

SOME BASICS OF LOCAL TELECOMMUNICATIONS FRANCHISING AND NINE IDEAS FOR MAKING THE FRANCHISING PROCESS LESS PAINFUL

By

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Facilities based telecommunications companies, whether long distance carriers who have a need to pass through a municipality or those seeking to build a local loop, often must obtain a franchise or license to construct their facilities within the municipality's rights-of-way. In some communities, obtaining a municipal franchise can be an expensive and drawn out process. Carriers can be faced with unanticipated delays in construction that can affect activation schedules, financing and overall business plans.

Municipalities, as is their nature and need, often look upon telecommunications franchising as a revenue source. While also concerned about safety and disruptions to residents and businesses, especially during construction, as well as aesthetics and infrastructure maintenance, payment for use of the rights-of-way is almost always the primary concern of the elected officials and most of the administrative staff. The municipality looks at this as "free" money. There is no political backlash. Virtually no one complains to the municipality about these fees (even if passed through) other than the carriers themselves.

In an effort to limit the deleterious effect franchising can have in the formation of facilities based competition, Congress included Section 253 in the Telecommunications Act of 1996 (47 U.S.C. §253). Entitled "Removal of Barriers To Entry," Section 253 limits municipal franchising authority, providing in pertinent part:

(a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

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(c) STATE AND LOCAL GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable

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compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

One of the issues continually raised is exactly when permissible "management" of the rights-of-way begins to "prohibit or have the effect of prohibiting" a carrier from providing telecommunication services. Another, even more frequently raised issue, is the meaning of "fair and reasonable compensation" for use of the local rights-of-way. Should municipalities be able to obtain market priced rents or should they simply receive enough to cover their actual costs associated with regulating and maintaining their rights-of-way? More importantly, is it appropriate to charge carriers a franchise fee based on their "gross revenues" as opposed to the amount of facilities in the rights-of-way?

Though there are several fairly recent cases that have ruled on these issues, the decision in *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 205 (D.C. Md 1999) provides a very complete discussion.² Generally, the court found that while it is legal for a local governmental body to require a franchise for entry into the rights-of-way, discretion in granting a franchise, certain materials and information requested of the potential franchisee and the compensation requirements violated Section 253 of the Telecommunications Act.

In *Bell Atlantic*, Prince George's County instituted a franchise ordinance that, like many franchising ordinances, required engineering plans and contact names as well as the provision of information regarding the carrier's financial condition, a description of the telecommunications services to be provided and the technical standards of the proposed system. After the provision of the information, the ordinance granted the County Board discretion in whether to "recommend" whether a franchise should be granted. In making its "recommendation," the ordinance provides that the County Board "may consider" factors such as the managerial, technical and legal qualifications of the carrier, the "nature" of the proposed facilities and services, the recent performance record of the carrier in other jurisdictions and the ultimate discretionary consideration -- "whether the proposal will serve and protect the public interest."

Even if the County Board recommended a franchise be granted, a franchise agreement still needed to be negotiated with the County Executive. All franchisees were required to pay three percent of gross revenues as a franchise fee, make quarterly and annual financial disclosures and permit the County to perform financial audits.

² Other recent cases discussing these issues include: *AT&T Communications of the Southwest v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999) (the Court's opinion on a preliminary injunction request can be found 8 F. Supp. 2d 582); *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S. D. Fl. 1999) and *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998).

Bell Atlantic challenged these requirements and disclosures. Without ruling on individual requirements, the court held that the combined franchising requirements "create a substantial and unlawful barrier to entry." *Bell Atlantic*, 49 F. Supp. 2d at 815. The court then analyzed whether the requirements fit into the "safe harbor" provisions of Section 253© -- nondiscriminatory and competitively neutral management of the rights-of-way or fair and reasonable compensation for their use.

Rights-of-Way Management

Relying in part on FCC interpretations of Section 253© and the legislative history, the court found that management of the rights-of-way permitted municipalities only a "narrow scope" of regulations:

Section 253(c) preserves the authority of the state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way. . . . The types of activities that fall into the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

Bell Atlantic, 49 F. Supp. 2d at 815-816 (quoting *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, p. 103 (FCC 1997)). The court also noted that "these activities were spelled out in somewhat greater detail" in another FCC interpretation, *In re Classic Telephone, Inc.* 11 FCC Rcd 13082 (FCC 1996), that quoted congressional testimony from Senator Diane Feinstein giving examples of intended restrictions that Congress intended to permit including:

- regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;
- requiring a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;
- requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations;

-- enforcing local zoning regulations; and

-- requiring a company to indemnify the City against any claims of injury arising from the company's excavation.

Bell Atlantic, 49 F. Supp. 2d at 816 (quoting *In re Classic Telephone, Inc.* 11 FCC Rcd 13082, p. 39 (FCC 1996)).

The court specifically found that the requirement to produce financial information, information about other operations in other jurisdictions, and technical standards of the proposed system are "not directly related to the County's management of its rights-of-way." However, the Court found "most objectionable" the franchise ordinance's vesting of complete discretion in the County to grant or deny a franchise. "The County's decision to grant or deny a franchise may not be left to the County's ultimate discretion." *Bell Atlantic*, 49 F. Supp. 2d at 816-817.

Fair and Reasonable Compensation

The *Bell Atlantic* court's discussion of "fair and reasonable compensation" rejects the very common practice of municipalities -- using franchise fees to raise general fund revenues.³

[L]ocal governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the cost of administering their franchise programs and of maintaining and improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures.

Bell Atlantic, 49 F. Supp. 2d at 817. Rejecting as a "fundamental error" the percentage of gross revenues calculation as a method for determining the franchise fee, the *Bell Atlantic* court stated:

The appropriate benchmark is not the "value" of Bell Atlantic's "privilege" of using the County's public rights-of-way to provide telecommunications services in Prince George's County. Rather, the proper benchmark is the cost to the County of maintaining and improving the public rights-of-way that Bell Atlantic actually uses. Furthermore, to be "fair and reasonable,"

³ The *Bell Atlantic* court specifically rejected the holding of a Michigan District Court in *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d 785 (E.D. Mich. 1998) that held that the statute did not limit "municipalities to strictly their costs related to telecommunications providers' use of their rights-of-way" and upheld a four percent of gross revenues franchise fee and a one time payment of \$50,000. *Bell Atlantic*, 49 F. Supp. 2d at 818 n. 27.

these costs must be apportioned to Bell Atlantic based on its degree of use, not its overall level of profitability.

Bell Atlantic, 49 F. Supp. 2d at 818.

Though the carriers seem to be winning on these issues, these cases and FCC determinations have not stopped other communities from passing rights-of-way management ordinances that require financial information, approval of the technology and service offerings and payment of franchise fees far exceeding the municipalities' costs of managing and maintaining their rights-of-way.

Obtaining a Fair Franchise Quickly and Without Litigation

In most situations, of course, carriers are reluctant to challenge local franchising requirements in the courts or at the FCC. Any money that might be saved by lowering the "franchise fee" or removing seemingly overzealous regulations may be lost in the costs to challenge the requirement and the delays in constructing facilities and entering the market. Further, municipal officials communicate with each other; the "bad blood" created with one community often has a negative effect on a company's chances for friendly dealings with other nearby communities.

Below are nine ideas on how to move quickly (and less painfully) through a municipal franchising process.

1. **Begin The Process At Least Six Months Prior To Your Planned Construction Start Date.** Recognize that local governments do not move as quickly as business. Those with professional staffs still have procedural and political processes that must be followed. Even in the most sophisticated and business friendly communities, an application for a municipal telecommunications franchise may take months to process. In addition to the time necessary to complete the application, answer the staff's questions and receive engineering approval, a proposed franchise may also be required to be published and approved by a commission or committee before being presented to the City Council. The Council may only meet once a month and an ordinance may require two readings before it can be approved.
2. **Be Prepared.** Know the desired route for your facilities the first time you speak with staff. Know where existing facilities are overhead and try to know where available conduit already exists. Be able to explain the reasons for your desired route, especially where trenching might be necessary. Get copies of recently approved franchises and read them. Find out the preferred format for review of the engineering plans and provide them in that format.

3. **Ask Questions.** Ask about issues that are of concern to the staff and elected officials. Request a tentative timetable for the entire process. Find out when the council meets, how many readings an ordinance requires before passage, and whether there is a committee chair who should be copied on submissions.
4. **Listen To The Staff.** Respond to their concerns and answer their questions. The elected officials rely on staff explanations and recommendations.
5. **Make Sure That There Is At Least One Schematic Allowing A Non-Engineer To Follow The Entire Route.** City Councils are rarely made up of engineers. They want to see where you will be digging and need to be able to understand what they are presented. Further, complaints to the municipality from residents and businesses affected by your construction can be minimized or deflected if your plans clearly show the route and can be followed by persons other than the engineers.
6. **Appear Flexible.** Don't take and then change bottom line positions anymore than you would in any business negotiation. While you should not be shy about advising the staff of requirements you believe violate Section 253 of the Act, if your goal is quick approval and construction, be ready to compromise.
7. **Don't Make Idle Threats To Sue.** Municipal governments are often stubborn and arrogant. Threats to sue will not move the process along quicker nor do they instill fear. Municipal officials know that suing will cost you more in money and time than it will cost them.
8. **Find Out About All Fees And Taxes.** Find out if there are building permit, inspection or street blocking fees that are separate from the franchise fee and not found in the ordinance requiring franchises. If these fees do exist, try to negotiate them away. Also, find out if there is a utility or other excise tax on telephone bills. This can help you determine the true effect of passing through a franchise fee.
9. **Be Professional.** Finally, don't treat the franchising process as an unnecessary hassle. Municipalities' legitimate concerns regarding liability, traffic safety, business disruption, drainage and roadway maintenance are all affected by the installation of facilities within the rights-of-way. Acknowledge these legitimate concerns and work with the municipality to resolve them.