing so, the federal government could be authorizing an unconstitutional taking. Courts assume that Congress understands the constitutional implications of its statutory language. Therefore, courts should interpret § 253(c) to avoid an unconstitutional result.

Further, paying for property use is a cost of doing business for telecommunications providers. The cables, wires, and transmission boxes necessary to provide telecommunications services have a physical presence. If these providers did not have access to public rights-of-way, they would have to seek permission from private landowners and locate equipment on private property.

A narrow cost-recovery interpretation of § 253(c) potentially commandeers local governments into implementing a federal regulatory program and enacting federal policy, in violation of the Commerce

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319. See * supra* Part I.A.
323. See *California v. United States*, 395 F.2d 261, 264 (9th Cir. 1968).
324. See *U.S. W. Corp. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999).
326. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982); see also *Worstell, supra* note 86, at 467-69.
Clause, by forcing them to support telecommunications companies at public expense.\textsuperscript{328} When cities are limited to a cost-recovery model for the use of their rights-of-way,\textsuperscript{329} private companies receive the benefit of property held in trust for the public without paying for its full value. In effect, the company is granted a free public resource.\textsuperscript{330} This results in public subsidization of private companies.\textsuperscript{331} Congress may not compel local governments to subsidize private companies.\textsuperscript{332} Such commandeering is prohibited by the U.S. Constitution.\textsuperscript{333} To avoid creating unconstitutional results, courts should broadly interpret § 253 to allow the public to be appropriately compensated for the use of its property.

D. Local Governments May Use a Variety of Methods to Determine What Is “Fair and Reasonable Compensation”

If the state has not set limits on compensation, local governments should be able to determine the amount of compensation for use of their rights-of-way. Compensation can be based on several factors, including the nature of the local government’s interest in the rights-of-way,\textsuperscript{334} and what other companies pay.\textsuperscript{335} Further, the franchise fees can appropriately be based on a percentage of the telecommunications provider’s gross revenue.\textsuperscript{336}

The nature of the local government interest in the public rights-of-way can be a factor in calculating appropriate compensation. Certain property rights have value, which can be used to establish a fair and reasonable amount of compensation.\textsuperscript{337} If the local government has

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328. See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1328–29 (D.N.M. 2002).
330. See City of Santa Fe, 224 F. Supp. 2d at 1329.
331. See id. at 1329.
332. See New York v. United States, 505 U.S. 144, 175 (1992). In addition, many state constitutions have provisions specifically prohibiting such a gift of public resources to private companies, so such an interpretation potentially creates unconstitutional results at the state level. See, e.g., ALASKA CONST. art. IX, § 6; CAL CONST. art. XVI, § 6; N.Y. CONST. art. VII, § 8; WASH. CONST. art. VIII, § 7.
335. See id.
337. See supra notes 95–100 and accompanying text.
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complete ownership of the streets, in the same manner as a private owner, the appropriate compensation is fair rental value,\footnote{338. See City of St. Louis v. W. Union Tel. Co., 148 U.S. 92, 97 (1893).} the method used by the federal government to determine compensation for use of its own property.\footnote{339. 43 C.F.R. § 2803.1-2 (2002).} If the local government holds the right-of-way as an easement, this interest has value,\footnote{340. See United States v. Causby, 328 U.S. 256, 261 (1946).} which has been measured in different ways depending upon the circumstances.\footnote{341. See id. at 261–62.} If the public right-of-way is held in trust for the public, the local government arguably has a duty to receive compensation for the property on behalf of the public.\footnote{342. See Nat'l League of Cities, supra note 342, at 3.} The U.S. Supreme Court has indicated that reasonable rental may be appropriate in this case as well.\footnote{343. See City of St. Louis, 148 U.S. at 100.}

If the portion of the public rights-of-way used by the telecommunications provider could bring funds to the local government, it has value for which the local government should be compensated.\footnote{344. See California v. United States, 395 F.2d 261, 264 (9th Cir. 1968).} If the local government gave away this valuable property for free, it would not only be neglecting the best interests of its citizens,\footnote{345. See Nat'l League of Cities, supra note 342, at 3.} but it would also violate many state constitutions.\footnote{346. See, e.g., ALASKA CONST. art. IX, § 6; CAL CONST. art. XVI, § 6; N.Y. CONST. art. VII, § 8; WASH. CONST. art. VIII, § 7.} The appropriate amount of compensation is what the market can bear, up to state-imposed limits.\footnote{347. See Nat'l League of Cities, supra note 342, at 3.} The underlying purpose of local government authority over public rights-of-way is to control the streets and alleys for the benefit of the public,\footnote{348. See Nat'l League of Cities, supra note 342, at 3.} which includes receiving compensation when the land is used by a private company.\footnote{349. See Am. Pub. Works Ass'n, supra note 23, at 1.}

If local governments can receive compensation from other companies for use of public rights-of-way, they should be able to require compensation from telecommunications companies as well. The government’s loss of the space appropriated by a telecommunications provider could be measured in terms of what other providers are willing
Utilities other than telecommunications providers, such as cable television and electrical providers, also use public rights-of-way. Local governments generally receive payment from these utilities in the form of a percentage of gross revenue.

A telecommunications provider’s gross revenue is an appropriate basis from which to calculate compensation, even if it is not equivalent to the local government’s costs. U.S. Supreme Court decisions suggest that there is nothing inherently unreasonable about basing franchise fees on the gross revenue of a communications company within a particular jurisdiction. Many lower courts have expressly allowed such a calculation. Even courts that have limited fees for other reasons have not disputed that fees can be revenue based. For example, a Florida district court indicated that a one percent fee based on gross revenue was reasonable if allowed by state law.

Basing fees on a percentage of gross revenue is a fair approximation of the value of a company’s use of public rights-of-way. Because it is an indication of the amount of a company’s business in a particular jurisdiction, gross revenue reflects the value of their use of the right-of-way. Courts have agreed that for fees to be valid, their purpose must be expressly stated and the fees must be related to a company’s presence in the public rights-of-way. Fees based on a percentage of gross

351. See City of Dallas v. FCC, 118 F.3d 393, 393 (5th Cir. 1997).
352. See Alachua County v. Florida, 737 So.2d 1065, 1066 (Fla. 1999).
353. See City of Dallas, 118 F.3d at 393; Alachua County, 737 So.2d at 1066.
355. For example, City of St. Louis indicates that although Western Union was charged based on the number of its poles, other telegraph companies were apparently “taxed on their gross income for city purposes.” City of St. Louis v. W. Union Tel. Co., 148 U.S. 92, 98 (1893). The Court did not suggest that such a calculation was impermissible.
356. See City of Dearborn, 206 F.3d at 625 (upholding a franchise fee based on 4% of the telecommunication provider’s gross revenue); accord Bellsouth Telecommunications v. City of Orangeburg, 522 S.E.2d 804, 808 (S.C. 1999) (upholding a franchise fee based on 5% of the telecommunication provider’s gross revenue).
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revenue fulfill both these conditions. Such fees in franchises predating the 1996 Act were presumably considered “fair and reasonable.”\textsuperscript{360} Nothing has changed since passage of the 1996 Act that would render these fees unreasonable.

Furthermore, the 1996 Act expressly allows the use of a percentage of gross revenue for payment of certain franchise fees. Cities entering into franchise agreements with cable and OVS companies are allowed to charge revenue-based fees: local governments may charge fees of up to five percent of the gross revenue of cable television providers,\textsuperscript{361} and OVS operators are also charged based on their gross revenues.\textsuperscript{362} No technological or statutory distinction compels a different result for telecommunications franchises.

Local governments can choose from several methods of valuation when setting franchise fees, including the value of the property as appraised,\textsuperscript{363} prevailing rental value,\textsuperscript{364} and what other providers are willing to pay.\textsuperscript{365} The local government may provide other services to the telecommunications provider, such as supervision or licensing, for which it can be further compensated.\textsuperscript{366} The method used to determine the amount of compensation should be left to the discretion of the local government and the free market.\textsuperscript{367}

VI. CONCLUSION

Section 253(c) of the 1996 Act preserves the authority of local governments to require fair and reasonable compensation for use of public rights-of-way.\textsuperscript{368} State law is the source of both local government

\textsuperscript{360} See, e.g., City of Santa Fe, 224 F. Supp. 2d at 1308 (dating back to 1975); City of Orangeburg, 522 S.E.2d at 805 (dating back to 1993).
\textsuperscript{361} 47 U.S.C. § 542(b) (2000).
\textsuperscript{362} Id. § 573(c)(2)(B).
\textsuperscript{363} See City of Santa Fe, 224 F. Supp. 2d at 1309.
\textsuperscript{364} TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 789 (E.D. Mich. 1998), aff’d, 206 F.3d 618 (6th Cir. 2000); City of Orangeburg, 522 S.E.2d at 808.
\textsuperscript{365} See City of Santa Fe, 224 F. Supp. 2d at 1329; City of Dearborn, 16 F. Supp. 2d at 790.
\textsuperscript{366} See AT&T Communications v. City of Eugene, 35 P.3d 1029, 1034 (Or. Ct. App. 2001).
\textsuperscript{368} 47 U.S.C. § 253(c) (2000).
property rights and franchising authority.\footnote{See supra Part I.A–B.} Therefore, when evaluating whether a local government franchise fee requires fair and reasonable compensation from a telecommunications provider, courts should first consider state law.\footnote{See Qwest Corp. v. City of Santa Fe, 224 F. Supp. 2d 1305, 1318 (D.N.M. 2000).} Only after the court has identified the nature of the local government authority can it consider if the fee is fair and reasonable under federal law.

Some courts have interpreted § 253(c) too narrowly, limiting local governments to recover only direct costs for private companies’ use of public rights-of-way.\footnote{See Grant County v. Qwest Corp., 169 F. Supp. 2d 1243, 1249 (D.N.M. 2001).} Courts taking this approach potentially violate the U.S. Constitution by allowing private companies to appropriate a property interest without compensation, and by commandeering local governments into federal service.\footnote{See supra Part V.C.3.} Other courts have examined the totality of the circumstances surrounding a franchise and have allowed local governments to require greater compensation than merely direct costs.\footnote{See TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 789–90 (E.D. Mich. 1998), aff’d, 206 F.3d 618 (6th Cir. 2000).} The text and legislative history of § 253(c) and analogous U.S. Supreme Court precedent support this approach.\footnote{See supra Part V.C.1–2.} Thus, when considering the validity of a particular franchise fee, courts should first determine the source of local government authority under state law, and then apply a totality of the circumstances approach to determine if the fee is fair and reasonable.