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Right way wrong way: The fading legal justifications for telecommunications infrastructure rights-of-way

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ABSTRACT

Telecommunications providers use rights-of-way to build physical network infrastructure on lands they do not own. Agreements to use these lands are usually made with public landowners such as local governments. Traditional rules for these negotiations are based on public utilities law and the common law of land ownership. Specific rules for telecommunications providers are also based on common carriage and Carrier or Last Resort regulations. Furthermore, the exercise of property rights by local landowners are often mischaracterized by telecommunications companies as burdensome regulation, with policy and jurisprudence following suit. This paper argues that in an era of technological convergence and the erosion of traditional public interest responsibilities, there are now fewer justifications for the unfettered usage of publicly-controlled lands by telecommunications firms.

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1. Introduction

Per common practice, telecommunications providers use rights-of-way to build physical network infrastructure on lands they do not own, for deploying cable aboveground or underground and for placing wireless transmission towers. Agreements to use these lands are usually made with public landowners such as local governments and the agencies that oversee national parks, state forests, and the like.

This article focuses on American policies and regulations that govern the use of such publicly-controlled lands by telecommunications providers. The procedures for interacting with and compensating landowners in order to obtain rights-of-way have been established per regulation and court precedent. In short, private landowners should be justly compensated;¹ public landowners may be compensated directly, but more often the firm using the land must offer some sort of remedy that is in the public interest. Traditionally, the particular responsibilities of telecommunications firms have been codified in common carrier regulations in which the firms received the authorization to use the land in return for delivering public interest benefits like universal service. Meanwhile, governments exercised the rights of landowners under traditional property ownership laws. This article focuses on the histories of these legal traditions as applied to telecommunications networks, arguing that the existing legal justifications for allowing telecommunications firms to use publicly-controlled lands (i.e. lands overseen by local or state governments in the interests of citizens) for rights-of-way are becoming untenable due to recent developments in the industry and the services that it delivers.

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¹ Compensation from telecom firms to private landowners for rights-of-way is a matter of contract law with its own complexities and controversies; this topic is beyond the scope of the present paper.

While the 1996 Telecommunications Act includes some specific rules for rights-of-way as needed by telecom service providers, much of the law regarding this matter descends from utilities regulation and the common law of land ownership. More specifically, utilities that operate aboveground power lines or underground pipelines are designated as franchisees that have been granted certain privileges for using land that is controlled by someone else, and in return these franchisees face various public interest obligations. For example, per statutes like the Clean Water Act, a fossil fuels company that lays a pipeline through a state forest is often required to satisfy the public interest by vowing to repair ecological damage. Historically, telecommunications firms have been subjected to similar requirements.

This article will introduce rights-of-way policy for private operators that make use of publicly-controlled lands, including the corresponding regulations in the telecommunications industry. Recent actions by telecommunications firms in which they have sought to be released from public interest responsibilities – including the maintenance of universal service programs, serving as common carriers, and serving as Carriers of Last Resort – have eroded their legal justifications for unfettered use public rights-of-way, which is one of the most important benefits they receive from the regulations that they hope to escape. The telecommunications industry also commonly mischaracterizes the exercise of property rights by local governments as burdensome regulation or punitive taxation, swaying policy decisions and judicial rulings in the event of land use disputes. The article will conclude with a discussion of whether this conundrum can be resolved via existing telecommunications regulations, or if a new focus on local property rights and public utilities law should be considered.

2. Rights-of-way for telecommunications infrastructure

2.1. The history of telecommunications land usage

In the words of NextLink Engineering Vice President Ed Koops back in 1999, “It doesn’t matter how high-tech the industry is. You still have to dig in the dirt” (quoted in [Glasner, 1999](#)). Modern telecom consumers may feel fully mobile and untethered from archaic wired infrastructures, but such networks still require a great amount of on-the-ground construction and placement of facilities. And these requirements will most likely grow in the near future. Policymakers are aware of this; for example, issues surrounding the acquisition and maintenance of rights-of-way received considerable attention in the Federal Communications Commission’s 2010 National Broadband Plan ([FCC, 2010](#), pp. 112–115). Nancy Victory of the National Telecommunications and Information Administration stated in 2002 that there is “no issue more fundamentally important to the widespread deployment of broadband and really, just about any other network technology, than rights-of-way” ([FCC, 2002](#), p. 133).

For burgeoning wireless networks, increasing numbers of transmission towers are becoming necessary, often being placed in remote locations with significant impacts on the natural environment ([Cramer, 2012](#)). For wired networks, aboveground cables are strung on telephone poles; these arrangements typically require contractual agreements among telecom providers and power companies (among others) that are beyond the scope of the present article. On the other hand, wherever underground conduits are more desirable or practical, those in urbanized areas are typically placed under streets, which are owned by the public; while longer-distance networks may take shortcuts between cities under publicly-owned lands like state forests.²

Many existing long-distance telecom networks are descended from lines strung along transportation corridors, for which the transportation rights-of-way issues were already settled. Some of these arrangements go back as far as telegraph lines constructed alongside railroad tracks in the 1830s, becoming a widespread practice with the completion of nationwide rail systems by the late 1880s. Those lines were gradually replaced over time with more modern infrastructure that in turn has been inherited by modern telecom providers. For example, Sprint arose from the communications division of Southern Pacific Railway, which used its existing rights-of-way for tracks to build its own private communications network. Similarly, MCI laid much of its fiber optic network along Amtrak rights-of-way and also inherited many rights-of-way dating back to early telegraph lines used by Western Union ([Melody & Møller, 1997](#), pp. 119–130).

2.2. Franchise law and network infrastructure

For cases in which early telecom lines needed to be placed in corridors that were not already alongside railroad tracks or roadways, such arrangements fell under the existing law of land ownership. In turn, telecom providers are considered to be franchisees, and the rights-of-way arrangements are typically managed by state public utility commissions. A “franchise” is a legal designation for a party that receives special rights and privileges from a government that are not enjoyed by all the citizens of the territory.³ In the present discussion, a telecom company using a plot of publicly-controlled land is a franchisee

² One phenomenon of interest is the practice of stringing new fiber optic cables through abandoned underground pipelines that were once used for natural gas and other fluids, which is becoming more common in former fossil fuel hubs like rural Pennsylvania. This practice raises the same issues as those analyzed throughout this paper, because the pipelines often traverse publicly-owned state forests and state parks, and digging is required to reach the old pipelines, clean them up, and reuse them (see for example [Myerson, 1994](#)).

³ This article uses the public law definition of “franchise” as described in the accompanying text. The term has different meanings in other areas of law, such as contract law regarding for-profit franchised businesses, which are beyond the scope of this article.

that can use the land in particular ways beyond the rights of the local residents, but such special rights come with responsibilities to operate in the public interest (Ellrod & Miller, 2003).⁴ This body of law arose because early in the history of the American republic, cities could not afford to build transportation and utility networks themselves, so they offered charters (later known as franchises) to private companies to build those networks. These contractual arrangements gave the private firms access to valuable rights-of-way, but in return they were obligated to use that public property in the public's interest, typically by offering services in a non-discriminatory fashion at reasonable rates (Spidak & Spulber, 1996). Franchise arrangements were also beneficial for the private firms, who only needed to negotiate with local governments and not with myriad small landowners (Priest, 1993).

These were voluntary contracts in which the private firms could profit from the publicly-owned land, knowing that in return the local governments would regulate their activities in the public interest (Priest, 1993). Obligations were also justified by the fact that most providers of networked services were natural monopolies, so private firms were protected from new entrants that would make a marketplace less efficient but would submit to regulatory oversight lest they try to take advantage of their monopoly power and neglect the public interest (Post, 1995). At the local level, this monopoly power is unlikely to be restrained by any type of regulation except for franchise agreements (Speta, 2003).

More specifically, any arrangement between a governmental entity and a private company, in which the government oversees the company's actions on behalf of the public, is called a "regulatory contract" in the law. This is the foundation of public utilities law, which has been extended into telecommunication rights-of-way (Spidak & Spulber, 1996). Furthermore, telecommunication law is directly descended from public utilities law because both types of industries operate as networks in which rights-of-way are required; both are also prone to natural monopolies that could be tempted to abuse their market power (Newbery, 1997). Therefore, franchise agreements between local governments and private firms in these industries, with market power being exchanged for public interest obligations, quickly gained legitimacy as regulatory tools.

In the *Charles River Bridge case of 1837*, the U.S. Supreme Court ruled that the relationship between Massachusetts and a private firm that it had licensed to operate a toll bridge was contractual in nature with rights and responsibilities for both sides. Furthermore, since the bridge was used by the public to cross a waterway that was itself public property, the government could impose obligations on the private company to operate in the public interest. A concurring opinion by Justice John McLean added that the public enters into the contract through its agent – the government – so the public has all of the privileges and protections bestowed by contract law, just like the private firm (Spidak & Spulber, 1996, pp. 891–893).

The rights and responsibilities of both public owners and private franchisees, in a regulatory contract with ramifications for property owners, were further clarified in the landmark Supreme Court case *Munn v. Illinois in 1877*, involving a dispute over state regulation of grain elevators that stored product in the midst of being shipped along publicly-owned waterways. Chief Justice Morrison Waite noted that property becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." Waite tied this interpretation to English common law and added that the arrangement was a bargain between the state and the owner of the property, if the use of that property had public interest ramifications. Furthermore, in this case the bargain was between a regulator and a public utility. In turn, the franchise agreement became accepted as a type of contract with all of the requisite legal and constitutional protections, regardless of the fact that one of the parties was a governmental entity (Spidak & Spulber, 1996, pp. 896–899).

2.3. *The rise of public interest obligations*

Meanwhile, changing technologies and political realities tended to make specifically-written franchise agreements unworkable because new public interest obligations would become necessary over time. The solution was to drop the specific obligations and use more flexible language about the public interest that could be interpreted by boards of local politicians. These boards eventually evolved into state utility commissions, which arose in the early 20th Century (Priest, 1993). These commissions originally oversaw power and water utilities and later added telecommunications networks to their bailiwick. Over time, the commissions oversaw public interest obligations that fell into four typical categories: reasonable prices, limitations on expanding into other types of business, construction of networks to all potential customers in the territory, and maintaining adequate levels of service. A utility commission oversees all of these as the public's representative while also serving as one of the parties in the franchise agreement (Spidak & Spulber, 1996, pp. 906–907).

Disputes over rights-of-way for telecommunications infrastructure and other utilities often become unnecessarily contentious because of an inaccurate focus. When local governments place conditions on the use of their land for rights-of-way, this is often characterized by the private firm as "regulation" when it is really the self-interested action of any property owner with contractual and constitutional rights. Mischaracterizing such action by local governments in this way has a political effect and can sway court decisions, with property usage fees being blasted as "taxes" and a city's exercise of property rights inspiring complaints about restrictive regulations and big government (Ellrod & Miller, 2003, pp. 504–505). Another misperception is that the Federal Communications Commission (FCC), with its focus on telecom networks, can tell local governments not to charge fees for use of lands for those networks; this is false because the authority to charge such fees is established in state law (West, 1994).

⁴ The legal construction of the franchise as applied to a telecom firm's usage of a right-of-way on publicly-owned land has been affirmed by the Federal Courts; see for example *TCG Detroit v. City of Dearborn* (2000).

On the other hand, local authorities (as opposed to federal regulators like the FCC) are more knowledgeable about local land use issues and the best locations for building infrastructure when it comes to safety, economic development, and other matters of the public interest. When viewed in this fashion, rights-of-way agreements become quite simple. In the words of Ellrod and Miller, “The fundamental fact about local communities’ rights vis-a-vis telecommunications companies is this: the public rights-of-way belong to the community, and neither a private company nor the federal government can use that property without the owner’s permission.” Ellrod and Miller have also expressed dismay at the refusal of private firms who have received value from publicly-owned property to admit that free market principles would imply that they owe something in return to the owners, either in cash or in kind (Ellrod & Miller, 2003, pp. 482–488).

This article argues that this viewpoint should be adopted as telecommunications companies use more and more publicly-controlled land for rights-of-way while attempting to shed their codified public interest obligations. Historically, with the exception of typically minor land use fees, operating in the public interest was usually the only obligation that local governments have placed on private firms for using public rights-of-way. From the property rights point of view, a local government holds land in trust for the local citizens, and when a private company ignores its contractual obligations for the use of that land, it is violating the property rights of each citizen represented by the local government that entered into the agreement (Ellrod & Miller, 2003).

2.4. Judicial interpretations of rights-of-way obligations

Courts have ruled that in such agreements, local governments have not just the right but the duty to protect the interests of local citizens by managing how the private company uses the land.⁵ Courts have also ruled that a franchise agreement is merely an authorization for a private firm to occupy public property and does not bestow unlimited or unfettered rights for using that land. Instead, the private firm is merely entering the public property, and the public owners (represented by local government) can impose conditions in return for the authorization to enter.⁶

Local governments (usually via state constitutions) have a responsibility to manage the use of rights-of-way by telecommunications firms, particularly in regards to traffic and street conditions, and this is a traditional justification for requirements that are added to rights-of-way agreements (Speta, 2003; West, 1994). Poor management could lead to expensive and disruptive effects for the community, especially poorly scheduled and executed road work (many modern cables are placed under roadways). Road work comes with disruptions of traffic and access to nearby homes and businesses, and even damage to other utilities in the same road cut such as water and gas lines (Sullivan, 1998).

Balancing these nuisances with the telecommunications benefits derived from the companies’ use of rights-of-way is becoming an increasingly vexing challenge for local governments (McCauley, 1999). Competing companies have also shown a reluctance to cooperate when building physical network infrastructures, lest trade secrets be revealed, thus increasing the challenges faced by local governments when managing rights-of-way (Speta, 2003). In fairness, it should also be noted that local governments have been known to manipulate the rights-of-way approval process for financial gain or to favor certain carriers, which could have a deleterious effect on competitive options for consumers (Szoka, Starr & Henke, 2013).

3. Telecommunications rights-of-way at the FCC and in the courts

Concerning land usage and franchise agreements, telecommunications service providers generally fall within the realm of public utilities law, in which public interest obligations have become an accepted part of the law. Utilities have the obligation to serve all potential customers in the territory, and to expand networks to handle growing demand. Regulators oversee these obligations plus customer relations, quality of equipment, speed of repairs, and the like (Spidak & Spulber, 1996). Of course, the telecommunications industry has its own robust regulatory regime, leading to some overlap and contradictions with the established law of rights-of-way in the realm of public utilities, especially as telecom firms shed the public interest obligations that are inherent in traditional telecommunications policy, as will be discussed below.

3.1. Statutory language in American telecommunications statutes

The Telecommunications Act of 1996 has its own rules for local management of rights-of-way usage by telecom firms, and the interpretations of these rules by the FCC and the judiciary have narrowed the ability of local governments to instill obligations on such firms (Esbin & Lutzker, 2001), as traditionally granted in public utilities law. According to the Congressional drafters of the Cable Communications Policy Act of 1984, federal law governs any local government oversight of telecom firms as they use the rights-of-way for laying underground conduits, hanging wires from poles, and erecting utility boxes (United States Congress, 1984, 1983). However, both Congress and the FCC have recognized that local governments

⁵ See for example *City of Colorado Springs v. Weiher* (1942); *Erie Telecommunications Inc. v. City of Erie* (1988); *Miller County v. Groves* (1991); *Rheinberger v. Security Life Insurance Company of America* (1944); *Yellow Cab Taxi Service v. City of Twin Falls* (1948).

⁶ See for example *Dunmar Investment Company v. Northern Natural Gas Company* (1970); *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966); *United States v. Puget Sound Power & Light Company* (1944); *Village of Blaine v. Independent School District No. 12* (1963).

retain certain aspects of their general authority over rights-of-way that was established in older utilities law, including the ability to add public interest obligations (Esbin & Miller, 2001, pp. 28–30; FCC, 1975).

Management of rights-of-way is governed by Section 253 of the Telecommunications Act of 1996, which is titled “Removal of Barriers to Entry” – a conclusory title that has steered the course of most of the jurisprudence arising from that section. The matter is stated rather forcefully in Section 253(a): “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”.

Telecom firms typically interpret this provision as characterizing the conditions and responsibilities placed by local governments on rights-of-way as illegal barriers to entry, while using divisive rhetoric about taxes and regulation and disregarding property rights, as discussed above. A later provision essentially commands the FCC to follow this line of thought, with Section 253(d) stating: “if... the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”

However, two intervening provisions seem to offer the contradictory notion of local political control. According to Section 253(b): “Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 [universal service], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” Furthermore, Section 253(c) says the same about rights-of-way in particular: “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...” This article argues that telecom firms have been extracting themselves from the universal service requirements of Sections 253(b) and 254 (and, less directly, consumer rights and other less-defined matters of the public interest) while failing to acknowledge the prerogative of local governments to impose requirements on those matters as given in these two sections of the Act.

3.2. Subsequent policy at the Federal Communications Commission

Most of the jurisprudence surrounding Section 253 of the Telecommunications Act offers little guidance for whether local governments have property rights over rights-of-way, because almost all of that jurisprudence is built around arguments that frame local regulations as restrictions on the operations of telecom firms. For starters, one surprisingly complex question revolves around how exactly a telecom firm “uses” public lands (Esbin & Lutzker, 2001, pp. 24–25). It took some time for courts to establish that “using” a right-of-way requires physical facilities and infrastructure, and does not include resellers and similar operations (Grogan, 2002).⁷ Therefore the rules are applied only to facilities-based service providers.

Section 253 of the Telecommunications Act has inspired a fair number of court disputes and FCC adjudications over local requirements for the use of rights-of-way, with the arguments usually being framed as barriers to entry afflicting new competitive carriers, and the rulings proceeding apace (for a judicial history up to about 2001, see Esbin & Lutzker, 2001, pp. 32–51; Ellrod & Miller, 2003, pp. 533–563). Some exemplary cases that pertain to the arguments in this article will be discussed here.

In the first FCC adjudication focused on Section 253, the Commission ruled that it is reasonable for a local government, when negotiating rights-of-way, to impose conditions on the scheduling and techniques of road construction projects to place telecom lines and to enforce local zoning regulations. If these requirements are framed sufficiently as matters of the public interest, and if they are applied only to the physical location of the right-of-way, the local government’s actions are protected under Section 253(c). The cities in question, two small towns in Kansas, did not frame such requirements adequately (FCC, 1996). However, in a later adjudication the Commission ruled that it would review any local rights-of-way ordinance in light of whether it “materially inhibits or limits the ability of any competitor to compete in a fair and balanced legal and regulatory environment” (FCC, 1997a). This is a very broad interpretation that allows any firm to claim that rights-of-way requirements prohibit its ability to compete freely, thus significantly restricting local regulation (Esbin & Lutzker, 2001).

In a 1999 Notice of Inquiry, the FCC stated that local governments “are responsible for... ensuring that the rights-of-way are used in a manner that benefits the public and... neither threatens public safety, unnecessarily inconveniences the public, nor imposes uncompensated costs” (FCC, 1999). This initially gives local governments the authority to impose conditions on matters of the public interest such as safety, but the phrase “benefits the public” is not given any further definition and can be used by telecom firms to justify their own usage of the land in question, if they frame the argument in terms of telecom options for consumers. In general, the FCC has exhibited a pattern of ignoring the matter of local property rights when adjudicating rights-of-way disputes (Ellrod & Miller, 2003), though perhaps not purposefully given the language of the Telecommunications Act.

⁷ This issue was major point of contention in *City of Auburn v. Qwest Corp.* (2001).

3.3. Rights-of-way disputes in the courts

Meanwhile, the courts have largely adopted the philosophy that Section 253 allows local governments to only impose rights-of-way conditions that are narrowly tailored toward the business of furnishing telecommunications services. This philosophy has allowed the judiciary to broadly interpret the effects of rights-of-way regulations based on the ability of telecom firms to do business, rather than any effects on the public interest (Esbin & Lutzker, 2001).⁸ Several District Courts have affirmed this philosophy of narrow local regulations, concluding that such local regulations must be “reasonable” in light of achieving telecom competition. The Ninth Circuit later ruled that local requirements must be limited to “control over the right-of-way itself, not control over companies with facilities in the right-of-way.”⁹ This opened a new can of worms, which was avoided by the Circuit Court, over how public-interest regulations directly or indirectly affect the telecom firm’s usage of the right-of-way, and how that usage is actually defined (Ellrod & Miller, 2003).

Furthermore, a Pennsylvania District Court framed a rights-of-way dispute as “balancing the authority of a local government to regulate within its borders against the right of a telecommunications provider to install its fiber optic cables in a community without undue interference from the community’s officials.” Note that this ruling characterizes a local government’s concerns over land use as potential “interference” with the telecom firm’s “right” to provide services. Meanwhile, the proposed balancing test can be greatly influenced by whether the presiding judge frames the issue as regulation or as property rights, as discussed elsewhere in this article. A similar philosophy can be seen in other rulings, such as one in which a South Carolina court ruled that a local government can require a telecom firm to use a right-of-way in the public interest, but that the firm only needs to make a “reasonable effort” to do so.¹⁰ This essentially allows the telecom firm to decide which uses of the right-of-way are in the public interest.

The dot-com boom and the spread of physical broadband networks led to a plethora of rights-of-way jurisprudence between the mid-1990s and early 2000s, notable precedents of which are discussed above. More recent cases are less numerous and have largely followed the reasoning of the earlier cases, but with some new legal strategies by telecom firms. In 2005, Qwest attempted to claim that a conditional rights-of-way franchise agreement with a city violated its due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution; a petition to this effect was rejected as unsupported by a North Carolina Federal Court. Another notable recent development came from a Federal Court in New York State in 2010, which ruled that the courts have jurisdiction over rights-of-way disputes between telecom firms and local governments if the parties are unsatisfied with FCC adjudication.¹¹

Much of the remaining jurisprudence surrounding Section 253 and rights-of-way disputes concerns fees charged by local governments for the use of land by telecom firms. This seemingly straightforward matter can also be framed in two different ways: whether the fee serves as just compensation to the landowners (local citizens) or as a punitive tax against the telecom firm. The courts have generally adopted the latter viewpoint, usually discussing whether such a fee is “reasonable” in terms of encouraging telecom competition. However, it is important to note that under the common law of franchises, a local government has not *sold* a right-of-way to a private firm; any fees charged are typically considered to be nominal compensation for costs incurred (Melody & Møller, 1997, pp. 119–130).

In the seminal ruling on this matter, a Texas Federal Court ruled that a right-of-way fee should only serve as “compensation” to the local government and any “unreasonable” fee acts as an economic barrier to entry that violates Section 253(a) of the Telecommunications Act, though the court avoided defining those two key terms.¹² Subsequent rulings have largely adopted the view that financial requirements on rights-of-way are potential obstructions to the competitive telecom marketplace envisioned by Congress in Section 253, and are possibly discriminatory against new entrants (Esbin & Lutzker, 2001). Fortunately for local governments, in 2005 a California Federal Court ruled that a telecom company arguing that a local government’s right-of-way fee is unreasonable must provide evidence that the fee extends beyond mere compensation.¹³

Section 253 of the Telecommunications Act has benefited the industry much more than local governments because after years of judicial interpretation, the consensus is that the rule is not concerned about property rights and instead functions as a barrier against local shenanigans in which regulations are misused to stifle the entry of new competing telecom providers. In other words, the section is intended to prevent new regimes of local regulation of telecom firms (Esbin & Lutzker, 2001). The FCC has followed this line of reasoning, often siding with telecom firms who mischaracterize the rights-of-way requirements of local governments as burdensome regulation rather than an exercise of a landowner’s property rights. The Commission has also ruled specifically that Section 253 was intended by Congress to be “deregulatory” (FCC, 1997b). This allows the telecom firms to define the terms of the debate, claiming that local rights-of-way conditions are in fact regulations, and setting the FCC on the path of removing barriers to entry.

⁸ A rare exception to this trend, in which a court at least partially considered local property rights, can be found in *Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston* (1999).

⁹ *AT&T Communications of the Southwest, Inc. v. City of Dallas* (1998); *BellSouth Telecommunications, Inc. v. City of Coral Springs* (1999); *City of Auburn v. Qwest Corp.* (2001).

¹⁰ *BellSouth Telecommunications Inc. v. City of Orangeburg* (1999); *PECO Energy Co. v. Township of Haverford* (1999).

¹¹ *New York State Thruway Authority v. Level 3 Communications* (2010); *Qwest Communications Corp. v. City of Greensboro* (2005).

¹² *AT&T Communications of the Southwest, Inc. v. City of Dallas* (1998).

¹³ *Pacific Bell Telephone Co. v. California Department of Transportation* (2005).

On the other hand, it does not take much imagination to conclude that the FCC would be less likely to allow a firm to trespass on a landowner's property (or at least to enter without proper authorization) if the dispute were framed in that fashion. Ellrod and Miller have noted that the landlord of a building (the owner) could evict a tenant who misuses or abuses the property under a previously agreed-upon contract, but in the world of telecommunications policy such an action would be seen as a barrier to entry (Ellrod & Miller, 2003). This line of thought has had expensive consequences, because there have been dozens of class action lawsuits in recent decades against telecommunications firms that have entered rights-of-way without proper permission. Many of these incidents arose from the companies failing to contact the public or private owners of land adjacent to, or under, railroad corridors for which arrangements were made with the respective transportation companies (Calhoun, 2001).

In addition to being a violation of property rights, some courts have seen such actions as criminal trespassing as well. In one notable case against MCI WorldCom in 2001, an Indiana court called the company's actions "willful trespass" and ordered that all unauthorized telecom infrastructure be removed, which cost the company more than \$8 million per month until the matter was resolved (Ackerson & Price, 2001). Interestingly, reflecting the evolution of telecom regulations from railroad regulations as discussed above, telecom firms also "inherited" this type of poor behavior from early railroad companies. Before laws on the matter were solidified in the late 1800s, those companies would build tracks through private lands without receiving authorization from the landowners. The railroads believed that the need for expanded networks precluded all other considerations – another attitude that can be detected at modern telecom firms. Internal telecom company documents revealed during lawsuits on this matter indicate that they knew they were using land without legal permission, rationalizing their actions with the need to expand their networks and remain competitive. In one case, AT&T admitted internally that its legal position was "far from sound" and "precarious" (Ackerson, 2003).

3.4. *Common carrier and carrier of last resort obligations*

Yet another inheritance from transportation, a networked industry with significant public interest ramifications, is the concept of the common carrier in telecommunications. Per Section 102 of the Telecommunications Act, a provider of telephone service can be designated as a common carrier by a state utility commission if doing so is consistent with the public interest. That carrier is then eligible to receive universal service funding and must use those funds to develop service for all potential customers in the service area. Common carrier regulation is closely related to public utilities law, with long-standing justifications for requiring that regulated firms fulfill certain obligations to the public interest, in return for the benefits of favorable treatment from government – ranging from tolerance of natural monopolies to granting usage of public rights-of-way. Common carriers and public utilities have long been subjected to specific obligations (not imposed on other types of businesses) to serve the public and charge reasonable prices, while avoiding the exercise of excessive market power (Cherry, 2008).

Common carriage and universal service requirements in telephony gradually led to a further regulatory designation called "Carrier of Last Resort" (COLR), which requires the incumbent firm in a given service area to make facilities and infrastructure available to all of the area's potential customers on demand, in case all other options fall through. Service providers typically receive this designation from state utility commissions. Furthermore, any utility (including telephone companies) with a franchise to operate in a given area must maintain responsibility to serve all customers on demand (Weisman, 1994).

Like many other aspects of public utilities infrastructure and the attendant legal traditions, the COLR concept dates back to the age of railroads, when carriers were prohibited from completely abandoning routes if doing so would damage the local economy and the public interest (Goldberg, 1979). In telecom, COLR obligations originated as extra requirements for a firm that was a monopoly or natural monopoly (Cherry, 2003).

Historically, telephone service providers (but not providers of more advanced telecom services) have been obligated under FCC regulations to make basic service available to all potential customers in their territories and at a reasonable price, even if doing so was not economically attractive for the company in question. Hence, the firm was designated as the "Carrier of Last Resort," a concept that has become more contentious in recent decades with the appearance of not just competitors for basic telephone service but also new and converged telecom technologies (Post, 1995).

4. The twilight of traditional obligations

For most of the history of American telecommunications service, telephones and broadcasting (plus cable TV and Internet later) were completely different technologies that were regulated separately. Telephone service was delivered over a network known in telecom parlance as the Public Switched Telephone Network (PSTN), and the regulation of this network was based upon oversight of natural monopolies (especially the old AT&T) and the delivery of benefits like universal service. Now thanks to convergence, consumers can get telephone service on myriad different devices and networks that also deliver other, formerly separate communications technologies (Werbach, 2007). This has led to the encroaching obsolescence of the PSTN and its regulatory regime, and technological convergence may lead to a loss of regulatory benefits for both the telecom firms and their consumers.

4.1. Carrier of Last Resort and universal service obligations

Carrier of Last Resort (COLR) obligations, which arose when telecommunications service providers were monopolies or natural monopolies, are losing their efficacy in the era of convergence because direct or indirect competitive options are increasing (Weisman, 1999). Most notably for the present discussion, telephone service providers have been regulated as common carriers, with the requirement to take on all customers; some of them were regulated further by states as COLRs with the extra requirement to make services available to all *potential* customers (among other obligations). COLRs were thus most likely to receive access to rights-of-way. Most common carriers and COLRs received a further designation from the FCC at the federal level – Eligible Telecommunications Carrier (ETC) – which made such a company eligible to receive universal service funding (Gillett, 2012).

Telecom firms have supported new legislation that would ease or eliminate COLR responsibilities (Frieden, 2013b). This has placed doubt on whether COLR responsibilities are still relevant, which companies (if any) should fulfill COLR obligations, and whether those obligations could be fulfilled by different technologies. The implications for universal service are also changing (Gillett, 2012), with questions being raised about whether telephone companies should continue to use funds that have been collected from consumers to continue reaching for the goal of basic telephone service for all (Cramer, 2015, pp. 158–164).

The advent of advanced and converging telecom services has raised questions about the continued efficacy of universal service requirements and if they are even necessary when most modern consumers are no longer interested in plain old telephone service for themselves or anyone else (Cramer, 2015). In recent years, company attempts to be released from universal service requirements have proliferated in the courts (Intergovernmental Advisory Committee, 2013), and have made the national news. In one notable example, after Hurricane Sandy devastated the landline phone system on New York's Fire Island in 2012, Verizon announced a plan to abandon landlines in favor of purely wireless services for the residents, which incidentally would have extracted the company from delivering universal service commitments and common carrier obligations (Bobkoff, 2013).

4.2. Common carrier obligations

The common carrier designation is also losing its efficacy, because technological convergence may make the concept of a telecommunication company that must take on all customers irrelevant. Most influentially, that concept has also been distorted in the modern network neutrality debate, with companies that deliver both telephone service and Internet service claiming that they should not be classified as common carriers – which is probably to their advantage (lesser federal regulation) when delivering Internet services but which eliminates both the responsibilities and benefits of being a common carrier, such as gaining access to rights-of-way after vowing to deliver universal service and other benefits (Cherry, 2006). Via the network neutrality debate, if converged telecom service providers do not wish to be regulated as common carriers, perhaps they should give up the benefits of that designation.

5. The fading legal justifications for unfettered usage of rights-of-way

5.1. Regulatory classifications

Section 253(a) of the Telecommunications Act uses the term “telecommunications service” but not “information service;” under a strict reading of the statutory language, the ability of local governments to regulate rights-of-way under Section 253 would apply only to those services described as “telecommunications services” (typically traditional telephony) elsewhere in the Act. But in the modern world of telecommunications convergence, services are on the road to being reclassified as “information services” that are not mentioned in Section 253. Commentators have warned that this would remove most local government authority over rights-of-way when used strictly for services otherwise classified by the FCC as “information services” (Esbin & Lutzker, 2001).¹⁴

This regulatory reclassification has been accompanied by the dismantling of common carrier obligations for converged telecom companies (Cherry, 2006). The proliferation of new competitive options and network access points is eroding the need for common carriers in telecommunications, but the anti-discriminatory and public interest goals of old common carrier regulations are not being replaced with any sort of pro-local regulatory regime. For the present article, one notable outcome of this deregulatory trend is the loss of support for universal service programs – previously one of the major benefits bestowed by telecom carriers to the public in return for the benefits they receive from local governments (Cherry, 2008). Common carriers and COLRs have also long received public subsidies to assist in the expansion of network infrastructure (Whitt, 2009). In fact, former common carriers and COLRs may have underestimated the benefits they have

¹⁴ Note that in February 2015 the FCC reclassified broadband Internet carriers from “information services” to “telecommunications services” in order to encourage network neutrality and preserve the Commission’s conception of an “open Internet.” This crucial development might have an impact on the matters discussed in this paper, but as of the time of writing it is too soon to tell.

received from those regulatory designations (Frieden, 2013b). As telecom firms work to shed common carrier regulations they will lose certain regulatory benefits, and so will the public.

5.2. Converging technologies and public utilities law

Telephony, cable, broadcasting, and the Internet – traditionally regulated under different regimes because they operated in different fashions – are converging, with the same “content” being delivered to customers over networks that are becoming more and more similar technologically (Bauer, 2010). Ironically, this ultramodern trend might be making telecom networks more like public utilities than ever before, at least through the lens of regulation. Commentators including Henten et al. have suggested that converged telecom technologies should be accompanied by converged regulatory regimes, with a new type of “multisector utility” scheme in which regulators leverage authority across various types of infrastructure in order to oversee the higher-level matter of the delivery of information to customers (Henten, Samarajiva, & Melody, 2003).

If this is the case, telecommunications would be regulated just like public utilities, and the regulations directed at those two industries could themselves be converged, putting telecom at the same level as electricity, transportation, and water. This in turn would lead to a convergence in the regulation of rights-of-way, to be managed by entities similar to the older state utility commissions and without the telecom-specific FCC regulations discussed herein (Henten et al., 2003).

Converging telecommunications technologies have added new challenges to the on-the-ground management of rights-of-way as well. Whereas these strips of public land were once given away for next-to-nothing by local governments desperate for infrastructure development, the choicest parcels (in terms of geography and ease of access) are becoming scarce, with competing firms willing to pay handsomely for their use. Control of the most desirable rights-of-way by private firms has now also become a method of obstruction (barriers to entry) toward new competing firms (Henten et al., 2003), which could possibly be ameliorated by more active local regulation.

Telecommunications firms that have shed the common carrier or COLR regulatory designations have been known to cling to the benefits of the previous regulations while striving to capture gains from their new deregulated milieu. But while the FCC has released them from their responsibilities under the former regulatory designation, perhaps they should give up the benefits too – such as unfettered usage of public rights-of-way (Frieden, 2013b).

6. Conclusions

Evidence indicates that landowners are becoming more aware of their legal rights in regard to rights-of-way as used by private companies – from large private landowners like the paper companies who own entire forests, to national and state entities that oversee public lands, and local governments as well (Ackerson, 2003). A prominent telecommunications policy expert recently declared, “Now that telephone companies want to provide anything but [basic] wireline telephone service it strikes me that they should lose the rights of way granted to them by state public utility commissions.” He continued, “[I]f a telephone company no longer wants to serve as the carrier of last resort... then they in effect should be deemed to have abandoned their right to secure a property interest in my land,” and “[I]f a common carrier opts to abandon its common carrier duties, then it should lose its rights of way over private property for lines that no longer provide common carrier services” (Frieden, 2013a). This implies that telecom firms that use lands they do not own should deliver some sort of public interest benefit to local citizens, which has been the case in the past under common carrier regulations, but the justification for which is fading under modern technological and regulatory convergence.

In a critical reading of the jurisprudence that has arisen from Section 253 of the Telecommunications Act, Ellrod and Miller concluded that Congress intended for the Act to preserve local rights and the processes of federalism, with local governments as the proper overseers of publicly-controlled land that is used by private telecom firms. This is at least the argument in cases for which a court considered the right-of-way dispute at hand as a matter of property rights rather than barriers to market entry (Ellrod & Miller, 2003). However, the FCC typically views such disputes as matters of network expansion rather than local property rights, with telecom firms fueling the flames with divisive rhetoric about taxes and burdensome regulations. It might be time to return to the philosophy of property rights and the law of public utilities, because telecom firms are running out of justifications for unfettered usage of rights-of-way thanks to their own efforts to be freed from traditional regulations.

Common carrier regulation, while seemingly onerous when viewed as government intervention in markets, actually comes with significant benefits that eventually translate into cost savings and revenues for telecom firms (Frieden, 2013b). Most notably for the present discussion, these include access to publicly-controlled land for rights-of-way, typically at a nominal fee that is far below what equivalent lands would cost on the open real estate market (Snyder & Fitzsimmons, 2011, pp. 172–174). But even though firms are shedding their common carrier responsibilities, they are likely to continue insisting that they should receive these benefits.

All of this diminishes and obscures the public interest in accessible services at reasonable prices, not to mention wise use of publicly-controlled lands for rights-of-way. Meanwhile, as the FCC phases out common carrier and COLR obligations for telecom firms, while reclassifying more and more networks as information services, there is no regulatory fallback that requires such firms to continue delivering any public interest benefits. In the event of future rights-of-way disputes, this will require awkward legal rationales from the FCC, such as tough-to-support exercises of ancillary jurisdiction or newly-

constituted regulatory classifications that will require new legislation (Frieden, 2013b).

A renewed regulatory regime on this matter, based on property rights and public utilities law, would obviously benefit communities by preserving local government authority over land usage. Telecom firms might be surprised to find that this will benefit them as well, because this type of new regulatory regime would be a solid replacement for the previous legal justifications that allowed them to realize the benefits of rights-of-way, but which are becoming weaker and less sustainable thanks to convergence and the actions of the firms themselves.

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