Hottest Issues in Telecommunications:
City of Auburn v. QWEST, Franchises & Refusals to Underground

A Presentation to Washington State Municipal Attorneys
by
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The struggle between telecommunications service providers and local governments unleashed by the passage of the Federal Telecommunications Act of 1996 (FTA) continues unabated. While the slowing of the national economy, the tanking of telecommunications stock values, and the recalcitrance of the Baby Bells have slowed the expansion of competitive local exchange services across the country, several Washington cities have approved applications for competitive local exchange carriers (CLECs) to compete with the incumbent local exchange carrier (ILEC). CLECs lure business customers away from the incumbent, be it VERIZON or QWEST, by offering higher reliability, lower cost broadband telecommunications services to high volume telecommunications users. Other cities have witnessed mission creep as the incumbent cable television service provider expands its telecommunications offerings into cable modem internet access service and even local dial tone service.

This rapid evolution in the telecommunications services industry poses unique challenges for local governments. The telecommunications industry has been successful in using the confusing and overly rigid federal regulatory structure to challenge local government decision-making authority. QWEST has been particularly aggressive. It has successfully mounted challenges against local government regulations in Washington, California and Colorado.[2] A major challenge to the telecommunications franchising and taxing scheme authorized by Oregon state law, and used by Portland and other Oregon cities, is now playing out in the U.S. District Court in Oregon.

On the *wireless* side there is some good news to report. Despite the staggering increase in the number of wireless telecommunications customers[3] the tide seems to be turning in favor of local governments. They have been increasingly successful in defending federal court challenges brought by telecommunications carriers aggrieved by

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[2] See *QWEST v. City and County of Denver*, 18 P.3d 748 (Colo. 2001).

[3] At the spring 1999 WSAMA conference I reported there were 66,000,000 U.S. wireless customers. There are now 122,000,000. See http://www.wow-com.com/. Worldwide the number of wireless customers is expected to surpass the number of wireline customers by 2006. By then it is estimated there will be 1.6 billion cell phone users with only 973 million fixed lines. See http://www.idg.net/go.cgi?id=558173.

decisions denying applications to build wireless telecommunications facilities[4]. The story on the *wireline* side is not nearly as encouraging.

This paper explores some current flashpoints on the *wireline* side of the telecommunications revolution.[5] At the request of the WSAMA conference committee it examines *City of Auburn v. QWEST*, franchises and undergrounding.

A. *AUBURN* & ITS PROGENY: DIRECT CHALLENGES TO LOCAL GOVERNMENT AUTHORITY

1. City of Auburn v. QWEST, 260 F.3d 1160 (9th Cir. 2001)

This case was a challenge brought by a coalition of eighteen Washington cities against QWEST, f/k/a US WEST, to require it to relocate its telecommunications facilities located within city rights of ways at the company's own expense. The case began when US WEST suddenly announced in February 1996 that it would henceforth require cities and counties to pay for the costs of all relocations of US WEST's facilities. This announcement was predicated upon a new interpretation of an existing tariff that had been in effect for nearly 30 years. In response to US WEST's action, a group of counties, lead by Pierce County, successfully brought a declaratory judgment lawsuit. The Pierce County Superior Court granted the counties summary judgment on their claim that US WEST, not the counties, was required to pay relocation costs. When a group of cities sought similar relief, US WEST filed a counterclaim seeking to invalidate several of the cities' telecommunications ordinances and removed the matter to federal court.

At the District Court level, the cities won. The Court ordered US WEST to pay for the costs of relocating its facilities. The Court also denied US WEST any relief on its counterclaim[6] finding that the matter was not yet ripe for judicial determination because none of the cities had attempted to compel US WEST to comply with their telecommunications ordinance.

On appeal the Ninth Circuit in Part I of its opinion upheld the Cities' position on the relocation issue. It affirmed that a tariff cannot supersede the common law and con-

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[4] See, e.g., *Wireless Telecommunications in 2001, a Municipal Perspective*, a paper delivered by me at the Law Seminar International Fourth Annual Local Telecommunications Infrastructure Conference in August. An updated version of this paper will be posted on the MRSC telecommunications web page.

[5] For fuller discussion of telecommunications issues, check the telecommunications page at www.mrsc.org. Several national law firms that specialize in telecommunications law on behalf of municipal governments have helpful websites. See, www.millervaneaton.com, and www.varnumlaw.com. For a website from a law firm representing several telecommunications industry clients is helpful see www.crblaw.com.

[6] US WEST agreed to dismiss its counterclaim against the City of University Place while the matter was pending before the District Court. The City passed Ordinance No. 242 in July 1999. The ordinance, available from the City website at www.ci.university-place.wa.us, exempts any telecommunications provider that has a franchise for wireline facilities based on the Washington State Constitution from the City's franchising requirements. Similar language, exempting US WEST and VERIZON from telecommunications master permits for wireline facilities, appears at RCW 35.99.030(1).

tains strong statements about the common law requirements that compel QWEST to relocate facilities at the company's own expense. The Ninth Circuit's reaffirmation of Washington common law will be helpful in subsequent disputes about relocation.

Part II of the Ninth Circuit's decision in *Auburn*, however, is quite disconcerting. The Court rejected the ripeness challenge asserted by the cities, reversed the District Court and threw out in their entirety the telecommunications ordinances of four cities. The Court began by finding that ESSB 6676, now codified at RCW 35.99, clearly conflicts with the cities' ordinances provisions that purport to regulate the *wireline* facilities of QWEST. Therefore, the cities' ordinances are preempted under state law. The Court declined to rule on whether RCW 35.99 preempted the cities ordinance for US WEST's *wireless* facilities. This is probably a moot point, however, in light of the Court's decision to preempt the ordinances under federal law.

In its federal preemption decision the Ninth Circuit, citing *AT&T Communications v. City of Dallas,* 8 F.Supp.2d 582 (N.D. Tex. 1998), adopted the most restrictive interpretation of what is left of municipal authority over telecommunications providers, "Municipalities therefore have a very limited and proscribed role in the regulations of telecommunications."

The Court focused on four significant features of the ordinance that it found violated the FTA. First, the ordinances require QWEST to undergo an extensive application process that is not directly related to the management of the right of way. This application process includes providing data about financial soundness, technical qualifications, legal ability to provide telecommunications services, and a description of telecommunications currently either currently provided or planned to be provided.

Second, the ordinances impose reporting requirements or other controls over matters not directly related to management of the rights-of-ways including regulations controlling the ownership and transfer of ownership of telecommunications companies. The Court found that the municipal regulation of stock transfers extends far beyond the management of the rights-of-way.

Third, the ordinances require, either through the application process or by other means, that franchise agreements contain conditions, i.e., most favored nation clauses, requiring the telecommunications provider to guarantee the cities the most favorable billing rates for service. The Court found that such requirements are not connected with the cities' obligation to manage the rights-of-way and constitute an impermissible rate regulation of the services of the provider.

Fourth, the ordinances grant the Cities "unfettered discretion to insist on unspecified franchise terms and to, grant, deny, or revoke a franchise based on unnamed factors." The Court concluded that the ordinances are too broad and vague to comply with §253 of the FTA. The Court went on to find that the preempted regulations so permeate the cities' ordinances that it is impossible to sever the preempted provisions. Therefore, it struck the ordinances down in their entirety.

2. *QWEST v. City of Berkeley*, 146 F. Supp.2d 1081 (N.D.Cal. 5/23/01)

This case involves a challenge filed by QWEST in February, 2001, to a newly enacted right of way management ordinance, Berkeley Municipal Code, § 16.10 et seq., that applies to all telecommunications carriers seeking to encroach upon rights-of-way within the City of Berkeley, California. QWEST claimed that both the ordinance and its accompanying fee schedule are preempted under the Sections 253(a) and (c) of the Telecommunications Act, conflict with the general laws of the States of California, and interfere with a contractual relationship between QWEST and the Lawrence Berkeley National Laboratory.

The City of Berkeley moved to dismiss QWEST's complaint and its damage claim. QWEST sought a preliminary injunction against the City based on its preemption claim. The case was argued before the District Court on April 24, the day after the Ninth Circuit decision in *Auburn*. The parties were given the opportunity to submit supplemental briefs in light of *Auburn*.

The District Court granted a preliminary injunction to QWEST preventing the City from enforcing its ordinance. The Court found that QWEST had established that it was likely to prevail on the merits of its claim that Berkeley's ordinance is preempted by both federal and state law. The District Court's opinion tracks similar concerns in Berkeley's ordinance as those raised by QWEST about the cities' ordinances in *Auburn*.

3. *QWEST v. City of Portland*, No. 01-CV-1005-JE, (USDC Oregon)

By amended complaint filed on July 18, 2001 QWEST seeks to overturn an Oregon Revised Statute § 221.515(1), which states:

> The council of every municipality in this state may levy and collect from every telecommunications carrier operating within the municipality and actually using the streets, alleys or highways in such municipality for other than travel, a privilege tax for the use of the streets, alleys, or highways, or all of them, in such municipality in an amount which may not exceed seven percent of the local exchange access revenues of the telecommunications carrier currently earned within the boundaries of the municipality.

QWEST also seeks to invalidate portions of the Portland City charter, Chapter 7.14 of the Portland Municipal Code, and a Temporary Revocable Permit (TRP) issued by the City of Portland authorizing QWEST to continue providing telecommunications services for up to a twelve month period commencing July 1, 2001 following Portland's revocation of a License Agreement entered in 1932 between the City and QWEST's predecessor. Portland provided notice on December 29, 1999 that it would the License Agreement. The revocation became effective on June 30, 2001.

QWEST asserts[7] that the state statute and City code result in it being required to pay unlawful fees for the use of municipal rights of ways. In reliance upon *City of Auburn, supra*, QWEST has stopped paying franchise fees to over 80 Oregon cities. QWEST asserts that the *Auburn* case precludes any payment for use of the right-of-way other than direct costs incurred by a city in managing access to rights-of-way including regulating the physical process of installing and maintaining facilities in them. QWEST's action in withholding franchise fees will cost the City of Portland alone over six million dollars a year.

QWEST also asserts that the franchise requirements imposed by the City of Portland constitute "substantial and unlawful barrier[s] to entry into the telecommunications market" in contravention of *Auburn.* Among the provisions of the City code that QWEST challenges are requirements that telecommunications providers file reports, including onerous annual reports, and permit the Bureau of Licenses to conduct investigations and audits to determine the accuracy of the annual reports submitted by QWEST.

QWEST's challenges to the Temporary Revocable Permit (TRP) issued by Portland and which QWEST accepted with an express reservation of rights include the provisions: (1) limiting the term to one year; (2) being temporary and revocable; (3) requiring QWEST to submit a quarterly report detailing the company's gross revenue; (4) permitting the City to conduct an audit and financial review of the company; (5) requiring QWEST to change the location of its telecommunications system at any time at its own expense; (6) requiring QWEST to unconditionally accept the terms and conditions of the TRP; (7) requiring a 7% of gross revenue franchise fee for use of the rights of ways. QWEST asserts that these regulations constitute a "third tier" of local regulations impermissible under the FTA.

QWEST seeks relief: (a) under the Sections 253(a) and (c) of the Telecommunications Act of 1996 invalidating the requirements imposed on it by Portland; (b) relief under 42 USC § 1983 for violation of its vested property rights; and declaratory relief under 28 USC §§ 2201, 2202, the Declaratory Judgment Act. QWEST also seeks its costs, disbursements, and attorney's fees incurred in connection with this action pursuant to 42 USC § 1988. QWEST bases its challenge to Portland's regulation on *City of Auburn v. QWEST*, 246 F.3d 966, amended decision at 260 F.3d 1160 (9th Cir. 2001) which QWEST states is the first authoritative decision in this Circuit interpreting FTA Section 253, 47 USC § 253.

On July 20, 2001 QWEST filed its motion for summary judgment and expedited hearing request. The summary judgment motion clarifies in part QWEST's challenge to

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[7] Pleadings, newspaper reports about the dispute and other documents are available at the League of Oregon Cities website at http://www.orcities.org/members/franchise/franchise.html.

the Oregon statute. Apart from the fact that the statute authorizes a "privilege tax *for the use of the streets, alleys or highways or all of them* in such municipality …" which QWEST argues directly violates the FTA as determined by the Ninth Circuit in *Auburn*, QWEST also objects to the uneven application of the seven percent tax. As QWEST interprets Oregon law, cities are allowed to impose this tax only upon incumbent local exchange carriers, not on new entrants into Oregon cities' telecommunications markets, the CLECs. States QWEST, "Accordingly, only incumbents, such as QWEST, are subject to the 7% revenue-based fee; competitive telecommunications providers are not." QWEST further objects to state law provisions that permit cities to impose: (1) regulations regarding a carrier's equipment, facilities or plant; (2) impose a penalty for noncompliance with any ordinance, city charter or franchise agreement; and (3) allow cities to exclude or eject a telecommunications carrier from the rights-of-way.

QWEST's summary judgment motion further clarifies its objections to Portland's charter and code. QWEST essentially argues that these provisions impose a third tier of regulation of QWEST in violation of the Telecommunications Act. Among the Portland City Charter provisions to which QWEST objects: (1) that the regulations do not apply to competitive telecommunications providers; (2) the charter right to investigate the affairs, business and property of the utility; (3) the right to enter upon the utility's premises and the power to regulate and control any changes or improvements in the utility's business or property; (4) the requirement to submit detailed quarterly financial reports; (5) the right to demand favorable rates or use the utility's facilities in exchange for granting a franchise; and (6) restrictions upon the assignment or transfer of the franchise. QWEST's objections to Portland Municipal Code chapters 7.12 and 7.14 are similar in nature to its objections to the Portland City Charter.

In its summary judgment motion, QWEST argues that the regulations cited above are all preempted by the Telecommunications Act of 1996. Specifically, QWEST argues that the 7% privilege tax is a non-cost-based fee imposed by cities on QWEST for use of the rights-of-ways. QWEST also argues that the statute, charter, code and ordinance grant unfettered discretion to Portland to control QWEST's activities in violation of the Act. QWEST eschews the requirements for detailed written reports, restrictions on transfer of ownership, penalty provisions, mapping provisions, and most-favored nation provisions. QWEST asserts that these regulations are invalid, in part, because they are imposed in a discriminatory manner against QWEST.

The City of Portland's response brief is due Friday, October 5, 2001. Six other Oregon cities, including Pendleton, have petitioned to intervene. QWEST has opposed intervention. While QWEST's target is Portland at the moment, a review of QWEST's pleadings raises troubling issues for many Washington cities. QWEST's assertion that it is exempt from municipal audits for taxes owed to a municipality has immediate implications for Washington cities.

At first blush RCW 35.21.860-.870, the Washington cities utility tax sections, seem somewhat similar to Oregon Revised Statutes (ORS) 221.510 through 221.515, the

Oregon telecommunications tax provisions, which are so vigorously being contested by QWEST. Both state laws address telecommunications providers, a privilege tax on gross revenues earned within the municipality, and the use of the rights-of-way. Compare ORS 221.515, quoted above, with RCW 35.21.860 which states, "*No city or town may impose a franchise fee* or any other fee or charge of whatever nature or description *upon* the light and power, or gas businesses, as defined in RCW 82.16.010, or *telephone business*, as defined in RCW 82.04.065, *or service provider for use of the right of way, except: (a) A tax authorized by RCW 35.21.865 may be imposed*:…" (Emphasis added).

There are several important differences between the statutory schemes. First, RCW 35.21.860 – 870 are limitations upon, not the source of city taxing authority over telephone businesses. See, generally, *A Revenue Guide for Washington Cities and Town, MRSC*, Report No. 46, p. 13 (August 1999). In Washington cities have the right to raise revenues (tax) businesses within the city. In Oregon QWEST raises a dispute about the source of city taxing authority. QWEST asserts the Oregon statute, ORS 221.515, is an affirmative grant of taxing authority to cities. The cities insist this statute just put an upper limit on the broad taxing authority cities enjoy under Oregon's "home rule" powers.

Second, Washington's utility tax on light, power, gas and telephone businesses is unrelated to use of the rights-of-ways. For example, cities have been imposing a utility tax on wireless telecommunications services billed to addresses within the city for years. Wireless telecommunications facilities have traditionally been located on private property. Light, power, gas, and telephone businesses also pay a tax on all gross revenues for sales within a city. It does not matter if the sales revenue emanate from services provided to private property or from lines running down private streets. Use of the city rights-of-way is not the triggering event for the tax.

Third, the Washington statutory scheme may be broader than that of Oregon. If QWEST is correct when it asserts that the Oregon statutes result in a tax imposed only upon ILECS, while CLECS are exempt, this would be substantially different from the Washington scheme. RCW 82.04.065 broadly defines the "telephone business" that is subject to tax. It includes both ILECs and CLECs.

Fourth, the term "use of the right of way" was one of several amendments to RCW 35.21.860 enacted during the 2000 Legislative Session. This language was not inserted to authorize a city utility tax over telecommunications providers whose facilities happened to be located within rights of ways. As stated above, cities had been imposing a tax on telecommunications providers for years without any concern over where the providers' facilities were located, public right of way or on private property. Indeed, existing state law tax authority over telecommunications service providers was specifically reserved in the statute. RCW 35.21.860(1)(C).

The language "use of right of way" was inserted into RCW 35.21.860 because a new site-specific charge not previously authorized by Washington law and which is related to a newly created right for wireless telecommunications providers to use some public rights of way was engrafted onto RCW 35.21.860 at (1)(e). The act prohibits cities from enacting citywide bans preventing wireless carriers from locating some facilities in the rights of way. In turn, cities are now able to impose a site-specific charge for these new facilities.

Testimony was adduced at the Legislative Hearings on the legislation that wireless providers like Sprint had built out their national networks relying entirely on locating towers either on private property or on publicly owned property not involving rights of ways. RCW 35.99 gave wireless providers a newly created opportunity to site some wireless telecommunications facilities within rights of ways. The language of REC 35.21.860(1) was changed, in part, to reflect this new opportunity.

Another reason for the language change was to reflect the agreement between the industry and city representatives at the negotiations table that they were unable to reach a compromise over language regarding degradation fees. The parties had attempted during negotiations to resolve what, if any, additional fees cities could charge telecommunications providers that actually located facilities underground within public rights of way. Both sides recognized that repeated cuts into rights-of-ways shorten the useful life of the pavement and create a significant expense to cities. The City of Seattle already had commissioned a study of road degradation due to right of way cuts while legislative negotiations over RCW 35.99 ensued. The words "for use of the right of way" was shorthand language that recognizes the bill preserved all existing city taxing authority, granted cities a right to assess a new site-specific charge for wireless telecommunications facilities located within the rights of way, and preserved local authority to charge additional degradation cost-based fees for repairs to the rights of ways only on the telecommunications providers who impacted rights of ways by making street cuts.

4. *City of Pendleton v. QWEST,* No. 01-CV-1282 (USDC Oregon)

The City of Pendleton, Oregon has taken a different tack. It filed a Complaint for Specific Performance of Contract against QWEST in the Umatilla County Circuit Court. The complaint was filed on August 10, 2001 and seeks to require QWEST to pay the 7% franchise fee that QWEST promised to pay in a franchise that QWEST proposed to the City in 1996. The City adopted QWEST's proposed franchise ordinance. QWEST then accepted this franchise ordinance in writing on September 10, 1996.

QWEST removed the matter to federal court, answered that notwithstanding its prior agreement to pay the 7% franchise fee to Pendleton, the franchise ordinance was now preempted. It then counterclaimed against Pendleton in a manner similar to its complaint against Portland. A copy of QWEST's letter to Pendleton informing of its intent to stop paying franchise fees is attached to this paper.

B. Telecommunications Franchising in a Post-*Auburn* World

1. Local Franchising Regulations that Survive *Auburn*

Clearly the *Auburn* case places significant restrictions upon local government franchising obligations upon telecommunications providers. As has been discussed at more length elsewhere,[8] the *Auburn* decision conflicts with decisions of the First and Sixth Circuits. A Petition for Writ of Certiorai will be filed. Hopefully, the Petition will be granted and the decision reversed.

In the interim, *Auburn* is the law in the Ninth Circuit. Redrafting telecommunications ordinances to comply with *Auburn* has to be completed by several Washington cities, including University Place. Carol Arnold, who represented the cities in the *Auburn* lawsuit, prepared an outline of points cities should include in a Post-*Auburn* right of way management ordinance.[9] Among the provisions that Carol believes *Auburn* still upholds are: (1) franchises; (2) construction coordination; (3) enforcement of permit requirements, building codes, and zoning regulations; (4) regulation of time and location of excavation; (5) traffic coordination; (6) financial assurances – insurance, bonds, indemnity requirements; (7) recovery of costs related to street degradations; and (8) recovery of administrative costs.

Carol indicates that among other permissible ordinance provisions that may be upheld are: (1) reasonable reporting requirements; (2) requirements for installation, maintenance, repair, removal and placement of facilities and restoration of streets; (3) franchise applications and forms; (4) reasonable application fees; (5) a reasonable denial of a franchise; and (6) reasonable maps.

2. FCC Presses For Equal Treatment of all Telecommunications Carriers by Local Governments

The FCC recently weighed in on the issue of local government regulations that have a disproportionate impact on new telecommunications providers. In an *Amicus Curiae* brief filed in the Second Circuit on June 12, 2001, the Federal Communications Commission urged the Court to reverse the district court decision in *TCG New York v. City of White Plains*, 125 F. Supp.2d 81 (S.D.N.Y. 2000). The District Court upheld a franchise requirement that imposed: (1) a 5% of gross revenue franchise on TCG and all affiliates that used facilities installed under the franchise; (2) a minimum annual fee of $5,000 that rose gradually to $10,000 over the fifteen year franchise term; (3) a requirement that TCG reimburse the City for the costs of reasonable attorneys and consultants fees in connection with the grant of the franchise; and (4) a requirement that it build 1,000 feet of conduit for the City at points where TCG's new facilities would overlap a

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[8] See section B3, *infra*.
[9] See, Arnold, *Recent Developments in Rights-Of-Way Management,* Auburn ET al v. QWEST, a paper delivered at the Law Seminar International Fourth Annual Local Telecommunications Infrastructure seminar.

currently being built City network. Bell Atlantic, the ILEC, was exempt from these franchise requirements. CLECs like TCG, however, were not exempt.

In its *Amicus* brief the FCC took strong exception to a local telephone franchise fee that applies only to new entrants and not to incumbent local exchange carriers. The FCC argued that such a fee is not "competitively neutral and nondiscriminatory" within the meaning of §253(c) of the FTA. The FCC's Brief adopts a bright line rule for local telecommunications regulation: requirements imposed on new entrants, but not on incumbents, are not competitively neutral and nondiscriminatory. The FCC urged the Second Circuit to "reverse the district court's holding that the franchise fee imposed on competitive local exchange carriers and not on the incumbent is competitively neutral and nondiscriminatory, and should hold that this requirement is preempted under section 253 of the Communications Act."

The FCC's position in *White Plains* should cause Washington cities to reassess any franchise or master permit obligations that are imposed on CLECs under either RCW 35.99 or RCW 35A.47.040. The Ninth Circuit in *Auburn* assumed that QWEST has a statewide constitutional franchise that exempts it from city master permit obligations. If the FCC position urged in *White Plains* becomes the law, the very vitality of RCW 35.99[10] and RCW 35A.47 are suspect. Local franchising authority will have become almost totally preempted under Federal Law.[11]

<u>3. Cautionary Notes About Unduly Burdensome Local Regulations</u>

Words of caution about how local governments should approach telecommunications service provider regulations come from even national law firms that specialize in representing municipal governments. For example, in a feature article analyzing the federal court decisions construing Section 253 of the Telecommunications Act, the Miller Van Eaton law firm suggests:

> In the context of the above cases, it may be that local communities' best chance to retain their property rights - to manage the public rights-of-way

[10] The exemption in RCW 35.99.030(1) from master permit requirements for carriers "with an existing statewide grant to occupy the right of way…" was predicated upon an ability of cities to make a reasonable distinction between incumbent providers who have been in city rights of way for more than a century and new providers whose sources of revenue or ability to perform is unproven. Two federal Circuit Court of Appeals decisions, *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2001) and *Cablevision of Boston, Inc. v. Public Improvement Comm'n.*, 184 F.3d 88 (1st Cir. 1999) decided before RCW 35.99 was enacted support a local government's ability to make such a principled distinction. The FCC *amicus* brief in *White Plains*, however, casts serious doubt on this. If the FCC wins in *White Plains*, RCW 35.99.030(1) may be preempted.

[11] For an article by an observer who raises Tenth Amendment concerns about the Telecommunications Act of 1996, see Note: *Section 253 of the Telecommunications Act of 1996: A Permanent Physical Appropriation of Private Property that Must Be Justly Compensated*, Jennifer L. Worstell, 50 Fed. Comm. L.J. 441 (1998). See also the comments filed with the FCC by the City of Auburn, et al, in the *City Signals* Petitions discussed *infra.*

> and gain fair and reasonable compensation - may be to create a tangible separation between these powers and the power to exclude. A community that avoids appearing to seek the ability to refuse entry may be better received by the courts, or the FCC, in seeking to retain management and compensation powers. Thus, for example, it may be advisable for local governments not to reserve what appears to be unconditional discretion to grant or deny applications for right-of-way use, even where such discretion would be normal in a private rental situation. Similarly, it would appear that application procedures should be streamlined as far as possible, to avoid leaving openings for would-be right-of-way users to allege that the community is improperly seeking unnecessary information. It may be prudent to omit regulatory and informational requirements that cannot be clearly connected to right-of-way management - for example, information about the telecommunications services to be offered. Finally, it is important to keep compensation requirements, as rent for the use of the right-of-way, distinct from the concepts of taxation and of mere cost recovery.

http://www.millervaneaton.com/feature_2.html

C. Refusals to Underground: A Clear and Present Challenge to Local Authority

1. Common Law Rule Regarding Municipal Authority to Require Undergrounding of Public Utility Facilities

7A McQuillin, *Municipal Corporations*, §24.588, pages 311-13 (1998) discusses general municipal authority regarding the placing of underground facilities in city streets states:

> Municipal corporations ordinarily may and do exercise police control over the erection and maintenance of poles, wires, pipes and similar apparatus of utility companies or others in streets, alleys and public ways. They can, in this respect, where they act reasonably, compel all generally accepted improvements, which tend to decrease the obstruction of the streets or increase the safety or convenience of the public in their use.…
>
> Wire-using companies can be compelled by municipalities to place their wires in underground conduits. The franchises of such companies are subject to the police power, where and to the extent state law does not preclude it. But an ordinance requiring wires to be placed in conduits underground must be reasonable.…
>
> Although regulation for the purpose of promoting public health, safety and the general welfare is properly grounded on the police power, where regulation of placement of electrical wiring is for esthetic purposes only, the police power is not involved.… (Footnotes omitted).

12 McQuillin, *Municipal Corporations*, § 34.78, p. 237 (1995) and 2001 Cumulative Supplement, p. 25 states:

> As already stated in another chapter [*See §24.588, supra*], wire-using companies may be compelled to place their wires underground or in subsurface conduits, when convenience or the good government of the municipality requires. To illustrate, it has been held that requiring a telephone company to build conduits through ungraded streets in suburban parts of the city and in open country, to carry its wires, was clearly an unreasonable exercise of the police power. But creating an "underground district" and requiring all poles and wires in use in that district to be removed from the surface, except trolley wires, and to be placed in conduits, where the underground section is in the congested center of the city, is a valid exercise of the police power.
>
> The legislature may require wires to be put underground, or may delegate the power to do so, and a municipality cannot require wires to be put underground unless authority so to do has been delegated to it by the legislature; nor can it so require where the requirement is arbitrary and without reasonable cause; and municipal power to regulate the erection of poles or stringing of wires does not authorize a municipality to require the placing of wires underground….
>
> For purposes of evaluating utility's state and federal constitutional takings claim arising from municipality's requirement that utility relocate its underground wires at its own costs, a municipality may reasonably decide that relocation is necessary to promote public's safety, health, or welfare, and reasonableness of municipality's exercise (Footnotes omitted.)

2. <u>Washington Statutes Granting Cities Authority Over Telecommunications Undergrounding & Conversion</u>

Washington cities derive their right to control streets, alleys and highways from the general law. RCW 35.21.230 -.240 provide an express delegation of state legislative authority over streets to municipal governments. Cities derive authority to require conversions of electrical and telecommunications facilities from overhead to underground locations from the general legislative delegated authority to cities over streets,[12] from their authority over franchises,[13] and from other statutes.[14]

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[12] RCW 35.21.230 et seq.

[13] See, e.g., RCW 35A.47.040 which gives code cities the authority to permit and regulate nonexclusive franchises "for the use of public streets, bridges or other public ways, structures or places *above or below the surface of the ground* …" This specific authority is in addition to the general franchise authority granted to cities.

A recent statute, RCW 35.99, further clarifies municipal authority to require the relocation of telecommunications facilities. This statute came about in part because of the intransigence of QWEST, *nee* US WEST, which claimed that cities must bear the costs for relocating its facilities. RCW 35.99.060(1) allows cities and towns to require all telecommunications service providers to relocate facilities within the right of way "when reasonably necessary for construction, alteration, repair, or improvement of the right of way for purposes of public welfare, health, or safety."

Such relocations, whether aerial-to-aerial or underground-to-underground, are at the expense of the service provider except in three circumstances. First, the service provider can seek reimbursement from the city if the city required the same facilities to be relocated within the past five years. Second, service providers who have an ownership share of the aerial supporting structure, typically only a telephone company that has a reversionary interest in utility poles after the electrical facilities are removed, can seek reimbursement for the incremental costs of converting the facilities to underground versus a pole-to-pole relocation. If a tariff provides for a lesser cost for undergrounding to the city, the tariff controls.[15] Third, service providers can seek reimbursement for relocation expenses if the relocation is solely for aesthetic reasons. The statute also contains a savings clause that allows service providers to seek reimbursement against third parties if the relocation is primarily for the benefit of a private party.

3. WUTC Authority re Undergrounding

The Washington Utilities and Transportation Commission (WUTC) has been granted general regulatory authority over the rates, services, facilities and practices of electric, gas, water and telecommunications companies. RCW 80.01.040(3). This includes the power to regulate rates and approve tariffs. RCW 80.04.130. Certain laws applicable to larger telecommunications carriers do not apply to telephone local exchange access companies that serve less than two percent of the state's access lines. RCW 80.04.530. Consistent with those laws, the WUTC has loosened regulations on competitive telephone companies. WAC 480-120-024. For example, competitive telephone companies are exempt from tariff obligations. WAC 480-80-041.

Pursuant to its general authority over utilities in 1971 the WUTC required telephone utilities, to set forth in their tariffs the conditions for providing underground facili-

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[14] See, e.g., RCW 35.96 granting cities additional authority over requiring the conversion of above ground facilities to underground.

[15] In construing the current QWEST relocation tariff, WN U-31, the Ninth Circuit in *Auburn*, stated that the tariff "… has a different scope; it is not restricted to undergrounding, but purports to apply to *all* relocations." (Emphasis in original). Thus, in upholding the common law principle that a telephone company has an obligation to relocate its facilities at its own expense, the Ninth Circuit decision supports requiring QWEST to pay all expenses for undergrounding its own facilities. Such a result is consistent with the FCC position argued in their *amicus* brief in *White Plains, supra*, that it violates 47 USC §253 to grant ILECs a competitive advantage over CLECs.

ties. WAC 480-120-076. VERIZON, f/ka General Telephone, and QWEST, f/k/a as Pacific Northwest Bell and US WEST, have both filed undergrounding tariffs. See, e.g., WN U-31.[16]

4. Main Washington Cases on Undergrounding Telecommunications Facilities

The principal Washington cases discussing both relocation and undergrounding of telecommunications facilities are discussed in *City of Auburn v. QWEST, supra.* Part I of the *Auburn* case is quite helpful to cities.

5. Impact of the Federal Telecommunications Act of 1996 upon Undergrounding of New Telecommunications Facilities

With the advent of the FTA, local governments (and local municipal utilities) face the challenge of an increasing number of service providers who wish to hang telecommunications lines on existing poles. Some cities have adopted ordinances requiring all new telecommunications facilities to be installed underground. City Signals, a new telecommunications provider in Ohio, brought a Petition for Declaratory Ruling[17] before the Federal Communications Commission challenging the undergrounding ordinances of Cleveland Heights, Wickliffe and Pepper Pike, Ohio.

City Signals requested under Section 254 (d) of the FTA that the FCC preempt the local ordinances. City Signals claimed that the ordinances should be preempted because being required to puts its lines underground in areas of the cities where the incumbent had existing overhead facilities would increase the costs for installing new telecommunications facilities. City Signals claimed that the ordinances constituted an "effective prohibition of entry" into the telecommunications markets of these cities in contravention of §253 of the FTA.

City Signals' petitions ignited a storm of controversy.[18] A coalition of cities and NATOA filed comments. These comments focused on the reasonableness of the cities' ordinances. They also contested the jurisdiction of the FCC under the powers reserved to States under the Tenth Amendment of the United States. At least two Washington cities, Federal Way and Medina, filed comments in these matters. Several telecommunications submitted comments in favor of City Signals.

The City of Wickliffe, Ohio reached an agreement with City Signals permitting it to install above ground lines. By stipulation, that petition was dismissed on June 22, 2001. The Cities of Pepper Pike and Cleveland Heights appear to be moving towards agreements with City Signals that would allow it to utilize existing conduits. Hopefully, agreements can be reached and these petitions dismissed.

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[16] The QWEST Washington tariff is available on-line at http://tariffs.uswest.com:8000/.
[17] There are three interrelated petitions filed at CS Dockets 00-253, 00-254 and 00-255.
[18] The filed comments are available electronically. Go to http://www.fcc.gov/searchtools.html, scroll down to "Search for Filed Comments," then click. The proceeding numbers are 00-253, 00-254, and 00-255.

While it appears, that there may not be a FCC decision regarding preemption of undergrounding arising out of the City Signals petitions, any Washington city or town that now has or is considering adopting an undergrounding ordinance for new telecommunications facilities would be well advised to reexamine the ordinance in light of the comments filed in the City Signals petitions. At a minimum, the City may wish to build a better factual record to support such an ordinance.

Cities should also keep in mind the comments filed by the FCC in *TCG v. City of White Plains, supra.* The FCC position is that municipal requirements that add costs for new entrants and from which the incumbent is exempt are not "competitively neutral and nondiscriminatory." Therefore, such requirements could violate the FTA. Also keep an eye out for the Second Circuit decision in *White Plains.* It will be interesting to see if that Court accepts the FCC argument.

6. Puget Sound Energy's Challenge to Cities' Underground Conversion Requirements.

The hottest challenge at present to city undergrounding authority arises, not in telecommunications, but in electrical energy franchises and tariffs. Puget Sound Energy ("PSE"), an electrical energy and natural gas supplier, has refused to underground electrical distribution lines in conjunction with various cities' public works street improvement projects.[19] Telecommunications carriers and electrical energy companies have a similar interest in avoiding relocation and underground conversion expenses.[20] Because PSE has ratcheted up the exposure for cities by insisting that cities must provide PSE with exclusive easements as a precedent to PSE's obligation to do underground conversions of electrical facilities, a review of PSE's current position is warranted.

There are now two separate consolidated matters pending before the WUTC. The first consolidated matter was brought by the cities of Kent, Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton, SeaTac and Tukwila. Oral argument is scheduled before the Commission on October 11, 2001 on this matter. A second consolidated matter was brought by SeaTac and Clyde Hill.

Both of the consolidated matters are before the WUTC on motions for summary determination, the administrative equivalent of summary judgment, regarding the interpretation of Puget Sound Energy's tariff.[21] PSE is vigorously defending both matters. The legal issues overlap in both matters because they involve interpretations of PSE's tariffs for undergrounding in residential, Schedule 70, and commercial, Schedule 71, areas of the cities.

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[19] The pleadings filed by the parties are voluminous. They are available at the WUTC web site, http://www.wutc.wa.gov/. Search documents for "Puget Sound Energy." Sort results by "Newest First."
[20] Remember also. Perkins Coie represents both PSE and QWEST.
[21] Puget Sound Energy tariffs are available online at http://www.pse.com/accounts/rates/rateselec.html.

In the SeaTac and Clyde Hill matter the WUTC is asked to interpret the "availability" section of Schedule 70 § 2 of WN U-60, Schedule 70, First Revised Sheet No.70 of PSE's tariff that states:

> AVAILABILITY. Subject to availability of equipment and materials, the Company will provide and install a Main Distribution System and will remove existing overhead electric distribution lines of 15,000 volts or less together with Company-owned poles following the removal of all utility wires therefrom *in areas which are zoned and used exclusively for residential purposes*, provided that at the time of such installation the Company shall have adequate operating rights, and provided further that the Conversion Area must be not less than one (1) city block in length, or in the absence of city blocks, not less than six (6) contiguous building lots abutting each side of the public thoroughfare with all real property on both sides of each public thoroughfare to receive electric service from the Main Distribution System. (Emphasis added).

PSE's position is that Schedule 70 does not apply in SeaTac because South 170th Street, the subject of a current City street improvement project, is a "collector arterial" that provides access to the commercial area around SeaTac airport. Because Schedule 70 requires PSE to underground facilities only in areas zoned and used exclusively for residential purposes, PSE argues that the existence of a "collector arterial" in this residential area requires the application of Tariff Schedule 71. Schedule 71 pertains to undergrounding in commercial areas. Under Schedule 71, SeaTac would have to reimburse PSE 30% of the costs for undergrounding its facilities. PSE would be on the hook for the remaining 70%.

The Clyde Hill matter involves a LID formed in a residential area of about 100 homes to underground utility lines and install street lighting. PSE asserts that Schedule 71, the commercial undergrounding provision, applies in a portion of the undergrounding area and the Clyde Hill must pay PSE 100% of the costs for undergrounding facilities that are presently located in private easements owned by PSE. Clyde Hill argues that all of the criteria of Schedule 70 apply and there is nothing in the tariff that allows PSE There is no language in Section 2 of Section 70 that provides for segmenting, or breaking down, a contiguous underground conversion area in a residential area into smaller segments for purposes of applications of the tariff.

The consolidated matter brought by Kent, Auburn, Bremerton, Des Moines, Federal Way, Lakewood, Redmond, Renton SeaTac and Tukwila involve city public improvement projects along Pacific Highway South and other planned projects. A principal issue is PSE's claim that as a condition of performing underground conversions of its facilities it can require the cities to secure exclusive easements in PSE's names and on PSE's standard form on private property for the placement of underground and pad-mounted facilities. PSE contends that the cities must obtain these easements or reimburse PSE for the costs of these easements.

In their motion for summary determination the cities assert that in so far as undergrounding in commercial areas is concerned that Schedule 71 applies and that Schedule 71 by its plain language does not require the cities to provide PSE with private easements for undergrounding facilities in commercial areas. The cities further argue that requiring them to purchase private easements for the exclusive use of PSE would constitute an unconstitutional gift of public funds.

In its Response to Motion for Summary Determination and Cross Motion for Summary Determination, PSE asserts that it has no obligation to perform conversions from overhead to underground unless PSE is provided with easements for placements of facilities on private property, at no cost to PSE. It further argues that: (1) its judgment requiring placement of its facilities on private property is sound; (2) PSE may require cities to pay the costs of relocating its underground facilities in the future as a condition of agreeing to place facilities in the rights of way rather than on private property; and (3) a long history of underground conversions done for cities demonstrate that PSE has traditionally required cities to obtain easements for PSE.

In its Response and Cross Motion, PSE identifies that, in part, it is requesting cities to supply it with exclusive easement for underground electrical facilities to prevent the cities from ever again being able to require PSE to relocate its facilities as part of public rights of way improvement projects. PSE states:

> Because PSE's franchises generally require PSE to relocate facilities that are in the rights-of-way at PSE's expense for municipal purposes, it is PSE, and not the municipality ordering the facilities relocated, that would have to absorb these significant relocation costs if PSE's facilities are placed in rights-of-way. If overhead facilities are converted to underground and the new underground system is placed in rights-of-way, municipalities have no economic incentive to ensure that the underground facilities are initially placed such that they will not require immediate relocation. Municipalities also have no economic incentive to take into account the costs of relocating underground facilities when considering whether to pursue conversions of overhead facilities to underground rather than keeping the electric distribution system overhead, or when considering whether to require PSE to relocate its facilities in future projects involving the rights-of-way.
>
> *For these reasons, PSE requires that if facilities are to be converted from overhead to underground, facilities other than cable and conduit will be placed within easements on private property, except under limited conditions in which PSE is protected from future relocation costs.* (Emphasis added.)

The effect of a PSE victory could be devastating to cities. It would mean that future public improvement projects could be effectively blocked because cities would have to buy PSE out of their then existing underground easement rights. The costs for acquiring such rights would be prohibitive. The electrical utility could become the largest single obstacle to necessary public transportation improvement projects. PSE easements would become modern day moats surrounding public rights-of-way. PSE would transform itself from a utility that was allowed to use public rights of way at no cost to a modern day troll exacting a toll from the public coffers every time a city attempted to improve the right-of-way.

Beware if telecommunications companies ever adopt such tactics!