
Are Local Regulators Threatening U.S. Broadband Buildout?

By Roderick S. Coy

No state or region can expect to be a significant player in the “Information Age” of our global economy if it does not have a modern high-speed broadband communications infrastructure. Some cities, however, because they have monopoly control over essential public rights of way, have significantly delayed communications providers from building out needed communications infrastructure. They have done so by imposing unreasonable and illegal fees, excessive regulations, and discriminatory local requirements. These roadblocks are increasingly catching the attention of concerned state and federal officials.

Urgency of the problem

The critical need for the high-speed broadband communications infrastructure is beyond serious debate. FCC Commissioner Kevin Martin, speaking at the National Summit on Broadband Deployment last October, declared “encouraging broadband deployment should be a fundamental priority of the Commission and government in general.” U.S. Assistant Secretary of Commerce Nancy Victory, head of the National Telecommunications Information Administration, said in a speech to NARUC’s Committee on Telecommunication last February that broadband deployment is needed because it “can expand educational opportunities, improve health care, increase government responsiveness to its citizens, and enhance our global competitiveness.”

Yet, an aggressive minority of local governments, supported by their Washington-based lobbying organizations and lawyers, have become a major obstacle to building high-speed broadband communications infrastructure across the United States. These local governments demand that communications providers pay fees far above any actual costs for access to and use of public rights-of-way and also require submission to a new unlawful “third tier” of local telecommunications regulations.

Local regulators: landlords or trustees?

These local governments first argued that they had regulatory authority to impose these fees and regulations, but the majority of courts across the country struck down these claims. See, for example, *City of Auburn v. Qwest Communications Corporation*, 260 F.3d 1160, TREA Leading Cases page LC-711 (9th Circuit 2001). Now the arguments have shifted to a claim of “property rights.”

Regulation-minded public officials argue that communications infrastructure providers must pay “rent” at the “fair market value” for use of essential public rights of way.

Given the local government’s monopoly control of the public’s rights of way, however, the demand for “rent” really amounts to demanding monopoly prices for access to essential public rights of way.

This argument has been rejected by a number of courts, who have scolded these public officials for misunderstanding their role over the public’s rights of way. The courts have reminded local officials that they are “trustees” of the public’s need for the rights of way, not private landowners seeking to maximize profits. See *City and County of Denver v. Qwest Corporation, et al.*, 18 P.3d 748, Colorado, 2001; *AT&T v. Village of Arlington Heights* 620 N.E.2d 1040, 1044 (Illinois, 1993); *City of Albany v State of New York*, 250 N.Y.S.2d 300 (App Div, 1964), aff’d 15 N.Y. 2d 1024 (1965). Clearly, local officials’ actions related to rights of way are done in their “governmental” capacity, not in any “proprietary” capacity.

Nonetheless, any communications provider who refuses to succumb to these demands finds construction of the needed high-speed network facilities delayed and costs increased. In some cases the network may be cancelled altogether. Since networks require all of the points to be interconnected, a single local unit of government can have a disproportionate ef-

fect, a virtual veto, over an entire region's ability to access high speed communications services.

Michigan's solution

The problem has become so serious that an increasing number of states as well as the federal government are being called upon to play a more active role in curbing these local regulatory excesses.

Michigan Governor John Engler, who had long been on record opposing unreasonable local regulations and fees for use of public rights of way, last year found the situation so serious that he labeled these local officials as "broadband bandits" in his annual State of the State message. His economic development advisors had reported to him that the state was having difficulty attracting new businesses with high-speed communications requirements because the broadband infrastructure and access points were not available in many parts of the state. To make matters worse, the state's reviving auto industry was imposing new high-speed communication requirements on all its suppliers. A Report called "Link Michigan" issued by the state's economic development authority described the situation:

In the global economy, Michigan is not only in competition for new business growth, it is in competition to retain and attract a skilled workforce that can continue to support the state's diversifying economy. In both cases, *not having readily available access will increasingly be seen as unacceptable*—whether at businesses, schools, hospitals, or home. Michigan is in danger of falling behind in the availability of advanced telecommunications services."

Link Michigan Report, May, 2001, page 7.

Michigan already had one of the best laws in the country limiting fees—MCL 484.2251-2254, which limited right-of-way fees to an amount necessary to recover actual costs—augmented by a network of regulations unrelated to rights of way. Nevertheless, some local governments were ignoring the law and blocking new networks from being built if telecom-

munications providers were unwilling to pay their demands. Municipal surveys showed more than 90% of local units of government were actually following the law and only charging their actual costs, but some of the others were effectively monopolizing access to rights of way, charging fees far higher than allowed costs, and delaying or preventing new networks from being built. Some of these local units of government were even insisting on charging a fee based on a percentage of the provider's gross revenues, an approach the courts had already ruled illegal in Michigan. Hundreds of millions of dollars of new high-speed networks were cancelled because of the demands of a few municipalities.

Governor Engler responded by proposing a new law stripping local officials of all authority to set any fees related to the use of public rights of way. The new law placed that power in a new state authority, and set uniform state-wide fees. Earlier this year the legislature passed Engler's proposals. See Michigan Public Act 48, 2002.

Other states step in

Michigan is not alone. State legislatures across the country are increasingly being asked to look at the impact local governments are having on not only their own state's need for advanced telecommunications infrastructure, but how their local governments may be impeding the nation's communications needs. Missouri has also clamped down on local governments fees and delays in holding up the deployment of telecommunications infrastructure. Texas has adopted a uniform method of compensating local units of government for use of public rights of way in an effort to reduce barriers to entry and be more competitively neutral. Florida passed a law requiring municipal and county rules on access to rights of way to be reasonable and non-discriminatory.

Unfortunately, however, some local units of government continue to press for unreasonable terms. Earlier this year Jefferson County, Kentucky, which includes the City of Louisville, passed an ordinance, over the vocal opposition of technology and economic development leaders, requiring telecommunications providers to pay fees for use of public rights of way based on a percentage of the provider's gross revenues.

National initiatives

The national association of state public utility commissioners, at its winter meetings in Washington, D.C. this February, passed a resolution which:

...encourages all governmental entities to act on applications for access to public rights of way in a reasonable and fixed period of time, to treat all providers uniformly and in a competitively neutral manner consistent with applicable federal and state law, to ensure that their control over access to public rights of way and public lands is used to facilitate, and not create an unnecessary burden to the deployment of telecommunications facilities in the form of increased costs or delays, and to consider the impact of setting compensation above actual and direct costs on the deployment of advanced telecommunications and broadband networks.

Now federal officials are considering the role the federal government should take in the matter, since the nation's communication infrastructure and global competitiveness are affected. FCC Chairman Michael Powell recently wrote, "I am convinced that access to and management of public rights of way is one of the most critical issues that we face with respect to promoting deployment of broadband infrastructure." The Chairman's more recent speeches have expressed the

FCC's "growing concern about rights of way as a barrier" to new services.

Conclusion

If the United States is going to maintain its legitimate place in the Information Age, it cannot do so using archaic telephone lines. High-speed communications facilities are essential to a vibrant national economic future, and state and national leaders are well advised to be re-assessing the significant negative impact a relatively few local units of government are having on this national imperative.

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