Volume 107
Issue 4 *Dickinson Law Review - Volume 107, 2002-2003*

3-1-2003

Rights-of-Way Redux...Redux

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I. Introduction

This is the third installment printed in the *Dickinson Law Review* addressing the fees that local governments may permissibly charge wireline telecommunications and cable television companies[1] for use of public rights-of-way. The Fall 2002 issue of the *Law Review* led off with an article by Gardner Gillespie: *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators* (*Rights-of-Way Redux*).[2] William Malone, who has represented a number of municipalities on what he calls this "hotly contested question,"[3] offered a response in the Winter 2003 issue: *Municipalities' Right to Full Compensation for Telecommunications Providers' Uses of the Public Rights-of-Way* (*Municipalities' Right to Full Compensation*).[4] This article serves as a brief reply.

Rights-of-Way Redux was an effort to bring some clarity to the swirling debate about municipal wireline fees. Municipalities across the country today are increasingly supplementing their general fund revenues by imposing fees on wireline companies for use of public rights-of-way.[5]

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1. For the convenience of the reader, this article will use the term "wireline companies" when referring both to wireline telecommunications and cable companies.

2. Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209 (2002).

3. Mr. Malone acted as counsel in *T.C.G. Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000), *Bell Atlantic-Maryland v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000), and *City of Gary v. Indiana Bell Telephone Co.*, 732 N.E.2d 149 (Ind. 2000), among other cases. *See infra* text accompanying notes 26-30.

4. William Malone, *Municipalities' Right to Full Compensation for Telecommunications Providers' Uses of the Public Rights-of-Way*, 107 DICK. L. REV. 623, 636 (2003).

5. Gillespie, *supra* note 2, at 209.

The fees demanded by the municipalities typically take the form of a percentage of the wireline companies' gross revenues.[6] As consumers embrace the new communications services offered by wireline companies, the municipalities are pocketing substantial dollar amounts.[7]

This development has caused a surge in litigation between wireline companies and municipalities, litigation that has not yet finally resolved itself into a coherent legal doctrine.[8] But many of the issues involved have a familiar ring.[9] Municipalities in the nineteenth century similarly attempted to extract crippling tolls from the telephone and telegraph companies that used the public roads to run their wires.[10] And these efforts were eventually quieted by the courts.[11]

Rights-of-Way Redux begins with a look back to the nineteenth century, both to examine the accepted unique and limited nature of municipalities' ownership rights in their streets and to analyze carefully the often-misread 1893 Supreme Court decision of *City of St. Louis v. Western Union Telegraph Co. (St. Louis I)*.[12] In his initial opinion in the case,[13] Justice Brewer, writing for the Court, suggested for the first time that municipalities may exact "rental" from telecommunications companies for the use of their streets.[14] Yet his pronouncement was made without the benefit of briefing on the issue,[15] and he was apparently unaware of the accepted common law notion that municipalities own their streets only in trust for the public, and have no rights to rent or sell them.[16] In his opinion on rehearing two months later (*St. Louis II*),[17] the Court retreated from the rental theory, and fell back on the accepted doctrine that municipal fees were properly limited to regulatory costs.[18]

Having thus set the stage, the article then moves on to a discussion of the current federal statutes that further limit municipal ability to exact revenue-generating fees from wireline companies.[19] The article argues in conclusion that the current municipal efforts to "pluck the golden goose

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6. *Id.*
7. *Id.* at 210.
8. *Id.*
9. *Id.* at 210-11.
10. *Id.*
11. *Id.* at 212.
12. 148 U.S. 92 (1893) [hereinafter *St. Louis I*], *reh'g denied*, 149 U.S. 465 (1893) [hereinafter *St. Louis II*]; *see also* Gillespie, *supra* note 2, at 213-26.
13. *St. Louis I*, 148 U.S. 92.
14. *Id.* at 99.
15. *See* Gillespie, *supra* note 2, at 218 & n.57.
16. *See id.* at 214 & nn.21-28.
17. *St. Louis II*, 149 U.S. 465.
18. *Id.* at 470-71; *see also* Gillespie, *supra* note 2, at 221-22.
19. 47 U.S.C. §§ 253, 542 (2001); *see* Gillespie, *supra* note 2, at 233-54.

of new telecommunications and cable services," like the similar efforts of the municipalities to extract huge fees from the telephone and telegraph industries towards the end of the nineteenth century, are bound to fail.[20]

In response, Mr. Malone chooses largely to take the debate in other directions. He spends a considerable amount of his analysis discussing what he believes is a change in the historical regulatory compact between regulators and telecommunications utilities, though he does not establish how this discussion is relevant to the issue of municipal fees.[21] He also suggests, without support, that the historical nature of municipal street ownership has been changed by the proliferation of "home rule" statutes,[22] and he argues that municipalities are permitted by the Fifth Amendment[23] and required by state "anti-donation" laws to exact high fees for street usage.[24] Finally, Mr. Malone presents a newly minted interpretation of the legislative history of section 253 of the Telecommunications Act of 1996.[25]

This article will attempt to refocus and, hopefully, to close the debate. As discussed below, the historical perspective offered in *Rights-of-Way Redux* is necessary to understand the issues. Neither Mr. Malone's discussion of the changing nature of the regulatory compact nor his reference to the increased number of home rule states contributes meaningfully to the debate. Even were Mr. Malone correct that the Telecommunications Act implicates just compensation principles, the amount that would be due would be nominal. And, finally, Mr. Malone's unusual reading of the legislative history of section 253 is incorrect and has never been accepted by any of the dozens of courts that have interpreted the section.

II. The Importance of a Proper Historical Perspective

Mr. Malone's criticism of *Rights-of-Way Redux* for relying on older cases[26] is disingenuous, considering the positions that he has taken on behalf of his municipal clients in a number of cases. Indeed, it was Mr. Malone and his law firm that successfully convinced the court in *T.C.G. Detroit v. City of Dearborn*[27] that the 1893 Supreme Court decision in *St.*

20. *See* Gillespie, *supra* note 2, at 250-51.
21. Malone, *supra* note 4, at 627-29.
22. *Id.* at 630.
23. *Id.* at 635, 638.
24. *Id.* at 631-32.
25. *Id.* at 636-37.
26. *Id.* at 626 ("[T]he first thing one notices about the statutes and cases cited by Mr. Gillespie is their age.").
27. 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

Louis I established that municipalities have the right to rent their streets.[28] Mr. Malone has continued to advocate that position in later cases.[29] Only in the face of the demonstration in *Rights-of-Way Redux* that *St. Louis I*'s use of a rental analysis was quickly discarded on rehearing in *St. Louis II*,[30] and was then absent from the ten other Supreme Court decisions considering municipal fees over the next twenty-five years, does Mr. Malone suggest that these older cases have gone bad with age.

Indeed, Mr. Malone makes little effort in *Municipalities' Right to Full Compensation* to defend the view of *St. Louis I* reflected in his briefs. He issues a single *ex cathedra* interpretation of *St. Louis II*, attempting to shoehorn the Court's statement that "regulation" could include some right to require payment to "regulate the use" of the streets into an "affirmation of the City's power under state law to charge rent."[31] Mr. Malone chooses to ignore altogether the numerous other cases over the next three decades in which the Court analyzed municipal wireline fees solely on the basis of whether they were justified to meet regulatory costs.[32]

Instead of focusing on the *St. Louis* cases and the failure of the Supreme Court to approve a "rental" analysis in later decisions, Mr. Malone spends the bulk of his article on discussions of the change in the regulatory compact that he believes is reflected in the Telecommunications Act of 1996 and the home rule movement.[33] But, whatever the Telecommunications Act may say about the diminished role of natural monopoly theory in telecommunications regulation, a

28. Mr. Malone was one of the counsel for the City of Dearborn. *Id.* at 786.

29. In the motion to dismiss that Mr. Malone filed on behalf of his client in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000), he relied heavily on the *St. Louis I* opinion to support his claim that "[t]he ability of local governments to obtain compensation for use of their streets has long been recognized by the courts." Memorandum in Support of Defendants' Motion To Dismiss at 17-18, *Bell Atl.-Md., Inc.*, 49 F. Supp. 2d 805 (No. 4187). Quoting from *St. Louis I*, Mr. Malone argued that the compensation sought by local governments for use of public rights-of-way "is more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental. It is a demand of proprietorship." *Id.* at 17 (internal quotations omitted); *see also* Brief for Appellant at 12, City of Gary v. Ind. Bell Tel. Co., 732 N.E.2d 149 (Ind. 2000) (No. 45A03-9808-CV-333).

30. City of St. Louis v. W. Union Tel. Co., 149 U.S. 465 (1893) [hereinafter *St. Louis II*]; Gillespie, *supra* note 2, at 221-22.

31. Malone, *supra* note 4, at 632 (quoting *St. Louis II*, 149 U.S. at 468-70). As noted in *Rights-of-Way Redux*, this statement by the Court merely recognized the right of municipalities to charge a fee to cover the possible cost of Western Union's right-of-way use to other possible users. Gillespie, *supra* note 2, at 220-21.

32. Gillespie, *supra* note 2, at 222.

33. Malone, *supra* note 4, at 627-30, 635-38.

position with which these authors fundamentally agree, that issue simply has nothing to do with the common law limitations on municipal street ownership. Nor do home rule statutes affect the limited nature of municipal street ownership. Mr. Malone does not explicitly address—and it is unclear whether he disputes—the historical understanding that streets are held in trust for the public and, unlike other municipal property, are owned in a "governmental" and not a "proprietary" capacity.[34]

Mr. Malone believes that the trend toward municipal home rule is a "potent" and "universal" reason for dismissing older rights-of-way cases as "no longer predictive of present-day state law."[35] To support his claim, Mr. Malone chooses to rely principally on a case in which he represented the municipality, *City of Gary v. Indiana Bell Telephone Company, Inc.*[36] But the *Gary* case actually hurts his cause. Addressing the question whether the city had authority to impose revenue-based fees for use of its rights-of-way, the court initially took note of Indiana's Home Rule Act of 1980.[37] According to the court, the act "abrogated the traditional rule that local governments possessed only those powers expressly authorized by statute and declared that a local government possesses '[a]ll other powers necessary or desirable in the conduct of its affairs.'"[38] The court's inquiry did not end there, however.

Indiana's home rule statute did not answer the question before the court. As the court made plain, it was "faced with deciding whether the [revenue-based] fee was within Gary's broad grant of powers conferred on it by the Home Rule Act."[39] To grasp the scope of the powers delegated to the city, the *Gary* court retreated to the common law.[40] Unfortunately, the court accepted Mr. Malone's invitation to rely on the misreading of the common law evident in *St. Louis I*.[41] Based on *St. Louis I*, the court concluded that a local government's powers include "the unspecified power to operate in a proprietary capacity to charge fair and reasonable compensation for the private, commercial use of these

34. As noted in *City of Clinton v. Cedar Rapids & Missouri River Railroad Co.*, 24 Iowa 455 (1868), and *City of Des Moines v. Iowa Telephone Co.*, 162 N.W. 323 (Iowa 1917), municipal ownership interest in streets is unlike municipal ownership in "a market house, a public hall or the like." *City of Des Moines*, 162 N.W. 323; *City of Clinton*, 24 Iowa 455. Whereas the municipal interest in the latter was like the ownership interest of a private party, the ownership interest in streets, though held in fee simple, was merely a governmental interest. *See* Gillespie, *supra* note 2, at 214-15.

35. Malone, *supra* note 4, at 630.

36. 732 N.E.2d 149 (Ind. 2000).

37. *Id.* at 153.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 153-54.

public grounds, irrespective of the label placed on the compensation."[42] If the *Gary* court was aware of *St. Louis II*, and the Supreme Court's failure to follow the rental theory in later cases, it is not evident.

Mr. Malone's interpretation of the home rule phenomenon must thus be viewed suspiciously. The Indiana Supreme Court's reasoning in *Gary* reveals that the trend does not, in fact, "represent[] a watershed, such that pre-home rule cases on municipal property rights are no longer unconditionally authoritative."[43] The *Gary* court actually looked right past the Home Rule Act to the pre-home rule common law for authority that "validated [the] city's power to charge rent" for use of its rights-of-way.[44] It is precisely this misunderstanding of the common law—and misreading of the *St. Louis* opinions—that *Rights-of-Way Redux* seeks to correct.[45]

Mr. Malone is not able to make the case that municipal home rule by itself alters in any way the historical nature of municipal street ownership. Properly understood, home rule is simply a type of municipal organization that gives local governments broad powers over local concerns.[46] Home rule statutes may well have modernized the way states relate to their political subdivisions, but they did not—as the *Gary* case illustrates—reverse longstanding common law principles.[47] The issue is not about which governmental entities are vested with "ownership" of the public roads; rather, the issue is whether ownership of the public streets allows local governments to rent public rights-of-way.[48] *Rights-of-Way Redux* readily accepts that municipalities may be afforded taxing power by their legislatures, sufficient to permit the

42. *Id.* at 153.

43. Malone, *supra* note 4, at 630.

44. *Id.*; *see Gary*, 732 N.E.2d at 153-54.

45. Gillespie, *supra* note 2, at 218-225.

46. *See, e.g.*, *Gary*, 732 N.E.2d at 153 (stating that the home rule act "declared that a local government possesses '[a]ll other powers necessary or desirable in the conduct of its affairs'"). *See generally* 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 1.40 (3d ed. 1995).

47. *See, e.g.*, *Gary*, 732 N.E.2d at 153-54.

48. Mr. Malone's statement that early rights-of-way decisions have been "effectively reversed by state legislative action" is incorrect. Malone, *supra* note 4, at 629. The Maryland law on which he rests this claim uncontrovertibly passes title to the public roads to the Maryland Board of County Road Commissioners and empowers the Board to perform "duties as may be necessary to secure an efficient administration of the public road system." Act of Apr. 12, 1904, ch. 591, § 285, 1904 Md. Laws 1006, 1008. However, this piece of legislation is not responsive to the question whether administration of public road systems allows local governments to rent use of the public rights-of-way. Of similar effect are the cases cited by Mr. Malone for the point that municipalities may hold title to their streets. *See, e.g.*, Malone, *supra* note 4, at 630 nn.56, 63.

imposition of local taxes on street usage. But, as recognized there,[49] and also by Mr. Malone,[50] seldom have states delegated that broad power to their municipal governments.

Mr. Malone also suggests that state constitution "anti-donation" clauses demand that public property not be given away without adequate compensation.[51] But he cites no authority for the proposition that these constitutional limitations have any effect on the use of streets for the public purpose of wireline communications activities.[52] The constitutional provisions on which he relies are fully consistent with the historical restrictions against the use of streets for non-public purposes.[53] But it has long been recognized that wireline use of the streets is a public purpose.[54] Permitting wireline companies to place their wires above or below the streets is not in any way a donation of public property.

III. The Takings Clause Does Not Alter the Analysis Under Section 253

Mr. Malone appears to argue that the Takings Clause of the Fifth Amendment requires that section 253 of the Communications Act not be interpreted to prevent municipalities from imposing revenue-generating fees on wireline companies.[55] The split in the caselaw interpreting 47

49. Gillespie, *supra* note 2, at 226.

50. Malone, *supra* note 4, at 634.

51. *Id.* at 631.

52. Wireline telecommunications and cable companies' use of public streets is considered a "public purpose." *See, e.g.*, Cable Holdings of Ga., Inc. v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 609 (11th Cir. 1992) (stating that cable companies are entitled to access easements dedicated to the public for general utility use) (citing Centel Cable Television Co. v. Thos. J. White Dev. Corp., 902 F.2d 905 (11th Cir. 1995)); Yale Univ. v. City of New Haven, 134 A. 268, 271 (Conn. 1926) (stating that use of roads for public purposes includes placing telephone and telegraph wires above or below ground); Bentel v. Bannock County, 656 P.2d 1383, 1386 (Idaho 1983) (noting that "foreseeable" public uses of easements include "communications"); Williams Telecomms. Co. v. Gragg, 750 P.2d 398, 402 (Kan. 1988) (approving use of eminent domain power for public purpose of ensuring "[r]eliable high-speed transmission of telecommunications"); Cater v. Northwestern Tel. Exch. Co., 63 N.W. 111, 112 (Minn. 1895) (stating that "[t]he transmission of intelligence by telegraph or telephone" is a "public use" of the roads); Smith v. Adams, 523 A.2d 788, 789 (Pa. Super. Ct. 1987) (holding that cable communications are a "public service" for which public streets may be used); State *ex rel.* York v. Bd. of Comm'rs, 184 P.2d 577, 582 (Wash. 1947) (stating that roads may be used for public purpose of telephone and telegraph lines); Herold v. Hughes, 90 S.E.2d 451, 458 (W. Va. 1955) ("[P]ublic road purposes include[] all rights and privileges necessary or convenient to the use of the public in travel or transportation of properties of all kinds, under or along all public highways."). *See generally* 11 MCQUILLIN, *supra* note 46, § 30.159.

53. Gillespie, *supra* note 2, at 215.

54. *See supra* note 52.

55. Malone, *supra* note 4, at 635-36.

U.S.C. § 253 is discussed extensively in *Rights-of-Way Redux*.[56] One line of cases, germinating from *T.C.G. Detroit v. City of Dearborn*,[57] relies on a misreading of *St. Louis I* to hold that municipalities may obtain compensation in the form of "rent" under section 253.[58] The other line, increasingly gaining favor, holds that "fair and reasonable" compensation under section 253 is limited to regulatory costs.[59] Mr. Malone argues that these latter cases do not adequately recognize the requirements of the Takings Clause.[60] According to Mr. Malone, the requirement of section 253 that municipalities must not prohibit telecommunications companies from providing their services exacts a "taking" which must be compensated.[61]

There is a serious question whether the indirect restriction contained in section 253 against any "local legal requirement" that has "the effect of prohibiting the ability of any entity to provide . . . telecommunications service" effects a taking in the first place.[62] None of the numerous cases

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56. Gillespie, *supra* note 2, at 233-46.

57. 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

58. *See* Gillespie, *supra* note 2, at 235-40.

59. City of Auburn v. Qwest Corp., 260 F.3d 1160, 1179-80 & n.19 (9th Cir. 2001) (stating that non-cost-based fees are objectionable), *cert. denied sub. nom.* City of Tacoma v. Qwest Corp., 534 U.S. 1079 (2002); Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1100-01 (N.D. Cal. 2001) ("Fees charged against telecommunications carriers must be directly related to the carrier's actual use of the local rights-of-way."); N.J. Payphone Ass'n v. Town of West New York, 130 F. Supp. 2d 631, 637-38 (D.N.J. 2001) (stating more persuasive view is that municipalities are limited to recouping "costs directly incurred through use of the public rights-of-way"), *aff'd*, 299 F.3d 235 (3d Cir. 2002); Bell Atl.-Md, Inc. v. Prince George's County, 49 F. Supp. 2d 805, 817-19 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000); PECO Energy Co. v. Township of Haverford, No. 99-4766, 1999 WL 1240941, at *6-9 (E.D. Pa. Dec. 20, 1999); AT&T Communications of the Southwest, Inc. v. City of Austin, 40 F. Supp. 2d 852, 855-56 (W.D. Tex. 1998), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998); *see also* Bd. of County Comm'rs v. Qwest Corp., 169 F. Supp. 2d 1243, 1251 (D.N.M. 2001). *See generally* Gillespie, *supra* note 2, at 243-44. This view continues to gain adherents as more cases are handed down. In the recent case of *XO Missouri, Inc. v. City of Maryland Heights*, No. 4:99-CV-1052, 2003 WL 1838767 (E.D. Mo. Feb. 5, 2003), the Eastern District of Missouri chose to side with this camp. *Id.* at *4-5 ("The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under [§ 253]."); *cf.* Qwest Communications Corp. v. City of Berkeley, No. C 01-0 0663 SI, 2003 WL 1857631, at *5-7 (N.D. Cal. Apr. 7, 2003) (stating that city ordinances are not saved by section 253(c)); City of Rome v. Verizon Communications, Inc., 240 F. Supp. 2d 176, 181 n.2 (N.D.N.Y. 2003) (declining to decide fee issue because "numerous provisions of the Agreement" violated section 253(a)).

60. Malone, *supra* note 4, at 631, 635-36.

61. *Id.*

62. 47 U.S.C. § 253 (2001). It is doubtful whether government regulation that requires municipalities to permit the use of public streets for one of their historical public purposes can be deemed a "regulatory taking." Only if government "regulation goes too far" will it be "recognized as a taking." Pa. Coal Co. v. Mahon, 260 U.S. 393, 415

analyzing section 253 has held that the section effects a taking of municipal property. But, were just compensation principles to apply, they would not justify the revenue-generating fees that Mr. Malone seeks. Traditional takings law holds that just compensation is determined by the loss sustained by the person whose property is taken;[63] the value of the property to the taker is not considered.[64] As noted in *Rights-of-Way Redux*, historical just compensation principles would thus provide only nominal compensation to a street owner for the presence of a wire along or under the street, because the wire would "not unduly interfere with the [municipality's] use of the [right-of-way] for [other] purposes."[65]

Judge Tjoflat recently discussed these just compensation principles on behalf of the Eleventh Circuit in *Alabama Power Co. v. FCC*.[66] His analysis updates, but is wholly consistent with, the historic *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*[67] case. Judge

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(1922). The Supreme Court has generally "eschewed 'any set formula for determining'" how far is too far, choosing instead to engage in "essentially ad hoc, factual inquiries." *See, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992)); *cf. Lucas*, 505 U.S. at 1015 (stating that categorical treatment is appropriate when "land-use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land*'") (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)). Surely a regulation that prevents local governments only from thwarting wireline companies' abilities to deliver telecommunications services does not go too far. *See* 47 U.S.C. § 253(c). *But see* Jennifer L. Worstell, Note, *Section 253 of the Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property That Must Be Justly Compensated*, 50 FED. COMM. L.J. 441, 467-74 (1998) (stating that section 253 allows "telecommunications firms to permanently occupy the rights-of-way of municipalities, which amounts to a Fifth Amendment Taking requiring just compensation").

63. *See, e.g.*, Ala. Power Co. v. FCC, 311 F.3d 1357, 1369 (11th Cir. 2002) (citing United States v. Causby, 328 U.S. 256, 261 (1946)).

64. *Id.* at 1370 ("But if we know one immutable principle in the law of just compensation, it is that the value to the taker is not to be considered, only loss to the owner is to be valued.") (quoting Metro. Transp. Auth. v. ICC, 792 F.2d 287, 297 (2d Cir. 1986)).

65. Gillespie, *supra* note 2, at 241 (quoting Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 242 (1897)).

66. 311 F.3d 1357 (11th Cir. 2002).

67. 166 U.S. 226, 242 (1897). *Alabama Power Co.* is consistent with the Supreme Court's determination in *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984), that municipal property is covered by the Takings Clause and generally subject to a fair-market-value analysis. Malone, *supra* note 4, at 631. The Eleventh Circuit admitted that, if it were deciding a traditional physical takings case, fair market value would typically be the formula used to determine just compensation. *Ala. Power Co.*, 311 F.3d at 1368. The problem was that it was presented with a "unique" takings case. *Id.* at 1369. Because the property at issue—pole space—was nonrivalrous, the court determined that marginal cost, not fair market value, was an appropriate measure of just compensation. *Id.* at 1369-70.

Tjoflat reformulated the traditional principles in law and economics terminology. In analyzing the arguments of electric utilities that the Federal Pole Attachment Act required that just compensation be paid to utilities for allowing cable operators to attach to utility poles, the court determined that where the property taken was "nonrivalrous"—"[t]hat is, the cable company's use does not foreclose any other use"—marginal cost was adequate compensation.[68] Because the use of utility poles by cable operators would not "diminish the use and enjoyment of [the poles by] others," the court concluded that the utilities were due nothing more than the marginal costs associated with attaching additional wires to their poles.[69] Similarly, the marginal cost of wireline companies' use of municipal streets is surely not greater in any measurable degree than the regulatory costs to the municipality. Local governments' ability to collect "fair and reasonable compensation" for wireline companies' use of public rights-of-way under section 253 therefore satisfies the Takings Clause's "just compensation" requirement.[70]

IV. The Legislative History of Section 253(c) Does Not Endorse Gross-Receipt-Based Fees

Mr. Malone finds in the debate leading to passage by the House of the Stupak-Barton amendment "unambiguous[]" proof that the Congress "wrote subsection (c) [of section 253] in contemplation of gross-receipts-based fees."[71] A fair reading of this piece of legislative history, however, does not support Mr. Malone's view. And mounting contrary precedent signals that it is simply wrong.[72] The most that can be reasonably implied from passage of the amendment is that it was intended to allow local governments to consider the varying regulatory burdens placed on public rights-of-way by different telecommunications providers when

68. *Ala. Power Co.*, 311 F.3d at 1369.

69. *Id.* at 1369-71. The court qualified its holding by adding that the analysis would be different if the utility showed that a cable company's use of its poles foreclosed any other use. *Id.* at 1370. The court explained that, in this scenario, the pole space would be rivalrous—that is, the use of pole space by a cable operator would result "in a gain that precisely corresponds to the loss endured by the other party." *Id.* at 1369. Before the court would consider pole space to be a rivalrous good, however, a utility must demonstrate that the pole in question is at full capacity and the utility is able to put the space requested to a higher-valued use. *Id.* at 1369-71.

70. 47 U.S.C. § 253(c) (2001). Courts that have addressed the municipal fees issue have also indicated that section 253(c)'s "fair and reasonable compensation" is consistent with the Takings Clause's "just compensation" language. *See, e.g.*, N.J. Payphone Ass'n v. Town of West New York, 130 F. Supp. 2d 631, 638 (D.N.J. 2001) ("[A] fee that does more than make a municipality whole is not compensatory in the literal sense . . . ."), *aff'd*, 299 F.3d 235 (3d Cir. 2002).

71. *See* Malone, *supra* note 4, at 636.

72. *See infra* text accompanying notes 80-84.

imposing usage fees.

The circumstances under which the amendment was passed contradict Mr. Malone's claim that "[b]oth the proponents and opponents of the House committee's version agreed that the language adopted would permit gross-receipts-based fees."[73] The Stupak-Barton amendment was offered to replace a provision that would have required municipalities to charge different telecommunications providers the same fees for use of rights-of-way.[74] In offering the amendment, Representative Stupak asserted that local governments must be permitted to tailor the fees that they charge a given telecommunications provider to the burden that the provider places on the rights-of-way.[75] According to Representative Stupak, a municipality should be allowed to impose a different fee on "a company that just wants to string a wire across two streets to a couple of buildings" than one that "plans to run 100 miles of trenching in our streets and wires to all parts of the cities."[76] Representative Stupak claimed that under the existing provision municipalities "cannot make that distinction."[77] The Stupak-Barton amendment ultimately carried the day by a vote of 338-86.[78]

This understanding of the legislative history has gained broad acceptance in the courts.[79] By contrast, Mr. Malone stands essentially

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73. Malone, *supra* note 4, at 637.

74. 141 CONG. REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak).

75. *Id.* ("Local governments must be able to distinguish between different telecommunications providers.").

76. *Id.*

77. *Id.*

78. *Id.* at H8477.

79. *See, e.g.*, N.J. Payphone Ass'n v. Town of West New York, 299 F.3d 235, 246 n.7 (3d Cir. 2002) ("The authors' comments accompanying the introduction of their amendment were primarily concerned with providing local governments with the flexibility to vary charges based on the use of the rights of way."); T.C.G.N.Y., Inc. v. City of White Plains, 125 F. Supp. 2d 81, 98 (S.D.N.Y. 2000) (stating that Congress rejected "parity" provision by adopting Stupak-Barton amendment), *aff'd in part and rev'd in part*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 71 U.S.L.W. 3489 (U.S. 2003); T.C.G. Detroit v. City of Dearborn, 16 F. Supp. 2d 785, 792 (E.D. Mich. 1998) ("As can be clearly seen from Representative Stupak's comments, the parity provision was defeated because it did not allow a local government to distinguish between providers based on their varying use of the right-of-ways."), *aff'd*, 206 F.3d 618 (6th Cir. 2000); AT&T Communications of the Southwest v. City of Dallas, 8 F. Supp. 2d 582, 594 & n.42 (N.D. Tex. 1998) (stating that parity provision was rejected because it required local governments to charge the same fee to every telecommunications provider irrespective of burden imposed on the rights-of-way); T.C.G. Detroit v. City of Dearborn, 977 F. Supp. 836, 840 n.1 (E.D. Mich. 1997) ("As can be clearly seen from Representative Stupak's comments, the parity provision was defeated because it did not allow a local government to distinguish between providers and impose a 'fair and reasonable rate' to providers based on their use of the right-of-ways."), *aff'd*, 206 F.3d 618 (6th Cir. 2000); GST Tucson Lightwave, Inc. v. City of Tucson, 950 F. Supp. 968, 970 (D. Ariz. 1996) (stating that the "amendment constituted rejection of the previously offered 'parity' provision").

alone in his interpretation.[80] Of the many courts that have confronted the issue, not one has countenanced Mr. Malone's interpretation of the legislative history.[81] To the contrary, these courts have overwhelmingly rejected it. The majority has done so implicitly, by holding that subsection (c) does not allow municipalities to charge gross-receipts-based fees.[82] Others have done so more directly, by agreeing with the reading of the subsection's legislative history presented here.[83] For but one example, take the recent case decided by the Eastern District of Missouri, *XO Missouri, Inc. v. City of Maryland Heights*.[84] The *XO Missouri* court explained that in holding that subsection (c) does not allow municipalities to impose revenue-based fees it was "persuaded by the [subsection's] legislative history."[85]

Mr. Malone's analysis is further called into question by the fact that even the few cases supporting his conclusion—that subsection (c) allows municipalities to assess gross-receipts-based fees—have been unwilling to embrace his view of the subsection's legislative history.[86] Of course,

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80. *Cf.* Worstell, *supra* note 62, at 475-76 ("On the whole, Congress did not give any indication of what it thought was 'fair compensation' . . . .").

81. *See infra* notes 83-84.

82. Bd. of County Comm'rs v. Qwest Corp., 169 F. Supp. 2d 1243, 1251 (D.N.M. 2001) (stating that amount of user fee must "directly relate to County's expenses incurred in managing the actual physical use of the public right of way"); Qwest Communications Corp. v. City of Berkeley, 146 F. Supp. 2d 1081, 1100-01 (N.D. Cal. 2001); PECO Energy Co. v. Township of Haverford, No. 99-4766, 1999 WL 1240941, at *6-9 (E.D. Pa. Dec. 20, 1999); AT&T Communications of the Southwest, Inc. v. City of Austin, 40 F. Supp. 2d 852, 855-56 (W.D. Tex. 1998), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); AT&T Communications of the Southwest v. City of Dallas, 8 F. Supp. 2d at 593; *cf.* City of Auburn v. Qwest Corp., 260 F.3d 1160, 1180 & n.19 (9th Cir. 2001) (stating that non-cost-based fees are objectionable).

83. XO Mo., Inc. v. City of Maryland Heights, No. 99-CV-1052, 2003 WL 1838767, at *4-5 (E.D. Mo. Feb. 5, 2003); N.J. Payphone Ass'n v. Town of West New York, 130 F. Supp. 2d 631, 637-38 (D.N.J. 2001) (stating more persuasive view is that municipalities are limited to recouping "costs directly incurred through use of the public rights-of-way") (citing Bell Atl.-Md., Inc. v. Prince George's County, 49 F. Supp. 2d 805, 817-19 (D. Md. 1999), *vacated and remanded for consid. of state law issues*, 212 F.3d 863 (4th Cir. 2000)), *aff'd*, 299 F.3d 235 (3d Cir. 2002); *Bell Atl.-Md., Inc.*, 49 F. Supp. 2d at 817-19 ("The legislative history further supports the conclusion that the purpose of section 253(c) is to enable local governments to recoup their investments in public rights-of-way by imposing 'fair and reasonable' user fees on telecommunications companies, *apportioned according to the companies' actual physical use of the rights-of-way*.") (emphasis added) (citing 141 CONG REC. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Stupak)).

84. No. 4:99-CV-1052, 2003 WL 1838767, at *4-5 (E.D. Mo. Feb. 5, 2003).

85. *Id.* at *5.

86. *See* Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1257-59 (D. Or. 2002); T.C.G.N.Y., Inc. v. City of White Plains, 125 F. Supp. 2d 81, 95-98 (S.D.N.Y. 2000), *aff'd in part and rev'd in part*, 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 71 U.S.L.W. 3489 (U.S. 2003); Omnipoint Communications, Inc. v. Port Auth., No. 99-CIV-0060, 1999 WL 494120, at *6-8 (S.D.N.Y. July 13, 1999); T.C.G. Detroit v. City of

there may well be a variety of legitimate reasons to explain why these courts failed to rely on legislative history to bolster their holdings. A review of these decisions, however, suggests an obvious explanation: The courts did not believe that the legislative history is susceptible to the interpretation Mr. Malone would impose on it.[87] This point is well illustrated by the Eastern District of Michigan's decision in *T.C.G. Detroit v. City of Dearborn*.[88]

Addressing the issue of what kinds of fees subsection (c) permits, the *City of Dearborn* court devised an intricate test that explicitly allows municipalities to collect gross-receipts-based fees from wireline companies for use of public rights-of-way.[89] In arriving at this holding, the court in no way relied on the legislative history of the Stupak-Barton amendment.[90] As noted in *Rights-of-Way Redux*, the *City of Dearborn* court's tortured analysis, in the end, relied heavily on its misunderstanding of the *St. Louis* cases. The court, however, *did* look to the legislative history to explicate the subsection's "competitively neutral and nondiscriminatory" language.[91] If the legislative history "unambiguously" evidenced congressional approval of revenue-based fees, it is odd that the court chose not to rely on it for both its efforts at statutory interpretation. Had the court agreed with Mr. Malone that the legislative history sheds light on the fees issue, perhaps it would have taken this easier way to reaching its holding than the one it chose.

There is a good explanation for why the court took the hard road. The *City of Dearborn* court's discussion of the legislative history indicates that it did not think that it supported the proposition that subsection (c) permits municipalities to seek revenue-based rents from wireline companies for use of the public rights-of-way.[92] The court explained that, "[a]s can be clearly seen from Representative Stupak's comments, the parity provision was defeated because it did not allow a local government to distinguish between providers based on their varying

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Dearborn, 16 F. Supp. 2d 785, 788-91 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000); *see also* AT&T Communications of the Pacific Northwest, Inc. v. City of Eugene, 35 P.3d 1029, 1047-48 (Or. Ct. App. 2001) (failing to reach fees issue because the court held that plaintiffs failed to demonstrate that city ordinance violated section 253(a)), *review denied*, 52 P.3d 1056 (Or. 2002); BellSouth Telecomms., Inc. v. City of Orangeburg, 522 S.E.2d 804, 808 (S.C. 1999) (finding that a "franchise fee equal to a percentage of the revenue generated is not inherently unfair or unreasonable as a measure of the franchise's value as a business asset to the franchisee").

87. *See supra* notes 83-84.

88. 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F.3d 618 (6th Cir. 2000).

89. *Id.* at 788-91.

90. *Id.*

91. *Id.* at 792.

92. *Id.*

use of the right-of-ways."[93] The court did not accept the inference that Mr. Malone draws from the defeat of the parity provision.

V. Conclusion

Mr. Malone notes that the Second Circuit in *T.C.G. New York, Inc. v. City of White Plains*,[94] decided after *Rights-of-Way Redux* was written but before it was published, declined to reach the central issues addressed in this debate, finding the issues "difficult."[95] *Rights-of-Way Redux* and this brief rejoinder are efforts to bring some clarity to these issues so they are *less* difficult. A full understanding of the historical common law regarding municipal streets, the actual, limited significance of *St. Louis I*, the faulty reliance on *St. Louis I* that drove the analysis in *City of Dearborn* and its progeny, and the meaning of the language and legislative history of section 253 of the Telecommunications Act—all of these insights will aid courts in moving to consistent results in municipal wireline fee cases.

93. *Id.*
94. 305 F.3d 67 (2d Cir. 2002), *cert. denied*, 71 U.S.L.W. 3489 (U.S. 2003).
95. *Id.* at 79.