

# Congress Refused to Preempt Local Government Authority: A Narrated Walk Through The Legislative History of Section 253

## **Introduction**

Section 253(c) protects local governments' authority to manage their public rights-of-way and to receive fair and reasonable compensation from all telecommunications occupants of those rights-of-way. This paper seeks to walk the reader through the debate surrounding adoption of Section 253 by following the development of the provisions through the Senate passage of S. 652, the Telecommunications Competition and Deregulation Act of 1995, and the House's substitution of House Bill 1555, the Communications Act of 1995, and finally culminating in adoption by both houses of final language in the conference agreement on the bills.

## **I. The Senate Bill**

### **A. Introduction and Hearings**

A draft of S. 652, the Telecommunications Competition and Deregulation Act of 1995, was circulated by Senator Larry Pressler (R-SD) on January 31, 1995. A draft Democratic alternative, the Universal Service Telecommunications Act of 1995, was circulated by Senator Hollings (D-SC) on February 14, 1995. Hearings were held on January 9, March 2, and March 21, 1995. No local government representatives were invited to testify.

At the hearings, Senator Kay Bailey Hutchison (R-TX) raised the concern of local governments to preserve their right to manage and receive compensation for use of public rights-of-way by telecommunications providers.<sup>1</sup> The Commerce Committee marked up S. 652 on March 23, 1995. The bill as reported included an amendment by Senator Hutchison to new section 254 (which ultimately became section 253) as follows:

(c) LOCAL GOVERNMENT AUTHORITY.- Nothing in this section affects the authority of a 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-

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<sup>1</sup> 141 CONG. REC. S8431 (1995).

of-way on a nondiscriminatory basis, if the compensation is publicly disclosed by such government.

S. 652 as reported by the Commerce, Science, and Transportation Committee also contained an amendment in subsection (d) that was not sought by Senator Hutchison, and for which no Senator or committee staff member has publicly claimed responsibility, which gave the FCC the authority to preempt local government exercise of its authority under subsection (c) as well as to preempt state regulatory under subsection (b) and state and local authority under subsection (a). It read:

(d) If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with this section, the Commission shall immediately preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

The language of Senator Hutchison's amendment is virtually identical to that finally enacted in 1996. But the language of the stealth amendment in subsection (d) in 1995 differs significantly from the language finally enacted in 1996. The Committee Report (S. Rpt. 104-23) explained the 1995 language by merely repeating it.<sup>2</sup> The report language is ambiguous and could be read to imply that the focus of FCC preemption is to be barriers to entry.

Local governments were pleased with the affirmation of their authority over rights-of-way reflected in the Hutchison amendment that became subsection (c). They were very concerned, however, that the broad provision for FCC preemption under subsection (d) could act to wipe out that authority. The provision for FCC preemption of local right-of-way management and compensation authority in subsection (d) became the focus of local government concerns about S. 652 as it moved to the Senate floor in 1995.

The National League of Cities, the United States Conference of Mayors, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors mounted a major campaign to forestall FCC preemption of local right-of-way management and compensation authority. They were supported by the National Governors

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<sup>2</sup> “Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation required is publicly disclosed. New section 254(d) requires the FCC, after notice and an opportunity for public comment, to preempt enforcement of any state or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsection (a) or other provisions of section 254.” S.R. Rep. No. 104-23, at 35 (1995).

Association and the National Conference of State Legislatures, and by numerous individual cities and counties.

## **B. The Floor of the Senate: Kempthorne, Feinstein & Gorton**

The Senate debated S. 652 on June 7, 8, 9, 12, 13, 14, and 15, 1995. Senators Dirk Kempthorne (R-ID) and Diane Feinstein (D-CA) offered a floor amendment to strike subsection (d) entirely. This amendment would have entirely eliminated FCC jurisdiction over barriers to entry and disputes under subsections (a), (b), and (c), leaving those disputes to the courts. The Feinstein-Kempthorne amendment failed on a narrow vote of 44-56 on June 14. The Senate then adopted, by voice vote, a substitute amendment supported by Senators Feinstein and Kempthorne and offered by Senator Slade Gorton (R-WA). The substitute was developed after negotiations between the committee members and Senators Feinstein and Kempthorne. The Gorton amendment as adopted read as follows:

(d) If, after notice and an opportunity for public comment, 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.

The purpose of the Gorton amendment was to preclude FCC jurisdiction over disputes involving local government authority over rights-of-way management and compensation, while preserving FCC jurisdiction over telecommunications business regulation by state or local regulators. Thus, the structure of Section 253 itself reflects the distinction between business regulation and local governments' more property-related rights regarding compensation and management of the rights-of-way.

The floor debate over the Kempthorne-Feinstein amendment, together with the debate over the subsequently adopted substitute Gorton amendment, makes clear that the Senate's intent in adopting the Gorton amendment was to completely remove FCC jurisdiction over subsection (c) disputes about whether local government management of compensation requirements for rights-of-way are competitively neutral or nondiscriminatory. For example, in explaining the Feinstein-Kempthorne amendment, Senator Feinstein stated that

the FCC lacks the expertise to address the cities' concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.<sup>3</sup>

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<sup>3</sup> 141 CONG. REC. S8,171 (1995).

Senator Kempthorne also gave an example:

When I was the mayor of Boise, ID, we had a particular project that on the main street, on Idaho Street, from store front to store front, we took everything out 3 feet below the surface and we put in brand new utilities. I think it was something like 11 different utilities all being coordinated, put in at the same time, then building it back up, new sidewalks, curbs, gutters, paving of the main street. I will tell you, Mr. President, that there is no way in the world that the FCC, 3,000 miles away, could have coordinated that.<sup>4</sup>

Senator Feinstein also raised some theoretical questions about what the effect of subsection (d) would be if it were not so limited:

[I]s a city insurance or bonding requirement a barrier to entry? Is a city requirement that a company pay fees prior to installing any facilities to cover the cost of reviewing plans and inspecting excavation work a barrier to entry? Is the city requirement that a company use a particular type of excavation equipment or a different and specific technique suited to certain local circumstances to minimize the risk of major public health and safety hazards a barrier to entry? Is a city requirement that a cable operator move a trunk line away from a public park or place cables underground rather than overhead in order to protect public health a barrier to entry?<sup>5</sup>

In explaining his amendment, which was ultimately adopted, Senator Gorton made clear that the amendment was intended to remove from FCC jurisdiction the very kinds of management and compensation requirements that Senators Feinstein and Kempthorne had referred to. He stated:

[T]he Feinstein amendment... does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. ... I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give... [a]nd the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.<sup>6</sup>

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<sup>4</sup> 141 CONG. REC. S8,173 (1995).

<sup>5</sup> 141 CONG. REC. S8,305 (1995).

<sup>6</sup> 141 CONG. REC. S8,306 (1995).

He added:

[O]nce again, the alternative proposal [the Gorton amendment]... retains not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.<sup>7</sup>

Senator Gorton also made clear that the kinds of actions that would remain subject to FCC preemption authority under subsections (a) and (b) were very different: Grants of monopoly or exclusive rights in violation of subsection (a) (“This will say that if a State or some local community decides that it does not like the bill and that there should be only one telephone company in its jurisdiction or one cable television provider”);<sup>8</sup> or anticompetitive actions under subsection (b) “when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers.”<sup>9</sup> Senator Gorton summarized: “So my modification to the Feinstein amendment says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances.”<sup>10</sup>

### **C. Looking Ahead Just a Bit**

It is imperative that any reader or interpreter of Section 253 (c) understand the dynamics of the Senate debate, as it is the Senate’s language that is finally adopted in conference, but we are getting ahead of ourselves in the story.

## **II. The House Bill**

### **A. Introduction and Hearing**

House Bill 1555, The Communications Act of 1995, was introduced on May 3, 1995. Section 101 contained the following language on rights-of-way management and compensation similar to language in a predecessor, House Bill 4103, which had been passed by the House in the 103rd Congress:

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<sup>7</sup> 141 CONG. REC. S8,308 (1995). This distinction as to venue parallels the distinction between Section 402(a) appeals, which may be taken to courts where the party appealing resides, and Section 402(b) appeals concerning federally issued radio licenses and the like, that have been taken to the court of appeals in the District of Columbia since 1927.

<sup>8</sup> 141 CONG. REC. S8,306 (1995).

<sup>9</sup> 141 CONG. REC. S8,306 (1995).

<sup>10</sup> 141 CONG. REC. S8,306 (1995)(emphasis added).

*Section 243. Preemption*

(a) **REMOVAL OF BARRIERS TO ENTRY.**- Except as provided in subsection (b) of this section, no State or local statute, regulation, or other legal requirement shall-- (1) effectively prohibit any carrier or other person from entering the business of providing interstate or intrastate telecommunications services or information service; or (2) effectively prohibit any carrier or other person providing interstate or intrastate telecommunications services or information services from exercising the access and interconnection rights provided under this part.

(b) **STATE AND LOCAL AUTHORITY.**- Nothing in this section shall affect the ability of State or local officials to impose, on a nondiscriminatory basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, ensure that a providers's business practices are consistent with consumer protection laws and regulations, and ensure just and reasonable rates, provided that such requirements do not effectively prohibit any carrier or person from providing interstate or intrastate telecommunications services or information services.

(c) **CONSTRUCTION PERMITS.**- Subsection (a) shall not be construed to prohibit a local government from requiring a person or carrier to obtain ordinary and usual construction or similar permits for its operations if-- (1) such permit is required without regard to the nature of the business; and (2) requiring such permit does not effectively prohibit any person or carrier from providing any interstate or intrastate telecommunications service or information service.

(d) **EXCEPTION.**- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

(e) **PARITY OF FRANCHISE AND OTHER CHARGES.**- Notwithstanding section 2(b), no local government may impose or collect any franchise, license, permit, or right-of-way fee or any assessment, rental, or any other charge or equivalent thereof as a condition for operating in the locality or for obtaining access to, occupying, or crossing public rights-of-way from any provider of telecommunications services that distinguishes between or among providers of telecommunications services, including the local exchange carrier. For purposes of this subsection, a franchise, license, permit or right-of-way fee or an assessment, rental, or any other charge or equivalent thereof does not include any imposition of general applicability which does not distinguish between or among providers of telecommunications services, or any tax.

The chief proponent of subsections (c) and (e) of section 243 was Congressman Dan Schaefer (R-CO). The language in subsections (c) and (e) was generally referred to as the "MFS

amendment,” because that company had successfully sought inclusion of similar language in House Bill 4103 in the 103rd Congress.

Hearings were held on House Bill 1555 on May 10, 11, and 12, 1995. Local government representatives testified on May 11 and strongly opposed the language in new section 243 – particularly that in the MFS amendment.

The Telecommunications and Finance Subcommittee marked up House Bill 1555 on May 17, 1995. No amendments were made to section 243 at the markup and the Subcommittee reported the bill with the same language in section 243 as introduced.

The full Commerce Committee marked up House Bill 1555 on May 24 and 25, 1995. At the full Commerce Committee mark on May 25, Congressman Bart Stupak (D-MI) raised the concern of local governments about the language in section 243. Congressman Stupak offered and then withdrew an amendment to section 243 that was similar to the language adopted by the Senate Committee, but without the pre-Gorton amendment provision for FCC preemption of local government right-of-way management and compensation authority. The language of the proposed Stupak amendment was as follows:

STRIKE NEW SECTION 243 (a), (b), (c), and (e) beginning on Page 12, Line 6, AND INSERT THE FOLLOWING NEW SECTION:

**REMOVAL OF BARRIERS TO ENTRY.**

(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 interstate or intrastate telecommunications services.

(b) **STATE AND LOCAL AUTHORITY.**- Nothing in this section shall affect the ability of a State or local government to impose, on a competitively neutral basis and consistent with section 253, 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.

(c) **LOCAL GOVERNMENT AUTHORITY.**- Nothing in this Act affects the authority of a 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 the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

## **B. The Manager's Mark for the Floor**

Congressman Stupak withdrew his amendment amid assurances by the committee leadership that efforts would be made before the bill was reported to the floor to work out language that would respond to the concerns of local governments over the limiting effect of subsections (c) and (e) concerning construction permits and parity language. Congressman Joe Barton (R-TX) took the lead on the majority side on behalf of local governments in this effort. Efforts were made to reach agreement in talks and negotiations with the chief proponent of the section 243 language, Congressman Schaefer. The alternatives that were considered included a proposal to explicitly invalidate existing below-market telephone franchises that hindered the application of reasonable right-of-way compensation fees, and another proposal to specifically authorize fees at a level not to exceed eight percent. All versions offered by Congressman Schaefer, however, continued to include the objectionable parity language of paragraph (e) and were rejected by Congressmen Stupak and Barton, who determined to take the matter to the full House.

The Committee Report on House Bill 1555, filed July 24, 1995 , describes the relevant portions of section 243 as follows:

Section 243(c) makes explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way. This provision clarifies that local control over construction on public rights-of-way is not disturbed. . . . Section 243(e) prohibits a local government from imposing a franchise fee or its equivalent for access to public rights-of-way in any manner that discriminates among providers of telecommunications services (including the LEC). The purpose of this provision is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity. It is not the intent of the Committee to deny local governments their authority to impose franchise fees, but rather simply to require such fees be imposed in a non-discriminatory manner. This paragraph is not intended to affect local governments' franchise powers under Title VI of the Communications Act. Local governments can remedy any situation in which a fee structure violates this section by expanding the application of their fees to all providers of telecommunications services, including the LECs. Moreover, this section does not invalidate any general imposition that does not distinguish between or among providers of telecommunications services, nor does it apply to any lawfully imposed tax.<sup>11</sup>

## **C. The Floor Debate: Barton, Stupak and Schaefer**

The House debated House Bill 1555 on August 3 and 4, 1995. The manager's amendment, adopted by the House, included a revision to section 243 in an attempt to head off

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<sup>11</sup> H.R. REP. NO. 104-204, at 75-76 (1995).

adoption of a Barton-Stupak amendment. The manager's amendment revised subsection (b) by striking the words “or local”, and it inserted a new subsection (c)(2) as follows:

**MANAGEMENT OF RIGHTS OF WAY.**- Nothing in subsection (a) shall affect the authority of a 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, if the compensation is publicly disclosed by such government.

This language was the same as part of the Hutchison amendment adopted by the Senate Committee. The manager’s amendment left in place, however, what to local government was the objectionable parity language of the Schaefer-MFS provision in subsection (e).

The Barton-Stupak amendment was one of very few amendments permitted by the House Rules Committee under the rule governing debate on House Bill 1555. The Barton-Stupak amendment proposed to strike *all* of section 243 as reported by the House Committee and to substitute new language. The new language was essentially the same as that of the Senate Committee, with three qualifications: (1) it would extend the safe harbor of subsection (b) to local as well as State governments; (2) it would apply the safe harbor in subsection (c) to the entire Act, not just that section; and (3) it would eliminate any reference to FCC preemption jurisdiction over State or local actions.

The Barton-Stupak amendment read as follows:

#### Section 243. REMOVAL OF BARRIERS TO ENTRY

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

(b) **STATE AND LOCAL AUTHORITY.**- Nothing in this section shall affect the ability of State or local officials to impose, on a competitively neutral basis and consistent with section 247 (relating to 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.

(c) **LOCAL GOVERNMENT AUTHORITY.**- Nothing in this Act affects the authority of a 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 the rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) EXCEPTION.- In the case of commercial mobile services, the provisions of section 332(c)(3) shall apply in lieu of the provisions of this section.

In his remarks on the House floor during the debate on House Bill 1555, Congressman Stupak particularly stressed that the Barton-Stupak amendment would delete the requirement for parity between the LEC and other providers, and instead could allow different compensation from different providers for use of the rights-of-way. He stated:

Local governments must be able to distinguish between different telecommunications providers... The manager's amendment states that local governments would have to charge the same fee to every company, regardless of how much or how little they use the rights-of-way or rip up our streets. Because the contracts have been in place for many years, some as long as 100 years, if our amendment is not adopted, if the Barton-Stupak amendment is not adopted, you will have companies in many areas securing free access to public property. Taxpayers paid for this property, taxpayers paid to maintain this property, and it is simply not fair to ask the taxpayers to continue to subsidize telecommunications companies . . . .<sup>12</sup>

Congressman Barton stated a similar intent:

[The amendment] explicitly guarantees that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for the use of that right-of-way.... The Chairman's [Manager's] amendment has tried to address this problem. It goes part of the way, but not the entire way. The Federal Government has no business telling State and local governments how to price access to their local right-of-way.<sup>13</sup>

Over the vigorous opposition of Rep. Schaefer, the proponent of the “MFS amendment,” the House debated and adopted the Barton-Stupak amendment by an overwhelming vote of 338-86. In arguing vigorously (and unsuccessfully) against the Barton-Stupak amendment, Congressman Schaefer and others made many of the same arguments that the telecommunications industry later made in petitions to the FCC. For example, Congressman Schaefer claimed that acceptance of the Barton-Stupak amendment “is going to allow the local governments to slow down and even derail the movement to real competition.”<sup>14</sup> Congressman Fields claimed that cities are allowed to charge incumbent telephone company little or nothing because of “a century-old charter ... which may even predate the incorporation of the city itself. ... [T]hey threaten to Balkanize the development of our national telecommunications infrastructure. ...” “When a percentage of revenue fee is imposed by a city on a telecommunications provider for use of rights-of-way, that fee becomes a cost of doing business

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<sup>12</sup> 141 CONG. REC. H8,460 (1995).

<sup>13</sup> 141 CONG. REC. S8,460 (1995).

<sup>14</sup> 141 CONG. REC. S8,460 (1995).

for that provider, and, if you will, the cost of a ticket to enter the market. That is anti-competitive....” “[W]hat does control of rights-of-way have to do with assessing a fee of 11 percent of gross revenue? Absolutely nothing.”<sup>15</sup>

After hearing Congressman Schaefer's arguments, the House rejected them and adopted the Barton-Stupak amendment by a vote of 338-86. By adopting Barton-Stupak, the House strongly rejected the Schaefer-Fields arguments for the MFS parity language. By adopting Barton-Stupak, which was the same as the Senate language with respect to fair and reasonable compensation for right-of-way use, the House overwhelmingly endorsed the proposition that differential compensation based on market valuation is not discriminatory and that local governments are the appropriate body to make compensation decisions.

### **III. The Conference Agreement**

Despite the overwhelming House vote for the Barton-Stupak amendment, the close vote on Feinstein-Kempthorne, and the unanimous adoption of the Gorton amendment in the Senate, the debate over rights-of-way management and compensation language continued into the conference process. Speculation was that certain House Committee staff, who apparently did not accept, or were instructed not to accept, the clear will and intent of the two houses of Congress fueled the debate. The final conference agreement on Senate Bill 652/House Bill 1555 as adopted by both houses, however, adopts the Senate language of section 253. The final law thus preserves the safe harbor protecting the authority of local governments over rights-of-way management and compensation and preserves the clear intent of Congress that the FCC is to have no jurisdiction over subsection (c) disputes, leaving them to the courts. It also preserves the recognition that “fair and reasonable” does not require that compensation be identical for differently situated users of the public rights-of-way.

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<sup>15</sup> 141 CONG. REC. S8,461 (1995).