

Local Government Principles Relating to Rights-of-Way

Local Government Principles

**Relating to Rights-Of-Way
Management and Compensation
&
Ownership of
Telecommunications
Facilities**

Prepared for the
**National Association of
Telecommunications
Officers and Advisors**
by the
NATOA Ad Hoc Committee
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**NATOA Rights-of-Way
AND
TELECOMMUNICATIONS OWNERSHIP
Principles**

INTRODUCTION

Historically, local government has been recognized as the unit of government responsible to manage and control local rights-of-way to ensure its safe and efficient use and to be compensated for the use of it by others. Additionally, citizens look to local government to plan for community needs and to provide needed public services.

With the passage of the Telecommunications Act of 1996, this traditional role of local government is maintained and, in fact, reinforced. Notwithstanding this, recently, commercial occupants of local streets are seeking legislative changes at the state level that would severely cripple or alter the long-established police and fiduciary powers of local units of government.

The National Association of Telecommunications Officers and Advisors ("NATOA") is an organization comprised of local government officials from throughout the country. Our members' work and responsibilities relate not only to the protection of community rights-of-way and oversight of cable and telecommunications providers, but also to the provision of services that meet local needs in this changing telecommunications age. NATOA and its members work closely with U.S. Conference of Mayors (USCM), National League of Cities (NLC), National Association of Counties (NACO), and International City/County Management Association (ICMA) on telecommunications issues.

As such, NATOA and the cities and counties it represents are well-positioned to outline principles of local government authority which must be maintained and not diminished through the state legislative process. What follows are the principles which NATOA adopts, based on its research and understanding of local government needs, services, and costs. We ask local and state governments throughout the country to support and promote the following principles:

- *Local governments have a duty and an obligation to bear the costs of acquiring and maintaining public right-of-way.*
- *Commercial use of public property for private profit requires equitable, fair, and reasonable compensation for its use.*
- *Both public and private entities have a role to play in the delivery of advanced telecommunications services to all Americans.*
- *Federal, state, and local governments each have a role in ensuring the goals of the Telecommunications Act are achieved and each must respect the authority of the others.*

Further, NATOA encourages and asks local governments to acquaint state legislators with these principles and to request that they share them with fellow legislators.

Principle #1: Rights-of-Way Management

Local governments have a duty and AN obligation to bear the costs of acquiring and maintaining public right-of-way.

Nothing in the Federal Telecommunications Act of 1996 affects the authority of local government to manage the public rights-of-way. [47 U.S.C. § 253]

A. Stewardship: Local governments have an obligation to manage the public rights-of-way as a trustee for the public.

- The public rights-of-way are a valuable and scarce community resource that require local government management for the most efficient and best use.
- In order to protect the health and safety of the public, as well the existing facilities of local government and other rights-of-way users, local governments must have the ability to ensure the efficient use of the public rights-of-way through the development and implementation of effective policies and management practices.
- The responsibility to manage public lands requires the ability to place appropriate conditions on their use.
- Access to local government facilities is vital to public safety and well-being. The fundamental purpose of government procurement of rights-of-way is to ensure orderly development of business and residential areas, including traffic management and conveyance of essential utilities.
- We believe stewardship includes operating and maintaining rights-of-way in the least intrusive manner.

B. Expanded Use: New technologies and competition foster more intensive use of public rights-of-way by multiple users. This, in turn, requires more intensive management of the rights-of-way to ensure orderly use, maintenance of public safety, reliable delivery of essential services and equitable treatment of all users.

- Availability of and demand for a variety of telecommunications services and delivery technologies has dramatically increased the demand for use of the rights-of-way.
- The local government obligation to ensure the orderly and efficient use of this limited resource among multiple users and to treat all users fairly while preserving public safety, essential services and economical access to its own facilities, has added greatly to the complexity of modern rights-of-way management by local government.
- Increasing demand for use of public rights-of-way is causing, and will continue to cause, local governments to expand management services and responsibilities. This includes more frequent inspections, repairs, and repaving, sophisticated mapping technologies and systems (GIS, SCADA) and increased personnel.

C. Grant of Authority: A grant of authority from local government is the traditional and accepted means for persons to obtain permission to construct, occupy and maintain facilities in the public rights-of-way.

- Local government cannot continue to have responsibility to maintain and manage the public rights-of-way without continued authority to do so effectively.
- Ordinances describing the terms for the use of the public rights-of-way benefit all users and assure that appropriate ground rules for construction, occupancy and maintenance in the rights-of-way are uniformly applied without discriminating against any user.
- It is critical for local government to have the flexibility to adapt its regulations to the local geographic conditions, type of services and the unique business plans of each class of user in the rights-of-way.
- A grant of authority at the local level guarantees that local governments can coordinate activities within the rights-of-way and ensure the integrity of services which often impact health, safety and security of the local citizenry.

Principle #2: Rights-of-Way Compensation

Commercial use of public property for private profit requires EQUITABLE, fair, AND reasonable compensation FOR ITS USE.

Nothing in the Act affects the authority of a local government to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way, if the compensation required is publicly disclosed by such government. [47 U.S.C. § 253]

A. Investment: Community investment in local rights-of-way is a significant expenditure of taxpayer funds.

- Local government is entrusted with a duty to protect the investment and ensure that its use for private purposes provides a fair return to the taxpayers who have invested in it.
- Local governments have a fiduciary responsibility and duty to establish a fee schedule that will recover all immediate and long-term capital and operating costs and provide a reasonable return on the public investment in the rights-of-way.

- Local government must be compensated not only for the costs of the management of the rights-of-way, in part caused by the users, but also in consideration of the public investment and ongoing operating costs.
- If fees from users do not recover all direct and indirect costs, then taxpayers ultimately subsidize selected users of the rights-of-way, which is contrary to the local government duty, and can result in inequitable treatment of users.
- Fees for rights-of-way use are typically "passed through" to the consumers of a service in proportion to the amount of service received. Thus, fees for the commercial use of the public rights-of-way do not constitute a burdensome general tax, but instead are charges imposed on the commercial user who may pass it on to those who purchase the service. The alternative to this approach, as it relates to recovering the costs of private use of public rights-of-way, is to charge a general tax which would then be a cost to users and non-users alike.

B. Local Government Duty: Local government has a duty under general legal principles governing property rights not to give away public property for private use without just compensation. Taxpayers expect their local government to abide by these principles.

- There are numerous examples of taxpayer insistence that local government not subsidize private endeavors with taxpayer funds.
- Receiving a payment for use and occupancy of the public rights-of-way without consideration of its value would result in giving away public land for private use and gain.
- Limiting compensation to the recovery of costs would also result in giving away public land for private use and gain.

C. Compensation for Rights-of-Way Use is Not Unique: Private use of rights-of-way owned by local government is comparable to private use of property owned by other governmental units, for which compensation is expected and not questioned.

- In order for finite and scarce public resources to be used for commercial purposes, government units, as a standard practice, require reasonable compensation from the commercial user of the resource. For example:
 - The FCC, recognizing the limited availability of spectrum needed for personal communications services, utilized an auction process requiring payments considerably in excess of the FCC's cost for holding those auctions, but instead giving recognition to the value of the property rights being auctioned.
 - State and federal governments have traditionally expected and received fair market value payment for the sale and/or lease of properties.
- Just as the telecommunications industry currently charges local governments fair market value, not just direct cost recovery, for use of commercial services or facilities (like conduits), local governments should receive compensation based on the value of the public land used.

D. Distinctions Among Users: The various users (gas, electric, cable TV, telecommunications, water, sewer) of the public rights-of-way use the rights-of-way in dissimilar ways and pose

different concerns to local government management. Therefore, it is an oversimplification to suggest that all rights-of-way use can be, or should be, treated in precisely the same way.

Principle #3 -- Competition

Both public and private entities have a role to play in delivery of advanced telecommunications services to all Americans.

No state legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide or interstate or intrastate telecommunications service. [47 U.S.C. § 253]

A. Local Ownership: Local governments play a unique role in community and economic development which require their involvement in insuring the availability of essential universal services, such as gas, electric, sewer, as well as telecommunications. As public agencies, local governments in partnerships with other public or private entities, or by themselves, should have the unfettered right to construct telecommunications infrastructure and provide telecommunications services for their citizens.

- There should be no distinction between telecommunications utilities and other types of utilities, such as electric, where local governments build systems to serve under-served communities (20% of electric utilities in the United States are government-owned and operated).

B. Community Needs: State legislation limiting local government ownership will frustrate federal initiatives to develop internet services and interconnectivity for such locally-implemented programs as distance learning and telemedicine.

- The availability of affordable telecommunications services to all Americans is a goal of the Telecommunications Act of 1996, the accomplishment of which will encourage the broad dissemination of information and knowledge, spur economic development, create more equal opportunity for all citizens and strengthen our democratic traditions.
- The uneven or inequitable provision of telecommunications, going forward, will increase disparity of growth and opportunity among our citizens and undermine the goals of the Telecommunications Act as well as our democratic institutions.

C. Availability of Services: Competitive telecommunications providers, under the Telecommunications Act, are not obliged to serve all communities or all portions of a single community in which they wish to do business. Decisions by private sector companies for deployment of telecommunications services are based on concerns about shareholders and profit potential, not broad community development goals.

- Where private sector entities choose not to construct facilities or provide services, public entities must be empowered to fulfill basic needs.
- Where private telecommunications services do exist, provision of similar

services by public entities can enhance competition, resulting in more choice, better service and lower prices.

- Private entities should be encouraged, and local governments should be allowed, to build telecommunications networks, providing advanced telecommunications services, where necessary such as to less dense or non-urban areas and to offer these services at affordable rates in order to meet the stated goals of the Telecommunications Act.

PRINCIPLE #4: FEDERAL/STATE/LOCAL PARTNERSHIP

Federal, state, and local governments each have a role in ENSURING the goals of the Telecommunications Act are attained and each must RESPECT the authority of the others.

FCC Local and State Government Advisory Committee in its policy statements states:

The FCC and state and local governments should assume the mutual burden of educating the other parties in their respective areas of expertise. Regulation, preemption, and formal legal action against another level of government should be the last, not the first, recourse to resolve conflicting interest.

Cooperation: It should be the exception, not the rule, for one governmental unit to limit the traditional authority of another governmental unit.

- The greatest amount of benefit from the Telecommunications Act can be achieved only by joint and cooperative effort among all units of government.
- Continued adherence to this long-established practice will facilitate, rather than obstruct, the orderly deployment of competitive telecommunications services in our communities, and bring the benefits of both new technologies and new competition to the greatest number of Americans.
- Proposed regulatory approaches by one governmental unit which forces another into an adversarial atmosphere with private industry is not conducive to rapid telecommunications deployment.
- Tinkering with delicately-balanced traditional local authority can have an effect that results in unintended consequences.

SUMMARY

The purpose of the foregoing document has been to clearly enunciate principles relating to local government management of rights-of-way and ownership of telecommunications systems in the wake of the Telecommunications Act of 1996.

This document does not suggest newly-crafted principles, but simply restates, in the modern context, long-standing principles with foundation in federal and state law, tradition and daily practice. These principles are re-affirmed in the Telecommunications Act.

It is our hope that this document will bring greater understanding to the legitimate and important role of local governments as it relates to rights-of-way management, specifically, and to the exciting future of telecommunications, generally.

In this vein, we encourage local governments to study these principles and reference them readily with those responsible for policy and legislation in your state.

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